

# ISAS Insights

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Institute of South Asian Studies  
National University of Singapore  
29 Heng Mui Keng Terrace  
#08-06 (Block B)  
Singapore 119620  
Tel: (65) 6516 4239 Fax: (65) 6776 7505  
www.isas.nus.edu.sg  
<http://southasiandiaspora.org>



## Implications of the South China Sea Arbitration Case

*The South China Sea (SCS) arbitration case has given a fresh opportunity to ASEAN countries to reflect on their strategy and undertake confidence-building measures. A better understanding among ASEAN states is necessary if they are to offer a much-needed political message to China. Indeed, the SCS dispute is a litmus test for ASEAN unity and its role in maintaining regional stability and peace.*

Rajeev Ranjan Chaturvedy<sup>1</sup>

### Introduction

The Permanent Court of Arbitration (PCA) rendered its long-awaited Award on 12 July 2016 in the arbitration instituted by the Philippines against China.<sup>2</sup> The arbitration examined the role of historic rights, the status of certain maritime features, the maritime entitlements and the lawfulness of certain Chinese actions in the South China Sea that were alleged by Manila as

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<sup>1</sup> Mr Rajeev Ranjan Chaturvedy is Research Associate at the Institute of South Asian Studies (ISAS), an autonomous research institute at the National University of Singapore. He can be contacted at [isasrc@nus.edu.sg](mailto:isasrc@nus.edu.sg). The author, not ISAS, is liable for the facts cited and opinions expressed in this paper.

<sup>2</sup> The Philippines initiated arbitration proceedings at the Permanent Court of Arbitration (PCA) against China with regard to disputes between the two countries. Although China officially refused to participate in the arbitration on 19 February 2013, the arbitration proceeded in its absence as per provisions of UNCLOS. Annex VII of UNCLOS provides that the “absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings”. See Permanent Court of Arbitration Press Release, “The South China Sea Arbitration (The Republic of the Philippines V. The People’s Republic of China), The Hague, 12 July 2016, available at: <https://www.pcacases.com/web/view/7>.

illegal. The five-member tribunal gave its unanimous decision which is “final and binding” as set out in Article 296 of the United Nations Convention on the Law of the Sea (UNCLOS) and Article 11 of Annex VII. China considered this as illegitimate and prejudiced. In fact, Beijing did not accept or acknowledge the arbitration award and opposed it from the very beginning.

China used all channel of communications to garner support and explain its position across the globe with limited success.<sup>3</sup> Immediately after the award, the Ministry of Foreign Affairs of China said in a statement that “the award is null and void and has no binding force. China neither accepts nor recognizes it”. It added, “China opposes and will never accept any claim or action based on those awards. The Chinese government reiterates that, *regarding territorial issues and maritime delimitation disputes, China does not accept any means of third party dispute settlement or any solution imposed on China*” (emphasis added).<sup>4</sup> So, what are the salient points of the award, what has changed and what would be its implications?

## **Salient Points of the Award**

The PCA has negated China’s claim to historic rights in the South China Sea, and the unanimous decision was remarkably in favour of the Philippines. Accordingly, “there was no evidence that China had historically exercises *exclusive control* over the waters or their resources” (emphasis added). Further, it underlined that historic rights to resources within the sea area falling within the ‘nine-dash line’ were illegal. The tribunal noted that the reefs have been heavily modified by land reclamation and construction which were contrary to obligation under UNCLOS. China has “inflicted irreparable harm to the maritime environment” and “destroyed evidence of the natural condition of features in the South China Sea”. Considering

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<sup>3</sup> The Asia Maritime Transparency Initiative (AMTI) is tracking arbitration support. Since the ruling was issued, AMTI has identified **7** countries that have publicly called for it to be respected, **32** that have issued generally positive statements noting the verdict but have stopped short of calling for the parties to abide by it, **6** that have made overly vague or neutral statements about the South China Sea without addressing the ruling, and **3** that have publicly rejected it. On the eve of the ruling, China’s Ministry of Foreign Affairs claimed that number had climbed to more than 60, but had not provided a list of the countries or, in most cases, evidence for their support. AMTI identified 65 countries that appeared to be included in China’s list of supporters before the verdict. Of those, **10** had publicly confirmed their support, **4** had denied Beijing’s claim of support, and **51** had remained publicly silent or have issued statements that are considerably vaguer than indicated by China. In contrast, **40** countries had said that the arbitral award would be legally binding and had called on both China and the Philippines to respect it. More details available at: <https://amti.csis.org/arbitration-support-tracker/>.

