

# The South China Sea Arbitration Decision: China Fought the Law, and the Law Won....Or Did It?

[fpri.org/article/2016/07/south-china-sea-arbitration-decision-china-fought-law-law-won/](http://fpri.org/article/2016/07/south-china-sea-arbitration-decision-china-fought-law-law-won/)

Jacques deLisle

July 2016

## E-Notes

Jacques deLisle is director of the Foreign Policy Research Institute's Asia Program and the Stephen Cozen Professor of Law at the University of Pennsylvania.



## Chinese and Philippine claims in the South China Sea

When the Permanent Court of Arbitration in the Hague issued its unanimous decision on July 12 in the case that the Philippines had filed against the People's Republic of China two and a half years earlier, the Court set forth: a stunning repudiation of several of China's key legal arguments and much of its real-world behavior in the disputed South China Sea; a remarkable affirmation of the core elements of US policy and strategy toward the contested maritime region and China's claims and actions therein; and a striking assertion of the reach and capacity of international law and formal dispute resolution procedures. Yet, as with so much else concerning the South China Sea, China's relations with its neighbors, US policy toward China, and international law, the implications of the decision are a good deal more ambiguous and ambivalent. In the aftermath of the decision, China is faced with difficult choices, the US with complex dilemmas, and international law with substantial peril.

## A Sweeping Decision

While most observers expected a significant partial victory for the Philippines, the scope and the sweeping rejection of China's positions were a surprise. Where the Court initially had found jurisdiction over seven of the Philippines' claims and reserved judgment on jurisdiction over seven others (and required further briefing on one other), the Court's final decision asserted jurisdiction over all of the Philippines' diverse and wide-ranging claims.

In doing so, the Court accepted the Philippines' artful pleading and rejected China's contrary analysis. It was not persuaded by China's arguments that various claims would require the Court to resolve questions of sovereignty over contested landforms (an issue that clearly falls outside the ambit of the United Nations Convention on the Law of the Sea, and which provided the basis for the Court's authority).

The Court was equally unmoved by China's assertions that ruling on the Philippines' claims would require the tribunal to decide three types of issues that had been placed beyond the Court's reach by a lawful reservation China had imposed as a condition of subjecting itself to UNCLOS and its dispute resolution procedures: delimiting potentially overlapping maritime zones between China and the Philippines (of which there were none, given the Court's finding on the merits that the relevant landforms claimed by China were too insignificant to generate zones large enough to overlap significantly with the Philippines' maritime zones); passing judgment on military activities (a category that the Court found did not include China's moves to build up landforms into areas with harbors and airstrips used by elements of the Chinese armed forces), or deciding on claims of historic title (given the Court's conclusion that the type of history-based rights asserted by China were not recognized under the relevant law of the sea). The Court also refused to accept China's alternative argument that the Philippines was bound by what China claimed was an agreement that informal bilateral negotiations were to be the exclusive means by which the two parties would address their dispute.

On the merits of Beijing's claims to maritime rights in South China Sea areas near the Philippines, China's defeat was more jarring. The Court declared several of the disputed landforms—including ones on which China had undertaken massive land reclamation and construction of facilities for military use—to be merely low tide elevations (LTE) and thus not entitled to any maritime zone of their own (although some were located close enough to larger landforms to permit a modest extension of maritime zones derived from the latter). The Court concluded that other maritime features were merely rocks (naturally occurring landforms that were above water at high tide), which—even if under Chinese sovereignty—could provide the basis for nothing more than a twelve nautical-mile-wide territorial sea. Such sea areas are far more modest than the vast expanse inside the convex 9-dash line that Beijing has long claimed (albeit with ambiguous and weak legal basis) to mark the extent of its sovereign rights over the bulk of the South China Sea.

