

Crossing the Rubicon: Duterte, China and Resource-Sharing in the South China Sea

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The only way for a Joint Development Agreement to push through is that Duterte would manage to amend the Philippine constitution, largely ignore his country's arbitration award victory, and overcome deep-seated public antipathy towards resource-sharing agreements with China.

Since his election in 2016, President Rodrigo Duterte has upended the Philippine foreign policy, particularly vis-à-vis China. Viewing the Asian powerhouse as a partner for national development, and striking a pragmatic course on territorial disputes, the Filipino president has effectively ended the Philippines' years-long role as the vortex of regional resistance against Chinese maritime assertiveness in the South China Sea. To Beijing's delight, the Philippine president has almost categorically disavowed the strategic disposition of his predecessor, Benigno Aquino III, who dedicated a bulk of his diplomatic capital to confronting Chinese creeping incursion into Philippine waters as well as occupation of Philippine-claimed Scarborough Shoal.¹

In a telltale sign of improving bilateral relations, the Philippines and China announced earlier this year (March) a preliminary agreement to pursue a joint exploration agreement (JEA) in the South China Sea. By August, the Philippines announced the formation of a technical working group (TWG) to oversee the legality of any joint exploration scheme in areas of "overlapping claims" between the two neighbors.² Both sides are, however, also canvassing the prospects for a Joint Development Agreement (JDA) that may dramatically alter the geopolitical complexion of the maritime disputes. The two sides are looking to finalize the framework for, at least, a JEA by the end of September, though it's not clear if the details will be made public anytime soon. The framework of the JEA is expected to be signed during Chinese President Xi Jinping's visit to Manila in November.

Even in abstract terms, the proposal for joint resource-exploration and resource-sharing, however, remains deeply controversial in the Philippines, where influential members of the defense establishment, civil society, and broader intelligentsia view such cooperative schemes with China as illegal, both based on the 1987 Philippine Constitution³ as well as the 2016 arbitration award ruling⁴ at The Hague. Thus, the challenge is for both sides to find a goldilocks legal compromise, which appeases domestic constituencies without undermining their respective sovereignty claims, sovereign rights, and maritime boundaries.

In the meantime, however, China is simply purchasing additional diplomatic time, while changing facts on the ground on a daily basis. So long as it discusses resource-sharing regimes with the Philippines, China can remain confident that its Southeast Asian neighbor will likely continue to not insist on the arbitration award in multilateral fora, particularly under Duterte. It also allows China to project a veneer of generosity and good spiritedness by underscoring its commitment to a dialogue-based management of maritime disputes with smaller neighboring states. Thus, whether a JEA or JDA comes into operation or not, China reaps strategic dividends from the ongoing negotiations with the Philippines, an American treaty ally that not long ago was its most vociferous critic in the Association of Southeast Asian Nations (ASEAN).

Strategic Accommodation

Opting for a diplomatic “soft landing” in the South China Sea, Duterte has effectively “set aside”⁵ the country’s landmark arbitration award at The Hague⁶, which (i) reaffirmed the Philippines’ sovereign rights in the disputed areas and (ii) nullified much of China’s expansive nine-dashed-line claims as well as doctrine of ‘historic rights’ in the South China Sea. If anything, the arbitration award also censured China for (i) the ecological damage caused by its massive reclamation activities in the disputed areas as well as its (ii) coercive actions against Filipino fishermen traversing disputed land features, particularly the Scarborough Shoal. Not only has the Philippines backed down from standing up to China, but it has also become a reliable regional partner. As the chairman of the ASEAN in 2017, Duterte essentially toed the Chinese line on the disputes,

