

Assessing the South China Sea award

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Introduction

Anthony Bergin

The Philippines had a major, if unenforceable, win against China in the 12 July South China Sea Arbitration under the United Nations Convention on the Law of the Sea.

But the implications go beyond the bilateral dispute between China and the Philippines and it carries great legal weight as an authoritative ruling by an international judicial body.

The South China Sea arbitration was not a decision of the Permanent Court of Arbitration or the International Tribunal of the Law of the Sea. It was by an Annex VII Arbitral Tribunal under the UN Law of the Sea Convention that used the PCA as its registry. The Arbitral Tribunal accepted 14 of the 15 claims made by the Philippines in a unanimous award.

The case was brought to the Tribunal by the Philippines in 2013 due to a lack of progress with China in resolving their maritime disputes. The Philippines challenged China's 'nine-dash line,' which encircles much of the South China Sea, as well as China's assertion of sovereign rights over the South China Sea based upon claims over very small islands, islets, reefs and shoals.

Manila also challenged the legality of China's land reclamation and island building activities. The award addresses key ambiguities and uncertainties in the UN Convention on the Law of the Sea, and it especially refutes historically inspired unilateral claims to ocean space.

The decision is final and binding, although it has been rejected not only by China, but also Taiwan, which was formally excluded from proceedings. The widely disseminated 13 July Chinese Ministry of Foreign Affairs statement on the award contained the following statement (at para 4):



Source: Map by Clive Schofield & Andi Arsana of the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong. It appeared in the the American Journal of International Law, v.107, January 2013: 95, © 2013 American Society of International Law.

‘China’s territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China opposes and will never accept *any claim or action based on those awards.*’

Bearing in mind that the award is legally binding only on the parties to the arbitration, there’s the question of what might this assertion mean for third countries who may opt to exercise navigational rights based on the Tribunal’s rulings on the status and maritime entitlements of features in the Spratlys.

Providing a foreign warship is conducting itself consistently with innocent passage rights within 12 nm of a disputed feature then the US and Australian view would be that such an assertion of a navigational right is consistent with the law of the sea. Overflight rights would relate to the status of land reclamation, artificial islands and issues of territoriality.

The South China Sea award has produced a diverse range of opinions on the ASPI Strategist. This *Strategic Insights* assembles a selection of those articles.

The South China Sea: how will this end?

Peter Jennings, 13 July 2016

The ruling delivered overnight by the Arbitral Tribunal in The Hague is one that will deeply discomfort Beijing. Since the Philippines put its case to the Tribunal in June 2013 China refused to participate in the Tribunal’s proceedings. Beijing stridently maintains that the Tribunal has no legitimate authority to make judgements about sovereignty claims in the South China Sea. Indeed the Tribunal’s ‘Award’—as its judgement is called—makes no ruling about whether China or the Philippines has legitimate claims to any land features in the South China Sea.

But the ruling delivers a shattering blow to the legitimacy of Chinese claims over maritime area. It says that China’s claims of sovereignty within the ‘nine-dash line’ has no legitimacy and is harshly critical of Chinese environmental destruction of reefs and marine life.

The Tribunal’s [media statement](#) accompanying the Award uses remarkably strong language to set out its key findings.

These include:

- ‘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’.’
- ‘... the Tribunal concluded that none of the Spratly Islands is capable of generating extended maritime zones. ... Having found that none of the features claimed by China was capable of generating an exclusive economic zone, the Tribunal found that it could—without delimiting a boundary—declare that certain sea areas are within the exclusive economic zone of the Philippines, because those areas are not overlapped by any possible entitlement of China.
- ‘Having found that certain areas are within the exclusive economic zone of the Philippines, the Tribunal found that China had violated the Philippines’ sovereign rights in its exclusive economic zone ...’
- ‘[The Tribunal] found that 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.’
- ‘The Tribunal found, ... that China’s recent large-scale land reclamation and construction of artificial islands was incompatible with the obligations on a State during dispute resolution proceedings, insofar as China has inflicted irreparable harm to the marine environment, built a large artificial island in the Philippines’ exclusive economic zone, and destroyed evidence of the natural condition of features in the South China Sea that formed part of the Parties’ dispute.

There’s much more along those harsh lines and collectively the judgement amounts to the most comprehensive condemnation of China’s threadbare sovereignty claims.

So what happens now? China appears to be locked on to a path of ever more stridently asserting its claim to the vast bulk of the South China Sea. In addition to the island construction, runway building and stationing of radars, combat aircraft and surface-to-air missiles on those islands, Beijing has recently conducted large scale naval exercises which included extensive missile and torpedo launches.

The island building and exercises have featured prominently in Chinese domestic media reporting which is building nationalistic ardour about China's claims. President Xi's domestic credibility, not least his ability to keep control of the People's Liberation Army, is now in some part hostage to China continuing to assert its unilateral claim to everything falling within the nine-dash line.

Beijing has also worked hard, and largely successfully, to break ASEAN's always faltering unity on the South China Sea. There's clearly an attempt underway to see if the Philippines' new president, Rodrigo Duterte, can be induced to negotiate over Manila's claims in the Spratly Islands in return for economic assistance. A collection of motley African kleptocracies have been persuaded to spruik the legitimacy of Chinese claims, although it's doubtful that Zimbabwe—a land-locked dictatorship—has much that's useful to say about the Law of the Sea.

Other countries, Australia included, have been warned by China not to get too vocal in pushing the case for a resolution to sovereignty disputes in the South China Sea based on what the Australian 2016 Defence White Paper repeatedly calls a 'rules based global order.' Canberra recently received a pat on the head from Mr Xiangmo Huang, Chairman of the Australia–China Relations Institute at the University of Technology in Sydney, saying it was 'wise to resist the subtle American pressure to join its patrols in the South China Sea.' Better to be cautious, [he observed in the *Australian Financial Review*](#), than to make 'any knee-jerk reactions Australia may end up regretting.'

But it's not clear just how long our *sotto voce* approach will suffice. The Tribunal ruling makes it painfully clear that there's a stark incompatibility between Australia and China's approach. Readers will recall the 2016 Defence White Paper claims that Australia's '... second Strategic Defence Interest is in a secure nearer region, encompassing maritime South East Asia and the South Pacific.' In other words, we assert a critical national security interest in the security of a region now almost entirely claimed by China. Don't forget we are spending \$89 billion re-building the Navy to contribute to regional maritime security. These submarines and frigates won't be sailing off Antarctica.

As is so often the case, Washington's policy approach will critically define what happens next. The Obama administration has slowly and reluctantly come around to the realisation that disputes over a bunch of rocks in the South China Sea really do have the potential to damage the broader US–China relationship. Even though the US has never become a party to the Law of the Sea Convention it's impossible that Washington won't respond to a judgement from the Permanent Court of Arbitration which finds so strongly against China's actions in the South China Sea.

We should expect that the US will conduct more Freedom of Navigation and overflight manoeuvres in the region. We should also expect that the US will turn to its key regional allies to do the same. A phone call from the White House won't be far away.

A heavy defeat for Beijing: the South China Sea Tribunal ruling

Anthony Bergin, 13 July 2016

The People's Republic of China's Ministry of Foreign Affairs has [already stated](#) that [the international Tribunal's award](#) in *The Philippines v. China* case is null and void and has no binding force. That's no great surprise.

There's no other way to describe this mammoth 501-page ruling than as a complete and total sweeping legal victory for the Philippines on all counts—and a harsh verdict on the lawfulness of China's artificial island construction and other actions in the South China Sea.

It found that China's construction of artificial islands at seven features in the Spratly Islands violated UNCLOS obligations to protect the marine environment.

The Tribunal ruled that China's land reclamation and construction of artificial islands in the Spratly Islands after the arbitration was commenced, violated the obligations UNCLOS places on states to refrain from conduct that aggravates and extends a dispute while dispute resolution proceedings are pending.

