

Roundtable: The Arbitral Tribunal’s Ruling on the South China Sea — Implications and Regional Responses

Three and a half years after the Philippines took the unprecedented step of challenging the legal basis of China’s expansive maritime claims in the South China Sea, the Arbitral Tribunal established under compulsory dispute resolution provisions contained in the United Nations Convention on the Law of the Sea (UNCLOS), and based at the Permanent Court of Arbitration in The Hague, issued its final ruling on 12 July 2016.

The award was far more comprehensive and decisive than many legal experts had predicted: the Philippines won 14 of the 15 disputes under consideration. The Tribunal was not mandated to adjudicate on the sovereignty of hundreds of geographical features which make up the Spratly archipelago, but instead focused on maritime rights and entitlements in the South China Sea. The judges issued four major decisions. First, China’s “historic rights” claim to living and non-living resources within the nine-dash line that appears on Chinese maps of the South China Sea is incompatible with UNCLOS. Second, that none of the Spratly features are islands entitled to a 200 nautical mile (nm) exclusive economic zone (EEZ); they are either rocks, entitled only to a 12 nm territorial sea, or low-tide elevations with no associated maritime zones. Third, that Beijing had violated the Philippines’ sovereign rights in its EEZ by harassing fishing boats and survey vessels, and by undertaking massive reclamation work at several Chinese-occupied features determined to be within the EEZ of the Philippines. Fourth, that China’s reclamation activities had caused irreparable damage to fragile reef ecosystems, and had aggravated the dispute while legal proceedings were underway. The

award represented an almost total victory for the Philippines and a major defeat for China.

For this Roundtable, the editors of *Contemporary Southeast Asia* asked seven leading experts on the South China Sea to consider the legal and geopolitical implications of the ruling six months after it was issued. In the first article, Clive Schofield provides a concise overview of the award and its legal significance. The following six contributions look at the responses to the award from the Philippines (Lowell Bautista), China (Nong Hong), Taiwan (Anne Hsiu-An Hsiao), Vietnam (Nguyen Thi Lan Anh), Malaysia (Prashanth Parameswaran) and Indonesia (Evan A. Laksmana). Overall, regional responses to the ruling have been relatively low-key. China and Taiwan have both rejected the award. Beijing has not moved to bring its claims into line with UNCLOS, but, contrary to expectations, neither has it increased its assertive actions in the South China Sea. The Philippines, under President Rodrigo Duterte, has acknowledged but downplayed the ruling as part of a policy to repair strained relations with China. Meanwhile, the other Southeast Asian claimants are watching closely how Sino–Philippine relations develop and the attendant potential ramifications for the long-running and contentious dispute in the South China Sea.

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A Landmark Decision in the South China Sea: The Scope and Implications of the Arbitral Tribunal's Award

CLIVE SCHOFIELD

On 12 July 2016, the Arbitral Tribunal in the case between the Philippines and China delivered its award.¹ The Tribunal's ruling represents a sweeping victory for the Philippines and fundamentally alters the international legal land, or more appropriately, seascape of the South China Sea. This article has three aims: first, to outline the character of the Tribunal and the status of its award; second to summarize the Tribunal's main findings; and third, to explore some of the potential implications of the award, both within and beyond the South China Sea.

The Tribunal and the Status of the Award

Both China and the Philippines are parties to the United Nations Convention on the Law of the Sea (UNCLOS, or the Convention). Part XV of the Convention, which deals with the settlement of disputes, sets out a variety of "compulsory procedures entailing binding decisions" including arbitration in accordance with procedures

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contained in Annex VII.² It is these provisions that the Philippines invoked to initiate the arbitration through a Statement of Claim of 22 January 2013.³ As the Tribunal arose from UNCLOS, sovereignty questions concerning disputed islands in the South China Sea were beyond its jurisdiction.

China rejected the initiation of the arbitration, arguing that the Tribunal lacked the jurisdiction to hear the case.⁴ Nonetheless, on the basis that both China and the Philippines are parties to UNCLOS, the Tribunal was duly constituted,⁵ with the Permanent Court of Arbitration (PCA) in The Hague acting as the registry for the case and venue for hearings. In light of China's challenge to its jurisdiction, the Tribunal bifurcated its proceedings, considering jurisdictional issues first. On 29 October 2015, in its Award on Jurisdiction and Admissibility,⁶ the Tribunal found that it had the required jurisdiction to proceed with the case with some jurisdictional issues held over to the merits phase of the proceedings.⁷ China refused to participate in the case directly,⁸ and although the Tribunal's award is "final and binding and without appeal",⁹ Beijing has robustly rejected it.¹⁰

Main Findings in the Award

Historic Rights and China's Nine-Dash Line

The nature and scope of China's claims within the so-called "nine-dash line" depicted on Chinese maps of the South China Sea has been a longstanding source of ambiguity in the South China Sea dispute. Given this uncertainty, coupled with China's refusal to directly participate in the case, the Tribunal assessed China's conduct within the nine-dash line. The Tribunal determined that China's claims within the line represented "a constellation of historic rights short of title".¹¹ Following on from this finding, the Tribunal found that any historic rights claim to resources within the nine-dash line were extinguished and, therefore, "incompatible" with UNCLOS.¹² This ruling was founded on the view that the Convention was designed to be comprehensive in nature regarding rights within maritime zones meaning that the rights of the other South China Sea coastal states within their EEZs and continental shelf areas "leaves no space for an assertion of historic rights".¹³

Status of Insular Features

In evaluating the Regime of Islands, that is, Article 121 of UNCLOS, and providing an authoritative interpretation of its provisions, the

Tribunal directly addressed one of the crucial ambiguities in the Convention. That is, the challenge of distinguishing between above high-water insular features which are able to generate extended maritime claims, and those that should be classified as “rocks”, which in accordance with Article 121(3) “cannot sustain human habitation or an economic life of their own” and which therefore “shall have no exclusive economic zone [EEZ] or continental shelf”.¹⁴

The Tribunal concluded that the assessment of a particular feature was not to be based on geological or geomorphological criteria.¹⁵ That is, that the term “rocks” is meant to apply only to features “composed of solid rock”.¹⁶ Further, it emphasized that assessment should be on the basis of the feature’s “natural capacity” to sustain human habitation or an economic life of its own, “without external additions or modifications intended to increase its capacity” to do so.¹⁷ The Tribunal went on to determine that only features with a capacity to sustain either “a stable community of people for whom the feature constitutes a home and on which they can remain”¹⁸ or economic activity that is “oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea” and not dependent on outside resources, or purely extractive in nature, are capable of generating extended maritime claims.¹⁹ It also made clear that the text of Article 121(3) is disjunctive, meaning that either capacity to sustain human habitation or economic life is required in order for a feature to escape being classified as a “rock”,²⁰ and that the assessment of insular features concerns their capacity to sustain human habitation or economic life rather than whether a feature is presently or has historically done so.²¹ Indeed, the Tribunal considered that evidence relating to the historical use of features as “the most reliable” for the assessment of a feature’s capacity to sustain human habitation or an economic life of its own.²²

The Tribunal’s ruling on Article 121 arguably represents an important clarification of one of the most ambiguous provisions of UNCLOS and is certainly the first judicial attempt to meaningfully address the central conundrum of the Regime of Islands. The Tribunal did, however, emphasize that assessment of insular features should be on a “case-by-case basis”,²³ and with “due regard” to the possibility that a group of islands may collectively provide for human habitation or economic life.²⁴ These considerations allow a necessary degree of flexibility in the assessment of whether a particular insular feature should be classified as an island capable of generating extended maritime claims, that is, EEZ and continental shelf rights, or is a

mere “rock” which cannot. However, they also introduce new language open to differing interpretations and therefore arguably provide fresh uncertainties in the interpretation of the Regime of Islands.

On the basis of the above interpretation of Article 121, the Tribunal concluded that none of the above high-tide features in the Spratlys “are capable of sustaining human habitation or an economic life of their own” and that therefore they are legally rocks without EEZ or continental shelf entitlements.²⁵ Consequently, individually or collectively, they are not capable of generating extended maritime claims beyond a 12-nautical mile territorial sea. Similarly, Scarborough Shoal was determined by the Tribunal to be a rock.²⁶

With regard to low-tide elevations (LTEs), that is, features that are submerged at high-tide but uncovered at low-tide, the Tribunal noted that, in keeping with Article 13(2), an LTE generates no territorial sea of its own except where it falls wholly or partially within the breadth of a territorial sea generated by an above high-tide feature or the mainland. The Tribunal acknowledged this, then made the point that, even though Article 13(2) does not expressly state it, it follows that LTEs are also “not entitled to an exclusive economic zone or continental shelf”.²⁷ The Tribunal also concurred with the ruling of the International Court of Justice (ICJ) in the 2012 Nicaragua/Columbia case that “low-tide elevations cannot be appropriated” in the same manner as land territory, although a coastal state will have sovereignty over LTEs situated within its territorial sea by virtue of its sovereignty over the territorial sea itself.²⁸

On the basis of the evidence before it, the Tribunal classified certain features as LTEs, for example, Mischief Reef and Second Thomas Shoal. Moreover, as a consequence of its ruling on the nine-dash line, coupled with its conclusion that none of the above high-tide features of the Spratlys can generate EEZ or continental shelf rights, the Tribunal observed that Mischief Reef and Second Thomas Shoal are located in an area “not overlapped by the entitlements generated by any maritime feature claimed by China” and that therefore these LTEs “form part of the exclusive economic zone and continental shelf of the Philippines”.²⁹

Conduct of Parties

Having found that the above-mentioned LTEs are part of the EEZ and continental shelf of the Philippines, the Tribunal ruled that China, through its artificial island-building activities on these features without permission being granted by the Philippines, had infringed the Philippines’ sovereign rights, and was therefore in breach of

Articles 60 and 80 of UNCLOS.³⁰ The Tribunal also found that China has violated the sovereign rights of the Philippines in its EEZ and continental shelf by interfering with Philippine fishing and petroleum exploration activities and failing to prevent Chinese fishermen from fishing in the Philippines' EEZ.

In particular, the Tribunal found that China had acted contrary to Article 77 in preventing the Philippines from undertaking activities related to non-living resources at Reed Bank.³¹ The Tribunal further concluded that China contravened Article 56 concerning the Philippines' sovereign rights over the living resources of its EEZ through China enacting a moratorium on fishing in the South China Sea without excepting areas of the South China Sea within the Philippines' EEZ and limiting the moratorium to Chinese flagged vessels.³² The Tribunal ruled that China had acted unlawfully in preventing Filipino fishermen from undertaking traditional fishing at Scarborough Shoal.³³ The Tribunal also determined that the actions of Chinese law enforcement vessels in the vicinity of Scarborough Shoal had "created serious risk of collision and danger to Philippine vessels and personnel",³⁴ thereby violating multiple rules of COLREGS,³⁵ and in consequence, China was found to have breached Article 94.

