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South China Sea Arbitration Ruling: What Happened and What's Next?

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Key Findings

- The arbitral tribunal adjudicating the Philippines' case against China in the South China Sea ruled overwhelmingly in favor of the Philippines, determining that major elements of China's claim—including its nine-dash line, recent land reclamation activities, and other activities in Philippine waters—were unlawful.
- Predictably, China reacted negatively to the ruling, maintaining it was “null and void.” China may take assertive and inflammatory steps to defend its position.
- The extent to which China abides by the ruling in the long term, and to which the international community supports and seeks to enforce the ruling, will have consequences for the utility of international law as a tool to ensure the peaceful, stable, and lawful use of the seas going forward.

Background

On July 12, 2016, the Permanent Court of Arbitration in The Hague released the ruling of the arbitral tribunal constituted under the UN Convention on the Law of the Sea (UNCLOS)* on the case initiated by the Philippines in 2013 regarding China's claims and activities in the South China Sea.¹ At the center of the dispute is China's nine-dash line, a vague depiction by China of its claim encompassing about 90 percent of the South China Sea.² Since around 2009, China has steadily increased its efforts to consolidate its position in the South China Sea with varied tactics, including using its military, coast guard, and maritime militia[†] to harass foreign ships; exploring and extracting resources in disputed areas; and, starting in 2013, constructing artificial islands and basing military and civilian assets there.

* Both China and the Philippines have ratified UNCLOS. The United States has not.

† China has the world's largest maritime militia, a quasi-military force of fishermen that are tasked by and report to China's People's Liberation Army. They are trained to participate in a variety of missions, including search and rescue, reconnaissance, deception operations, law enforcement, and “rights protection,” which often entails activities like harassing foreign vessels in China's claimed waters. Andrew Erickson and Conor M. Kennedy, “China's Fishing Militia is a Military Force in all but Name,” *War is Boring* (Blog), July 9, 2016. <https://warisboring.com/chinas-fishing-militia-is-a-military-force-in-all-but-name-58265cbdd7d#.6t8u2b104>.

Figure 1: Map of the South China Sea



Source: *Economist*, “Joining the Dashes,” October 4, 2014. <http://www.economist.com/news/asia/21621844-south-china-seas-littoral-states-will-fight-museums-archives-and>.

Economically, diplomatically, and militarily outmatched by China, the Philippines turned to legal arbitration. The Philippines’ case, comprised of thousands of pages of arguments and documents, asked the court, among other things, to (1) declare whether China’s claims based on the nine-dash line are invalid under UNCLOS; (2) declare whether certain land features in the South China Sea are rocks, islands, or low-tide elevations;^{*} and (3) declare whether China has interfered with the Philippines’ right to exploit resources within the Philippines’ claimed waters.³

Over the past three and a half years, China has expended resources and energy to discredit the Philippines’ case and the legitimacy of the proceedings, arguing that it would “neither accept nor participate in the arbitration.”⁴ In the months leading up to the ruling in particular, Beijing began a campaign of diplomatic warfare⁵ to solicit support from other countries for its position, and suggested in mid-June that 60 countries had pledged support to China’s position,⁶ though in reality only ten countries made public statements to that effect.[†] ⁷ The Chinese government and government-affiliated entities also placed advertisements and editorials in overseas media outlets, including the United States’ *Washington Post*⁸ and *San Francisco Chronicle*,⁹ the UK’s *Telegraph*,¹⁰ and Australia’s *The Age*,¹¹ supporting Beijing’s stance on the arbitration. At a think tank event in Washington, DC one week before the ruling,

^{*} The distinction, as defined by UNCLOS, between an island, rock, and low-tide elevation is important because each type of feature generates a different amount of maritime territory. Islands, which must be above water at high tide and be capable of sustaining human habitation or economic activity of their own, can generate exclusive economic zones out to 200 nautical miles. (An exclusive economic zone is a 200-nm zone extending from a country’s coastline within which that country can exercise exclusive sovereign rights to explore for and exploit natural resources, but not full sovereignty.) Rocks, which are defined as being above water at high tide but unable to sustain human habitation or economic activity, only generate a 12-nm territorial sea. Low-tide elevations are land features which are submerged at high tide. Unless they are located within the territorial sea of another island or mainland coastline, they do not generate any maritime territory. UN Convention on the Law of the Sea, “Article 121: Regime of Islands;” UN Convention on the Law of the Sea, “Part 2: Territorial Sea and Contiguous Zone;” and UN Convention on the Law of the Sea, “Part 5: Exclusive Economic Zone.”