These conclusions entailed and required one of the more unexpected and controversial determinations reached by the Court: Even Taiping Island / Itu Aba—the most substantial of the naturally occurring landforms in the area—failed (like all the other relevant land forms) to qualify as an island capable of supporting an economic life of its own or human habitation and, therefore, to provide the basis for an exclusive economic zone (EEZ) of up to 200 nautical miles. This decision about Taiping Island is especially fraught, for at least a few reasons. First, Taiping Island is the landform that could most plausibly ground a claim that China (or whichever state other than the Philippines held sovereignty over the island) had maritime entitlements reaching significantly into the areas that the Philippines asserted to the tribunal were part of the Philippines' EEZ or continental shelf. Second, Taiping Island is the one South China Sea landform controlled by Taiwan, and Taiwan—which was barred from the proceedings because its own disputed international legal status has left it unable to join the UNCLOS regime and participate in its dispute resolution institutions—had submitted an unsolicited *amicus curiae* brief to the Court that argued strongly for a key position that Beijing (which derives many of its claims from pre-1949 Republic of China claims) and Taipei (as the guardian of the original ROC claims) share: Taiping Island is entitled to full, EEZ-generating status. Thus, the often contentious issues of cross-Strait relations and Taiwan's state-like status (or lack thereof) were implicated as well. Third, the Court's decision concerning the application of UNCLOS's vague language to the facts of Taiping Island at least implies a more general legal interpretation—a precedent in a previously extremely sparse area of law—that casts greater doubt on the status of other, somewhat similar landforms that have been relied upon as bases for disputed or potentially disputed maritime claims around the world.

In another of its most striking and not so widely expected decisions, the Court rejected expansive or assertive PRC interpretations of the notorious 9-dash line. The tribunal declared that China's claims to maritime areas within the 9-dash line are unlawful to the extent that they are claims of "historic rights" or other "sovereign rights" or purport to have any other basis outside of the ordinary UNCLOS provisions (essentially, territorial sea or EEZ rights based on landforms). And the relevant landforms, in the geographical context of the South China Sea as evaluated by the Court, are mere rocks and LTEs that cannot collectively sustain claims to rights over much of the sea zone enclosed by the 9-dash line.

What all of this amounts to is a determination that the South China Sea area that was the object of the Philippines' arbitration claim is entirely (or almost entirely) part of the Philippines' EEZ and continental shelf. This, in turn, means—as the Court further found—that many of the controversial actions that China has undertaken, encouraged, or failed to prevent in areas of the South China Sea near the Philippines are improper under the law of the sea and violate the Philippines' rights and China's obligations under UNCLOS. This now-declared-unlawful behavior includes: China's interference (through dispatch of Coast Guard vessels, imposition of fishing regulations and so on) with the Philippines' exclusive right to control the exploitation of the natural resources of its EEZ and Continental Shelf; China's failure to take required steps to prevent Chinese fishing vessels from exploiting resources within the Philippines' EEZ without the Philippines' permission; China's interference, after it took control of the area around Scarborough Shoal in 2012, with Filipinos' exercise of their legally valid “traditional” fishing rights; China's impermissible destruction or toleration of impermissible destruction of the marine environment in the Philippines' zones, including through extensive harvesting of endangered species.

China's partly military-use-related land reclamation activities also drew condemnation from the Court. Here, the offenses included, in essence: severe physical destruction of resources that the Philippines was entitled to control; destruction of evidence of the natural condition of landforms, complicating the task of evaluating such landforms' legal status and, thus, their capacity to provide a basis for lawful claims to maritime zones and related rights; and taking steps (including ones after the case was already pending) that aggravated the dispute between the parties and could impede the execution of an eventual decision by the Court.

### **China's Problematic Choices**

The sweepingly adverse and unanimous decision puts China to a newly acute set of choices. Beijing can continue its already adumbrated policy of “four noes” toward the Court and its process and verdict: no participation, no acceptance, no recognition, and no enforcement. China can continue to assert that the Court lacked jurisdiction (because issues of territorial sovereignty, maritime zone delimitation, military activities, or historic rights—as defined eccentrically and expansively by China—were involved, or because the Philippines had ostensibly agreed to an alternative method of dispute resolution). The PRC can continue to insist that the views of the content of relevant international law adopted by the tribunal and applied to the facts of the case are simply wrong as a matter of law, and that China's conflicting interpretations—some of which had support from some other states—are correct. PRC sources can continue to assert or imply that the tribunal was biased. Beijing can continue to undertake or permit—and expand or escalate—the activities that the Court condemned as unlawful in the South China Sea areas near the Philippines. In the run-up to the decision and in its immediate aftermath, this seemed to be a major component of China's approach.