Failure to Protect and Preserve the Marine Environment

The Tribunal ruled on the harmful fishing practices and the harvesting of endangered species on the part of Chinese fishermen, as well as China's construction activities on seven reefs in the Spratlys against the context of the obligation under UNCLOS to protect and preserve the marine environment under Article 192.³⁶ The Tribunal found that through its reclamation activities, China had caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species. In particular, the Tribunal ruled that China, "through its toleration and protection of, and failure to prevent" Chinese fishing vessels from engaging in such harmful practices, had breached Articles 192 and 194(5).³⁷ Further, the Tribunal found that China, through its island-building activities, was in breach of multiple provisions of UNCLOS.³⁸

Dispute Settlement

Finally, the Tribunal found that during the course of the case, China had "aggravated and extended" the disputes between the parties

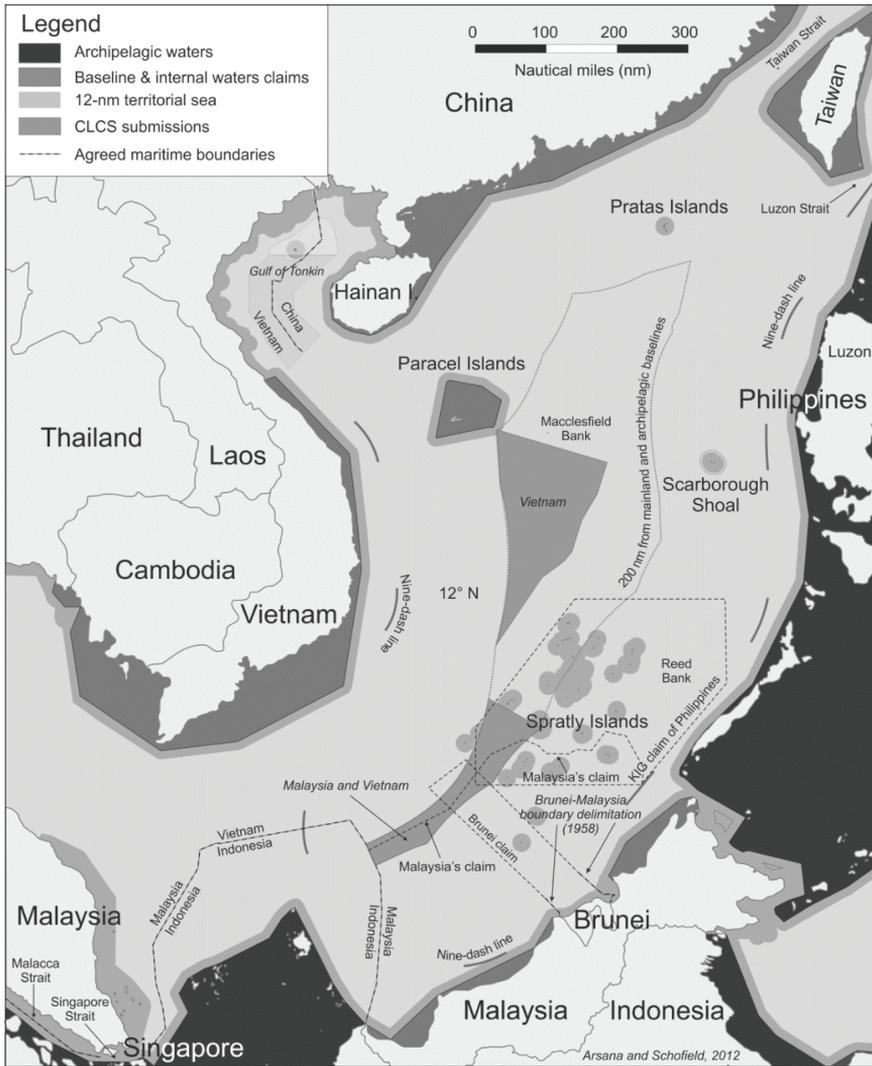
through its dredging, artificial island-building and construction activities. In consequence, China's actions had inflicted "permanent, irreparable harm to the coral reef habitat" of Mischief Reef whilst "permanently destroying evidence of the natural condition" of multiple insular features through such activities.³⁹

Implications of the Arbitration Award

While the award does not address the fundamental cause of the dispute, i.e. sovereignty over disputed islands, it nonetheless has significant implications both within and beyond the South China Sea. The Tribunal found that any Chinese historical claims to resources within the nine-dash line were extinguished upon China becoming a party to UNCLOS. This ruling, coupled with the Tribunal's finding that none of the Spratly Islands or Scarborough Shoal is capable of generating extended maritime claims, has the potential to radically reshape the South China Sea dispute. The Tribunal's ruling significantly reduces the extent of disputed waters in the South China Sea, restricting them to pockets of contested territorial sea surrounding islands, sovereignty over which is disputed. While disputes between neighbouring states would still exist, such as those between Indonesia and both Malaysia and Vietnam, this scenario transforms the spatial picture of competing maritime claims in the South China Sea. Additionally, the Tribunal's ruling creates a pocket of high seas outside any national claim in the central part of the South China Sea (see Figure 1).

The Tribunal's award clearly indicates that the Philippines' EEZ extends into the South China Sea and, by extension, underpins analogous claims on the part of other South China Sea littoral states. Indeed, there is evidence to suggest that some of the South China Sea coastal states, excepting China (and Taiwan), are adopting a more robust stance with regard to asserting jurisdiction over what they regard as national waters, proximate to their mainland and main island coasts.⁴⁰ Given China's vociferous rejection of the Tribunal's ruling, any such efforts on the part of the other South China Sea coastal states to enhance efforts to use and patrol waters off their coasts, but which lie within the confines of the nine-dash line, will be strongly resisted by China.⁴¹ Further, the Tribunal's findings that Mischief Reef and Second Thomas Shoal, sites of significant artificial island-building on the part of China, are part of the EEZ of the Philippines, as well as that concerning Scarborough Shoal

Figure 1
Maritime Claims in the South China Sea



Source: This map was prepared by Clive Schofield and Andi Arsana of the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia. Adapted from a map that appeared in Robert Beckman and Clive Schofield, “Defining EEZ Claims from Islands: A Potential South China Sea Change”, *The International Journal of Marine and Coastal Law* 29, no. 2 (2014): 199.

offer notable potential future flashpoints. This would seem to set the scene for increased maritime conflicts in the South China Sea. At the time of writing, however, such an escalation in tensions have yet to materialize, providing some grounds for optimism.

The Tribunal's ruling will, moreover, resound well beyond the South China Sea. Although it was specifically focussed on the South China Sea, and its findings are only binding on China and the Philippines in its specifics, it is nonetheless an authoritative and unanimous ruling by an international judicial body on the issues it addressed and therefore carries considerable legal weight.

In particular, the ruling represents a strong assertion of the primary role of the Convention in the international law of the sea and especially of the rights and obligations set out in the framework of maritime zones it established. The Tribunal also sought to address notable ambiguities in the Convention, particularly in relation to historic rights and concerning the regime of islands. In doing so, the Tribunal's award has the potential to greatly assist in the development of the law of the sea.

The Tribunal's award serves to counter apparently historically-inspired unilateral claims to maritime spaces. Further, the Tribunal found that only features that have a capacity to sustain either a stable community of people or economic activity that is not dependent on outside resources, or purely extractive in nature, in their natural state are entitled to generate extended maritime claims. This represents a major development with significant potential implications for insular features elsewhere. As a result of uncertainties over which insular features can generate what maritime zones, many states have advanced expansive maritime claims from small, sparsely populated or uninhabited islands and these claims are now placed in jeopardy after the ruling. It will be intriguing to see whether states modify their claims in light of the Tribunal's award.

NOTES

¹ "PCA Case No. 2013-9 in the Matter of the South China Sea Arbitration", 12 July 2016, available at <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>. Hereafter "Award".

² UNCLOS, Part XV and Annex VII.

³ Philippines, "Notification and Statement of Claim on the West Philippine Sea", 22 January 2013, available at <<http://www.pcacases.com/pcadocs/The%20>

Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29.pdf>.

- 4 China made a Declaration on its ratification of UNCLOS in 1996 indicating that it was exercising its option under Article 298 that the dispute resolution mechanisms provided under Part XV of the Convention do not apply where consideration of “any unsettled dispute concerning sovereignty or other rights over continental or insular land territory” is required, where disputes related to “sea boundary delimitations” are involved, or should “historic bays or titles” be involved. See, China, “Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines”, 7 December 2014, available at <www.fmprc.gov.cn/nanhai/eng/snhwtlchwj_1/t1368899.htm>.
- 5 Article 9 of Annex VII of UNCLOS expressly addresses the issue of a party to an arbitration case initiated under its terms refusing to participate, providing that “absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings”.
- 6 Available at the PCA website. See endnote 1.
- 7 In its Award the Tribunal confirmed that it had the necessary jurisdiction to address the vast majority of the issues and questions posed to it by the Philippines. See, Award, para. 167.
- 8 While China has not participated in the case directly, it has nonetheless done so informally, for instance through issuing *notes verbale* and publishing its Position Paper.
- 9 UNCLOS, Annex VII, Article 11.
- 10 China has stated that the Tribunal’s award is “null and void” and has “no binding force”. See, “Statement of the Ministry of Foreign Affairs on the Award of 12 July 2016 of the Arbitral Tribunal Established at the Request of the Republic of the Philippines”, 12 July 2016, available at <www.fmprc.gov.cn/nanhai/eng/snhwtlchwj_1/t1379492.htm>.
- 11 Award, para. 229.
- 12 Award, para. 246. Any China’s historic claim to resources within the nine-dash line were found to be incompatible with UNCLOS “to the extent that it exceeds the limits of China’s maritime zones as provided for by the Convention” as the “Convention supersedes earlier rights and agreements to the extent of any incompatibility”.
- 13 Award, para. 261. It should be noted that the Tribunal indicated that China may retain some traditional fishing rights at Scarborough Shoal since it found that this feature has been the traditional fishing ground of fishermen of many nationalities “including the Philippines, China (including from Taiwan), and Viet Nam”. See, Award para. 805 and 812.
- 14 UNCLOS, Article 121(3).
- 15 Award, para. 540.
- 16 Ibid.
- 17 Ibid., para. 541.
- 18 Ibid., para. 542.

¹⁹ Ibid., para. 543.

²⁰ Ibid., para. 544.

²¹ Ibid., para. 545.

²² Ibid., para. 549.

²³ Ibid., para. 546.

²⁴ Ibid., para. 547.

²⁵ Ibid., para. 646.

²⁶ Ibid., para. 643.

²⁷ Ibid., para. 308.

²⁸ Ibid., para. 309 and 1043. See also, Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment (2012) ICJ Report p. 624, at p. 641, para. 26.

²⁹ Ibid., para. 647.

³⁰ Ibid., para. 1043.

³¹ Ibid., para. 716.

³² Ibid. See also, para. 757.

³³ Ibid., para. 814.

³⁴ Ibid., para. 1109.

³⁵ See, Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972, 1050 UNTS 1976. Specifically, China was found to have breached Rules 2, 6, 7, 8, 15, and 16. See, Award, para. 1109.

³⁶ UNCLOS, Article 192.

³⁷ Award, para. 992.

³⁸ Specifically China was found to have “breached Articles 192, 194(1), 194(5), 197, 123, and 206 of the Convention”. See, Award, para. 993.

³⁹ Ibid., para. 1181.

⁴⁰ See, for example, Clive Schofield, Rashid Sumalia and William Cheung, “Fishing, Not Oil, is at the Heart of the South China Sea Dispute”, *The Conversation*, 16 August 2016, available at <<https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580>>.

⁴¹ Ibid.

The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead

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The Philippines is in the midst of a transition. The astonishing rise and decisive victory of Rodrigo Duterte in the presidential election in May 2016 marked a significant turning point in Philippine politics. Manila's longstanding territorial and maritime boundary disputes with Beijing in the South China Sea are among the most immediate and intricate foreign policy challenges facing President Duterte. However, in an unexpected twist, previously acrimonious bilateral relations with China have demonstrated signs of improvement while Duterte's relentless and fiercely critical rhetoric against the United States has placed the country's robust and longstanding security and defence relations with America in question. This turn of events heralds uncertain times for both the Philippines and Southeast Asia.