<sup>4</sup> “Full text of statement of China's Foreign Ministry on award of South China Sea arbitration initiated by Philippines”, *Xinhua*, 12 July 2016, available at [http://news.xinhuanet.com/english/2016-07/12/c\\_135507744.htm](http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm).

the status of features, the Tribunal noted that none of the Spratly Islands is self-sustainable and concluded that “none of the Spratly Island is capable of generating extended maritime zones”. Further, the Tribunal found that “China has violated the Philippines’ sovereign rights in its exclusive economic zone by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in the zone”. The tribunal added that China has restricted traditional fishing rights of Filipino fishermen and Beijing has created a “serious risk of collision” at sea by physically obstructing Philippine vessels. Finally, the Tribunal concluded that “there was *no legal basis* for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’”. It also noted that “China has violated its obligations to refrain from aggravating or extending the Parties’ disputes during the pendency of the settlement process”. The Tribunal, however, noted that the root of the dispute lies in “*fundamentally different understandings of their respective rights*” under UNCLOS in the waters of the South China Sea (emphasis added).<sup>5</sup>

Two important points, however, should be noted – first, “the tribunal did not rule that it was unlawful in principle for China to undertake construction activities on the disputed islands that it occupies” and second, “there is nothing in the decision which would make it unlawful for China to construct military installations on the islands it occupies, with the exception of Mischief Reef”.<sup>6</sup>

## **Implications of the Award**

Though, the Award has been welcomed by several countries, China has consistently questioned the legality and jurisdiction of the Tribunal. Also, it has kept its position clear and consistent. According to China’s Foreign Ministry statement, released immediately after the ruling, “China opposes and will never accept any claim or action based on those awards”. Indeed, speaking at China-US Dialogue on South China Sea between Chinese and US Think Tanks in Washington, exactly one week before the ruling, Dai Bingguo remarked that “the arbitration case is political intrigue, whereby *certain countries have been deliberately provoking problems and stirring up*

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<sup>5</sup> Permanent Court of Arbitration Press Release, “The South China Sea Arbitration (The Republic of the Philippines V. The People’s Republic of China), The Hague, 12 July 2016, available at: <https://www.pcacases.com/web/view/7>.

<sup>6</sup> Robert Beckman, “South China Sea: Tribunal Ruling a game changer”, *The Straits Times*, 14 July 2016.

*tensions*, eager to see turbulence in the South China Sea” (emphasis added). He added that “the final award of the arbitration amounts to *nothing more than a piece of paper*” and China “will never accept any solution imposed by a third party”.<sup>7</sup> Chinese political leaders and diplomats have reiterated this position in their statements. In short, China views the arbitration as an engineered conspiracy, unjust and a farce. Nevertheless, it has kept the negotiation channel open. During 49<sup>th</sup> ASEAN Foreign Ministers’ meeting, Chinese Foreign Minister Wang Yi remarked that the “page of the South China Sea arbitration has been turned over.” He added that China and the ASEAN members have reached consensus on returning to the right track of dialogue and consultation between countries directly involved in the maritime disputes with a “dual-track” approach. China has advocated the “dual-track” approach — disputes should be resolved peacefully through negotiation between the parties directly concerned, and China and ASEAN countries should work together to maintain peace and stability in the South China Sea.<sup>8</sup>

Obviously, the Award has further complicated the already-troubled South China Sea waters. The South China Sea disputes are regarded as one of the most difficult regional conflicts in the Asia-Pacific, and China’s inflexible approach has worked as a catalyst to aggravate the problem. Indeed, the South China Sea conflict will probably remain the ‘worst-case’ threat to peace and security in the ASEAN region, and these disputes are not going to be resolved any time soon.

Hence, the question arises about the kind of a regional/global architecture China envisages in this region. While PCA has announced its ruling, it has not changed the ground reality, and implementing the ruling is practically impossible. The US, which is expecting compliance from China, had not accepted similar rulings in past and has not ratified the UNCLOS. There were other cases of non-compliance before. In general, the US has not a moral high-ground to put enough pressure on China, particularly when the presidential election process is on. So, what are the implications of this case and what could be a way forward? How to deal with an assertive China when it is challenging international laws? Certainly, this episode has not only

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<sup>7</sup> “Speech by Dai Bingguo at China-US Dialogue on South China Sea Between Chinese and US Think Tanks”, 5 July 2016, Washington D.C., available at: [http://www.fmprc.cn/mfa\\_eng/zxxx\\_662805/t1377747.shtml](http://www.fmprc.cn/mfa_eng/zxxx_662805/t1377747.shtml).

<sup>8</sup> “Chinese FM says ASEAN ministerial meetings focus on dialogue, cooperation”, *Xinhua*, 27 July 2016, available at: [http://news.xinhuanet.com/english/2016-07/27/c\\_135542398.htm](http://news.xinhuanet.com/english/2016-07/27/c_135542398.htm). Also see, “Page of South China Sea arbitration has been turned over: Chinese FM”, *CCTV America*, 26 July 2016, available at: <http://www.cctv-america.com/2016/07/26/page-of-south-china-sea-arbitration-has-been-turned-over-chinese-fm>.

amplified the ‘trust deficit’ among China and its neighbours but it has also forced countries to take a re-look at their approach in handling ties with China. The biggest concern at this moment is to maintain tranquillity and order at sea.