The Tribunal held that Chinese law enforcement vessels violated maritime safety obligations by creating a serious risk of collision on two occasions in April and May 2012 during the Scarborough Shoal standoff.

No wonder China is furious, even though the Tribunal pointed out that we shouldn't assume that these disputes are the product of China's bad faith, but rather the result of basic disagreements about respective rights and obligations and the applicability of UNCLOS. (See [para 1,198 of the award](#)).

The Tribunal's award is final and legally binding on the parties to the dispute under the provisions of UNCLOS. China is required to comply with the award.

The Tribunal didn't in any way hold back from deciding on all the legal issues before it. There will be lots to discuss, debate and digest for quite a while, but the key point is that the Tribunal ruled in favour of almost all of the Philippines' claims in the arbitration.

There's almost no room in the five judges' rulings here for China to try and reach an agreement with the Philippines.

The Tribunal even went as far as cutting off the option of China drawing 'straight baselines' around the Spratlys to allow the whole area to generate ocean zones: it simply stated that China wasn't an 'archipelagic' state.

The most important ruling was that the nine-dash line has been ruled inconsistent with China's obligations under the UN Convention on the Law of the Sea.



The Peace Palace in The Hague, Netherlands housing the International Court of Justice (which is the principal judicial body of the United Nations, the Permanent Court of Arbitration (PCA), and the Hague Academy of International Law. The PCA acted as the registry for the Arbitral Tribunal. Image courtesy Flickr user Terry Straehley.

China has never made clear whether the line represents a claim to the islands within the line and their adjacent waters, a boundary of national sovereignty over all the enclosed waters, or an historic claim of rights to the maritime space within the line.

The Tribunal ruled that UNCLOS comprehensively governs the parties' respective rights to maritime areas in the South China Sea and so to the extent China's nine-dash line is a claim of 'historic rights' to the waters of the South China Sea, it's invalid.

It also found that were no land features in the Spratlys that are islands. It even ruled that Itu Aba (Taiping Island), the largest land feature in the Spratly Islands, is a rock and not an island.

In fact, it found that many of the ocean features aren't even rocks that would allow China to generate a territorial sea. The Tribunal held that determining the status of a land feature as a rock or as an island required showing that the land feature lacks an ability to sustain human habitation and an economic life of its own.

The Tribunal found that current presence of personnel on the features is dependent on outside support and doesn't reflect the capacity of the features in their natural condition.

China will still be able to maintain its garrison on the Scarborough Shoal: it's a rock that generates a territorial sea. But China has no basis for claiming sovereignty over the Second Thomas Shoal, due to its status as a reef.

The Tribunal held that Mischief Reef, within the exclusive economic zone and on the continental shelf of the Philippines, isn't a rock.

China has a very extensive artificial island on top of Mischief Reef. But the award means that China can't justify this illegal artificial island. I wouldn't, however, hold my breath waiting to see China's reaction if Manila asks for its withdrawal.

The Tribunal has no power to enforce its binding decision. So the key question now will turn on how the ruling will be implemented, and how it'll impact on future negotiations over sovereignty in the South China Sea. [Taiwan](#), [Singapore](#) and [Malaysia](#) have issued statements but as yet there's been no common ASEAN statement.

There's still a lot of water to pass under this bridge but in the short term the Tribunal's decision will raise diplomatic tensions with China. By being defeated legally so extensively, China may not even consider commencing negotiations unless the judgement is put aside.

Breathtaking but counterproductive: the South China Sea arbitration award

Feng Zhang, 14 July 2016

Anthony Bergin wrote [here](#) on *The Strategist* that The Hague award in *The Philippines v China* arbitration case is a [heavy defeat](#) for Beijing. The award is breathtaking in its overwhelming support for the Philippines's position, and comes as a surprise to many seasoned international maritime law experts. I'll just raise two such surprises.

First, although many [experts](#) expected the Tribunal to make general statements on China's so-called 'nine-dash line', few predicted a straightforward verdict declaring the line invalid when it comes to China's historical rights to resources.

Second, although [many](#) expected the Tribunal to rule on the status of some of the maritime features in the Spratly Islands, very few believed that Itu Aba (Taiping Island), the largest naturally formed feature in the South China Sea, would be ruled as a mere 'rock' rather than a fully-fledged 'island.' An 'island' is entitled to a 12-nautical-mile territorial sea, a 200-nautical-mile exclusive economic zone (EEZ) and a continental shelf; a 'rock' only gets a territorial sea.

Of those two decisions, the ruling on the status of features is the more controversial in legal terms and also more consequential in terms of the political and diplomatic fallout. A significant part of the [international opinion](#) considers Itu Aba an 'island,' contrary to the Tribunal's judgment. No wonder the new pro-independence government in Taiwan categorically [rejected](#) the award, forging a

truly rare agreement between Taipei and Beijing on an issue of such great importance. The Tribunal's rule on Itu Aba is careless and debatable to say the least.

Beijing made five immediate releases following the award: a Foreign Ministry [statement](#) about its position on the award; [remarks](#) by Foreign Minister Wang Yi on the award; [remarks](#) by People's Republic of China (PRC) President Xi Jinping on the award; a PRC government [statement](#) about China's territorial sovereignty and maritime rights in the South China Sea; and a [State Council white paper](#) on settling the disputes with the Philippines through negotiation: the PRC's first white paper on the South China Sea.

Of those five documents, the last two are the most important. Crucially, both mention the 'nine-dash line' map only in passing. Instead, the PRC government statement announces China's readiness to make practical temporary arrangements with the Philippines to reduce tension and seek cooperation. The white paper also reaffirms China's intention to seek regional peace and stability.

Those documents were clearly prepared beforehand. They show that the Foreign Ministry is engineering important policy changes in this vital area. In particular, the PRC government statement makes an important step in clarifying China's claims, stating that those include four areas: sovereignty over all the islands in the South China Sea; internal waters, territorial seas and contiguous zones of those islands; EEZs and continental shelves of these islands; and historical rights.

Notice that the 'nine-dash line' doesn't figure at all in these claims. That suggests that Beijing may have come to the realisation that the line has become a historical burden rather than a strategic advantage. The quiet disappearance of the 'nine-dash line' from China's official claims is a major policy change. Although it will be hard to ascertain the Chinese leadership's latest view on the 'nine-dash line,' this statement is ground-breaking in implying that China doesn't take it as a territorial demarcation line—that is, China doesn't claim 90% of the South China Sea as 'a Chinese lake,' as is so often alleged in international media. Such clarification, even if only deducible by implication, is probably the most important signal Beijing wants to send to the outside world following the award.

Also notice that although the claim to sovereignty and maritime rights over 'all the islands' appear sweeping, the claim doesn't specify the nature or scope of those islands. The ambiguity is likely meant to leave room for future negotiation with other countries. It's possible that Beijing may eventually bring those claims in line with the United Nations Convention on the Law of the Sea in some manner, subject to satisfactory negotiation outcomes.

These are important policy changes that Beijing has planned to announce at the conclusion of the arbitration case. Indeed, in the final months before the announcement of the award, there were already signs that the Chinese government—at least the Foreign Ministry—was looking for a way out of the arbitration case. Chinese diplomats privately complained about the costs of spending so much diplomatic energy and resources over this case. They were hoping that in the event of a more or less balanced award, Beijing could quietly ignore it while starting a new diplomatic negotiation process with the Philippines.

Unfortunately, the lopsided award has put the credibility of the Foreign Ministry's efforts on the line, especially in the eyes of growing domestic nationalistic criticisms. The counterproductive effect of the award is to stir up Chinese nationalism while undermining moderate voices represented by professional diplomats. Whatever its failings, the Foreign Ministry is still China's best hope for shaping a peaceful and responsible approach to the world.