The Philippines at a Crossroads

Philippine foreign policy under President Duterte will be profoundly different from the one pursued by the previous administration

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of President Benigno Aquino III. The priorities, philosophy and dynamics that inform the policies of Duterte will be fashioned and influenced by his background as a local politician from the southern Philippines, predicated on his anti-establishment position as a virtual outsider in national politics and a neophyte in foreign affairs. On the sombre stage of global diplomacy where tradition, protocol and etiquette are primordial values, the raw honesty, populist theatrics, impulsiveness and frivolity of Duterte have not been well-received in other countries, though he remains very popular at home.

Duterte's conciliatory and amicable stance towards China seems a conundrum in stark contrast with his usual intrepid, volatile and pugnacious temperament. The President's colourful language, which reveals a deep-seated resentment towards the United States, is a thin veneer covering a hollow foreign policy on a dangerously isolationist path. While Duterte has demonstrated his embarrassing histrionics, he has yet to unveil a carefully crafted and detailed policy towards China and how his administration intends to deal with the complex disputes in the South China Sea.

An Overwhelming Victory

On 12 July 2016, the final award of the Arbitral Tribunal in the case filed by the Philippines against China over the South China Sea in January 2013 represented an overwhelming legal and moral victory for Manila. The Tribunal decisively declared that China's nine-dash line claim had no basis in international law and was incompatible with the United Nations Convention on the Law of the Sea (UNCLOS). However, China's defiance of the ruling and refusal to honour it pose a serious challenge to Manila's victory. There were initially high expectations — riding on a global tide of favourable public opinion after the Hague ruling — that the Philippines would call on other countries to help enforce the verdict, demand reparations over the damage done to the marine environment, negotiate a fisheries access agreement at Scarborough Shoal, conduct navigational operations, and peacefully contest China's hegemonic ambitions through regional support and diplomatic pressure. These options now endure only in the realm of wistful thinking. The strategic imperatives behind Manila's muted jubilation in response to the ruling are justifiable, but the short-sighted, amnesic foreign policy reaction to accommodate China is inexplicable.

The all-encompassing victory was subduely received. After the award was issued, the reaction from Foreign Affairs Secretary Perfecto Yasay was so sullen that casual observers unaware of the positive ruling might have formed the conclusion that the Philippines had actually lost the case. Yasay's terse official statement merely called for "restraint and sobriety", echoing President Duterte's "no-taunt, no-flaunt" policy. Both men advocated for carefully calibrated actions so as to cushion the blow of a positive ruling against China.¹ This was in sharp contrast to the Aquino administration's more bellicose stance towards Beijing.

The tight-lipped, almost cryptic response from Duterte — known for his animated language and unpredictable demeanour — was atypical of him. China's optimism in the Duterte administration indicates that the conciliatory approach of the new administration has not gone unnoticed in Beijing.² President Duterte has since avoided extended discussion of the legal victory, and has yet to reveal a well thought-out strategy that the country can employ towards Beijing. Yasay, for his part, appears less bullish as well, and in recent ASEAN forums was quoted as not pushing strongly for inclusion of the award in the organization's official statements, a position that earned him heavy criticism from seasoned Philippine diplomats.³ The only tangible directive from Malacañang Palace was the idea of sending former Philippine President Fidel Ramos as special envoy to China — with instructions and goals not quite made clear to the public — in order to resume talks with Beijing.⁴ In this capacity, Ramos visited Hong Kong in August 2016 and held a meeting with Chinese officials. However, following his scathing assessment of the Duterte administration, his future trips have been cancelled and he has resigned as special envoy to China.⁵ Manila has also appointed a new ambassador to China, a sign of improved bilateral relations between the two countries.

From 18 to 21 October 2016, during Duterte's state visit to China, in a baffling display of historical revision, he stated that China "has never invaded a piece of my country all these generations".⁶ Although Presidents Duterte and Xi Jinping discussed the South China Sea dispute, no concrete agreements were reached. Duterte did, however, announce the country's military and economic "separation" from the United States, which was immediately clarified as not a severance of diplomatic ties but merely the beginning of a foreign policy independent of America.⁷ These moves reinforce

his administration's accommodating posture towards China and possibly foreshadow an impending security realignment.⁸

The Tribunal's award is final and binding and there is no provision to appeal it. The ruling will carry huge precedential weight. The award cannot be ignored or set aside despite China's protestations that it is null and void. Beijing's accusations that cast aspersions on the integrity of the judges should not be dignified. Nevertheless, the Philippines needs to be magnanimous in its victory and be aware that the award has not changed the geopolitical situation in the region. The stark military and economic asymmetry between the claimant states and China still remains, and will remain unchanged in the years to come. There are massive illegal structures in the form of artificial islands and reclaimed land sitting in Philippine waters that raise issues of dismantlement, reparation and compensation for the irreparable damage caused to the marine environment. At the time of writing, Filipino fishermen are still barred from fishing at Scarborough Shoal which is under China's de facto control. There are contentious issues of reparation and state liability, and even tougher questions of dismantlement, demilitarization and de-escalation of tensions in order to avoid the possibility of miscalculations that could lead to armed conflict.

A Reality Check

The Philippines, against the backdrop of the euphoria of the Tribunal's award, needs to consider and put in perspective economic and trade realities, and the safety and welfare of Filipinos in China, including the large number of Overseas Filipino Workers (OFW) in Hong Kong. The Philippines needs to reassess its military capabilities, and recognize that it cannot rely on external powers such as the United States to safeguard the country's territorial integrity and national sovereignty. The possibility that China will establish an air identification zone (ADIZ) over the South China Sea similar to the one in place in the East China Sea remains. There is noticeable silence and even explicit lack of support from the other claimant states. Looking ahead, one hopes that the Tribunal's recognition of the rights of the Philippines under UNCLOS will encourage other claimant states to follow suit and launch their own legal challenge against China. The reality, however, indicates that this does not appear likely in the foreseeable future. In fact, in the aftermath of the award, the ruling has only highlighted fractures and divisions within ASEAN, exposed the drawbacks of

the region's consensus process, and challenged ASEAN "Centrality", with more potential points of intense clashes looming on the horizon.

Duterte's pronouncements on China, and his views on the South China Sea dispute, appear to be diametrically at odds with the current design and trajectory of Philippine foreign policy on these important issues. A few years into his presidency, Duterte's predecessor adopted a hard-line policy towards Beijing over the South China Sea, and pursued closer security ties with Washington and Tokyo. In contrast, Duterte favours direct negotiations with China and has indicated that he might be willing to shelve the contentious issue of sovereignty in exchange for Chinese economic concessions.⁹ Duterte's constantly changing and at times conflicting statements on the South China Sea include previous pronouncements that he will not surrender Philippine rights to Scarborough Shoal which he set aside during his state visit to China in October and curiously asked Beijing to allow Filipino fishermen to fish at the shoal. The Duterte administration has obviously abandoned the previously prevailing dominant narrative of Chinese hegemonic expansionism in the South China Sea. He espouses joint development with China while eschewing the issue of ownership. Sensibly, Duterte opposes the idea of going to war with China; nor does he advocate the use of legal avenues to enforce the Philippines' claims. Instead, he prefers a multilateral approach that will bring rival claimants and even extra-regional powers, including the United States, to the negotiating table. These views signal a radical shift in Philippine–China relations under Duterte.

A Pivot in Philippine–China Relations

At the time of writing, the direction Philippine–China relations will take under Duterte is still unclear. The paucity of any solid, long-term and categorical statement from Duterte on the South China Sea — indeed on foreign policy in general — makes crystal ball gazing particularly difficult. At best, Duterte's rhetoric suggests more cordial relations between Manila and Beijing. In many ways, of course, this would be a good thing. The two countries could channel their energies and resources on economic activities that are mutually beneficial. On the other hand, the softening of Manila's stand against an increasingly aggressive and expansionist China could expose cracks in the unstable regional security

architecture, and further weaken the concerted efforts of extra-regional powers, primarily the United States and Japan, to counterbalance China's provocative military posturing, as well as subvert ASEAN initiatives to rally behind a unified position against an assertive China. Duterte's reckless statements that the Philippines will discontinue its alliance with the United States in favour of an alliance with China and even Russia, if acted upon, will radically reorder the security situation not just in the South China Sea, but also the entire Asia-Pacific region.¹⁰ A rapid shift in defence posture by Manila could further increase the risk of miscalculations and provocations on the ground, and undermine longstanding efforts to reinforce a rules-based approach to resolving the South China Sea dispute.

The complexities associated with the dispute lie where international law, international relations, geopolitics and a rising global power all coalesce and intersect. The lawyers have done a commendable job in securing this historic legal and moral victory for the Philippines. The next phase is now the rightful domain of diplomats, strategists and foreign policy experts to take the lead in order to make the award a real and lasting triumph for the Philippines. It will take considerable time, colossal effort and immense goodwill from both the Philippines and China to mend their frayed bilateral relationship. Independent of the ruling, a significant shortcoming in the current incendiary posturing against the United States, which has introduced a perilous ambiguity in Philippine foreign relations with far-reaching consequences on the region and beyond, is the absence of a carefully considered, credible, long-term, and truly independent foreign policy.

The Tribunal's award was the first litmus test of where the populist strongman stood on this matter, which Duterte has opportunistically set aside while seeking trade, economic and military concessions from China. The Chinese government has repeatedly confirmed that it will neither honour nor consider itself bound by the award. In 2017, the Philippines assumes the chairmanship of ASEAN, and this will demand leadership from Duterte. It is still too early to say how Duterte will respond to China and where he will draw the line with Manila's colossal regional neighbour. But early signs are not very promising. The unpredictable and volatile nature of the president makes it even harder to calculate his position.

Competing claims in the South China Sea have made its waters rather turbulent in recent times. But hope always remains buoyant. And the man of the hour is Philippine President Rodrigo Duterte on whose shoulders rests the hope that he can capably navigate the strong currents and sail his country towards smooth and calmer waters in Philippine–China relations.

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The South China Sea Arbitral Tribunal Award: Political and Legal Implications for China

NONG HONG

The release of the Arbitral Tribunal's award on 12 July 2016 brought to an end the arbitration case on the South China Sea which the Philippines had unilaterally brought against China in January 2013. This thoroughly one-sided award ruled that many of China's maritime claims in the South China Sea were contrary to the United Nations Convention on the Law of the Sea (UNCLOS) and had thereby violated Philippine sovereign rights and freedoms. The ruling does not mean that the dispute between the Philippines and China is over. But it does have political and legal implications for China, especially its future approach to managing and eventually resolving the country's maritime disputes.

