

# The South China Sea after ‘Philippines v. China’: Summer of Our Discontent?

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## Summary

The July 2016 decision by the Permanent Court of Arbitration in the case of the Philippines versus China on outstanding legal disputes in the South China Sea was a watershed in the ongoing dispute over the waterway’s status. Although the verdicts weighed heavily against China’s claim to historical waters in the SCS, the Court’s decision will hardly be the last word on the subject, given Beijing’s rejection of the ruling and the growing importance of the waterway to both China as well as Southeast Asia and US policy in East Asia. In the wake of the decision, a cooling-off period would be ideal, but there are several variables which may or may not permit a reduction in tensions to take hold.

The summer of 2016 witnessed an unusually high degree of political and legal activity focussed on the status of the South China Sea (SCS). The waterway continues to be a source of regional discord between China and its southern neighbours, with a resolution remaining evasive. The catalyst which brought the SCS under further international scrutiny, however, was the long-awaited ruling by the Permanent Court of Arbitration (PCA) in The Hague in regards to a case brought by the government of the Philippines to the PCA in January 2013. The then-government of Benigno Aquino III in Manila sought a clarification from the Court on the legal status of waters in the South China Sea disputed between China and the Philippines. More specifically, the Philippine government argued that China’s maritime claims in the SCS, in the form of a ‘nine-dashed line’ which encompassed the majority of the sea, lacked a legal basis, clashed with the Philippines’ own 200 nautical mile exclusive economic zone (EEZ), and was interfering with maritime commerce.

The government of China refused to participate in the PCA arbitration, arguing that the Court was acting out of its jurisdiction, and that bilateral negotiations were the optimal method of settling the dispute. Beijing also censured the Philippines for bad faith in going outside of the Declaration

on the Conduct of Parties in the South China Sea (DOC),<sup>1</sup> signed between China and ASEAN in 2002, and instead attempting to internationalize the conflict. China also reiterated its support for the UN Convention on the Law of the Sea, while expressing the view that UNCLOS should not be used as a blunt instrument to deny countries their sovereign territory or to engage in a soft containment strategy.

The PCA ruled in October 2015 that the court did have the mandate to pursue many of the requests made by the Philippines,<sup>2</sup> including central arguments over the status of disputed features in the South China Sea, and whether these features were capable of generating their own EEZs, whether Philippine fishing vessels were being unlawfully prevented from operating in parts of the disputed zones, and whether Chinese vessels and activities in the SCS were also a hazard to the local environment. After that decision, Beijing continued to reject the validity of the PCA case, while re-affirming that the South China Sea represented Chinese historical waters and that the country’s activities within the nine-dashed line were legal and justified. Moreover, according to Beijing, the Court was confusing the question of SCS exploitation rights with questions of sovereignty, asserting that the latter point was well outside of the PCA’s mandate. After confirming that it would not recognise any ruling by the Court, the Chinese government released a position paper in December 2014 outlining its historical claims to the SCS and the invalidity of Manila’s legal actions.

## A Sea of Troubles

The origins of the current dispute, and the PCA case, are based on the greater question of South China Sea sovereignty, which has been an issue for decades but has only intensified in difficulty in recent years as China, other major disputants, and the

<sup>1</sup> The text of the DOC can be read at <[http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2)>.

<sup>2</sup> ‘Press Release: Arbitration between the Republic of the Philippines and the People’s Republic of China,’ *Permanent Court of Arbitration, The Hague*, 29 October, <<http://www.pcacases.com/web/sendAttach/1503>>.

United States have increased their presence in the region.<sup>3</sup> The SCS is of great economic value to East Asia, as it is believed to be holding rich amounts of oil and natural gas deposits, and is also a major source of fish and seafood, estimated to produce about ten percent of the global catch each year.<sup>4</sup> As well, the South China Sea is a major sea lane of communication (SLoC), with about US\$5 trillion in shipping is estimated to pass through the SCS every year, which is why much of the ongoing dispute has centred on ‘freedom of navigation’ concerns for both military and civilian vessels.

