

Policy Forum 08-022: The Philippines' Spratly "Bungle": Blessing In Disguise?

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By Mark J. Valencia

CONTENTS

[I. Introduction](#)

[II. Article by Mark J. Valencia](#)

[III. Nautilus invites your responses](#)

I. Introduction

Mark J. Valencia, Maritime Policy Analyst in Kaneohe, Hawaii and a Nautilus Institute Senior Associate, writes, "The publication of an article critical of the Philippine government's agreements

with China in 2004 and with China and Vietnam in 2005 to undertake joint seismic surveys in the South China Sea has unleashed a fusillade of allegations that have rocked the government of Gloria Macapagal Arroyo... in approving this arrangement, the Philippine government undermined its political relations within ASEAN and its own legal claims to islands, waters and continental shelf in the South China Sea."

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II. Article by Mark J. Valencia

- "The Philippines' Spratly "Bungle": Blessing In Disguise?"

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The publication of an article* critical of the Philippine government's agreements with China in 2004 and with China and Vietnam in 2005 to undertake joint seismic surveys in the South China Sea has unleashed a fusillade of allegations that have rocked the government of Gloria Macapagal Arroyo. Since I was accurately quoted in the article as saying "Some would say it was a sellout on the part of the Philippines", it is appropriate that I attempt to clarify some of the issues.

First what did I mean by "sellout"? My use of the term was in a geographic and legal context. I have neither knowledge nor an opinion regarding the allegations that the agreement with China was made in exchange for multi-billion dollar loans.

However, I do believe that in approving this arrangement, the Philippine government undermined its political relations within ASEAN and its own legal claims to islands, waters and continental shelf in the South China Sea. Regarding ASEAN, the Philippines-by striking a bilateral deal-- derogated the united front that ASEAN had formed to successfully deal with China on the South China Sea issues. I also think that forging the original bilateral agreement with China without consulting its ASEAN partners could be perceived as a violation of the spirit if not the letter of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC). All pledged therein "to exercise self restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability__", and to agree upon "the modalities, scope and locations, in respect of bilateral and multilateral cooperation"__ prior to their actual implementation". The agreement also ignores Taiwan's claims and interests in favor of China.

Last and perhaps most important, the agreements undercut the positions of fellow ASEAN members Malaysia and Brunei by tacitly lending credibility to China and Vietnam's extreme claims to islands and maritime space in the South China Sea. It does not matter whether the agreements were for "joint marine seismic undertaking" (JMSU) or full blown oil exploration; it is the tacit recognition of the others' right to participate in the defined area that contributes to the legal problem. As I have written elsewhere (*Sharing the Resources of the South China Sea* , Martinus Nijhoff, 1997) China and Vietnam's claims to the islands and maritime space in the Spratlys have significant weaknesses under international law as do the claims of the Philippines, Malaysia and Brunei. Since some may try to use the islands as base points to claim extended maritime jurisdictional zones, their inclusion in the JMSU area lends legitimacy to such claims to maritime space and indirectly to the islands themselves. On the other hand it is true that China and Vietnam have also lent some credence to the Philippine claim to Kalayaan by agreeing to the area of the joint undertaking.

My main concern however is that the Philippines has undermined its claim to some waters and seabed near Palawan that were not even claimed by Vietnam or China. Even if Vietnam and/or China

wound up owning the Spratlys--which is the only way they could legitimately claim most of the maritime space that they do-- the most they could possibly claim would be out to a line equidistant between the easternmost island and Philippine archipelagic baselines. And this would be for them a wildly optimistic scenario for any adjudicated award. Historic dashed lines and submerged reefs simply do not carry any weight in modern international law. The reference in the agreements' preamble to mutual commitment to the 1982 United Nations Convention on the Law of the Sea may be of some help here. But by agreeing to include some area for the JMSU that clearly belongs to the Philippines implies that the ownership of that area is in dispute. Apparently there was tacit recognition of this problem when Philippine energy officials revised the map annexed to the initial Philippine-China pact to move the survey area further away from Palawan.

As for the argument that these agreements were not between governments, the agreements themselves state that they "shall be approved by the Parties' respective governments (11.6 in the Tripartite agreement). Based on this clause, if the agreement was not approved by the respective governments it would neither have become effective nor have been implemented. As for the non-prejudicial clause "this Agreement shall not undermine the basic position held by the Government of each Party on the South China Sea issue", this is too vague to be meaningful. To what area does it apply-- only to the Spratlys--or undisputed Philippine waters and continental shelf as well? Do "basic position" and "issue" mean in regards to maritime claims, jurisdiction, fisheries regulation, security, or what? Moreover, this clause is contradicted by the tacit recognition of the credibility of others' claims to what should be exclusively Philippine waters and seabed.

As for joint seismic surveys in the Spratlys proper -- and exploration if warranted by the results -- I say go ahead. I say this because the damage has already been done. The documents are part of the historic record and can not be unilaterally expunged. Moreover joint exploration and development in the Spratlys proper could indeed build trust and confidence and enhance peace, stability, economic growth and prosperity as called for by the DOC. Malaysia and Brunei do not yet claim any part of the area delineated for the JMSU. However before proceeding, they should be consulted as should other ASEAN members per the DOC. I would suggest however that the area of joint exploration be confined to fall within the equidistance line between the Spratlys and Philippine territory and certainly not include any area claimed by Malaysia or Brunei.

Considerable money, time, legal capital and goodwill have been invested in this undertaking. These should not be wasted. Moving forward means that at least there will be some return for the unintended expenditure of legal capital. Indeed, if significant discoveries are made and the rewards amicably divided, this "bungle" could become a political and economic blessing in disguise.

*Barry Wain, Manila's bungle in the South China Sea, *Far Eastern Economic Review* , January/February 2008.

III. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

Produced by The Nautilus Institute for Security and Sustainable Development
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[Return to top](#)

[back to top](#)

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