arguing that the situation is generally stable and that the disputes should be “left untouched” by external powers⁷, namely the United States and its key allies such as Japan, India and European powers such as the United Kingdom and France. In effect, Duterte refused to leverage the Philippines’ rotational chairmanship of the ASEAN as well as The Hague ruling to deter and dissuade China’s relentless reclamation in and militarization of disputed areas in the South China Sea. Throughout his first two years in power, the Duterte administration adopted ‘quiet diplomacy’ vis-à-vis China. It repeatedly refused to criticize China, even when the latter deployed HQ-9B surface-to-air-missiles (SAMs)⁸, YJ-12B anti-cruise ballistic missiles (ACBMs), and electronic jamming equipment to Philippine-claimed land features in the Spratly chain of islands. There was similarly no explicit criticism from Manila when Beijing deployed H-6K nuclear-capable bombers, which, with an operational range of more than 1,000 nautical miles, placed much of the Philippines within their crosshair even if they were operating in the Paracels. It was also similarly diffident, when China allegedly deployed⁹ submarines and warships to unilaterally renamed¹⁰ seabed features and conducted Marine Scientific Research (MSR) in the Benham Rise, which constitutes a part of the Philippines’ extended continental shelf, where it enjoys, based on international law and a 2012 UN ruling, exclusive sovereign rights.

The dramatic turnabout in Philippine-China relations under Duterte’s watch marks one of the most significant geopolitical developments in recent years. The upshot is an ascendant China, which no longer, at least for now, worries about the prospect of smaller Southeast Asian claimant states such as the Philippines portraying it as an ‘international outlaw’ and, accordingly, mobilizing the international community against Beijing’s maritime revisionism. In fact, under a so-called ‘Nicaragua option’¹¹, the preceding Aquino administration was hoping to leverage a favorable arbitration outcome to diplomatically hammer and isolate China in major global fora, ranging from the ASEAN to the G7 as well as the United Nations General Assembly (UNGA). Duterte, however, made it clear that dialogue and cooperation, rather than confrontation, will define his approach towards the disputes. If necessary, Duterte, in his unusual embrace of strategic fatalism, has repeatedly confessed that ‘graceful

accommodation' is preferable to a suicidal confrontation with China. Viewing the disputes through the narrowly binary prism of 'acquiescence vs. conflict', the Philippine president has unabashedly called on smaller nations to remain "meek" and "humble"¹² in exchange for Chinese "mercy". Within a span of only two years, the Philippines went from China's chief critic, particularly in the context of the South China Sea disputes, to one of its most reliable strategic enablers. From Duterte's standpoint, however, rapprochement with China not only de-escalates maritime tensions, reduces the prospect of armed conflict, but also carries the promise of an economic bonanza in light of Beijing's multi-billion-dollar offer of trade and investment deals and aid as well as the opportunity for peaceful sharing of precious hydrocarbon resources in disputed areas. It's precisely within the context of strategic accommodation that one needs to understand Duterte's openness to "co-ownership"¹³ of disputed energy resources in the South China Sea.

In his second year in office, the president pressed ahead with solidifying his strategic cooperation with Beijing. During his second State of the Nation Address (SONA) on 24 July 2017, he praised China as a generous and friendly partner for national development. He perfunctorily discussed the South China Sea disputes, while emphasizing the importance of sustained dialogue to manage territorial disputes in the area. During his post-SONA press conference, Duterte reiterated his preference for a non-confrontational approach in the South China Sea, particularly through joint development agreements (JDAs). "If we can get something there with no hassle at all, why not?" he explained, underlining the importance of avoiding conflict at all cost.

Right after Duterte's SONA, Foreign Minister Wang Yi visited Manila, where he received warm welcome by the Filipino president at Malacanang. Wang hailed the "strong momentum" in Philippine-China relations, and called for an exclusive China-ASEAN solution to the South China Sea disputes. Underscoring the "full capabilities and wisdom [of ASEAN and China] to handle differences between us and maintain stability in the South China Sea," he called upon "non-regional forces", namely the United States, not to "stir up trouble" in the region.