The award would thus complicate China's internal difficulties—already massive—in fashioning a reasonable South China Sea policy. I've earlier [identified](#) three camps inside China vying for policy influence over the South China Sea: the realists, hardliners and the moderates. From the perspective of Chinese domestic policy debates, the biggest winner of the award is the hardliners, who have long held that the case is but an American conspiracy against China. Now they may even attack the award as a new ignominious chapter in China's 'century of humiliation' dating from the mid-19th century that can justify any response, including military force. The realists' position will remain secure, although they're likely to be pulled toward the hardliners' direction.

The moderates are now in a precarious situation, further besieged by attacks from all sides. That hardly bodes well for China's South China Sea policy or Asia's troubled maritime order. The outside world—the Philippines, the United States, and ASEAN, in particular—needs to help the moderates' cause by exercising restraint and demonstrating good will in an uncertain post-award world.

South China Sea: No way to save face in hiding from The Hague

Anthony Bergin, *The Australian*, 14 July 2016

The South China Sea is becoming a Chinese lake, but Tuesday's night's ruling by a tribunal at the Permanent Court of Arbitration on *The Philippines v China* was a complete and stunning victory in favour of Manila.

It's rare to get such an unqualified decision from an international tribunal: normally, these bodies try to find a way to give something to both sides, but there's no face-saving for China from this comprehensive decision.

China took no part in the proceedings, and mounted a diplomatic drive to undermine its authority. Given the result, it was a big mistake for China not to engage the tribunal, once it had ruled it had jurisdiction to consider the case. And it wasn't a great strategy to try to undermine the work of an international tribunal.

In rejecting the validity of China's 9-dash line, the tribunal may help to slow China's South China Sea ambitions in the long run.

We shouldn't expect, however, that China's creeping assertions of sovereignty in the sea to change anytime soon.

The Philippines didn't request the tribunal to decide any issues of sovereignty over maritime features in the sea, or to delimit disputed maritime boundaries within the region.

These disputes will ultimately have to be resolved by negotiation by the states in dispute. But by striking down China's nine-dash line, the ruling will affect how other claimants deal with Beijing.

The key argument in *The Philippines' case* was that China didn't have the right to explore and exploit the natural resources within *The Philippines' exclusive economic zone or continental shelf based on China's "historic rights" in the waters enclosed by the nine-dash line.*

China uses the nine-dash line to claim practically the entire South China Sea - it has been the bedrock source of all the problems in the sea.

The tribunal declared China's claim be invalid under the UN Convention on the Law of the Sea. In rejecting the notion of historic issues and "exceptionalism", the tribunal determined that it's the Law of the Sea Convention that is the comprehensive statement on the limits of maritime jurisdiction.

This is a big move forward and undermines China's negotiating position in dealing with *The Philippines* and others that make claims: Vietnam, Malaysia, Brunei and Taiwan.

Indonesia isn't a claimant, but it has been experiencing acts of assertion from China in the rich fishing grounds close to the Natuna Islands. China includes parts of the Indonesian-ruled Natunas within the nine-dash line. Indonesia is now playing the most assertive role among littoral countries.

With this ruling, Indonesia could also file a case against China: it's now clear that China doesn't have historic rights in the exclusive economic zone claimed by Indonesia from the Natuna Islands.

It's significant the tribunal found that China's fishing and reclamation activities violated law of the sea provisions to protect the marine environment.

As these activities were held to be illegitimate, China should stop them. This is a significant victory for ocean environmentalists. The tribunal also found Chinese coastguard vessels' activities against Philippine ships endanger the safety of life at sea.

It determined the legal entitlements of some disputed features in the Spratly Islands. It found them to be only rocks because they couldn't sustain a group of people, and so aren't entitled to an EEZ.

Many states around the world will be studying tribunal's high threshold for what ocean features generate offshore zones. Japan, for example, could be affected by this interpretation: it has an extensive EEZ and outer continental shelf claimed from Okinotori-Shima in the Pacific Ocean—the only natural formed parts of this feature above high tide are several small rocks.

Even Australia could be affected. We've relied on small and uninhabited features to extend our jurisdiction through maritime boundaries with France (New Caledonia): we have used Elizabeth and Middleton reefs as base points, which are periodically submerged.

International opinion will support using the decision to pressure Beijing to comply with the ruling. The arbitration case had the support of the US, Japan, Australia, South Korea, and key members of the EU. All these states have voiced concern about China's massive island building program.

But it's doubtful if international pressure will have any immediate impact on China, which has vowed to defy the ruling.

It's unlikely at this point that the US will respond with military force to Chinese provocations, (other than in the unlikely situation of Chinese military action above a high threshold).

While the tribunal's decision might make China more careful in its activities in the South China Sea, it would be naive to think there will be any changes quickly.

The reclaimed islands will remain. China has indicated that it will extend its resource activities in the South China Sea. It may even declare an Air Identification Zone in the sea, as it did three years ago in the East China Sea.

Other claimant countries will likely increase their presence of civilian armed vessels to protect their own resource activities; if they didn't, it would just leave them for China to exploit.

The tribunal's ruling limiting China's rights and jurisdiction to explore and exploit the natural resources in the waters of the South China Sea is legally binding on China. The ruling is final and without appeal, but there's no mechanism available to force China to comply.

Canberra should be prominent in arguing that the tribunal's decision reflects the position of international law, so that all actions taken contrary to the decision are therefore effectively illegal.

Washington, Canberra and Manila shouldn't be gloating. It would be best to give China some space to start to back down.

If it doesn't, then this ruling will end up being an obscure legal footnote in the ongoing conflict over rocks and reefs in the South China Sea.

The Philippines v. China verdict: China's crossroads

Jay L Batongbacal, 15 July 2016

'An overwhelming victory' is how Paul Reichler, lead counsel of the Philippines, describes the Award issued by Permanent Court of Arbitration Tribunal in the case of *Philippines v. China* concerning the South China Sea (SCS). The Tribunal unanimously granted all but a handful of Manila's claims, and in doing so laid down a significant number of rulings that will reshape the discourse over the SCS disputes in the years to come.

First and foremost, the Tribunal definitively characterised and then struck down the most expansive of all the various claims to the SCS: China's historic rights claims, as represented by the 'nine-dash line' map. The Tribunal held that clearly, any and all historic rights claims to waters beyond the territorial sea were relinquished and abandoned by China when it signed and ratified UNCLOS and thereby agreed with the establishment of the EEZ and continental shelf regimes in favour of all coastal states.

Second, the Tribunal comprehensively characterised all of the features in the Spratly Islands region and Scarborough Shoal. The islands and rocks created pockets of disputed territorial sovereignty, but the sea areas around them could be jurisdictionally allocated to adjacent coastal states in accordance with UNCLOS.

Third, the Tribunal found that China's interference with Filipino fishing and petroleum exploration activities, construction of artificial islands, and failure to prevent Chinese fishermen from fishing in the Philippines' EEZ, were all in violation of the Philippines' sovereign rights over its EEZ and continental shelf. The Tribunal also determined that China's construction of seven artificial islands and failure to prevent its fishermen from engaging in destructive fishing practices, violated its obligations to preserve and protect the marine environment.

Lastly, the Tribunal found that by creating artificial islands, China violated its obligations to refrain from taking actions that cause permanent and irreparable harm to the marine environment and acted prejudicially against the rights of the Philippines. China thereby acted contrary to international law by aggravating the dispute.

The Award has serious implications that ripple across the Southeast Asian region and the rest of the Asia-Pacific. It closes the door on China's claims to excessive maritime jurisdictions in the SCS based on historic rights. The vindication of the Philippines' rights to its EEZ and continental shelf outside of these disputed enclaves implies that beyond the mainland coasts and enclaves of islands or rocks, the SCS is open to either coastal state exclusive resource rights or common international uses.

The smaller littoral states of the SCS naturally gain from the legal reinforcement of their EEZ and continental shelf entitlements extending from their mainland coasts. If China insists on enforcing its now-illegitimate historic rights claims in these EEZ and continental shelf areas, it would clearly be acting illegally under international law and the coastal states would be entitled to take legal or other actions to defend their rights and jurisdictions. China must therefore immediately scale back and halt its maritime assertion and coercion activities against its neighbours, such as blocking and threatening non-Chinese vessels engaged in resource exploration and exploitation, and protecting Chinese fishing in other states' waters.