[†] These countries are Afghanistan, The Gambia (which formally restored diplomatic ties with China in March 2016 after severing diplomatic relations with Taiwan in 2013), Kenya, Lesotho, Liberia, Niger, Papua New Guinea, Sudan, Togo, and Vanuatu. Center for Strategic and International Studies Asia Maritime Transparency Initiative, *Arbitration Support Tracker*, June 15, 2016. <http://amti.csis.org/arbitration-support-tracker/>.

China’s former top diplomat Dai Bingguo remarked that the ruling would amount to “nothing more than a piece of paper.”¹²

Through diplomatic pressure and economic leverage China has also succeeded in preventing other South China Sea claimants from rallying in opposition to China’s activities or in support of the legal arbitration process. Members of the Association of Southeast Asian Nations (ASEAN)—five of whom have claims in the South China Sea—have failed to endorse a joint plan of action. The June 2016 meeting of ASEAN foreign ministers ended in discord after they issued and then retracted a joint communique expressing concerns over recent developments in the South China Sea—allegedly due to Chinese pressure.¹³

The Ruling: Key Takeaways

The Permanent Court of Arbitration’s 479-page ruling¹⁴ was overwhelmingly favorable to the Philippines’ position, ruling several elements of China’s claims in the South China Sea unlawful. Key findings of the ruling include:

- China’s claims to historic rights and resources within its nine-dash line have no legal basis.¹⁵
- None of China’s claimed land features in the Spratly Islands are an island capable of generating a 200-nm exclusive economic zone.^{*16}
- China violated the Philippines’ sovereign rights by interfering with Philippine oil exploration activities, prohibiting Philippine fishing vessels from operating, failing to prevent Chinese fishing vessels from operating, and conducting land reclamation in areas where the Philippines enjoys sovereign rights to explore for and exploit natural resources.^{†17}
- China violated its marine environmental protection obligations under UNCLOS by causing “severe harm to the coral reef environment” with its land reclamation activities and harvesting of endangered species.¹⁸

China is legally bound by the tribunal’s ruling by virtue of its ratification of UNCLOS.¹⁹ The extent to which, and how, the tribunal’s ruling might be enforced is an open question, however; the Philippines and others may be able to pursue a range of legal options to punish China should it fail to abide by the ruling,²⁰ or open negotiations to resolve the matter.

China’s Response

China’s immediate reaction to the ruling was to release two statements: a notably subdued Government statement that reaffirmed its “territorial sovereignty and maritime rights” in the South China Sea and expressed its desire to “resolve the relevant disputes peacefully” without making explicit reference to either the Philippines or the arbitration proceedings,²¹ and a much more hardline statement from the Ministry of Foreign Affairs declaring that

* The tribunal ruled that China’s claimed features are either rocks (capable of generating a 12-nm territorial sea) or low-tide elevations (incapable of generating maritime territory). Notably, it ruled that of the seven features on which China has conducted land reclamation, four are rocks (Johnson Reef, Cuarteron Reef, Fiery Cross Reef, and Gaven Reef [North]), and three are low-tide elevations (Subi Reef, Hughes Reef, and Mischief Reef). PCA Case No. 2013-19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China, *Award*, July 12, 2016, 174. <http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>.