At first glance, JDAs seem to be an ideal solution to the regional maritime disputes. According to one authoritative definition, it pertains to an "Agreement between two states to develop so as to share jointly in agreed proportions by inter-state co-operation and national measures the offshore oil and gas in a designated zone of the seabed and subsoil of the continental shelf to which both or either of the participating states are entitled in international law." A similar definition renders it as, "cooperation between States with regard to exploration for and exploitation of certain deposits, fields or accumulations of nonliving resources which either extend across a boundary or lie in an area of overlapping claims."¹⁴

In theory, Duterte's penchant for resource-sharing agreement among competing claimant states seems justifiable. After all, it's consistent with relevant provisions¹⁵ of the United Nations Convention on the Law of the Sea (see Articles 74 (3) and 83(3))¹⁶, which make it clear that "[T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

Moreover, PART IX, Article 123 of the UNCLOS, calls on, "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention."¹⁷ It enjoins concerned parties to "endeavor, directly or through an appropriate regional organization" towards coordinated (i) management, conservation, exploration and exploitation of the living resources of the sea; (ii) implementation of their rights and duties with respect to the protection and preservation of the marine environment; (iii) establishment of scientific research policies and undertake where appropriate joint programs of scientific research in the area; and (iv) invitation, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of the aforementioned article.¹⁸

Any resource-sharing regime also resonates with Deng Xiaoping's age-old formula of dispute-management: '[S]overeignty remains ours; shelve disputes; pursue joint development.' Deng's formula was adopted by his two adopted successors, Jiang Zemin and to a lesser degree Hu Jintao, who oversaw a string of territorial delimitation with China's myriad continental and maritime neighbors. As Taylor Fravel, a leading expert on China's territorial policy shows in his influential book, *Strong Borders, Secure Nation*, in 17 of these 23 conflicts, Beijing either reduced the scope of or completely abandoned its original claims in order to improve relations with its immediate neighbors, mostly continental.¹⁹

In recent years, China has proposed JDAs in its adjacent waters, particularly in the South China Sea. The difference, however, is that this time the Asian powerhouse is doing it from the position of strength and with greater assertiveness. Since President Xi Jinping took power, he has overseen the establishment of massive artificial islands across the Spratlys and Paracels. This has gone hand in hand with growing Chinese naval, para-military and fisheries footprint across the disputed waters, raising concerns over creeping intrusion into traditional fishing waters of smaller claimant states. Meanwhile, growing concerns over energy security have encouraged smaller claimant states to explore untapped resources in areas that are also claimed by China even if they fall within their Exclusive Economic Zones (EEZ). For years, the Philippines has not been able to conduct exploration activities in places such as Reed Bank due to geopolitical uncertainty and prospect of Chinese harassment. With the Malampaya Plant, a major natural gas extraction facility, in the Philippines set to be exhausted within less than a decade, Philippine Foreign Secretary Alan Cayetano emphasized the urgency of cooperative schemes with China: "But if we work it out with China and we get billions of dollars worth of oil there, and the deal is better or as good as Malampaya, is that good or bad for the country? I think it's good. I'd rather have two or three Malampayas rather than one [that is running out]."²⁰

Amid concerns over dwindling domestic energy resources, particularly in the Malampaya Plant, Manila is considering moving ahead with developing the Reed Bank later this year. Duterte has suggested that this could be done in cooperation with China: "When they [China] start to excavate the gas and oil [in the South China Sea], I tell you it's going to be just like a joint venture... it will be fair." In practice, however, Duterte will have to overcome significant legal and political hurdles to finalize a JDA with China, which claims "inherent and indisputable" sovereignty seemingly over almost the entirety of the South China Sea.²¹

Finding a Compromise

During a late-March meeting with his Chinese counterpart Wang Yi in Beijing, Cayetano hailed a "golden period" in bilateral ties, claiming the "South China Sea disputes will no longer block the development of bilateral ties," but instead, "will be turned into a source of friendship and cooperation between our two countries." During the meeting, both sides agreed to pursue "offshore oil and gas exploration" based on a "suitable legal framework." In turn, Mr. Wang said the two sides were exploring "in a prudent and steady way advanced cooperation on offshore oil and gas exploration."