But the meaning and implications of such statements and actions have changed in light of the decision. If China's approach remains relatively unchanged, it will have doubled down on a posture that had already spawned charges that Beijing was being an international scofflaw and revisionist in its approach to major components of the international legal order. Where Beijing previously could claim it was taking one side in debates over the meaning and application of vague or contested principles of international law, it now must reject an authoritative determination by a major international tribunal. Where the PRC could until recently hope for a mixed verdict from a divided tribunal that could lend credence to post-decision arguments that the issues were close ones and still subject to reasoned disagreement, debate, and challenge, China now had to reject a clear and strong decision nearly in its entirety. Where China might earlier have expected that its uncompromising refusal to participate in the process—even in the very limited and segregable form of appearing to contest the tribunal's jurisdiction—would undermine the legitimacy of any subsequent decision on the merits, that line of argument now has to coexist with the related counterargument that China was showing itself to be contemptuous of international legal procedures from soup (determining jurisdiction) to nuts (implementing or enforcing a final judgment). And China was taking this stance toward a dispute resolution process to which it had consented—at least in a “wholesale” way—as a party to UNCLOS.

It remains possible—and it is to be hoped—that after some initial period of surely strident and likely ardently nationalist reaction, the leadership in Beijing will find it prudent not to make this high-stakes “double or nothing” bet. China still could—and for its own interests and broader regional and international interests should—refrain from a range of provocative and destabilizing activities such as stepping up land reclamation or patrol activities,

declaring an Air Defense Identification Zone over the South China Sea, dislodging Filipinos from landforms on which they are stationed, or confronting, in a more threatening or risky way, the United States Navy when the latter engages in operations in the areas the Court has awarded to the Philippines. Further, China might take the outcome of the arbitration and the advent of the newly hard or risky choices it faces—as a reason and an opportunity to turn the page. Beijing might reinvigorate efforts to set aside sovereignty questions and seek cooperation on concrete issues with the Philippines and with the other rival claimant states that are surely contemplating what bringing arbitration claims might now do for them.

### **Vindication—and Challenges—for the United States**

The arbitration decision was strikingly in line with the central elements of US policy toward the South China Sea disputes and US policy toward China's approach to those disputes. The operative provisions in the decision read as something of a validation of four key US principles. First, the US has consistently insisted that it does not take sides on questions of what state has sovereignty over the disputed landforms in the South China Sea.

Supporting the tribunal's decision is perfectly consistent with this position, for the Court correctly acknowledged that it lacked authority to decide such issues. To oversimplify a bit, the Court made its decisions about rights and obligations in the maritime zones by analyzing the questions as if the Court had concluded (or had to assume) that China had sovereignty over the relevant contested landforms and entitlement to whatever maritime rights UNCLOS could confer based on such territorial sovereignty.

Second, the US has insisted on respect for rights of freedom of navigation and overflight in the South China Sea. Several of the activities undertaken, encouraged, or tolerated by China and condemned as unlawful by the tribunal can be classed as interference with such rights. So, too, could some of the more assertive—even aggressive—moves (such as enhanced, exclusionary patrols or implementation of a strong form of an ADIZ, or increased harassment of US military planes and ships) that some observers worry China may undertake in response to an adverse decision that Beijing has staunchly rejected.

Third, the US has consistently called upon all parties to the South China Sea disputes to respect international law, including the law of the sea generally and UNCLOS specifically. The Court's decision constitutes a formal and authoritative decision about what some of the relevant law is. And the content of this international law as reflected or determined in the arbitration decision is generally consistent with the views of law of the sea rules previously embraced by the US, and at odds with contrasting views pressed by China. With the decision now issued, the US's venerable call for respecting international law now morphs easily into a call on China to respect the specifics of the tribunal's decision.

Fourth, the US has insisted on parties' obligations to address their disputes peacefully and has pressed parties to accept multilateral and/or formal dispute resolution procedures. The arbitration process is a quintessential formal dispute resolution procedure. And the arbitration was able to go forward only because the tribunal rejected China's argument that the Philippines was bound to submit to the informal, purely bilateral negotiations that China has favored. With the final judgment now in place, the US's push for peaceful dispute resolution merges into specific pressure on China to implement the decision that is the product of such a process.

All of this apparent vindication is not without its downsides and perils for the United States and its agenda and interests in the South China Sea region. First, the relatively close alignment between the tribunal's legal decision and long-standing US policies risks further stoking already-prominent Chinese suspicions (or, at least, rhetorical claims) that Washington is the "black hand" behind Manila's now-successful gambit (and possible imitation by other claimants), emboldening a weak power to challenge its emerging superpower neighbor.