† The tribunal did not rule on the merits of the individual claimed features themselves (i.e., whether these claimed features belong to China or the Philippines). However, having found that some of China’s claimed features (Mischief Reef, Second Thomas Shoal, and Reed Bank) located within the Philippines’ claimed exclusive economic zone are low-tide elevations and do not overlap with any Chinese exclusive economic zone, the tribunal ruled that these features are Philippine features located in a Philippine exclusive economic zone. Permanent Court of Arbitration, *Press Release: The South China Sea Arbitration*, July 12, 2016, 10. <http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>.

the ruling is “null and void and has no binding force.”²² China’s state-affiliated press simultaneously released a slew of articles condemning the ruling.²³

It is unclear whether or how the ruling will prompt a change in China’s behavior in the short or long term, but it can reasonably be expected that China will not depart from the position it has held since 2013: it will not acknowledge the authority of the arbitral tribunal or abide by the ruling.²⁴ China likely will respond swiftly and assertively to demonstrate its disregard for the ruling and its displeasure with the Philippines for initiating the case.²⁵ Potential responses could include, but are not limited to, one or more of the following:

Increasing PLA, China Coast Guard, or Maritime Militia Presence in Disputed Areas: China may seek to use the People’s Liberation Army (PLA), the China Coast Guard, or the maritime militia to “show the flag” in its claimed waters, either with patrols or staged exercises. Increased harassment or intimidation of Philippine or other vessels by either the China Coast Guard or the maritime militia, a frequent occurrence in recent years,²⁶ is also possible. The PLA could also respond by deploying fighter jets or other advanced military assets to the Spratly Islands (which would violate China’s pledge not to “militarize” the area).²⁷

Engaging in Commercial Exploration in Disputed Waters: China may renew or expand its efforts to prospect for hydrocarbons and other minerals in its claimed waters.* China has demonstrated its willingness to escalate tensions by twice moving an oil rig into waters near the Paracel Islands—an area also claimed by Vietnam—despite Vietnam’s protests.²⁸ China has also reportedly approved plans for a mobile deep-sea platform to explore for minerals in the South China Sea.²⁹

Applying Economic Sanctions on the Philippines: China might employ overt or indirect economic sanctions against the Philippines, as it did when it restricted Philippine banana imports and banned Chinese travel to the Philippines during the Scarborough Reef crisis in 2012.³⁰

Conducting Land Reclamation at Scarborough Reef: China so far has refrained from conducting land reclamation at Scarborough Reef, likely due to intense U.S. pressure.[†]³¹ However, Beijing may perceive it to be a way to expand its physical presence in its claimed waters after being dealt a blow to its legal position. Though the tribunal ruled that Scarborough Reef was a rock (rather than an island or low-tide elevation), it did not determine whether China or the Philippines has sovereignty over the feature. Further, the tribunal did not deem Chinese fishing activities near Scarborough Reef unlawful;³² Beijing could feasibly use this part of the ruling as a justification for reclamation for the purposes of facilitating fishing activities in the area (conversely, since the tribunal deemed fishing by both Chinese and Filipino fishermen in the vicinity of Scarborough Reef lawful, this could provide an opportunity for conciliation and cooperation between Beijing and Manila). Should China develop Scarborough Reef in the way it has developed the other reclaimed features in the Spratly Island chain, it could significantly enhance China’s military presence in the South China Sea and establish a military outpost unprecedentedly close to the Philippines, effectively creating a “strategic triangle” of occupied islands (the Paracel Islands, Scarborough Reef, and the Spratly Islands) with the ability to host civilian and military infrastructure.³³

Establishing an Air Defense Identification Zone (ADIZ) in the South China Sea: Since China established an ADIZ[‡] in the East China Sea in 2013, several Chinese officials have suggested that China might create a second

* Estimates of proven and probable oil and natural gas reserves in the South China Sea vary. The U.S. Energy Information Administration believes the South China Sea contains approximately 11 billion barrels of oil and 190 trillion cubic feet of natural gas. Nonauthoritative estimates from China are significantly higher: 125 billion barrels of oil and 500 trillion cubic feet of natural gas. David Tweed, “What Do Weak Oil Prices Mean for the South China Sea?” Bloomberg, January 20, 2015. <http://www.bloomberg.com/news/articles/2015-01-20/all-about-the-base-oil-drop-won-t-stop-china-in-south-china-sea>.

† The U.S. Navy reportedly observed Chinese ships conducting surveys around Scarborough Reef—possibly in preparation for land reclamation—in early 2016. “U.S. Sees New Flashpoint in South China Sea Dispute,” *Wall Street Journal*, April 26, 2016. <http://www.wsj.com/articles/u-s-sees-new-flashpoint-in-south-china-sea-1461714183>.