When it comes to international disputes, China has a strong preference for negotiating or consulting directly with the other party directly concerned. This preference owes much to Chinese culture and history. China has always advocated bilateral negotiations as the most practical means of solving problems between states. China's perception of the role of international courts in dispute settlement is also negative. Thus far no dispute between China and any other

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state has been brought to the International Court of Justice (ICJ) or other international tribunals, except the South China Sea arbitration case. In treaties to which it is a party, China has usually made reservations about the clause of judicial settlement by the ICJ. As for UNCLOS, China declared on 7 September 2006 under Article 298 the exclusion of certain disputes (such as those concerning maritime boundary delimitation, historic bays and titles and military use of the ocean) with other countries from the jurisdiction of international arbitration.¹

Accordingly, China's position on the South China Sea arbitration case, namely non-participation and non-acceptance, is consistent with its 2006 declaration. China considered the act of initiating arbitration proceedings against it to be unfriendly and inimical to Sino–Philippine relations. Beijing's strong opposition to the arbitration case was clearly articulated in its Position Paper of 7 December 2014, in which it argued against the jurisdiction and admissibility of the Arbitral Tribunal.²

The ruling has four main implications for China. First, the award suggests that China's history-based claims within the nine-dash line do not include a claim to "historic title" (which bear the characteristics of sovereignty and should have been excluded from the Tribunal's jurisdiction in accordance with China's 2006 declaration). Rather, China's claim is one of "historic rights" which the Tribunal ruled to be an exclusive claim of sovereign rights and jurisdiction in the exclusive economic zone (EEZ) of the Philippines. The Tribunal judged China's claims to be contrary to UNCLOS and without lawful effect because these exceeded the geographic and substantive limits of China's maritime entitlements under the Convention. This finding has several major flaws. The Tribunal interpreted the nine-dash line as a line of "historic rights", even though China has never made a public statement about the legal meaning of this line. And, even supposing that China regarded the line representing "historic rights", the Tribunal took a different position on China's claims than the Philippines'. It stated that Manila is entitled to reach beyond the text of the Convention to enjoy non-exclusively exercised traditional fishing rights in the territorial sea of Scarborough Shoal, which is part of the body of general international law preserved by UNCLOS. However, the Tribunal denied China's historic rights in foreign EEZs and therefore its reasoning was unsatisfactory. Its limitation of artisanal fishing rights to territorial seas rather than other exclusive maritime zones

constituted an arbitrary narrowing of the jurisprudence created in *Eritrea v Yemen*.³

Second, the ruling provides that no land feature in the Spratlys, or Scarborough Shoal, is capable of sustaining human habitation or an economic life of its own.⁴ As such, none of the land features in the Spratlys meets the definition of an “island” within the meaning of Article 121 of UNCLOS. In other words, there is no entitlement to an EEZ or a continental shelf generated by any land feature claimed by China in the Spratlys or Scarborough Shoal. One of the most significant elements of the ruling was its finding that Itu Aba — the largest feature in the Spratlys group and occupied by Taiwan since 1956 — is not an “island” but is instead merely a “rock”. As pointed out by Sourabh Gupta, the Tribunal rejected decades of jurisprudential caution by directly addressing the distinction between “islands” and “rocks”, and added an arbitrary “historical use” test in the case of features that are difficult to define. The Tribunal’s interpretation bears little resemblance to the spirit of Article 121 which was deliberately drafted ambiguously.⁵ This finding on Article 121 (3) has significant implications with regard to jurisdictional questions related to a range of activities, including fishing, marine scientific research, reclamation, law enforcement, etc., conducted by China in the South China Sea.

Third, the ruling also stated that China’s land reclamation activities on seven of the Spratlys features had caused irreparable harm to the coral reef ecosystem and thereby, in violation of its international treaty obligations, it had damaged the marine environment.⁶ Given the provisions of international law, including UNCLOS, with respect to the protection and preservation of the marine environment, it is a critical issue whether China has fulfilled its obligations. The official statement from China’s Ministry of Foreign Affairs maintained that China had conducted environmental impact assessments (EIAs) and that it was continuing to monitor the impact of its reclamation activities.⁷ China should, therefore, make the EIAs public and acknowledge its duty to cooperate with potentially affected states. China should also be encouraged to make public relevant data such as the depth, position, and dimensions of its artificial islands. As China has justified its artificial island-building on the grounds that the facilities will provide public goods, it has to validate this claim by offering support for search and rescue and scientific research activities.

Fourth, the award has profound implications for the future of Article 298 of UNCLOS. As noted earlier, Article 298 allows states to opt out of the compulsory dispute settlement procedures on issues related to sovereignty, maritime delimitation, and military activities. This article was a compromise achieved after lengthy negotiations to meet the demands of some states which did not want certain disputes addressed through a third party. The utilization of Annex VII of UNCLOS for the Philippines versus China case — a case that involved sovereignty and maritime delimitation — could undermine the true spirit of the dispute settlement mechanism established under the Convention.

China's decision not to participate in the proceedings demonstrates its continued position of "non-acceptance and non-participation". It does not mean disrespect for the Arbitral Tribunal or international law, nor does it reflect China's unwillingness to resolve international disputes peacefully. But because China refused to participate in the arbitration proceedings, it has been unfairly portrayed as a country that ignores international law.

Arbitral tribunals should limit their jurisdiction to the scope of dispute rather than expanding its jurisdiction. The provisional nature of arbitration posits that its purpose is to resolve specific disputes rather than address broader issues. In the case of the South China Sea arbitration, the Tribunal granted itself jurisdiction even though it was aware of China's consistent position on resolving the territorial sovereignty and maritime disputes through bilateral negotiations, and was aware that the rulings would not ease tensions between Manila and Beijing. China is now facing pressure from the international community, especially from the United States and Japan, to abide by the ruling. However, China's position of non-participation and non-acceptance has the overwhelming support of the Chinese people.

The arbitration case is the first time a claimant state has submitted the South China Sea dispute to a third party forum. However, the outcome did not make a meaningful contribution to resolving the main problem between the Philippines and China. Nevertheless, the ruling could incentivize ASEAN and China to accelerate negotiations for finalizing a Code of Conduct (CoC) for the South China Sea. Although the ruling has, to some extent, complicated ASEAN-China relations, ASEAN has avoided taking sides and cooperation with China is on-going. For instance, in September 2016, ASEAN and China adopted a set of guidelines

to establish telephone hotlines among their foreign ministries to be used in times of crisis. The two sides also agreed to apply the Code for Unplanned Encounters at Sea (CUES) to the South China Sea so as to reduce the risk of potentially dangerous incidents at sea.⁸ The ruling has also created an opportunity for the Philippines and China to restart bilateral talks on the dispute. Philippine President Rodrigo Duterte has appointed former President Fidel Ramos as his special envoy to China to begin the process of bilateral negotiations.⁹ During a visit to Beijing in October 2016, Duterte discussed improving economic cooperation with China instead of focusing on the South China Sea dispute. Whether Duterte's low-key approach to the dispute will result in a better relationship with China or whether it is merely a tactic to play Beijing and Washington off each other remains to be seen.

While China and ASEAN are cooperating to better manage the dispute, the role of other stakeholders should not be ignored. The South China Sea dispute has evolved from a territorial and maritime dispute among the claimant states to a source of competition between China and the United States. In order to resolve this paradox, China and the United States have no choice but to engage each other and maintain regular communication on how they can coexist and respect each other's core interests. After all, the Asia-Pacific region is large enough for both countries to share and exert their respective influence without engaging in conflict.

The South China Sea arbitration case is not a complete loss for China. Over the past three years, it has not only been the government which has argued against the jurisdiction of the Tribunal and the outcome of the case, but also Chinese legal scholars and students of international law. Debates in the field of Chinese international law, dozens of publications on the South China Sea arbitration case and the heightened interest in UNCLOS all show that China is undergoing a transformational way of thinking regarding its future choices for resolving maritime disputes. Will its conventional approach of bilateral negotiations and consultations still be its preferred method for settling interstate disputes? Or will China come to accept that third-party dispute resolution has a pivotal role to play in settling problems with neighbouring countries? The Arbitral Tribunal's ruling on the South China Sea provides an opportunity for China to rethink its traditional approach to dispute resolution.

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Taiwan and the Arbitral Tribunal's Ruling: Responses and Future Challenges

ANNE HSIU-AN HSIAO

The Arbitral Tribunal's award of 12 July 2016 was overwhelmingly in favour of the Philippines and denounced by China. Although the Republic of China (ROC, or Taiwan) was not a party to the arbitration, it was dragged into the proceedings, as the issue of the status and entitlements of Itu Aba — the largest geographical feature in the Spratly Islands, occupied by Taiwan and also known as Taiping Island — gained prominence in the course of the Tribunal's deliberations.

The Tribunal's award declared that Itu Aba is a "rock" and not an "island" as defined by Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS).¹ The ROC government — headed by Taiwan's new President and Chair of the Democratic Progressive Party (DPP), Tsai Ing-wen — immediately objected to the ruling and declared that it had no legally binding force on the ROC. The government's response echoed that of China's, with whom relations have run into problems since President Tsai took office in May 2016. This article makes two propositions: first, that the immediate response from Taiwan was aimed at three audiences; and second, that the ruling has created challenges for Tsai's policy on the South China Sea.

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Taiwan's Kaleidoscopic Responses to the Arbitral Ruling

On the same day that the award was issued, Taiwan released two official statements rejecting it. One of the statements came from President Tsai's office, and made three assertions: first, that the ROC has sovereignty over the South China Sea islands and is entitled to all rights over those islands and their relevant waters under international law and the law of the sea; second, that because the Arbitral Tribunal did not invite the ROC to participate in the proceedings or solicit its views, its decisions which impinge on ROC's interests and undermine its rights, particularly those regarding the status of Itu Aba, are not legally binding on the ROC; third, that the ROC urges the South China Sea disputes to be settled through multilateral negotiations, and that it will work with all states concerned on the basis of equality.²

The other statement, issued by the Ministry of Foreign Affairs, gave more specific reasons for Taiwan's rejection of the award.³ First, that the Tribunal had inappropriately referred to the ROC as the "Taiwan Authority of China" and that the government considered this designation "inappropriate" and "demeaning to the ROC as a sovereign state". The second concerned how the Tribunal had dealt with the legal status of Itu Aba. According to the statement, this issue was not part of the Philippines' original submission in January 2013, and that the Tribunal "took it upon itself to expand its authority". In disregard of Taiwan's sovereignty and actual control of Itu Aba, and without inviting the ROC to participate in the arbitral proceedings or solicit its views, the Tribunal had denied Itu Aba's "island" status and the maritime entitlements provided by UNCLOS. The statement also reiterated President Tsai office's call to resolve the South China Sea dispute peacefully through multilateral negotiations, as well as "in the spirit of setting aside differences and promoting joint development".⁴

The two statements were simultaneously aimed at three audiences. The first and most important audience was China. Beijing is deeply suspicious about the new DPP government's cross-straits and South China Sea policies, and has been watching warily how Tsai would address these issues since she was elected in January 2016. In recent years, the South China Sea and Taiwan issues have become two inter-related "core interests" for China. On the one hand, Beijing's insistence on Taiwan as an integral part of China, and its firm opposition to so-called "Taiwan independence", are longstanding. On the other hand, Beijing, which claims to have

succeeded the ROC Nationalist (KMT) government as the sole legal government of China since 1 October 1949, adopted the ROC's eleven-dash "U-shaped line" published in 1947 to represent its claims in the South China Sea, albeit with subsequent modifications.⁵ Beijing also regards the ROC's administration of Itu Aba since 1956 as proof of China's territorial sovereignty of the Spratly Islands. Thus, China has repeatedly called for Taiwan to cooperate in defending the territorial sovereignty and the overall interests of the Chinese nation.

China welcomed efforts by Tsai's predecessor, Ma Ying-jeou, to defend and clarify the ROC's claims in the South China Sea, especially after the commencement of the arbitral proceedings in 2013. These efforts included holding an "Exhibition on the ROC's Historic Archives on the Southern Territories" in Taipei in September 2014, and supporting Itu Aba's "island" status.⁶ Even though the Ma government declined Beijing's call to help it defend Chinese sovereignty and interests in the South China Sea, China was prepared to tolerate his South China Sea Peace Initiative proposed in May 2015,⁷ and the associated Roadmap announced in January 2016⁸ that contains proposals for multilateral negotiations and regional cooperation. China tolerated Ma's activities because he had upheld the so-called "1992 Consensus", a short hand for the notion that the two sides across the Taiwan Straits maintain that there is only one China, to which both the Chinese mainland and Taiwan belong, although their interpretations of "one China" differ: for China it means the People's Republic of China and for Taiwan the Republic of China.⁹

So far, President Tsai has yet to fully and unequivocally recognize the "1992 Consensus" and the underlying notion of "one China", which Beijing has demanded as the basis for positive cross-strait interactions to continue. Tsai's reluctance to do so has led Beijing to suspend government-to-government communications with Taipei, and curtail Taiwan's participation in international organizations. With regard to the South China Sea, the DPP government has reiterated the ROC's sovereignty and maritime jurisdictional claims over the four groups of islands — Tungsha (Pratas), Chungsha (Macclesfield Bank), Shisha (Paracel) and Nansha (Spratly) — and rejected the Tribunal's ruling because it undermines Taipei's rights and interests.