Second, any seemingly strident US insistence that China obey international law as interpreted by the tribunal invites a particularly pointed form of a familiar charge of hypocrisy against the US. The tribunal specifically applied the law of UNCLOS. But the US still has not joined UNCLOS, and Washington thus must insist that others obey treaty rules that the US does not accept. When its own rights are at stake (as they are in US claims of navigational and other freedoms of operation in the South China Sea), Washington is reduced to claiming—plausibly but uncomfortably—that the relevant rules have become part of customary international law. Moreover, the arbitration panel's authority to decide the case without China's case-specific consent derives from the dispute

resolution provisions in UNCLOS—provisions that the US concedes are purely a product of the treaty and not part of customary international law and are, of course, not binding on the United States.

Third, the issuance of the tribunal's decision sharpens the challenge for the US of not pushing too much nor pushing too little for China to adhere to applicable international law (now as partly set forth in the decision). If the US presses very hard and lacks the will or the ability to induce some significant compliance by a recalcitrant China, the US will face a version of the "abandonment" problem in alliance-like relationships. Narrowly, the US's long-running, ostensibly robust commitment to international law as a means for addressing the South China Sea disputes will have been shown to be relatively hollow. This, in turn, feeds into the more general or broader problem of "abandonment" as perceived by US friends and allies. As with critical accounts of the pivot, so too with the US commitment to international law, the Philippines and others in the East Asian region (including some that are not South China Sea claimants) may at least incrementally lose confidence in the US's resolve and commitment to their security and the international rules that help to safeguard it. That, in turn, obviously threatens to erode US influence and US ability to pursue its aims (including maintaining peace and stability) in the region.

On the other, somewhat less sharp horn of the dilemma, Washington must be attentive to the risks of "entrapment." Although there is much posturing or paranoia in some Chinese sources' claims that Washington is puppet master behind the Philippines'—and Vietnam's—temerity in opposing China, an especially ardent (and not obviously hollow) US push in support of the relatively unambiguous international law and the clear winner / loser distinction in the arbitration decision might—especially in the relatively short term—be over-interpreted by the Philippines or other rival claimants (although the policy preferences and initial post-decision posture of the new Duterte government appear to have reduced this risk with the Philippines). It might lead to a law-themed variation of a recognized problem of alliance-like relationships, encouraging US friends or allies to be more assertive and intractable in dealing with China over the South China Sea, and doing so to an extent that impedes the US's ability to find compromise with Beijing or some relatively face-saving path for China that might better serve the interests of the United States and the goals of regional peace and stability.

### **International Law's Bold Reach and Lurking Vulnerability**

Finally, the arbitration panel's unanimous and strong decision—determining a clear winner (the Philippines and, prospectively, other Southeast Asian claimants) and loser (China), ordering significant behavioral changes by China, sharply condemning many Chinese claims and actions, and reaching conclusions on all of the many and varied claims raised by the Philippines across several doctrinal areas—is, at least at first blush, a bold proclamation of international law's reach, power, and potential utility. This outcome diverged sharply from expectations in some quarters that the panel might determine it had no jurisdiction over especially tough or controversial claims, or might decide it had insufficient information to rule on some issues, or might say that China's 9-dash line claim was ambiguous in its legal nature and potentially acceptable under some but not other interpretations, or might resort to unprincipled, half-a-loaf solutions, or might trim its sails when faced with issuing orders that China was likely to flout, and so on.

But with such boldness come obvious risks for international law and the Permanent Court of Arbitration and kindred bodies and procedures that had no direct role in the Philippines' South China Sea case. The tribunal all too evidently lacks real enforcement power. That obvious and brute fact is what makes China's calculus of risks and interests and the US's calibration of its commitment to the decision, the underlying process, and the decision's implementation so important. If, in the end, reality on the ground (and in the water) comes significantly into line with the arbitration decision, it will mark at least a partial victory for international law. If an important reason why that occurs is China's recognition of the reputational costs of openly flouting international law (and doing so in ways that deeply alarm neighboring states about China's intentions more generally), or the US's—and others'—commitment to supporting the decision because of the direct and indirect benefits flowing from adherence to international legal rules (ones that generally reflect the US's and other status quo states' substantive preferences), then it will have been a more significant advance for international law and the hope of peaceful resolution of disputes that such law and related institutions can help to achieve. If not, the initial win for international law will have been a very short-lived and even pyrrhic victory.