‡ An ADIZ is a publicly declared area, established in international airspace adjacent to a state’s national airspace, in which the state requires that civil aircraft provide aircraft identifiers and location. Its purpose is to allow a state the time and space to identify the nature of approaching aircraft prior to their entering national airspace to prepare defensive measures if necessary. China’s ADIZ regulations deviate from international norms by seeking to exert control over both civil and state (including military) aircraft, deliberately creating an overlapping area with other countries’ ADIZs and disputed territory, and threatening to use “defense emergency measures” against all noncompliant aircraft. Kimberly Hsu, “Air Defense Identification Zone Intended to Provide China Greater Flexibility to Enforce East

one in the South China Sea.³⁴ Though it is unclear whether the PLA has the capabilities in place to enforce an ADIZ in the South China Sea, it is possible China would establish one anyway for geopolitical, rather than operational, reasons.³⁵ In such a case, the ADIZ's utility could largely be symbolic, signaling China's resolve and rejection of the ruling.*

China's actual *enforcement* of an ADIZ—which would necessitate a more capable intelligence, surveillance, and reconnaissance network and the presence of radar systems and advanced military aircraft on its reclaimed land features³⁶—could pose tactical, logistical, and operational challenges: a potential uptick in dangerous mid-air encounters between Chinese and foreign aircraft; uncertainty for foreign government, military, and commercial pilots who need to navigate crowded airspace with several overlapping air traffic authorities; and the expansion of China's ability to collect intelligence on U.S. and other forces in the region. Moreover, some of the infrastructure and platforms useful for the enforcement of an ADIZ could have military applications in a South China Sea contingency.³⁷

Withdrawing from UNCLOS: Chinese officials and state-affiliated media have in recent years advanced an argument that China's position on the South China Sea disputes is fully in line with international law, and that the arbitral tribunal's proceedings constitute a violation, or are outside the jurisdiction, of UNCLOS.³⁸ As the ruling drew near, Chinese diplomats reportedly suggested to their counterparts in Southeast Asia that China was considering withdrawing from UNCLOS if the ruling was unfavorable to China.³⁹ However, taking this step does little to advance China's actual interests (and more likely undermines them).⁴⁰

Implications

In the short term, the ruling and China's rejection of it will heighten tensions in the region and strain China's relations with its neighbors, the United States, and any other country that publicly supports the ruling. The long-term implications of the ruling are likely to be much more significant, with potentially far-reaching consequences.

Implications for International Law and China's Relations with the Region

China's initial reaction aside, if the ruling fails to alter China's behavior in the longer term, it would send a signal to the rest of the world that adherence to international law is optional.[†] This would degrade the viability of international maritime law as a tool to ensure the peaceful, stable, and lawful use of the seas.[‡]⁴¹ This may be the most significant long-term consequence of China's response to the ruling; it also directly contradicts the United States' oft-stated goal of preserving peace through the promotion of a "rules-based order" in the Asia Pacific.⁴² Considered alongside China's increasingly aggressive and risk acceptant behavior in recent years,⁴³ it is becoming

China Sea Claims," *U.S.-China Economic and Security Review Commission*, January 14, 2014. <http://www.uscc.gov/sites/default/files/Research/China%20ADIZ%20Staff%20Report.pdf>; Xinhua (English edition), "Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.," November 23, 2013. http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm.

* Though an ADIZ does not serve as an expression of territorial sovereignty, the size and shape of a Chinese ADIZ in the South China Sea could serve to indirectly refute specific elements of the ruling that China opposes. Michael Pilger, "ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States," *U.S.-China Economic and Security Review Commission*, March 2, 2016, 8. http://origin.www.uscc.gov/sites/default/files/Research/ADIZ%20Update_0.pdf.