The Award also reinforces the high seas freedoms of extra-regional states, such as the US, Japan, and Australia. Maritime navigation is adequately protected by innocent passage rights through the territorial enclaves and seamless navigational freedoms through the EEZs and high seas of the SCS. However, the numerous territorial enclaves create a virtual obstacle course for aerial overflight.

China's declared option of imposing an air defense identification zone (ADIZ) in the future—if implemented using these territorial enclaves—could interfere with the practical needs of overflight through the SCS, whether for commercial or military purposes. It would create hazards to commercial air traffic routes and spawn numerous opportunities for military-to-military aerial encounters. An ADIZ spanning the entire Spratly Islands would also be unjustifiable given that China has insisted that its artificial islands and facilities are intended for civilian uses and to provide public goods. An expansive ADIZ centered around these facilities would only highlight their actual military purposes.

Overall, the Award clearly establishes the basis for a fair and equitable allocation of rights and jurisdictions over the SCS: between the littoral states, it allocates exclusive maritime zones and resources among all littoral states (including China) based on their coastal frontage and opens an area of international commons from which they can all benefit. It also accommodates the interests of external user states by maximising the areas for the exercise of high seas rights and freedoms with due regard to coastal states jurisdictions. The reduction of the area of legitimate disputes into scattered enclaves pose continuing but not insurmountable challenges. The Award lays down the conditions and points in the direction of a just and equitable resolution of the SCS dispute that's fair for all states.

For all practical intents and purposes, the ball is now on China's court: should it persist in its attempt to impose its will through unilateral assertion and coercion activities that have been clearly determined to be illegal, or should it adjust its policies and recognise the equitable balance of maritime rights and interests prescribed by international law binding on all states?

China's response will determine whether its long-term regional and global aspirations can still be achieved on the basis of mutual acceptance, accommodation, and cooperation with willing and trusting neighbors and partners in accordance with known rules, or shall be denied due to suspicion and rejection by an international community wary of unilateralism, expansionism, and domination by a rising great power. *Philippines v. China* has ended and placed China on a geopolitical crossroads that will undoubtedly determine its future.

Might doesn't make right in the South China Sea

Peter Jennings, *Herald Sun*, 15 July 2016

It's not often that a complex legal judgement has such an obvious and devastatingly clear outcome.

But that is what the Tribunal at the Permanent Court of Arbitration achieved at The Hague in the Netherlands this week, when it ruled on a dispute between the Philippines and China over who owns a number of rocks and reefs in the South China Sea.

China's claim that it has sovereign ownership of 80 per cent of the South China Sea – an area almost as big as the Mediterranean Ocean – was blown out of the water.

Chinese maps since 1947 have drawn a 'nine dash line' around most of the South China Sea, extending Beijing's 'ownership' as far south as Indonesia.

This historical claim was trashed by the international Tribunal, which was bluntly critical of China for encroaching on the Philippine's Exclusive Economic Zone.

Beijing was criticised for destroying reefs and the region's marine environment as it built artificial islands, now housing missiles, radars and runways for combat aircraft.

At base, this is a dispute between two different ways of thinking about the world.

For the Philippines and most Southeast Asian countries as well as Australia, Japan and the United States, this is a matter of upholding the international rule of law based on agreements like the Law of the Sea Convention. Disputes are supposed to be settled peacefully through Courts.

For several years now China has rejected this approach. In an old-fashioned exercise of 'might makes right' China has simply taken physical control of key territory. Up till now Beijing seems prepared to wear the international criticism for its actions.

Chinese leaders were probably surprised by the strength of the Tribunal's condemnation, but the signs are that Beijing will continue to denounce the Tribunal while strengthening its hold on the South China Sea.

At worst this turns what was once 'high seas', international waters where any country could sail ships or fly aircraft, into a militarised Chinese lake.

This matters deeply to Australia because two thirds of our merchandise exports pass through the South China Sea, including major coal, iron ore and liquefied natural gas exports.

It matters even more deeply to Japan, which is totally dependent on energy imports – oil from the Middle East and gas from Australia – going through the same region.

While it is in China's interests today to keep the trade flowing, it's impossible to predict how the future strategic situation will develop and none of China's neighbours will comfortably accept that Beijing has the ultimate power to decide who can move through the South China Sea.

What might happen from now on? Malcolm Turnbull is surely right to call for calm but it can't be denied that there is a flat contradiction between Chinese strategic priorities and the rest of the Asia-Pacific.

At some point Australia will need to back its strong public rhetoric supporting the principle of freedom of navigation and overflight by actually sending Defence ships and aircraft through the South China Sea.

This would make it clear that we accept the ruling of the international Tribunal rather than Chinese claims to sovereignty.

So far only the United States has undertaken such missions, sailing within 12 nautical miles of Chinese facilities – the sovereign limit that the Court says is not legal around rocks and artificial islands.

The French have hinted at doing the same thing on a number of recent deployments to the Asia-Pacific.

Japan has not staged a freedom of Navigation operation in the South China Sea but that may change after the Tribunal ruling and after Prime Minister Abe's Coalition won strongly in last weekend's election for the upper house of Japan's parliament.

Key Southeast Asian countries are likely to feel more confident after the Tribunal ruling that they have the better international legal position even if their military capabilities are outstripped by China.

No Asia-Pacific country can out-muscle the United States, which in the middle of June sent two aircraft carriers, the USS John C. Stennis and USS Ronald Reagan their full complement of attack aircraft and supporting ships to operate in the South China Sea.

Each carrier strike group combines more combat airpower than the entire Australian Defence Force.

While President Obama had earlier been reluctant to buy into the South China Sea disputes, Washington has clearly decided that it needs to protect its own strategic interest in freedom of navigation. It will expect support from key allies.

This will surely be a topic of conversation when US Vice President Joe Biden visits Australia this weekend.

In addition to taking in the Carlton and West Coast game at the MCG on Sunday, Biden will meet Malcolm Turnbull and visit Australian troops.

He will be pressing to see the strength of Australian commitment to take practical steps in supporting freedom of navigation.

Biden should refer to Malcolm Turnbull's 2016 Defence White Paper released a few months before the federal election.

It said that Australia had a key strategic interest 'in a secure nearer region, encompassing maritime South East Asia and the South Pacific.'

This is why the government is investing \$89 billion on new submarines and frigates.

Long before these vessels are built the challenge is to stand up for the international rule of law and oppose bullies who think that 'might equals right'.

A finding China can't ignore: the South China Sea arbitration

Donald Rothwell, 19 July 2016

The unanimous decision of the five-member Arbitral Tribunal in favour of the Philippines in its South China Sea case against China is breathtaking in its scope and will have profound consequences for regional geopolitics for decades. While the Arbitration Award and the processes associated with it have been completely rejected by China—to the point that it returned the formal documents

to the Philippines it was served in January 2013—China will find that it's not so easy to completely ignore the legal precedent set by the Award.

The Philippines commenced proceedings in 2013, provoked by ongoing disagreements with China over their respective South China Sea claims and particularly over the Scarborough Shoals, a series of reefs between the western Philippines and the Spratly Islands. The Philippines based its claims upon sovereign rights and jurisdictional entitlements found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which it had ratified in 1994 and China ratified in 1996. UNCLOS sought to significantly recalibrate the maritime entitlements of coastal states such as China and the Philippines by recognising a 12-nautical-mile territorial sea, and 200 mile EEZ and continental shelf.

Importantly for the South China Sea, Article 121 of UNCLOS also made clear that islands, including those of archipelagos such as the Philippines, generated the same entitlements. Rocks, on the other hand, under Article 121 (3) of UNCLOS only enjoyed a territorial sea. Unhelpfully, UNCLOS didn't clearly define the distinction between islands and rocks, and previous decisions of international courts and tribunals had either been too case-specific or too reluctant to precisely define a rock to be of much assistance in the South China Sea context.