That said, the aforementioned statements made no reference to a common Chinese history or the U-shaped line as former President Ma had done. Thus, on the surface at least, the Tsai

government's response to the ruling appears in line with China's, and hence Beijing's initial response to Taiwan's rejection of the award was moderate in tone. According to China's Ministry of Foreign Affairs spokesperson Lu Kang: "Chinese people across the Strait are duty-bound and obliged to jointly preserve the ancestral land of the Chinese nation."¹⁰ However, some policy experts in China pointed to the caveats in Taiwan's statements. For example, Wu Shicun, President of National Institute for South China Sea Studies, noted that Tsai has never recognized the U-shaped line, and warned that Tsai's future South China Sea policy may "separate itself from the Chinese mainland, follow the suit of the US and Japan, curry favor with the ASEAN, and seek Taiwan's independence", which, in turn, could adversely impact cross-strait cooperation.¹¹

The second audience was the domestic population. According to one poll conducted following the ruling, almost 70 per cent of Taiwanese felt that Taiwan had fallen victim to Sino-US competition in the South China Sea.¹² In particular, the United States was blamed for supporting the arbitral proceedings which had resulted in Itu Aba being downgraded from an island to a rock.¹³ In an attempt to make good on her inauguration pledge to "safeguard the sovereignty and territory of the Republic of China",¹⁴ a day after the ruling, Tsai dispatched a frigate to conduct patrols in the South China Sea, including a stop at Itu Aba. In a speech delivered on board the warship before it departed, Tsai stated that the Tribunal's ruling had created a new situation in the South China Sea and that it was necessary for Taiwan to demonstrate its determination to protect its national interests.¹⁵ However, thus far, Tsai has refrained from visiting Itu Aba herself, despite popular support to do so. Instead, Minister of the Interior Yeh Jiunn-rong paid a low-profile visit to Itu Aba in August 2016 during which he talked about environmental issues.¹⁶ His visit drew criticism from the KMT for not defending the country's sovereignty strongly enough in the South China Sea.

The third audience was the international community. The two statements registered Taiwan's grievances at the Tribunal's prejudice against the country's sovereign identity as well as its treatment of Taiwan during the proceedings. Although the legal status of Itu Aba directly concerns Taiwan's rights and interests in the South China Sea, the Tribunal rejected a request from Taipei for observer status. Moreover, although the Tribunal did take note of materials provided by Taiwan — including a 400-page *Amicus Curiae*

submission from the Chinese (Taiwan) Society of International Law — it did not give Taiwan an equal procedural opportunity to argue its case against the Philippines. The Tribunal's attitude towards Taiwan may have been due to the fact that it is not a state party to UNCLOS or because of China's non-participation in the proceedings. Nevertheless, Taiwan feels justified in rejecting the Tribunal's decision on Itu Aba because it was derived without due process.

Potential Challenges for Taiwan after the Arbitration

Legally speaking, the Tribunal's ruling is only binding on the Philippines and China, although other countries may choose to accept it. In Taiwan's case, while the Tsai government does not accept the binding effect of the Tribunal's interpretation concerning the status of Itu Aba, it is committed to maintaining territorial and maritime claims in accordance with international law and UNCLOS, and thus will not make excessive claims.¹⁷ This suggests that while Taiwan still claims sovereignty over all the atolls in the South China Sea and their relevant waters, the government will likely continue to enforce only a 4,000-metre prohibition sea zone and 6,000-metre restricted zone around Itu Aba, which was proclaimed in 1994 and has been implemented since then.

Technically, Taiwan is not obliged to take any action regarding the U-shaped line, since the Tribunal reached its conclusions by focusing mainly on China's interpretation and practices, and has indicated that its ruling applies only to the Philippines and China. Nonetheless, the ruling could still impact Taiwan's rights and interests. For example, following the ruling, a new round of debate and consultation may take place about the location of "overlapping" or "disputed" areas in the South China Sea. This may generate new tensions, particularly between the Philippines and China, or China and Vietnam, and any unilateral measures adopted by these countries could adversely affect the interests of Taiwanese fishing boats operating in the South China Sea. Attempts by the rival claimants to assert sovereignty or jurisdictional rights, or the increased militarization of the Spratlys, could also affect the rights or put at risk the safety of ROC ships and aircraft that sail or fly to Itu Aba on a regular basis. These will require the governments concerned to communicate and consult with one another to avoid potentially dangerous incidents at sea.

Moreover, as a country that borders the semi-enclosed South China Sea, and which controls Itu Aba and the non-disputed Pratas Islands in the northeast, Taiwan is a direct party to the dispute. Thus, Taiwan should be included in all relevant conflict management and cooperation processes, for example cooperation based on Article 123 of UNCLOS for states bordering enclosed or semi-enclosed seas, the implementation of the 2002 ASEAN–China Declaration on the Conduct of Parties in the South China Sea (DoC) and negotiations for a binding Code of Conduct (CoC). President Tsai's predecessors consistently objected to Taiwan's exclusion from cooperative arrangements, such as the DoC and the Trilateral (China–Philippines–Vietnam) Joint Marine Seismic Undertaking (2004–08) which allegedly covered areas around Itu Aba without consulting Taiwan. Similar situations should best be avoided in the future. Admittedly, for Taiwan to participate in those multilateral processes, political will and effective communication among the governments concerned will be necessary.

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The South China Sea Award: Legal Implications for Vietnam

NGUYEN THI LAN ANH

The Arbitral Tribunal award on the South China Sea, issued on the 12 July 2016, was a legal game changer.¹ As a major claimant in the South China Sea, the award has significant implications for Vietnam. This article addresses both the opportunities and challenges for Vietnam, as well as the short term and long term impacts of the Tribunal's award.

Vietnam as Major Party in the South China Sea Dispute

Vietnam claims sovereignty over the Paracel and Spratly archipelagos on the basis of *effectivités* of the international law on territorial acquisition. In a *note verbale* to the United Nations dated 22 February 2016, Vietnam stated that it “has ample legal basis and historical evidence to affirm its indisputable sovereignty over Hoang Sa [Paracel] Archipelago and Truong Sa [Spratly] Archipelago. Successive Vietnamese governments have peacefully and continuously exercised and defended Viet Nam's sovereignty over the two archipelagos since at least the seventeenth century.”²

As a South China Sea coastal state, Vietnam acknowledged the importance of the sea and proclaimed its maritime zones in a declaration in 1977, even before the 1982 United Nations Convention on the Law of the Sea (UNCLOS) came into effect. Vietnam declared sovereignty, sovereign rights and jurisdiction within five

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maritime zones: internal waters; territorial seas; contiguous zones; an exclusive economic zone (EEZ); and a continental shelf. This claim was reiterated in the 2012 Law No. 18/2012/QH13 on the Sea of Vietnam. Earlier, in 2009, Vietnam had delineated its 200 nautical mile (nm) EEZ and submitted its extended continental shelf claim to the UN Commission on the Limits of the Continental Shelf (CLCS).³ As to the maritime zones of the Paracels and Spratlys, Vietnam has adopted general principles as outlined in UNCLOS, without specifying precise details for the legal regime of each of the maritime features.⁴ Regarding dispute settlement, Vietnam has consistently expressed its willingness to settle all disputes in accordance with international law, particularly UNCLOS.⁵ In general, Vietnam has relied on international law to support its sovereignty claims over the Paracels and Spratlys, and on UNCLOS to delineate its maritime zones in the South China Sea.

Confirmation of the Legal Basis of Vietnam's Maritime Claims

In addressing the matter of applicable law for generating maritime zones, the Arbitral Tribunal firmly concluded that UNCLOS provides and defines limits within a comprehensive system of maritime zones that is capable of encompassing any area of the sea or seabed.⁶ Essentially, the Tribunal endorsed the methods used by Vietnam to delineate the country's maritime zones in the South China Sea in accordance with UNCLOS.

Over the past few years, due to conflicting maritime claims between Beijing and Hanoi, a number of serious incidents have occurred within Vietnam's claimed EEZ and continental shelf. These included the severing of towed cables attached to Vietnamese survey ships by Chinese vessels in 2011, the opening of nine oil blocks in Vietnam's EEZ for bidding by a Chinese state oil company in 2012, the deployment of the Chinese drilling vessel HYSY-981 into Vietnam's EEZ in 2014 and the frequent detention of Vietnamese fishermen by Chinese authorities.

Judging by its words and deeds, China appears to be claiming sovereign or historic rights to maritime resources within the nine-dash line, thus placing up to 60 per cent of Vietnam's EEZ and continental shelf in dispute.⁷ However, the Tribunal decisively ruled that "upon China's accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded ... by the limits of the maritime zones provided for by [UNCLOS]".⁸

The Tribunal's decision represents a major breakthrough for Vietnam, as it means that China has no maritime rights within the nine-dash line and thus there are no overlapping EEZ or continental shelf claims between the countries.

China also claims sovereignty over the Paracels and Spratlys, and believes that these two archipelagos can generate EEZs and continental shelves.⁹ Under international law, this means that not only is the sovereignty of these maritime features under dispute but also their maritime zones. However, the Tribunal concluded that none of the high-tide features in the Spratlys, including the largest geographical feature Itu Aba, can generate entitlements to an EEZ or a continental shelf.¹⁰ In making this judgement, the Tribunal has freed most of the maritime spaces in the South China Sea from disputes. It can also be argued that the criteria the judges used to determine the maritime entitlements of the Spratlys may also be applied to the Paracels. Thus the disputed maritime spaces from the Paracels and Spratlys can be said to be quarantined within the enclaved 12 nm of the high-tide maritime features of the two groups of islands.

Given the landmark conclusions of the Tribunal, most of the EEZ and continental shelf from the mainland of Vietnam are not disputed and exclusively subject to the sovereign rights and jurisdiction of Vietnam.

Alternative Dispute Settlement Measures

In accordance with its desire to resolve maritime disputes peacefully, Vietnam started negotiating with China boundary issues in the Gulf of Tonkin in 1973. In 2000, the two countries concluded a maritime delimitation agreement and a joint fisheries cooperation agreement for the Gulf of Tonkin. These agreements were the first maritime delimitation agreements between China and a neighbouring country, and are often held up as a model of successful dispute settlement and patient negotiations.

Building on the success of this model, and in implementing the commitments contained in the 2011 Vietnam–China Basic Principles on Settlement of Sea Issues agreement,¹¹ Vietnam currently maintains three negotiation mechanisms with China: negotiation on maritime delimitation on the area outside the mouth of the Gulf of Tonkin; maritime cooperation on non-sensitive issues; and the possibilities of joint development of maritime resources in the South China Sea. On non-sensitive issues at sea, the two sides have agreed to implement three cooperative projects on the marine

environment and search and rescue.¹² However, little progress has been achieved in the other two areas due to the widely different positions of each side. Despite Vietnam's desire to accelerate negotiations, China continues to take a hardline position on its "indisputable" sovereignty over the Paracels and Spratlys, as well as the nine-dash line.¹³ The resulting deadlock may force Vietnam to pursue more effective dispute resolution mechanisms.