The Chinese government has maintained that the area within a nine-dashed line (*jiuduan xian*), which has been used on official Chinese maps, is its sovereign waters. The first such map to indicate the line appeared in 1947, but there were charts from the 1930s which also indicated that the region was under Chinese historical jurisdiction. However, there remains no definitive demarcation of the nine-dashed line, which used to be eleven dashes before being reduced to nine in 1953 in a gesture of goodwill to what was then North Vietnam. A tenth dash was added to official Chinese ‘vertical’ maps produced after 2013 to include Taiwan and further illustrate an unbroken area of Chinese waters from the East China Sea to the SCS, as well as the ‘first island chain’ (*diyī daolian*) demarcated by the Philippines, Taiwan and Japan.

The South China Sea also includes several small features which have also been a source of contention, including the Spratly and Paracel Islands, which have been claimed in whole or in part by China and other governments in the region, including Vietnam and the Philippines as well as Brunei, Malaysia and Taiwan. There is also a potential dispute in the waters around Natuna Island, which are claimed by China and Indonesia, although there is no dispute over the island itself, which is administered by Jakarta. Several claimants have placed small outposts or structures on these features to further claim sovereignty, especially in the Spratlys.

There have been incidents of direct conflict over the features in the SCS, including in January 1974 when a brief skirmish between China and South Vietnam resulted in the Paracel Islands being placed under Chinese sovereignty, while still being claimed by Hanoi. There was also a diplomatic incident between China and the Philippines when it was discovered in 1995 that China was building various structures on Mischief Reef in the Spratlys. With the signing of the DOC, there was a cooling-off period, and a *de facto* ‘agree to disagree’ atmosphere, among the disputants. The 2002 declaration included

support for peaceful negotiations, promises to explore joint security cooperation, and a call to end any further provocative actions in the region.

In the decade afterwards, confidence between Beijing and the Southeast Asian claimants nonetheless began to erode for a variety of reasons. ASEAN states, especially the Philippines and Vietnam, were growing concerned about China’s naval and civilian maritime expansion and Beijing’s ongoing claims to the nine-dashed line region, while China was unhappy with what it saw as ongoing unregulated fishing activities in the SCS as well as the possibility of Southeast Asian governments allowing foreign firms to conduct surveys for oil and gas in the region. For example, there were incidents in 2011 when three Chinese surveillance vessels cut the exploration cable of a survey vessel belonging to PetroVietnam over these concerns. In the middle of 2014, an oilrig owned by the China National Offshore Oil Corp. was towed into waters also claimed by Vietnam, leading to a diplomatic standoff until the rig was withdrawn.

As well, after the Obama government began to elucidate the framework for its ‘Pivot to Asia’ or rebalancing policy in 2011, further concerns were raised in Beijing about a possible neo-containment policy which would seek to deny China access to what it termed its ‘blue national soil’. Beijing has also been concerned about the security of the Malacca Straits region, which China heavily depends on for trade and energy supplies via the Indian Ocean. The ‘Malacca Dilemma’ describes the worry that the Straits could be interdicted to strangle Chinese trade.<sup>5</sup> Also, during this time, many of the claimants began to occupy some of the disputed Spratly Islands. In 2013, Beijing announced that several of its civilian maritime patrol bodies would be amalgamated into a unified Chinese Coast Guard (*Zhongguo Haijing*), which since then has been primarily responsible for patrols and surveillance in the SCS region, along with fishing boats and Chinese naval vessels in what has been referred to as a multi-layered, ‘cabbage strategy’ (*baicai celue*).

The events which would lead up to the decision by the Philippines to bring the South China Sea dispute to the PCA mainly took place in 2012 as a result of an incident in April-July involving a tense standoff between Chinese and Philippine fishing and patrol vessels in the Scarborough Shoal, known in China as *Huangyan Dao* and in the Philippines as either Bajo de Masinloc or the Panatag Shoal. The crisis only ended when the Philippine vessels withdrew and Chinese ships continued to operate near the Shoal. This shoal, a rich fishing area, is viewed as one of the most delicate potential flashpoints in the current dispute, given that it rests only about 220 kilometres from Luzon Island in the Philippines, with Manila claiming it as historical territory and part of its EEZ.

However, China claims the Scarborough Shoal as part of its ancestral holdings dating back at least as far as the Yuan Dynasty in the thirteenth century, and considers the Shoal an island with

<sup>3</sup> Key background reading on the current history of the SCS dispute includes Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (New Haven and London: Yale University Press, 2014), Ian Storey and Lin Cheng-Yi (eds.), *The South China Sea Dispute: Navigating Strategic and Diplomatic Tensions* (Singapore: ISEAS, 2016), and Enrico Fels and Truong-Minh Vu (eds.) *Power Politics in Asia’s Contested Waters: Territorial Disputes in the South China Sea*, (Heidelberg: Springer, 2016). See also ‘Stirring up the South China Sea (III): A Fleeting Opportunity for Calm,’ International Crisis Group, *Asia Report* N°267, 7 May 2015.