China has successfully pursued some ASEAN countries to support China’s position through its ‘chequebook diplomacy’ and/or ‘intimidating approach’. In the short-term, China might have bought time and influenced joint statements and agenda of various regional/multilateral meetings, but in the long-term, coercive diplomacy could be counterproductive. Beijing must realise that it cannot buy trust and cooperation from neighbours, and South China Sea cannot be treated as ‘Chinese lake’. A sense of discomfort in ASEAN was clearly visible at the 49<sup>th</sup> ASEAN Foreign Ministers’ meeting in Vientiane. Except Cambodia, no other country supported China’s position openly. The Joint Communiqué of the 49<sup>th</sup> ASEAN Foreign Ministers’ meeting avoided reference to the ruling, but it reaffirmed ASEAN’s “shared commitment to maintaining and promoting peace, security and stability in the region, as well as to the peaceful resolution of disputes, including full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)”.<sup>9</sup>

ASEAN’s message was very clear that the region wants peace and respect for international law. No one wants to take a strong position because a small misunderstanding could escalate problems, and perhaps there is a realisation that the South China Sea issue needs a political framework which can only be developed through dialogue. The scope to resolve this issue through legal means is very limited and, therefore, leaders will attempt to find a political solution through ‘quiet diplomacy’. The utmost important task would be to maintain peace and de-escalate tensions at sea. In the short-term, ASEAN’s approach is to ease tensions and rebuild trust through dialogue. While a ‘war of words’ could continue, China and claimant states have shown their willingness for dialogue. The divisive nature of the Chinese approach, however, has fuelled debate about changing the ASEAN rules regarding ‘consensus based decision’. Likewise, ASEAN countries seems to take a determined approach to diversify their strategic, economic and trade relations to reduce their substantial dependence on China.

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<sup>9</sup> “Turning Vision into Reality for a Dynamic ASEAN Community: Joint Communiqué of the 49th ASEAN Foreign Ministers’ Meeting” Vientiane, 24 July 2016, available at: <http://asean.org/storage/2016/07/Joint-Communique-of-the-49th-AMM-ADOPTED.pdf>.

Security in the SCS is a concern both for the regional countries like China, Vietnam, the Philippines, Malaysia, Singapore, Indonesia and extra-regional countries including India, due to their strategic and economic interests in this region. The region's abundant natural resources and strategic location makes it essential to the agenda of several countries, including India. Most notably, the SCS occupies a significant geostrategic position in terms of international shipping. The majority of shipments of energy and raw materials pass through it. In fact, US\$ 5.3 trillion worth of total trade passes through the SCS every year. The SCS is an important junction for navigation between the Pacific and Indian Oceans and an important maritime gateway.<sup>10</sup> Any conflict in the SCS, which is one of the most important seas of the world, geopolitically, economically and strategically, will pose a threat to regional and international security. India and many other countries have an interest in protecting the sea lanes that run through the area, as they consider open and stable maritime commons essential to international trade and prosperity. Most importantly, China is deeply committed to the SCS because it attaches very high priority to this region, mainly due to – strategic value of the region; historically a weak position in the South China Sea dispute; the absence of past maritime agreements; and hypersensitive nationalism.<sup>11</sup> Realising that an open and peaceful sea is in the interest of everyone, China and other claimant states should avoid any kind of offensive measure.

It is unfortunate that “the South China Sea has become caught up in broader strategic tensions” between the United States and China and which has had the “unintended consequence of boosting nationalistic fervour” among claimant states. Further, the tacit American support to the case also added to the tension.<sup>12</sup> Therefore, the award has given a fresh opportunity to ASEAN to reflect on their strategy and take confidence-building measures. Political leaders of ASEAN have a greater responsibility to formulate a ‘political framework’ and work towards a binding ‘code of conduct’. China has its own set of domestic and economic issues, and confrontational approach is not in its interest as well. More importantly, a better understanding

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<sup>10</sup> See Rajeev Ranjan Chaturvedy, “South China Sea: India’s Maritime Gateway to the Pacific”, *Strategic Analysis*, Vol.39, No.4, 2015, pp. 360-377.

<sup>11</sup> M. Taylor Fravel, “Why does China care so much about the South China Sea: Here are 5 reasons”, *The Washington Post*, 13 July 2016, available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/>.

<sup>12</sup> See Sam Bateman, “The Impact of the Arbitration Case on Regional Maritime Security”, in Shicun Wu and Keyuan Zou (eds.), *Arbitration Concerning the South China Sea: Philippines versus China*, Surrey, England: Ashgate, 2016, pp. 227-239.

among ASEAN states is necessary if they are to offer a much-needed political message to China. Indeed, the South China Sea dispute is a litmus test for the ASEAN unity and its role in maintaining regional stability and peace.

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