In its *note verbale* dated 13 June 2016, Vietnam stated that

the two countries are under an obligation to settle their dispute over the Hoang Sa and Truong Sa Archipelagos and other disputes in the East Sea through peaceful means in accordance with international law. Failing the achievement of an agreed solution, the two countries are entitled to use other peaceful means as provided for in Article 33 of the Charter of the United Nations and in article 279 of [UNCLOS]. The recourse to peaceful means for the settlement of the dispute is a friendly and effective measure to ease tension in the region and offers new prospects for cooperation and development for all coastal States in the East Sea.¹⁴

In this connection, the outcome of the Philippines versus China case may offer Vietnam an alternative and more effective option to settle its maritime disputes with China and protect its sovereign and jurisdictional rights in its EEZ and on its continental shelf.

The Pressure to Clarify Vietnam's Claims

The South China Sea award presents not just opportunities but also challenges for Vietnam. First, Vietnam has not yet completed drawing its straight baselines in certain areas, including in the Gulf of Tonkin, the Gulf of Thailand and in the Paracels and Spratlys. In its award, the Tribunal concluded that employing straight baselines around the Spratlys to approximate the effect of archipelagic baselines would be contrary to UNCLOS.¹⁵ Vietnam should, therefore, establish straight baselines for the Spratlys and Paracels by grouping features within 12 nm of each other and an island with low tide elevations located within 12 nm of it. In doing so, Vietnam should classify the maritime features in the Paracels and Spratlys as submerged features, low tide elevations or high tide features, and identify their locations. The Tribunal has already started this process by identifying Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and McKennan Reef as rocks, and Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef and Second Thomas Shoal as low tide elevations. Second Thomas Shoal and Mischief

Reef form part of the EEZ and continental shelf of the Philippines. Hughes Reef lies within 12 nm of the high-tide features on McKennan Reef and Sin Cowe Island, Gaven Reef (South) lies within 12 nm of the high-tide features at Gaven Reef (North) and Namyit Island, and Subi Reef lies within 12 nm of the high-tide feature of Sandy Cay on the reefs to the west of Thitu Island.¹⁶ In light of these conclusions, Vietnam should clarify the legal regime of the other maritime features in the Paracels and Spratlys.

Second, the classification of maritime features and their locations also provides the foundation for Vietnam's clarification on sovereignty issues. Accordingly, Vietnam can declare sovereignty over high tide features and low tide elevations located within 12 nm of a high tide feature of the Paracels and Spratlys. Low tide elevations located beyond 12 nm of a high tide feature of the Paracels and Spratlys, but on the continental shelf of the Vietnamese mainland, rightfully belong to Vietnam. If a low tide elevation is located on the overlapping continental shelf between Vietnam and a neighbouring country, its fate should be decided by maritime delimitation. A low tide elevation located beyond the continental shelf of Vietnam is not subject to a sovereignty claim. Submerged features — no matter where they are located — are also not subject to a sovereignty claim. They are part of the sea bed and their status will, accordingly, be decided by the legal regime of the sea bed.

Third, Vietnam should cooperate with Malaysia to finalize the two countries' extended continental shelf submission at the CLCS. Paragraph 5(a) of Annex I of the Rules and Procedures of the CLCS states that "in cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute". After Vietnam and Malaysia made their joint submission in 2009, China lodged a protest note with the CLCS on the basis of existing land and maritime disputes.¹⁷ In light of the Tribunal's ruling on the legality of the nine-dash line and the maritime entitlements of Spratly features, China's opposition is no longer valid. Hence, Malaysia and Vietnam should coordinate with the Philippines to have their extended continental shelf limits reviewed by the CLCS thereby finalizing their maritime jurisdictional zones in the South China Sea.

The Tribunal's award has opened a new chapter in the long-running dispute in the South China Sea. It is now up to the claimants to seize the opportunities presented by the ruling, and transform this regional hot spot into a sea of cooperation based on good faith and the rule of law.

NOTES

- ¹ Robert Beckman, “Tribunal Ruling a Game Changer”, *Straits Times*, 14 July 2016.
- ² Vietnam has consistently expressed this view through white papers in 1975 and 1988 and a series of verbal notes and letters of Vietnam submitted to the UN, UN Document A/68/981, A/70/659, A/70/748, A/70/795, A/70/944.
- ³ “Submission of Vietnam in the North Area, Executive Summary”, available at <http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf>; and “Joint Submission of Vietnam and Malaysia in the Southern Part of the South China Sea, Executive Summary”, available at <http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.
- ⁴ Article 19 of the 2012 Law No. 18/2012/QH13 on the Sea of Vietnam, available at <<http://vietnamlawmagazine.vn/law-of-the-sea-of-vietnam-4895.html>>.
- ⁵ Point 7 of the 1977 Declaration of Vietnam on Maritime Zones. Point 4 of the Resolution dated on 23 June 1994 of the National Assembly of Vietnam on the Ratification of UNCLOS, Article 4(3) of 2012 Law No. 18/2012/QH13 on the Sea of Vietnam and series of *Note Verbale* and Letters of Vietnam submitted to the UN in 2015, 2016, supra, note 2.
- ⁶ Paragraph 231 of “PCA Case No. 2013-9 in the Matter of the South China Sea Arbitration”, 12 July 2016, available at <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>. Hereafter “Award”.
- ⁷ Chinese Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 7 July 2016, available at <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1378321.shtml>.
- ⁸ Award, para. 262.
- ⁹ *Note Verbale* of China to the UN, CML/8/2011 dated 14 April 2011.
- ¹⁰ Award, para. 646.
- ¹¹ The full text of the 2011 agreement can be seen at “VN-China Basic Principles on Settlement of Sea Issues”, available at <<http://en.vietnamplus.vn/vnchina-basic-principles-on-settlement-of-sea-issues/50572.vnp>>.
- ¹² The projects involved: (i) search and rescue; (ii) exchange of ideas and research on managing the environment of the Tonkin Gulf and its islands and; (iii) research the Holocene sediment in the Red River and Changjiang River Deltas.
- ¹³ China’s latest view expressed in its *Note Verbale* CLM/59/2016, 1 July 2016, available at <<https://seasresearch.wordpress.com/2016/08/29/note-verbale-dated-01-july-2016-of-the-permanent-mission-of-china/>>; and in China’s White Paper “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea”, 13 July 2016, available at <http://www.fmprc.gov.cn/nanhai/eng/snhwtlclwj_1/t1380615.htm>.
- ¹⁴ UN Document A/70/944.
- ¹⁵ Award, para. 575
- ¹⁶ Award, para. 382, 384 and 643–647.
- ¹⁷ *Note Verbale* of China to the UN, CML/17/2009, 7 May 2009, available at <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>.

Malaysia's Approach to the South China Sea Dispute after the Arbitral Tribunal's Ruling

PRASHANTH PARAMESWARAN

Malaysia has traditionally adopted a “playing it safe” approach to the South China Sea designed to secure its claims while simultaneously ensuring that it preserves its important bilateral relationship with China. Ahead of the ruling by the Arbitral Tribunal on 12 July 2016, that approach had come under increasing scrutiny, given the bolder and more frequent Chinese encroachments into Malaysian waters as well as some other diplomatic incidents in the Sino-Malaysian relationship.

However, thus far the ruling has provided Malaysia with an opportunity to pursue both prongs of its traditional approach. The verdict is a shot in the arm for international law, which is central to Malaysia's South China Sea policy, and a legal boost for its claims that it is seeking to protect. Furthermore, Malaysian policymakers recognize that the ruling presents members of the Association of Southeast Asian Nations (ASEAN), China and other actors with a short-term opportunity to lower the temperature in the South China Sea by pushing regional diplomatic efforts and strengthening ties with Beijing in other realms, even if there are doubts about the Asian giant's long-term trajectory.

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Malaysia's South China Sea Approach

Malaysia has tended to pursue what one might term a “playing it safe” approach to the South China Sea.¹ On the one hand, unlike the Philippines and Vietnam, Malaysia has practised “quiet diplomacy” over the South China Sea, preferring to communicate its concerns with Beijing privately rather than air them publicly and proving more willing to bolster bilateral ties in spite of the dispute. On the other hand, Malaysia has also taken calibrated steps to secure its own claims through various diplomatic, security, legal and economic measures, whether it be working behind the scenes to ensure ASEAN unity on the South China Sea, advancing security ties with countries like the United States while boosting its own defence capabilities, or even using international law to support its claims, as evidenced by its joint submission with Vietnam to the United Nations Commission on the Limits of the Continental Shelf (CLCS) in May 2009.

However, the increasing frequency of Chinese encroachments into Malaysia's waters, as well as a series of diplomatic incidents that rocked Sino–Malaysian relations — most notably Beijing's criticism of Malaysia's handling of the missing Beijing-bound Malaysian Airlines flight MH370 in 2013 and alleged interference by the Chinese envoy in the Southeast Asian state's internal affairs in 2014 after remarks made ahead of a pro-government rally in a predominantly ethnic Chinese district — had led Malaysia to recalibrate its outlook and caused some in the country to question the wisdom of Malaysia's overall strategy towards Beijing.² Indeed, heading into the ruling, some observers had even expected that the country's “playing it safe” approach would harden.

Malaysia's Response to the Ruling

Malaysia's response to the ruling has been mixed. On the one hand, Malaysia has recognized that the award has strengthened international law as well as bolstered its own claims which it is seeking to protect in the face of China's rising assertiveness. The fact that the Tribunal had rendered a historic verdict on the case brought by the Philippines over Beijing's jurisdictional claims in the South China Sea despite Beijing's protests and refusal to participate was itself a demonstration of the importance of international law, a point which Malaysian officials, including

Prime Minister Najib Razak himself, had repeatedly emphasized even ahead of the ruling.³

Additionally, the Tribunal's findings — most clearly the one which stated that China's claims to historic rights within the nine-dash line had no basis in international law — had direct implications for Malaysia's claims as well. If China's nine-dash line were to be enforced, Malaysia would lose approximately four-fifths of its exclusive economic zone (EEZ) in Sabah and Sarawak which face the South China Sea and which includes most of its active oil and gas fields. Repeated Chinese encroachments into features like James Shoal, which lies at the southern end of China's claim but is well within Malaysia's EEZ, had also clearly demonstrated to Malaysia the dangers of Beijing acting unconstrained by international law.

Little surprise then that the five-paragraph statement issued by Malaysia's foreign ministry on 12 July 2016 indicated the country's acknowledgement of the verdict's international legal significance.⁴ The inclusion of the phrase "full respect for diplomatic and legal processes" — language referring to the ruling that was used in other forward-leaning statements including the US–ASEAN Sunnylands Statement in February 2016 and the draft of the ASEAN statement at the ASEAN–China Special Foreign Ministers' Meeting in Yuxi in June 2016 that was eventually not issued — was particularly notable.⁵ Some Malaysian officials believe the latter statement was released in spite of Chinese pressure to water it down ahead of the ruling.⁶

But on the other hand, Malaysia also recognizes that China's rejection of the ruling, and, more recently, Philippine President Rodrigo Duterte's downplaying of the verdict in pursuit of closer ties with Beijing, limits its utility in a practical sense and incentivizes countries to find constructive ways to move forward themselves. Echoing Philippine Foreign Secretary Perfecto Yasay, Prime Minister Najib bluntly told reporters during the ASEAN Summit in Vientiane in September 2016 that "there is no mechanism for enforcement" of the verdict.⁷ The 12 July foreign ministry's statement also ends by underscoring Malaysia's belief that "all relevant parties can find constructive ways to develop healthy dialogues, negotiations and consultations while upholding the supremacy of the rule of law for the peace, security and stability of the region".⁸

In that vein, Malaysia has also continued to support regional efforts to chart rules of the road for managing ongoing tensions

and potential crises in the South China Sea. From Malaysia's perspective, the fact that ASEAN and China were able to reach several agreements at the 13th senior officials' meeting on the implementation of the Declaration on the Conduct of Parties (DoC) in the South China Sea in August 2016 that it had supported — including an ASEAN–China hotline for use during maritime emergencies, a joint declaration applying the Code for Unplanned Encounters at Sea (CUES) to the South China Sea, and an agreement to finish the draft framework of the Code of Conduct (CoC) by the middle of 2017 — was a promising sign.⁹ Malaysia has also continued to float additional proposals for maritime crisis management at both the Track 1 and Track 1.5 levels.¹⁰ Apart from the significance of these measures for the South China Sea, Malaysia also recognizes that reducing tensions allows ASEAN and China to focus on advancing their broader relationship which celebrated twenty-five years of dialogue partnership in 2016.¹¹

Malaysia has also continued to expand bilateral relations with China following the ruling. Ahead of the verdict, there were growing anxieties among some people in Malaysia about whether Beijing's rising influence in the country — in particular its purchase of government securities or assets from sensitive entities like 1Malaysia Development Berhad (1MDB), a beleaguered state fund linked to a massive corruption scandal implicating Najib himself — was undermining the country's ability to push back against Beijing over the South China Sea.¹² Though broader concerns may remain on this front, even a short-term easing of Beijing's assertiveness directed at Malaysia allows more breathing room for Najib's government to further strengthen Sino–Malaysian relations.