<sup>4</sup> Alan Dupont and Christopher G. Baker, ‘East Asia’s Maritime Disputes: Fishing in Troubled Waters,’ *Washington Quarterly* 37(1)(Spring 2014): 81.

<sup>5</sup> See Marc Lanteigne, ‘China’s Maritime Security and the “Malacca Dilemma”,’ *Asian Security* 4(2)(2008): 143-61.

an EEZ, and part of the larger *Zhongsha Qundao* archipelago in the northern part of the SCS. Any further clashes between China and the Philippines over this area could be especially risky especially given the 1951 Mutual Defence Treaty between the Manila and Washington. The response to the 2012 incident by the Aquino government was to further strengthen military cooperation with the United States, including rotating deployment of US military aircraft, and to bring the case of South China Sea jurisdiction to the PCA in the hopes of finally resolving the outstanding sovereignty disputes.

The overall SCS security situation was further complicated when, in early 2015, it was revealed that China was seeking to 'augment' several reefs in the Spratlys by adding sand and building infrastructure, including on Mischief Reef, Cuarteron Reef, Subi Reef and most notably Fiery Cross Reef, where a three-kilometre long airstrip was being built along with other facilities, (a second airstrip was reportedly under construction at Subi). This type of activity has been carried out by other parties in the region, for example at Sand Cay (*Đào Sơn Ca*) by Vietnam. In 1999, the Philippines purposefully ran a ship, the *Sierra Madre*, aground near the disputed Ayungin (Second Thomas) Shoal in the Spratlys, and kept the vessel manned, in order to reinforce Philippine claims there. However, the speed and volume of the Chinese reclamation projects were striking, and prompted US military officials to accuse Beijing of unilaterally seeking to 'create facts in the water' and develop a 'great wall of sand'.<sup>6</sup> China has argued that such activities were necessary to safeguard Chinese strategic interests in the SCS and also allow for the greater security of civilian vessels operating in the sea.

Nonetheless, the United States responded to these developments by commencing a series of 'freedom of navigation operations' (FONOPs), in the South China Sea, often near some of the islets in question. Commencing in October 2015, the US Navy destroyer *USS Lassen* passed through the Spratly Islands, including sailing within twelve nautical miles of Subi Reef. Two other FONOPs took place since then, with the most recent being in May 2016 when the destroyer *USS William P. Lawrence* sailed close to Fiery Cross Reef. However, the effectiveness of these operations continues to be debated in American foreign policy circles.

### Sound and Fury, Signifying Nothing?

The PCA's final ruling by the five-judge tribunal on the case was handed down in July 2016,<sup>7</sup> and even though it was expected that the verdicts would favour the Philippines, the decisions were even less beneficial for China than widely

anticipated. The primary ruling was that Beijing's claim to the maritime area identified by the nine-dashed line was without legal merit and contrary to UNCLOS. Moreover, the ruling also specified the status of several disputed features in the South China Sea, including Scarborough Shoal, Mischief Reef and Fiery Cross Reef, as rocks, which could not sustain human life and there cannot generate a 200nm exclusive economic zone as stipulated under UNCLOS. The construction and augmentation of land on Mischief Reef, and the interdiction of Philippine vessels by Chinese ships around Scarborough Shoal, were also judged to be unlawful activities. Finally, Beijing was cited for damaging the environment in some of the disputed areas and aggravating the dispute by permanently 'destroying the natural condition' of several features including Mischief Reef, Cuarteron Reef, Fiery Cross Reef, and Subi Reef.

Beijing immediately declared the decision to be 'null and void', and again called upon the Philippines to restart bilateral talks on the solving their maritime disputes. The government of China has also been critical of remarks by other governments, notably by the US, Japan and Australia, calling upon Beijing to agree to the ruling's stipulations. Immediately after the verdict was released, the Chinese State Council Information Office issued a white paper on the current bilateral situation between China and the Philippines was released by, calling for bilateral talks and reiterating that '*China's sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea have been established in the long course of history, and are solidly grounded in history and law*'.<sup>8</sup>

The ruling was also a setback for Taiwan, which administers Itu Aba, also known as Taiping Island, in the Spratly region. The case included Itu Aba on its list of features under question, and despite the size of the feature, (46 hectares), Itu Aba was also judged to be a rock as opposed to an island, and therefore unable to generate its own 200 nautical mile EEZ. The Taiwanese government rejected the verdict, and incoming president Tsai Ing-wen authorized the deployment of a frigate to patrol the region shortly after the rulings were announced.