The Philippines had options in commencing these proceedings as a result of the compulsory dispute resolution procedures available under Part XV of UNCLOS, which allow for both judicial settlement before standing courts and arbitration before an ad hoc tribunal specially convened to hear the dispute. The Philippines chose arbitration before a five-member panel and utilising mechanisms under Annex VII of UNCLOS nominated its preferred arbitrator. However, because China rejected the proceedings, default mechanisms were activated under which the remaining arbitrators were chosen by the President of the International Tribunal for the Law of the Sea, who at the time was Judge Yanai of Japan. Despite China's refusal to participate in the proceedings, the Tribunal continued to operate under default of appearance mechanisms designed to circumvent such actions. One consequence of this was that the Philippines bore all of the institutional costs of the Arbitration, including payment of the fees of the Arbitrators.

In October 2015 the Tribunal found it had jurisdiction and in doing so dismissed China's objections that this was a dispute over territorial sovereignty and maritime boundaries—which would've been grounds for finding against the Philippines. The 12 July Award also considered the outstanding issue of jurisdiction with respect to whether the case dealt with an historic title claim by China to the South China Sea, which directly raised the status of China's 'nine-dash line' claim. Again the Tribunal ruled against China and found that the 'nine-dash line' claim wasn't akin to historic title. It's principally because these three legal arguments challenging jurisdiction were dismissed that China has been so critical of the Award.

At the Merits phase of the case, the Philippines succeeded on nearly every argument it presented. This included that there was no basis in UNCLOS for the 'nine-dash line', that none of the relevant maritime features in the South China Sea were islands but rather UNCLOS Article 121 (3) rocks entitled only to a territorial sea, that China's land reclamation activities and building of artificial islands infringed the environmental rights of the Philippines, and that China had tolerated environmentally damaging fishing practices.

The big question is where to now in this dispute? The Award is final and binding. There's no right of appeal and the decision cannot be annulled by the UN. To date, the Philippines has been calm and measured in its response. It has the high moral ground in having taken the dispute to an agreed arbitration process before respected international jurists. China's short-term position is that it will not accept the decision but remains open to negotiations.

While the Award doesn't immediately confer upon the Philippines enforceable rights, it's created an important precedent with respect to the legality of the 'nine-dash line', the status of islands and rocks, and land reclamation and artificial island building activities. Using this as a legal benchmark, the Philippines and its South China Sea neighbours will rely upon the Award as they seek to reach settlements with China over their maritime disputes. Importantly, given the Tribunal's decision that many of the

contested rocks in the South China Sea don't generate an EEZ and continental shelf, the inherent value of these features has now been diminished and territorial tensions may cool.

China's next step in the South China Sea

Malcolm Davis, 21 July 2016

The findings of the [South China Sea Arbitration](#) conducted at The Hague refutes China claim of [indisputable sovereignty](#), and invalidates the 'nine-dash line' as a mechanism to delineate that claim—a heavy [defeat](#) for China. As expected, China has [rejected](#) the ruling. So what's Beijing's next likely move?

This dispute is one aspect of a broader Chinese ambition towards rejuvenation under a [China Dream](#) and restoration to 'middle kingdom' status that would see its neighbours in Southeast Asia relegated to [tributary](#) powers. That new Chinese hegemony would challenge US strategic primacy in Asia. The crisis feeds into a Chinese narrative of a 'Century of Humiliation' promoted by the Chinese Communist Party (CCP) to sustain its political legitimacy. So suddenly backing down on a critical Chinese interest would be an intolerable blow to CCP legitimacy, and in particular the reputation of Xi Jinping.

China will use soft power and [diplomacy](#) to counter global responses against Beijing's repudiation of a rules-based international order, but its steady challenge to that order won't waver, and Beijing won't back down in the South China Sea.

From a military perspective, Chinese control of the South China Sea allows the extension of a PLA anti-access and area denial ([A2AD](#)) 'bubble' further to the south and east. That allows the PLA to fully [employ](#) more advanced submarine and naval surface combatants, longer-ranged strike warfare, and more sophisticated air power to delay or deter US military intervention in any future regional crisis, such as over Taiwan, and support People's Liberation Army Navy (PLAN) power [projection](#) into the Indian Ocean. The South China Sea is also a [bastion](#) for China's *Jin* class SSBNs and the follow-on Type 096 *Tang* class SSBNs, particularly in the in the China Sea Basin south of China's main SSBN base at Hainan Island, which has a maximum depth of [6,000 metres](#).

Beijing has already made it extremely difficult for ASEAN to reach a [unified position](#) on the rival claims to the South China Sea and is sure to continue to coerce the organisation, particularly at the ASEAN Foreign Minister's meeting in [Laos](#) from the 21–26 July. It'll try to do a deal with unpredictable Philippines' President Rodrigo [Duterte](#), who has suggested [bilateral](#) negotiations with Beijing. It may walk away from long-running negotiations over a multilateral '[Code of Conduct](#)'. It'll continue to use both diplomatic pressure and bilateral economic inducements to buy off individual states.

China may also choose to go hard and press claims through military power. That would allow Beijing to demonstrate to the US, Japan and the region—as well as its domestic population—that it won't be cowed. China has employed 'grey zone' [actions](#) that keep the use of coercive power below a level that would generate a retaliatory response from the US. Were China to shift above that level, the potential for miscalculation on either side could generate a rapid escalation of events, leading to a military conflict that China simply couldn't afford to lose, but ultimately may not have the means to win.

There *are* some clear military [steps](#) that China could contemplate. It has already militarised disputed islands in the Paracels, so extending this to the Spratly Islands is a logical next step. That could include deploying combat aircraft, ground-based missile systems for air defence and anti-surface warfare, and naval forces to artificially created structures on Fiery Cross Reef, Mischief Reef, and Cuarteron Reef. China may contemplate fortifying [Scarborough Shoal](#)—a mere 150nm from Manila—or seizing [Second Thomas Shoal](#) and ejecting Philippines Marine forces there. Beijing could declare an Air Defence Identification Zone ([ADIZ](#)) over parts or all of the South China Sea—and rigorously enforce such an ADIZ using air capabilities deployed forward to artificial structures in the Spratly Islands. Finally, China could use its Coast Guard and 'strategic fishing fleets' even more assertively to challenge the interests of other claimants, and allow these '[white hulls](#)' and '[little blue men](#)' to be supported more directly by PLAN '[grey hulls](#)' in a manner that forces China's opponents to back down.



SOUTH CHINA SEA (July 6, 2016) The Military Sealift Command dry cargo and ammunition ship USNS *Matthew Perry* (T-AKE 9) steams alongside the Navy's only forward-deployed aircraft carrier USS *Ronald Reagan* (CVN 76) for a replenishment at sea. US Navy Flickr image.

The Arbitral Tribunal ruling has thrown down a gauntlet to Beijing that it must respond to. At the moment, a strong US [naval](#) force in the South China Sea centred on the aircraft carrier USS *Ronald Reagan*, constrains China's freedom to act. Absent that forward US military presence, China could calculate a window of opportunity exists in the last months of an Obama Administration, which prefers [leading from behind](#). That could prompt it to act while the US is distracted with a presidential election and seek to present a *fait accompli* to an incoming administration. Importantly, China probably calculates a tougher [ride](#) with a President Clinton, and an entirely unpredictable situation with a President Trump. So from Beijing's vantage point it may be better to act now rather than risk being deterred in the near future.

Certainly military options carry the risk of miscalculation and escalation, and weaken China's claim to a peaceful rise, but this cost must be balanced against risk in not acting. Failure to act decisively by Beijing could reinforce a domestic perception of a regime 'all at sea' with no clear idea how to proceed further, which would then have implications for regime legitimacy and domestic stability. Already Chinese censors are trying to keep a [lid](#) on nationalist anger. Fear of domestic unrest may prompt the Central Military Commission in Beijing to consider the military options more closely.