This dynamic is already playing out. Accounts of Najib's meeting with Chinese Premier Li Keqiang in Vientiane on 7 September 2016, as well as his third official visit to China in November 2016, suggest that it is full steam ahead for ties between Malaysia and China, its top trading partner and biggest tourism-generating market outside of ASEAN.¹³ Both countries have set an ambitious target to increase trade from US\$100 billion in 2015 to US\$160 billion by 2019.¹⁴ Chinese investments are expected to continue into Malaysia, especially in the property, manufacturing and tourism sectors, and Beijing is also a frontrunner in the race for a proposed multi-billion dollar high-speed rail network.¹⁵ Additional opportunities could also be in the works if China gradually advances its regional economic initiatives, including One Belt, One Road (OBOR) within which Malaysia is already playing a key role and realizes defence deals such as the

one announced during Najib's visit to China in November 2016 for four littoral mission ships from Beijing.

At the same time, it is important to emphasize that Malaysia also continues to take measures designed to consolidate its position in the South China Sea. In addition to more frequent naval patrols in the country's waters, Malaysia is also now mulling other measures including increased coordination between various maritime security agencies as well as tougher measures against encroachments by foreign vessels.¹⁶ To be sure, these measures are not solely directed against China, but a range of threats including piracy, smuggling, kidnapping, terrorism and illegal finishing, and some of them may be set back due to more budget cuts given the country's gloomy economic outlook. But Beijing is nonetheless a factor in Malaysia's defence planning, even though its leaders may be reluctant to admit it publicly.

The Road Ahead

If regional efforts to lower the temperature on the South China Sea continue into 2017, Malaysia would welcome this positive trend and its post-ruling South China Sea approach would continue. Reduced tensions create space for Malaysia to support existing and new crisis-management and confidence-building initiatives in the South China Sea within ASEAN, such as the quest for an elusive code of conduct and the establishment of a hotline for maritime emergencies. It also gives Malaysia more breathing room to expand its bilateral relationship with China, especially on the economic side given the relatively sluggish growth in 2016 which has set the two countries back on some of their trade targets to be realized by the end of 2017. And with a general election expected in Malaysia before August 2018, Najib will want to place his primary focus on consolidating his power at home and strengthening the Malaysian economy rather than being distracted by the South China Sea.

However, if China does once again increase its assertiveness in the South China Sea, and Malaysia feels the impact of that directly, the Najib government will find it difficult not to respond. Preventing encroachments into Malaysia's portion of the South China Sea is tied to preserving the country's sovereignty and territorial integrity, since the waterway divides Peninsular Malaysia from East Malaysia. Given also the centrality of Sabah and Sarawak to the ruling coalition winning the next general election, as well as the growing

outcry from some members of parliament, the government may feel compelled to take some kind of action. Though there will still be reluctance to forego opportunities in Sino–Malaysian relations, assertive actions by China could also speed up ongoing capacity-building measures in Malaysia and perhaps even create a domestic climate relatively more conducive to newer ones that would otherwise be difficult to justify given the economic constraints.

Ultimately, the shape of the regional environment will depend much less on Malaysia than it will on other actors. With the Philippines under President Rodrigo Duterte pursuing a surprising embrace of China and assuming the Chair of ASEAN in 2017, the United States having a new president in January 2017, and uncertainty remaining on the durability of Beijing’s call to “turn the page” on the South China Sea given its past record, there are any number of variables that could end up affecting the calculus of Malaysian policymakers. But one thing is for sure: Malaysia is likely to continue trying to walk the tightrope between engaging China bilaterally and multilaterally in spite of its behaviour in the South China Sea, while also taking measures to protect its own claims amid uncertainty over Beijing’s rise and conduct at sea.

NOTES

- ¹ Prashanth Parameswaran, “Malaysia’s Approach to the South China Sea and Implications for the United States”, Center for a New American Security, Washington, D.C., February 2015, available at <https://www.files.ethz.ch/isn/189746/CNAS%20Maritime%206_Parameswaran_Final.pdf>.
- ² In September 2015, China’s Ambassador to Malaysia Huang Huikang indicated that Beijing opposed any form of racial discrimination and would not tolerate violent demonstrations in Malaysia. The remarks, which were made ahead of a planned pro-government rally in response to previous protests urging Najib to resign amid a corruption scandal, were read as a direct interference in Malaysia’s internal affairs. Huang later clarified his comments at a press conference at the Chinese embassy in Kuala Lumpur, noting that if they were read in context, “there is no person of clear mind who will say the China ambassador is interfering in domestic affairs”. See Prashanth Parameswaran, “The Truth about China’s ‘Interference’ in Malaysia’s Politics”, *The Diplomat*, 2 October 2015.
- ³ See, for instance, Najib’s comments at the Asia-Pacific Roundtable in Kuala Lumpur. Najib Razak, “Keynote Address at the 30th Asia-Pacific Roundtable”, Kuala Lumpur, 30 May 2016, available at <http://www.isis.org.my/attachments/apr30/Prime_Minister_Speech_for_APR_30.pdf>.
- ⁴ Ministry of Foreign Affairs, “Statement by Malaysia”, 12 July 2016, available at <http://www.kln.gov.my/web/are_dubai/n2016/-/asset_publisher/ME2g/blog/>.

press-release-:-statement-by-malaysia-on-scs-arbitration-tribunal?redirect=%2Fweb%2Fare_dubai%2Fn2016>.

- ⁵ Prashanth Parameswaran, "Assessing ASEAN's South China Sea Position in its Post-Ruling Statement", *The Diplomat*, 25 July 2016.
- ⁶ Author's conversation with Malaysian officials, October 2016.
- ⁷ Azura Abas, "Najib: ASEAN Must Handle South China Sea Issue with Sensitivity", *New Straits Times*, 7 September 2016.
- ⁸ Ministry of Foreign Affairs, "Statement by Malaysia", 12 July 2016.
- ⁹ Prashanth Parameswaran, "Beware the Illusion of China-ASEAN South China Sea Breakthroughs", *The Diplomat*, 17 August 2016.
- ¹⁰ Author's conversation with Malaysian officials, October 2016.
- ¹¹ Prashanth Parameswaran, "ASEAN-China Dialogue Relations at 25", *China Brief* 16, no. 12 (1 August 2016).
- ¹² Prashanth Parameswaran, "Malaysia in 2015: Crises of Confidence", in *Southeast Asian Affairs 2016*, edited by Malcolm Cook and Daljit Singh (Singapore: Institute of Southeast Asian Studies, 2015), pp. 183-97.
- ¹³ State Council of the People's Republic of China, "Premier Li Meets Malaysian Prime Minister", 8 September 2016, available at <http://english.gov.cn/premier/photos/2016/09/08/content_281475436282141.htm>.
- ¹⁴ Ho Wah Foon, "Aiming for RM640 Bil Trade", *The Star*, 5 September 2016.
- ¹⁵ Tee Lin Say and Intan Farhana Zainul, "The China Factor in Malaysia's Growth", *The Star*, 10 September 2016.
- ¹⁶ Author's conversation with Malaysian officials, September 2016.

The Domestic Politics of Indonesia's Approach to the Tribunal Ruling and the South China Sea

EVAN A. LAKSMANA

Indonesia's immediate response to the 12 July ruling by the Arbitral Tribunal was under-whelming. The foreign ministry issued a bland, lacklustre five-sentence statement:

- Indonesia calls on all parties to exercise restraint and refrain from escalatory activities while securing Southeast Asia from military activities that could threaten peace and stability, and instead should respect international law, including 1982 UNCLOS.
- Indonesia calls on all parties to continue the common commitment to uphold peace and exhibit friendship and cooperation, as have been well-sustained thus far.
- Indonesia urges all parties in the South China Sea to behave and conduct their activities according to agreed-upon principles.
- Indonesia will continue to push for a peaceful, free, and neutral zone in Southeast Asia to further strengthen the ASEAN political and security community.

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- Indonesia urges all claimant states to continue peaceful negotiations over the overlapping sovereignty claims in the South China Sea according to international law.¹

At first glance, there is nothing fundamentally disagreeable about the statement. After all, Indonesia remains technically a non-claimant in the South China Sea dispute. Upon closer examination, however, the statement appears to be yet another example of Indonesia's inconsistent approach to the South China Sea, as well as to increasing encroachments by China into the country's 200 nautical mile exclusive economic zone (EEZ) around the Natuna Islands. Indeed, just a few weeks prior to the ruling, Indonesian President Joko Widodo (better known as Jokowi) staged a symbolic "show of force" by visiting the Natunas aboard the same warship that fired on Chinese fishing vessels operating in the area the week before. What then explains Indonesia's lacklustre response to the ruling and general inconsistency over the South China Sea problem?

This article argues that Indonesia's inconsistency should be placed within the deeper and broader historical ambivalence embedded in the bilateral relationship with China and in Indonesia's awkward non-claimant position, as well as the country's chaotic domestic maritime security governance. These permissive (or antecedent) conditions, however, are necessary but insufficient to explain Indonesia's lukewarm response to the ruling. This article argues that President Jokowi's lack of personal interest and grasp of foreign policy provides the more proximate (or triggering) condition behind the response. Specifically, his aloofness has led to deteriorating bureaucratic politics and the growing influence of a small number of advisers outside of the foreign ministry — a "foreign policy oligarchy" if you will — in the formulation of the country's China policy. Taken together, these permissive and triggering conditions point to the primacy of domestic politics, rather than well-developed geopolitical considerations, in shaping Indonesia's overall approach to the South China Sea, and its insipid response to the ruling in particular. The following sections expand and elaborate these arguments.

Indonesia's China and South China Sea Challenges

Scholars have noted that given the tumultuous history of Indonesia–China ties going back to the 1950s, Jakarta's political elite have always been ambivalent about China.² This ambivalence has been shaped by China's geographic proximity, how its expansionist history has

been taught in Indonesian schools and by the controversial role of ethnic Chinese-Indonesians in the economic life of the country (and the history of violence against them). Recently, even as Indonesia's prosperity has been increasingly tied to China's growth, Jakarta has become wary about the incompatibilities between the economies of the two countries, which drives the depiction of China as a strategic "challenge", rather than a direct "threat". These doubts constantly re-emerge whenever China is talked about in Indonesia.