† China is known to employ "lawfare," the use or manipulation of legal tools or standards to legitimize or otherwise advance its interests, in domestic and international settings. Kristien Bergerson, "China's Efforts to Counter U.S. Forward Presence in the Asia Pacific," *U.S.-China Economic and Security Review Commission*, March 15, 2016, 8. <http://origin.www.uscc.gov/sites/default/files/Research/USCC%20Staff%20Report%20on%20China%20Countering%20US%20Military%20Presence%20in%20Asia.pdf>.

‡ It will be particularly damaging if China manages to establish an influential coalition of likeminded countries to join it in opposing the ruling, though this does not seem likely.

clear that the reputational costs of flouting international law have not been sufficient to deter China from advancing its interests in the region in ways that undermine stability.

Nevertheless, in the wake of the ruling it will be more important than ever for the United States, the ASEAN countries, and other like-minded countries to make a public, concerted effort to affirm the ruling and express the important role international law plays in maintaining peace and stability in the maritime commons. A key test will be whether these countries, and ASEAN in particular, can deliver a unified response in support of the ruling; as noted earlier, in the past China has successfully sought to ensure ASEAN remains divided and unable to uniformly push back against Chinese behavior in the South China Sea.⁴⁴

The Role of Taiwan

Taiwan, which has claims in the South China Sea similar to mainland China, also rejected the ruling, though on slightly different grounds than China: Taipei argues that the tribunal's designation for Taiwan ("Taiwan Authority of China") is incorrect and "demeaning to the status of [Taiwan] as a sovereign state" and that the ruling is not binding on Taiwan since it was excluded from the proceedings.⁴⁵ Taiwan opposed in particular the tribunal's finding that Itu Aba (called Taiping Island by Taiwan)—the only feature controlled by Taiwan in the Spratly Islands—is a rock, rather than an island. Itu Aba is the largest feature in the Spratly Islands, which some observers thought had a strong chance of being designated an island by the tribunal.⁴⁶ Prior to the ruling, Taiwan had taken some positive steps to clarify its claims in the South China Sea in accordance with UNCLOS and initiated efforts to reduce tensions and establish coordination and cooperation mechanisms with other claimants.⁴⁷ Taiwan has an opportunity to further clarify its position now that the tribunal has invalidated the nine-dash line.

New Leadership in the Philippines

The Philippines Department of Foreign Affairs offered an initially subdued response to the ruling, noting that it was "studying" the ruling and called on "all those concerned to exercise restraint and sobriety."⁴⁸ Philippine Secretary of Foreign Affairs Perfecto Yasay remarked that "The Philippines strongly affirms its respect for this milestone decision as an important contribution to ongoing efforts in addressing disputes in the South China Sea."⁴⁹ It is unclear how the new administration of President Rodrigo Duterte will respond to the ruling. During his presidential campaign, Mr. Duterte made several inflammatory and contradictory remarks about how his administration would handle the South China Sea dispute with China: he alternately asserted he would personally ride a jet ski out to defend the Philippines' claimed islands and strike a deal with China to resolve the dispute.⁵⁰

Potential Future Cases

China's compliance with the arbitral tribunal's ruling notwithstanding, other countries—particularly Vietnam*—that have competing maritime claims with China may be encouraged by the tribunal ruling to initiate their own cases against China. This would be a positive development insofar as it would provide some authoritative clarity on the other competing claims in the region, and could be a useful way to apply additional pressure on China.⁵¹

* Vietnamese officials have suggested Hanoi, too, might pursue legal measures in defense of Vietnam's claims in the South China Sea. Though it did not explicitly support the Philippines' case, in 2014 Vietnam submitted a formal "statement of interest" to the Permanent Court of Arbitration expressing its hope that the tribunal take Vietnam's "legal rights and interests" into account in its decision, and rejecting China's nine-dash line claim. Vietnam Ministry of Foreign Affairs, "Remarks by MOFA Spokesperson Le Hai Binh on the South China Sea Arbitration Case," December 11, 2014. http://www.mofa.gov.vn/en/tt_baochi/pbnft/ns141212143709; Rosemarie Francisco and Manuel Mogato, "Vietnam PM says Considering Legal Action against China over Disputed Waters," Reuters, May 22, 2014. <http://www.reuters.com/article/us-vietnam-china-idUSBREA4K1AK20140522>.

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Endnotes

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