After arbitration: enforcing the rules in Southeast Asia

Amelia Long, 25 July 2016

The recent award handed down by the Arbitral Tribunal through the Permanent Court of Arbitration [undoubtedly favours the Philippines](#) (PDF) and is unlikely to end Beijing's assertive behaviour in the South China Sea. Beijing has wasted no time in rejecting the ruling, claiming it to be 'null and void', but the superpower isn't likely to go running away with its tail between its legs. In fact, [China has vowed to](#) 'take all necessary measures to protect its sovereignty in the South China Sea', including potentially

establishing an ADIZ [across the region](#). But how other claimant and non-claimant states act in response to the Tribunal's ruling will set an important precedent for dealing with behaviour that challenges the rules-based global order.

Despite [the Tribunal concluding that](#) 'there was no legal basis for China to claim historic rights to resources within the sea areas falling within the "nine-dash line"', China's fishermen militia will continue to fish in areas where China believes it has overlapping maritime claims. Such challenges will be hard to counter, since Southeast Asian claimants have only limited capability to enforce their sovereignty, and a fluctuating willingness to confront China. Ideally, Southeast Asian nations would present a united front that's both aligned with international law and remains cognizant of where the red lines lay.

That course poses a particular challenge for Philippines president Rodrigo Duterte, who [faces the dilemma](#) of continuing with his plan to 'reset' the Philippines' relationship with China or coming down hard on the Philippines' [largest two-way trade partner](#). Actually, China might decide that its best prospect for blurring the Tribunal's decision lies in its achieving a bilateral deal with Manila that recognises some of China's claims in exchange for concessions elsewhere. So Duterte's course of action could be formative.

How the Philippines acts in response to the Tribunal's award could also set a precedent for both claimants' and non-claimants' responses to future disagreements with China. And with China flying [nuclear-capable H-6K bombers and fighter jets](#) near the contested Scarborough Shoal last week, Beijing's signaling there's still much to play for.

Indonesia, which also gained from the Tribunal award, is a case in point. Its formal position— that it has no border dispute with China—has now been given legal reinforcement by the Tribunal's ruling. But that won't stop Chinese fishermen from encroaching on Indonesia's EEZ, nor will it prevent Chinese naval vessels from offering them protection. If Duterte doesn't firmly enforce the sovereignty of the waters surrounding his country, it could not only indicate that claimant states will bend to Chinese pressure, but also serve to discourage Jokowi from continuing with his more assertive stance on Chinese incursions on Indonesian waters.

Indonesia recently ramped up its efforts against China's behaviour in its waters, in particular slamming a [recent statement from China's foreign ministry](#) espousing 'overlapping claims for maritime rights and interests' in the waters off the Natuna Islands. After the third confrontation between Indonesia and China this year in Natuna waters, President Joko Widodo [signalled](#) to Beijing that his country wouldn't be cowed. He visited the Natunas and hosted a limited Cabinet meeting aboard the Indonesian Navy vessel that fired warning shots at Chinese trawlers the week before. And following the ruling, Indonesian Defense Minister Ryamizard Ryacudu [detailed plans](#) to deploy warships, fighter jets, SAMs, and drones—as well as construct port facilities—around the Natunas.

Now, as the *de facto* head of ASEAN, Indonesia's challenge will be to encourage a regional response that sets a precedent on how to address future Chinese territorial incursions. In [its formal statement on the Tribunal's ruling](#), Indonesia's Ministry of Foreign Affairs reiterated the importance of refraining from any escalatory actions in its near region, as well as resuming peaceful talks with a basis in international law on any existing overlapping claims. The Ministry also emphasised the important role that a zone of peace and neutrality would play in strengthening ASEAN's political and security communities. Indonesia has requested states to respect international law, with the statement [spurring criticism](#) from Chinese experts for being less 'objective, just and fair' than its traditional non-claimant stance on the South China Sea.

Cultivating that uniform response across ASEAN states—or even across claimants—is no simple task. [Some expected](#) the award to help ASEAN achieve a consensus position, but the evidence so far has been weak. The 49th ASEAN Foreign Ministers' and Post Ministerial Conference meetings in Vientiane this week provide another opportunity for China to ['divide'](#) and ['coerce'](#) member states.

A united ASEAN could produce and finalise an ASEAN–China Code of Conduct for Parties in the South China Sea that would soothe tensions after the arbitration and establish precedents for the future of the region's maritime security. But the challenges of coordinating such a diverse grouping of states, all with differing levels of economic dependence on China, has been demonstrated in [last month's spectacular failure](#) by ASEAN to stick to a firm position on China's aggressive island-building. And with a

traditionally non-aligned foreign policy and a now legitimised stance as a non-claimant on the issue, there's little reason for Indonesia to seize ASEAN's reins over a unified position.

If states in the region move towards [no longer seeing ASEAN and its regional architecture](#) 'as the vehicle through which to resolve territorial disputes', Indonesia might seek to engage its neighbours in new forms of defence diplomacy to build confidence and concord. Those could take the form of finalising the terms of the [proposed Indonesia–Malaysia–Philippines joint patrol](#) of the Sulu and Celebes seas.

Whatever the outcome, the coming months might well prove pivotal in shaping the future of the South China Sea. Both claimant and non-claimant ASEAN policymakers should use the confidence gained from the ruling to assert their sovereignty and commitment to the rules-based order. Inaction could prove a dangerous precedent as China attempts to save face and seize the initiative once more.

Fear and caution in Hanoi

Helen Clark, 26 July 2016

The Arbitral Tribunal ruling against China in the South China Sea is no boon for Hanoi, at least so far.

This has been an interesting year for those of us who watch Vietnam. There's a new government following the [12th National Congress](#), when powerhouse Prime Minister Nguyen Tan Dung was ousted after he lost in his bid to become General Secretary. That begs the question as to whether economic reform will continue and, importantly, what form the US–China balancing act will now take?

Then in April came the [Formosa fish kill scandal](#). Taiwanese firm Formosa's steel plant in Ha Tinh province, south of Hanoi, poisoned the ocean with a massive pollution dump, leading to the death of some 100 tonnes of fish. Unusually, protests drew in even ordinary citizens and much of the fury was over government inaction. [The matter was resolved only recently](#).

Now, after a shaky year there's been what should be a bright spot for those in power in Hanoi: China's defeat in The Hague after the Arbitral Tribunal ruled against it and its 'nine-dash line'. For Vietnam, now the 'nine-dash line' is legally void it has an unimpeded 22-nautical-mile EEZ. But China respecting that is another matter; the last time it moved its oil rig deep into Vietnam's EEZ, protests in Vietnam were so severe that factories (actually Taiwanese ones) were burned, three Chinese nationals killed, and relations between Hanoi and Beijing largely froze until November last year, when Xi Jinping squeezed in a visit and signed 12 bilateral agreements.

Not long after the ruling was announced, [Vietnam's Ministry of Foreign Affairs](#) released a tepid, boilerplate statement leaning heavily on legal arguments and the rule of law; newspapers largely stuck to this. There was no crowing, no antagonism, and no anti-China sentiment. At first blush this may seem unusual but Hanoi is at pains right now not to antagonise China, something Vietnam expert Carlyle Thayer confirmed to me last week.

After the ruling, China landed civilian aircraft on two reefs, a seemingly clear provocation to Vietnam, and beyond. As I wrote a few days later for the *Huffington Post*: 'Vietnam, however, [reacted](#) far stronger to supposed violations of sovereignty... in defiance of the ruling—rather than to the ruling itself.'

Antagonising Beijing is a problem for two main reasons: Vietnam and China are trying to rebuild relations. But any show of force by Beijing must be met with anger and declamations by Hanoi, lest activists accuse the government of 'not standing up' to Beijing.