As far as the public is concerned, perceptions of China are more contradictory. A 2005 poll by the Pew Research Center noted that 60 per cent of Indonesians welcomed the idea of a strong China that could rival American military strength. Similarly, a 2006 poll by the Lowy Institute suggested that over half of Indonesians thought that China could "somewhat be trusted". However, nearly half of respondents in 2008 were worried that China could become a military threat, and only 27 per cent were comfortable with the idea of China being the leader in Asia. By 2010, only 58 per cent of respondents had a "favourable" view of China.³ These figures suggest both the degree to which Jakarta's elite dominate the China narrative, as well as the lack of informed foreign policy opinion on China. A recent survey by the University of Indonesia noted, for example, that less than 12 per cent of the public knew about the South China Sea problem and why it matters for Indonesia.⁴

With the public effectively providing no serious check on the China narrative, and the elite continuing to exhibit historical ambivalence, it is not surprising that Indonesia's South China Sea policy has been plagued with dilemmas as well. On the one hand, Indonesia does not acknowledge China's nine-dash line claims in the South China Sea — in 2010 it submitted a letter to the United Nations stating that the line was incompatible with UNCLOS — and that therefore it is not a claimant in the dispute. The foreign ministry believed that this position would allow Indonesia to play a constructive, "honest broker" role in the dispute, particularly through an ASEAN–China framework. More importantly, it would allow Jakarta to further exploit the rich hydrocarbon and marine resources in the waters surrounding the Natunas. After all, militarily, there are few options available for the Indonesian defence establishment to change Beijing's calculus.⁵

However, on the other hand, the "non-claimant honest broker" position has in recent years diminished Indonesia's strategic capital in the region as China's militarization of (and its "salami slicing" tactics in) the South China Sea has rapidly changed the facts on the

ground (or on the water). This is particularly the case when Jokowi himself appears uninterested in foreign affairs (discussed further below) and has appeared bent on seeking closer ties with China to further his economic development agenda. In fact, some in the region have begun to wonder whether Indonesia's position represents an effort to keep the status quo between China and Indonesia while shying away from a leadership role in ASEAN. In other words, they have been left wondering whether Indonesia is sacrificing ASEAN at the altar of better (economic) relations with China.

The tensions in both the Natunas and the South China Sea have been exacerbated by the chaotic nature of Indonesia's domestic maritime governance. Maritime law enforcement in particular has gained strategic significance as illegal, unregulated, and unreported fishing (IUU fishing) activities, especially those conducted by China, are becoming an increasing source of contention and potential conflict in the region. In general, there have been overlapping authority and functions between Indonesia's multiple maritime security agencies; in the Natunas, this is primarily between the Indonesian Navy (TNI-AL), Maritime Security Agency (Bakamla) and the fisheries ministry's IUU Fishing Task Force (*Satgas 115*). These different agencies have their own command and control systems, standard operating procedures and operational capabilities, but they all "take turns" in patrolling Indonesian waters, including in sensitive areas such as around the Natunas.

The problem lies in the absence of a centralized hub coordinating and controlling the entire maritime security establishment. For one thing, the establishment of Bakamla in 2014, which was supposed to be the designated coast guard, did not resolve the overlapping jurisdictions and under-institutionalized maritime inter-agency operations. For another, Jokowi's elevation of the popular and assertive Susi Pudjiastuti as fisheries minister escalated the bureaucratic infighting. Some of her policies — especially the unnecessarily frequent destruction of foreign vessels caught and convicted of IUU fishing — have led to growing, albeit less public, friction with the navy for example. This bureaucratic scramble matters because as IUU fishing takes a more prominent space in Jakarta's strategic landscape, who gets to patrol Indonesian waters under what authority and capacity has strategic implications. Taken together, these conditions, from overall ambivalence to bureaucratic infighting, point to the broader institutional and historical context in which Indonesia's South China Sea policy has been formulated.

Dysfunctional South China Sea Policy under Jokowi

Despite the literature on how democratization transformed Indonesia's foreign policy, the Jokowi administration's China and South China Sea policies suggest that foreign policy-making remains strongly, perhaps even idiosyncratically, a presidential affair. This is partially a legacy of the centralized system entrenched under President Soeharto's New Order and partially because successive post-Soeharto presidents never paid serious and sustained attention to developing a professional, well-funded and well-oiled foreign policy-making system.⁶ Consequently, Jokowi's personal aloofness on foreign affairs, his seemingly narrow domestic economic agenda, and his preoccupation with domestic politics, have prevented Indonesia from marshalling the nation's strategic community to forcefully, coherently and consistently respond to day-to-day challenges, including in the South China Sea.⁷ This problem is compounded by the elimination of the Yudhoyono-era foreign affairs spokesperson office, the appointment of Jokowi's chief foreign policy adviser, Rizal Sukma, as ambassador to the United Kingdom, and the removal of Andi Widjajanto, a noted foreign policy analyst, as cabinet secretary.

However, while Jokowi adopts a devil-may-care attitude to foreign policy in general, he takes China policy more seriously, believing it to be crucial for his domestic agenda. With regard to the lacklustre response to the ruling, insiders argue that the bland statement of 12 July came after cabinet-level debates going back at least a few weeks. This was one of the few instances where a foreign policy matter, traditionally the foreign ministry's domain, was deliberated by the whole cabinet. The President, following strong suggestions by at least two ministers, was leaning against issuing a specific statement. After numerous debates and high-level lobbying (including, allegedly, involving Beijing), it was finally agreed that Indonesia would issue a statement, even a bland one, because it was better than no statement at all.⁸

On a personal level, observers have noted that Jokowi feels a strong and cordial rapport with Chinese President Xi Jinping and that they communicate regularly. But the role of cabinet members believed to be "pro-China" in their positions cannot be underestimated. These members, particularly State-Owned Enterprises Minister Rini Sumarno, and the then Coordinating Minister for Political, Legal, and Security Affairs Luhut Pandjaitan (who is now Coordinating Minister for Maritime Affairs), are among Jokowi's most trusted advisers, especially on foreign policy. They are Jokowi's top political operators and he relies on them to get most of his

policy agenda off the ground. In fact, arguably, Jokowi cannot win a re-election campaign without these two figures running the show.

While Sumarno's ties with Beijing have been reported during her time as a minister under the Megawati administration (2001–04), Pandjaitan's business empire expanded after he joined the Jokowi bandwagon.⁹ Pandjaitan's role in shaping China policy is noteworthy, as officials occasionally noted how his staff would run interference during some of the ASEAN–China diplomatic meetings. With these key players essentially determining China policy at the top, other bureaucratic players — from the ministries of fisheries, defence and foreign affairs, to the different maritime security agencies — had to argue among themselves, which further hindered the formulation of a coherent South China Sea policy.

What Lies Ahead?

The combination of Indonesia's China ambivalence and Jokowi's lack of interest in foreign policy has led to an inconsistent policy over the South China Sea. The presence of a foreign policy oligarchy in particular led to the lacklustre response to the ruling. These conditions suggest that while there might be occasional examples of Jokowi seemingly “pushing back”, such as the visit to the Natunas, Indonesia will continue to under-balance against China.¹⁰ As far as the response to the ruling itself, Indonesian foreign policymakers seem ready to move on from it, as has been demonstrated in several ASEAN meetings since the Tribunal issued its ruling. In that sense, while the ruling vindicated most of Jakarta's long-held positions on the South China Sea under UNCLOS, it is for all intents and purposes no longer a strategic urgency for policymakers in Jakarta to deal with.

Perhaps more importantly, Jakarta is now closely observing how Philippine President Rodrigo Duterte approaches the South China Sea dispute, and whether he will adopt, as his comments seem to suggest, a more pro-Beijing posture than that of his predecessor Benigno Aquino who initiated the arbitration process. Policymakers believe that the Philippines, as the ASEAN Chair in 2017 (during the group's fiftieth anniversary) and the next country coordinator for ASEAN–China relations, would be of critical importance. Thus, given Indonesia's declining strategic capital in the region, ASEAN will instead be looking to Manila for cues on how to engage China and deal with its hegemonic behaviour. As Indonesia is therefore seemingly “buck-passing” to Manila, expectations for the country's leadership is perhaps best tempered, going forward.

NOTES

- ¹ See the full text of the response in “Indonesia Serukan Semua Pihak untuk Menghormati Hukum Internasional Termasuk UNCLOS 1982” [Indonesia Calls on All Parties to Respect International Law including 1982 UNCLOS], Siaran Pers Kementerian Luar Negeri [Ministry of Foreign Affairs Press Release], 12 July 2016, available at <<http://kemlu.go.id/en/berita/siaran-pers/Pages/Indonesia-Serukan-Semua-Pihak-untuk-Menghormati-Hukum-Internasional-Termasuk-UNCLOS-1982-.aspx>>.
- ² See Rizal Sukma, “Indonesia–China Relations: The Politics of Re-engagement”, *Asian Survey* 49, no. 4 (July/August 2009): 591–608; Daniel Novotny, *Torn Between America and China: Elite Perceptions and Indonesian Foreign Policy* (Singapore: Institute of Southeast Asian Studies, 2010).
- ³ These polls are discussed in Evan A. Laksmana, “Variations on a Theme: Dimensions of Ambivalence in Indonesia–China Relations”, *Harvard Asia Quarterly* 13, no. 1 (Spring 2011): 26.
- ⁴ See Natalia Soebagjo and Rene Pattiradjawane, *Jajak Pendapat Umum 2014: Persepsi Masyarakat Indonesia terhadap RRC* [2014 Public Opinion Poll: Perception of Indonesian Society of the People’s Republic of China] (Jakarta: University of Indonesia’s Center for Chinese Studies, 2014), p. 40.
- ⁵ The military has held exercises in the vicinity of the Natunas since the mid-1990s, the most recent being in October 2016 by the air force. While explicit mention of Beijing (as the “target”) by military officers has waxed and waned over the years, there is no evidence that the exercises themselves have impacted Beijing’s strategic calculus.
- ⁶ After 1998, only the reforms instituted under Foreign Minister Hassan Wirajuda are noteworthy. But those reforms were not well-funded, nor were they sustainable. See Greta Nabbs-Keller, “Reforming Indonesia’s Foreign Ministry: Ideas, Organization and Leadership”, *Contemporary Southeast Asia* 35, no. 1 (April 2013): 56–82.
- ⁷ See Aaron L. Connelly, “Sovereignty and the Sea: President Joko Widodo’s Foreign Policy Challenges”, *Contemporary Southeast Asia* 37, no. 1 (April 2015): 1–28.
- ⁸ A previous draft of the statement had actually mentioned the ruling and its merits as well as Indonesia’s specific support for the processes which could help strengthen the country’s well-known position on the South China Sea.
- ⁹ A few weeks after the March 2016 incident in the Natunas, local press reported that Pandjaitan’s business network was one of the few who benefited from Chinese infrastructure loans. See more details in Alfin Tofler and Adam Rizky Nugroho, “Pinjaman China \$3 Miliar untuk Bank BUMN Mengalir ke Korporasi Besar Ini” [Three Billion Dollars of Chinese Loans to State-Owned Banks went into Big Corporations], *Bareksa Investment Portal*, 28 April 2016, available at <<http://www.bareksa.com/id/text/2016/04/28/pinjaman-china-3-miliar-untuk-bank-bumn-mengalir-ke-korporasi-besar-ini/13214/news>>.
- ¹⁰ “Under-balancing” happens when a threatened state fails to correctly perceive the threat posed by another state, or simply does not react appropriately to it. See Randall Schweller, *Unanswered Threats: Political Constraints on the Balance of Power* (Princeton, New Jersey: Princeton University Press, 2006).