In addition to calls for a resumption of bilateral talks with Manila, China has also been supportive of the development of a code of conduct (CoC) with the South China Sea disputants, but this process has been slow and there have been differences within ASEAN, as demonstrated by recent summits, including the Association's September 2016 leadership meetings in Vientiane, over how best to address China and its South China Sea policies. In the wake of the verdicts, concerns remained that Beijing would decide to accelerate

6 Andrew Browne, 'How China Upstaged US With a "Great Wall of Sand"', *Wall Street Journal*, 12 April 2016. 11.

7 'PCA Case No. 2013-19 In the Matter of the South China Sea Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China – Award,' *Permanent Court of Arbitration*, 12 July 2016, <<http://www.pccases.com/pcadocs/PH-CN%20-%202020160712%20-%20Award.pdf>>.

8 'China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea,' *Xinhua*, 13 July 2016, <[http://news.xinhuanet.com/english/china/2016-07/13/c\\_135509153.htm](http://news.xinhuanet.com/english/china/2016-07/13/c_135509153.htm)>.

its island development policies in the Sea, and possibly seek to build up and even add facilities to the Scarborough Shoal and declare an Air Defence Identification Zone (ADIZ) in the South China Sea, similar to the one placed in the East China Sea by Beijing in 2013. At the June 2016 Shangri-La Dialogue in Singapore on regional security, PLA Navy Admiral Sun Jianguo defended his country's position in the South China Sea, adding that 'we do not make trouble, but we have no fear of trouble'.<sup>9</sup>

### Outlook

At present, the most optimal scenario in the short term would be a cooling off period, which so far appears to be supported by all of the principal players. However, since the verdict Beijing has not shown signs of reducing its presence in the region, as evidenced by joint naval maneuvers by Chinese and Russian naval vessels in the SCS in September 2016. There are also several other 'wild cards' remaining in the South China Sea as well as in the greater Western Pacific.

First, there is the United States, which at the time of the PCA verdict was entering the crescendo of its 2016 presidential election season, with two candidates with often-different views on the US-China relationship as well as American commitments to allies in the region. The degree to which the post-Obama government in the US would continue to focus on South China Sea security and the pivot policy, given other American strategic challenges elsewhere in the world, remains an open question.

Second, the Philippine government of Rodrigo Duterte, who assumed office in June 2016, has been giving decidedly mixed signals towards both China and the United States regarding Manila's future relations with both powers. He has been critical of the Obama government, had called for the end of joint sea patrols with American vessels and the withdrawal of US Special Forces from the southern Philippines in September 2016, and hinted during the same month that he might be interested in purchasing arms from both China and Russia.

Third, there is the question of how SCS disputes will factor into wider security concerns in the Asia-Pacific, notably in the wake of North Korea fifth nuclear warhead test in September 2016, difficult relations between China and South Korea after Seoul's agreement to co-develop a 'terminal high altitude area defence' (THAAD) anti-missile system with Washington, and ongoing differences between China and Japan in the East China Sea. As Beijing faces economic challenges and the run up to the 19th National Congress of the Communist Party in 2017, Beijing remains sensitive to security challenges on its periphery.

Finally, there is the future question of the role of the South China Sea in Beijing's ongoing Belt and Road Initiative, (BRI), given that the South China Sea would be an essential component of the '21st Century Maritime Silk Road' trade routes which would link China to key markets in Africa, Europe, the Middle East and South Asia. Beijing has sought to increase its economic and strategic presence in the Indian Ocean, (including the March 2016 announcement of a Chinese naval supply facility being built in Djibouti), with the SCS being an essential outlet. With all of these issues in mind, it is apparent that China's maritime strategic thinking is well into a new phase, with the SCS continuing to play a major role.

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<sup>9</sup> The speech can be read at <<https://www.iiss.org/en/events/shangri-la%20dialogue/archive/shangri-la-dialogue-2016-4a4b/plenary4-6c15/jianguo-6391>>.

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