Anti-China demonstrators were arrested on Sunday near Hanoi's central Hoan Kiem Lake. These Sunday morning demonstrations became common in 2011 when tensions in the area ramped up in earnest. The government allowed them for a while so as to supposedly 'send a message' to Beijing, but after a few weeks the small groups of marchers were inevitably arrested. Overseas democracy groups like Viet Tan (officially declared a terrorist organisation in Vietnam) or even the Vietnamese Community in

Australia (VCA) like to needle Vietnam over its supposed appeasement of China. It's a good way to begin criticism of wider issues, too.

This time the security forces were right off the mark. Agence France-Presse reported Sunday that 'Plainclothes security forces were out in force... Throughout the morning, around 30 activists were swiftly bundled onto waiting buses and cars by security forces.'

The South China Sea sovereignty issues between Vietnam and China have driven an upgrade of Vietnam's navy—it now has all six of the Russian Kilo-class subs it ordered in 2009. The received, and likely right, wisdom has it that the SCS stand-off is behind closer ties with the US, as seen in General Secretary Nguyen Phu Trong's 2015 Washington visit and President Obama's visit to Hanoi in May—coupled with the lifting of the weapons sale embargo (conditional, however, on Congressional approval for each purchase). Vietnam's turning to the US was remarked on by Malcolm Turnbull's [first interview as PM with Leigh Sales](#).

Vietnam will apparently not pursue its own arbitration case, given that circumstances differ from the Philippines, and Vietnam and China both claim the entirety of the Spratly and Paracels (Hoang Sa and Truong Sa in what Vietnam [firmly](#) calls the East Sea).

Vietnam is hoping that ASEAN, which it will chair soon, is the way forward. Vietnam likes this sort of regional grouping, and it is hoping to build strong consensus there. The problem, of course, is Cambodia and Hun Sen, who has stood in the way of a collective response to China since 2012 when he apparently blocked a joint communique on the issue during Cambodia's tenure as ASEAN chair. That China has just given Cambodia (more typically once a client state of Vietnam) [US\\$600 million](#) may not help.

Beware an unhappy dragon

Allan Behm, 29 July 2016

Many commentators and readers of *The Economist* keenly await their weekly dose of KAL. The 16 July 2016 [cartoon](#) didn't disappoint. A claimant hoists the Arbitral Tribunal's South China Sea ruling aloft while the Chinese dragon dumps a load of rocks and topsoil on him, transforming him into a reclaimed facility and replacing the ruling with a more ominous sign 'Welcome to the New China'. It sums up, with KAL's usual mordancy, China's response to the Arbitral Tribunal's South China Sea determination: China will make its own rules when it comes to defining and protecting its strategic interests.

The Tribunal's arbitration award in favour of The Philippines is both legally and geo-strategically significant, as Don Rothwell [pointed out](#) in his elegantly argued post. And *The Economist's* [daily blog commented](#), 'it is also the biggest setback so far to China's challenge to America's influence in East Asia'. The early indications are that [China will tough it out](#), impugning the independence and integrity of the five judges of the Arbitral tribunal and [reaffirming](#) the entirety of its South China Sea claim.

But to argue that, by flouting the ruling, China will be elevating brute force over international law as the arbiter of disputes, [as did *The Economist*](#), at once misunderstands the dynamics of China's position and endorses a more robust demonstration of force [favoured by the US Navy and some Australian commentators](#) (such as the Opposition Defence spokesman, Senator Steven Conroy). In seeking to generate a strategic buffer in the South China Sea and to consolidate its military footholds there, China is doing exactly what any rising power seeks to do—stare down its rivals and marginalise any local opposition.

That, of course, is precisely what the Monroe Doctrine, enunciated almost two centuries ago but still informing US strategic policy today, achieved in securing US dominance over the western hemisphere. China, however, isn't promoting [its own version of the Monroe Doctrine](#) but is rather continuing an approach more consistent with the strategy of Admiral Zheng He (Cheng Ho) in the 15th century and the more contemporary One Belt One Road policy.

It's a strategic and political impossibility for China meekly to accept the Court of Arbitration's ruling and withdraw its claim. Had that at any time been under consideration, China would have joined proceedings in The Hague and argued its case. That's not to suggest, however, that China lacks options.

First, while continuing to ignore the ruling and proceeding with the construction of artificial installations in the South China Sea, China will play for time. The G20 meeting to be held in Hangzhou in early September is an important opportunity for China to

showcase its power, status and wealth. China will play down the significance of both the South China Sea issue and the ruling at least until it concludes a successful heads of government meeting. And China will certainly exploit Philippines President Duterte's offer of further consultations as proof that the court ruling isn't the last word on the matter.

Second, China will continue to challenge and rebuff what it sees as confected US interests in the South China Sea. China's claim, and those of the other claimants, have been alive for almost 70 years. But it was [Secretary of State Clinton's remarks](#) at the 2010 ASEAN Regional Forum in Hanoi that identified US interests in the South China Sea. China will continue to portray the US as a self-interested latecomer to the issue.

Third, China will continue to engage bilaterally with each of the claimants, seeking either to buy them off through promises of development funding (the One Belt approach) while using concessions by one claimant to manipulate the options of the others. China's neighbourhood diplomacy is already paying dividends, as the carefully drafted 24 July 2016 [ASEAN Foreign Ministers' Communiqué](#) reference to the South China Sea reflects.

Fourth, China will consolidate its land reclamations as *faits accomplis*, and while the declaration of an ADIZ may be unlikely in the short term (it wouldn't be helpful in the lead-up to the G20 meeting), such a declaration remains a definite option should the China–ASEAN discussions fail to proceed smoothly. And, of course, a naval show of force by the US and others to exercise freedom of navigation rights could precipitate exactly the outcome that regional countries wish to avoid.

China's regional diplomatic skills are well developed. Its push/pull manoeuvre/manipulate techniques are both honed and practised, and China is working away at creating its own set of regional agreements that will provide an interesting contrast to the 'rules-based international order' favoured by the US and its allies, particularly Australia. Wu Xinbo's [recent *International Affairs* article](#) makes for interesting reading in this regard.

Foreign Minister Julie Bishop is absolutely correct in emphasising diplomacy and negotiation as the most effective way forward in the current South China Sea dispute. But she needs to recognise that the term 'rules based international order' is tantamount to code for 'US-legitimised international order'—a concept that China is happy to ignore. As China, India and Russia—amongst others—continue to assert their strategic ambitions, the legitimacy of the post-WW2 international order can only erode further. China wants to be a rules-creator as well as, perhaps, a rules-observer. The issue here isn't one of accommodation or appeasement towards China's regional and global aspirations, but rather acceptance of China for what it has become—a major power in its own right. To deny China that role would be to create an unhappy dragon. We should all take care.

Giving China a ladder to climb down

William Choong, 1 August 2016

The 12 July [judgment](#) by the Hague-based Arbitral Tribunal on the South China Sea constituted a near-total defeat for China. While it was widely expected that the Philippines would win, it wasn't expected that China would lose by such a wide margin.

Understandably, China has taken a hawkish and resolute stance against the Tribunal. Eager to show China's resolve in defending its bastions in the South China Sea, China [landed](#) two civilian airliners on Mischief Reef on 13 July. It conducted two military exercises near Hainan Island—one just before the 12 July verdict and another the week after—closing off maritime areas and warning mariners that that area was prohibited.

There's now a distinct possibility that tensions will escalate in the South China Sea. Given that the Arbitral Tribunal had ruled that all the features in the Spratlys are either rocks or low-tide elevations, the US now has the legal cover to conduct FONOPs closer to, or even inside, the 12nm zones around the maritime features. In June, French defence minister Jean-Yves le Drian said that France should urge European Union countries to conduct 'regular and visible' [patrols](#) in the South China Sea. Chinese anger at such overt challenges could well lead to a conflict not from deliberation, but from accidental escalation.