Nonetheless, so far, it is far from clear whether the Philippines and China are pursuing JDAs, per the provisions (Part IX) of the United Nations Convention on the Law of the Sea (UNCLOS), or, alternatively, are considering more flexible confidence-building measures (CBMs) in the form a JEA. There are certain regional models to draw lessons from: Malaysia has had JDAs with Thailand (1990), Vietnam (1992) as well as Brunei (2009), which offer some encouraging model of resource sharing in Southeast Asia.²² There have been less encouraging precedents including the ones negotiated between Thailand and Cambodia, which was revoked in 2009 amid border skirmishes, and between Vietnam and Cambodia, where no discernible progress has been made yet. JDAs come in many forms²³, including, where a single state serves as an operator of shared resources, with the latter entitled to a designated share; joint ventures and compulsory unitization between operators for exploitation of

mineral/hydrocarbon deposits in overlapping areas of claim; and legal frameworks that create institutionalized and comprehensive cooperation in exploitation of shared deposits.²⁴

The stakes are high. If the Philippines and China were to pull off a successful outcome, this could set a strong precedent for China's maritime and territorial disputes with other claimants, namely Vietnam, Malaysia and Brunei. The problem, however, is that there is no encouraging precedent for the Philippines and China, so far. In 2005, the Philippines, China, and Vietnam signed the Joint Maritime Seismic Undertaking (JMSU).²⁵ Under the agreement, the details of which have yet to be fully revealed to the public, China's energy giant China National Offshore Oil Corporation (CNOOC) was tasked with undertaking seismic exploration in areas of overlapping claims in the South China Sea. In turn, the Philippine National Oil Company (PNOC) was tasked with interpretation of the data, while PetroVietnam was charged with processing it. Five years earlier, China and Vietnam negotiated a bilateral maritime delimitation agreement, as a basis for a JDA arrangement (2006), in the Gulf of Tonkin.

Yet, both the Gulf of Tonkin arrangement as well as the JMSU agreements either failed to come to fruition, were abandoned by the involved parties, or were mired in controversy. Vietnam has consistently complained about China's failure to comply with the provisions of various agreements in the Gulf of Tonkin,²⁶ while civil society groups in the Philippines challenged the JMSU as unconstitutional. Nonetheless, there are, at the very least, three possible arrangements that can be pursued by the Philippines and China. Some are more likely to cause a political backlash, and risk violating domestic jurisprudence as well as international law, while others have the potential of providing a basic framework for managing, if not resolving, their South China Sea disputes.

Menu of Compromise

The first and most feasible option is the Philippines subcontracting a Chinese company, as a subcontractor and in cooperation with a local company, to

explore and develop energy resources beyond the Southeast Asian country's Exclusive Economic Zone (EEZ) as well as China's nine-dash-line claims. The Philippines, for instance, has had this arrangement with Chevron and Shell in the Camago-Malampaya project (Service Contract 38). There is currently a proposal for the Philippine National Oil Company to partner with China's energy giant CNOOC, with Jadestone Energy Inc. as a minority stake. The joint venture is expected to be in the Calamian project off the island of Palawan, which does not fall within China's nine-dashed-line claim. Crucially, CNOOC is expected to hold a 51 percent majority stake. Per the Philippine government's interpretation of the Philippine constitution, restrictions on a foreign equity share only apply to the final profit, not ownership of the subcontracted project per se (thus the majority stake of Shell-Chevron in the Camago-Malampaya project).

The other proposed arrangement could be a confidence-building measure (CBM) in the form of the creation of a marine and ecological sanctuary in contested land features, particularly the Scarborough Shoal. This way, both parties can conserve and regulate the sustainable exploitation of fisheries resources in the area; suspend sovereignty disputes; and avoid ecological disasters in endangered zones. The above two arrangements do not fulfill the strict definition of JDAs as per international law, but will likely be acceptable to domestic constituencies in both countries, particularly in the Philippines. An actual JDA, within the Philippines' EEZ or China's nine-dashed-line claim, however, could prove highly problematic. "Exploration is easy because it is just like having an X-ray. We will be able to see what is in there. It can happen in six months to one year. But joint development, the hard part, will take four to six years since China will have to accept it [joint agreement] within their laws, Filipinos have to accept it within our laws," Cayetano lamented²⁷ in a news conference in August.