Regardless of the verdict, China has a solid physical position in the South China Sea. In February, it was [found](#) that China had installed high-frequency radar on Cuarteron Reef, and possibly radars on Gaven, Hughes and Johnson South reefs. Such facilities would enable it to establish control over large swathes of the South China Sea within the nine-dash line. Three 3,000m airstrips in the Spratlys [serve](#) to defend China's advanced submarines based farther north at Hainan Island. Deployed in the South China Sea, Jin-class [submarines](#) with JL-2 nuclear missiles can break into the Pacific Ocean to get within striking range of the continental United States. Given such a strategic position—compounded by Xi Jinping's heady mix of nationalism and rejuvenation from a 'century of humiliation'—it would be irrational for Beijing to give up its assets in the Spratlys.

The Arbitral Tribunal wasn't able to rule on questions of sovereignty, and while it did rule that China's historic rights claim to the nine-dash line was incompatible with UNCLOS, it [didn't conclude](#) that the nine-dash line per se was invalid or illegal. That gives China some wiggle room to continue to press its claim. In the clearest, quasi-authoritative response to the judgment, Wang Junmin, deputy dean of the CPS Postgraduate Institute, [notes](#) that the Philippines had used the Chinese expression 'historic rights' to argue China hadn't claimed 'historic title' to the South China Sea (the former [may](#) include sovereignty, but may equally include more limited rights, such as fishing or rights of access that fall 'well short' of claims of sovereignty; the latter is used specifically to refer to historic sovereignty). Writing in the *PLA Daily* on 18 July, Mr Wang wrote that Chinese references to 'historic rights' doesn't imply that China doesn't claim 'historic title.' He added that China has 'historic title' and 'historic fishing rights' in different areas within the nine-dash line.

By claiming that China has 'historic title' to internal waters in 'archipelagos or island groups' that are at a 'relatively close distance' and that can be viewed 'integrated whole,' China could well [draw](#) straight baselines around the features it occupies in the Spratlys and [claim](#) extended maritime zones outward. Such a hardened position goes directly against the Tribunal's conclusions and would likely be challenged by the US.

It's time, however, for China and the US to pull back from such a brink. The signs thus far are encouraging. The Chinese government didn't yield to public calls for a boycott of Philippine goods (*Xinhua* called this 'irrational patriotism'), and China has [stressed](#) that it would intensify talks for a binding Code of Conduct (COC) for the South China Sea. The US has [urged](#) the resumption of bilateral talks between China and other claimants, and encouraged them not to act provocatively. Likewise, the Philippines has responded sensibly, with President Rodrigo Duterte saying he wouldn't adopt a 'flaunt or taunt' position against Beijing.

In the medium term, the best approach isn't to pummel China with the 501-page judgment, but rather, to ensure that it has enough face to pursue tangible and functional outcomes. Those could include accelerating talks for the COC, an [expansion](#) of the Code of Unplanned Encounters at Sea (CUES) to include coast guard ships, and getting claimants—like the Philippines—to postpone negotiate directly with the Chinese.

Speaking to his American counterpart recently, Admiral Wu Shengli, the chief of the PLA Navy stressed that China would never sacrifice its sovereignty and interests in South China Sea, would never stop construction there and never be caught off guard. Yet he signalled that both sides could cooperate by following CUES and Rules of Behaviour for the Safety of Air and Maritime Encounters.

Working on tangible and functional outcomes—and not rubbing China's nose in the ruling—might well be the best way forward.

The South China Sea arbitration: challenges and opportunities

Sam Bateman, 2 August 2016

While the recent ruling by an Arbitral Tribunal in The Hague addressing the dispute between China and the Philippines in the South China Sea has been hailed as a '[game changer](#)' (PDF) and a '[heavy blow](#)' for China, it also presents new challenges and opportunities.

The first thing to say about the ruling is that its importance can be overstated. Despite much commentary to the contrary, it's not a ruling from the Permanent Court of Arbitration (PCA). Rather it's a ruling from a tribunal established under Annex VII of the 1982 UN Convention on the Law of the Sea (UNCLOS) for dispute resolution between parties to the Convention. The PCA only provided secretarial assistance for the tribunal. Referring to it as a ruling from the PCA inflates its importance.

The tribunal's ruling is binding only on the participating countries. It doesn't have the same status as rulings from major UN-sponsored international courts, such as the International Court of Justice (ICJ) and the International Tribunal on the Law of the Sea. The ICJ has taken the apparently unusual step of seeming to [distance itself](#) from the tribunal's award. With more judges and greater sensitivity to the political implications of its judgments, a higher level court may have produced a more nuanced ruling, particularly with regard to the status of 'islands' and 'rocks'.

No one expects China to quietly accept the ruling. Other countries, including the US, are open to allegations of hypocrisy if they are excessively critical of China in this regard. There's a long tradition of big nations [ignoring decisions](#) when they lose cases.

The surprising feature of the ruling was the judgment that there are no 'fully entitled' islands in the Spratly group entitled to an EEZ and continental shelf. That particular ruling has far-reaching implications. It presents challenges for other countries, including Australia, France, Japan and the US, which have claimed a full set of maritime zones from small, isolated features. Those countries are all likely to ignore the precedent established by the tribunal on 'rocks' and 'islands'.

Japan has already reasserted that the small feature of Okinotorishima in the Pacific Ocean, from which it claims both an EEZ and an extended continental shelf, is a true island rather than a rock. In doing so, Japan has [pointed out](#) that the recent ruling applies only to China and the Philippines.

Another challenge arises from the importance the tribunal accorded EEZs, which will likely reinforce the nationalistic attitude the South China Sea littoral states attach to their EEZs. That may shift their focus to unilaterally asserting sovereign rights in national zones rather than to more properly addressing their obligations and requirements to cooperate on managing the South China Sea and activities within it. Cooperation is an obligation of the littoral countries under Part IX of UNCLOS covering semi-enclosed seas. Assertions of sovereign rights in EEZs may become more strident after the ruling and this will inhibit progress towards effective cooperation.

At this stage there are relatively few maritime boundaries agreed in the South China Sea. There are some continental shelf boundaries but very few EEZ boundaries. Theoretically the tribunal's ruling that there are only 'rocks' in the Spratlys provides a basis for a system of maritime boundaries in the South China Sea with a number of enclaved territorial seas around the rocks and even a patch of high seas in the middle of the sea although this may be closed off in part by the [outer continental shelf claims](#) by Vietnam and Malaysia.

Despite the old adage that 'good fences make good neighbours', sometimes it's physically impossible, for a variety of reasons, to build good fences—particularly in the sea. Agreement on further maritime boundaries in the South China Sea will be heavily complicated by the geography of the region and the need for [tri-points](#) where pairs of bilateral boundaries intersect. The extant claim by the Philippines to Sabah prevents a boundary agreement between Malaysia and the Philippines. A further challenge is that islands in both the Paracels and Pratas groups are much larger than those in the Spratlys and are likely to satisfy the criteria to be regarded as 'fully entitled' islands. Vietnam could also assist ASEAN solidarity by dropping its claim to features that lie within the EEZs of the Philippines and Malaysia.

On the credit side, the ruling provides opportunities, particularly by [providing a basis for negotiations between the parties involved](#). Constructive dialogue is required rather than destructive sniping. As the editors of *East Asia Forum* have [rightly pointed out](#), 'It is not a time for grandstanding, adding insult to injury or taking action that could be construed as provocative'.

The focus of the negotiations should now be functional cooperation for activities, such as marine scientific research, fisheries management, protecting and preserving the marine environment, maritime law enforcement, and search and rescue. Unfortunately the need for those forms of cooperation has been lost in [recent rhetoric](#) on the South China Sea.

The bottom line is that China and ASEAN should now be given space to work out their differences and explore cooperation for managing the South China Sea without pressure or provocation from extra-regional/non-littoral powers. There's no strategic imperative for these powers to take any action, including no extant threat to freedoms of navigation and overflight that warrant confrontational assertions of these freedoms. Dialogue between ASEAN and China must now be given the chance to work.

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