As far as the Philippines is concerned, there are at least three hurdles to any JDA with China. First of all, it is the baggage from the past, particularly the fiasco under the Gloria Arroyo administration (2001-2010). In 2005, shortly after China offered major infrastructure investments in the Philippines, President

Arroyo signed the trilateral JMSU in the South China Sea with Vietnam and China. It did not take long, however, before both Chinese investments as well as the JMSU were challenged as unconstitutional and embroiled in massive controversy.²⁸ Opponents accused the Arroyo administration of accepting Chinese capital as a bribe in exchange for a potentially treasonous and highly resource-sharing agreement in the South China Sea.²⁹ Amid public backlash, the Philippine government refused to renew the JMSU once it expired in 2008. Today, China continues to be highly unpopular in the eyes of Filipino people and broader defense establishment, largely because of the Arroyo era baggage.³⁰

The second hurdle is the Philippines' 1987 constitution, which places extremely restrictive and draconian provisions regarding the exploration and development of resources within the country's Exclusive Economic Zone (EEZ). Specifically, Article XII, Section II on National Economy and Patrimony states, "the exploration, development, and utilization of natural resources shall be under the full control and supervision of the [Philippine] State."³¹ Any joint venture with should be exclusively with a company, which is majority-owned (60 percent) by a Filipino citizen. Most importantly, the contracting party should acknowledge the Philippines' sovereignty.

Finally, the landmark arbitration award at The Hague also made it clear that Manila and China have no overlapping EEZs in need of delimitation. Only in the Scarborough Shoal, which was ruled as a traditional fishing ground for several claimant countries, there is a room for a resource-sharing agreement in accordance to the tribunal's ruling under the aegis of UNCLOS. But China claims sovereignty over almost the entirety of the South China Sea³², while consistently rejecting The Hague ruling.

Prominent voices within the Philippine political establishment, such as interim Supreme Court Chief Justice Antonio Carpio, have described any JDA with China as unconstitutional and in violation of The Hague tribunal ruling. There is also fear that any JDA with China could end up legitimizing China's sweeping claims across the South China Sea, much to the detriment of other

Southeast Asian countries, namely Vietnam and Indonesia, which have rejected the nine-dashed-line claims.

Carpio's opinion is largely resonant among China-skeptic elements within the Philippine defense establishment as well as the broader civil society, which have constantly criticized Duterte's perceived acquiescence to Beijing. Thus, an actual JDA seems too politically risky for the Duterte administration, potentially provoking a strong backlash against the ongoing rapprochement with China. This is particularly true in the case of the Reed Bank, where the bulk of untapped energy resources in the South China Sea is reportedly located, which falls within the Philippines' EEZ and China's nine-dashed-line.

Public opinion in the Philippines is also hardening. According to an authoritative survey by Pulse Asia in July, as many as 7 out of 10 Filipinos want the Duterte administration to raise the arbitration award in the South China Sea to assert the Philippines' sovereign rights vis-à-vis China.³³ Another major survey by the Social Weather Stations in same month showed that almost 9 out of 10 Filipinos want the government wrest back control of Chinese-occupied land features claimed by the Philippines.³⁴ Encouraged by public backlash against Duterte's China-friendly diplomacy, former president Aquino has more openly challenged his successor.³⁵ In an open letter to Cayetano in August, he called on the government to be more transparent with its ongoing negotiations with China, stating "We are talking about our Exclusive Economic Zone. We have no obligation to share with them," underscoring the fact that the 2016 arbitration award made it clear that China and the Philippines have no overlapping EEZs. Aquino likened any JDA with Beijing as fundamentally unfair, since it means that the Asian powerhouse tells the Philippines, "what is ours is ours, and what is yours, we share."

Thus, the only way for a JDA to push through is that Duterte would manage to amend the Philippine constitution, largely ignore his country's arbitration award victory, and overcome deep-seated public antipathy towards resource-sharing agreements with China. In geopolitical terms, however, China benefits from the mere discussion of a JEA or JDA. After all, so long as

discussions – regardless of their substance – of resource-sharing arrangements are on the table, Beijing can effectively forestall any pushback by smaller claimant states such as the Philippines, while projecting a more peaceful image to its broader neighborhood. This will be an uphill battle for both sides, particularly the Duterte administration, with a lot of potential hiccups along the way. Without a doubt, the audacious Filipino president is entering a tricky territory.

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Notes

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