

Erik De Castro, Reuters

## **Dead in the Water: The South China Sea Arbitral Award, One Year Later**

Where does the international tribunal's July 2016 award on the South China Sea disputes between the Philippines and China stand?

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By **Carl Thayer**

On July 12, 2016, the Hague-based arbitral tribunal that heard the case of the Philippines against China on their maritime disputes in the South China Sea issued its award. The award comprehensively supported nearly all of the 15 submissions made by the Philippines and represented a major advancement in interpreting and clarifying the United Nations Convention on the Law of

the Sea (UNCLOS). UNCLOS is widely regarded by international law specialists as the constitution of the world's oceans and both China and the Philippines have signed and ratified the convention.

According to UNCLOS Annex VII, Article 11, which outlines arbitration, "The award shall be final and without appeal... It shall be complied with by the parties to the dispute." Looking back over the past year, however, it is evident that the arbitral tribunal's award is dead in the water. Neither China nor the Philippines have complied with the award. China denounced the entire arbitral process from the start and has repeatedly stated it does not recognize the authority of the tribunal. In the meantime, the Philippines, under the new administration of President Rodrigo Duterte, has set aside the award in an effort to improve relations with China.

### **The Findings of the Arbitral Tribunal in July 2016**

The arbitral tribunal's award, or findings, may be grouped into five categories. First, the tribunal ruled that China's nine-dash line claim to historic rights, other sovereign rights, and jurisdiction in the South China Sea "are contrary to the Convention and without lawful effect." Further, the tribunal found that UNCLOS "superseded any historic rights, or other sovereign rights or jurisdiction" claimed by China "in excess of the limits imposed."

Second, the tribunal ruled that none of the land features in the South China Sea were islands as defined by UNCLOS and therefore these features were not entitled to a 200 nautical mile (nm) exclusive economic zone (EEZ) or an extended continental shelf. The tribunal determined that Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, McKennan Reef, and Scarborough Shoal were rocks and were only entitled to a 12 nm territorial sea.

The tribunal also found that Gaven Reef (South), Hughes Reef, Mischief Reef, Second Thomas Shoal, and Subi Reef were low tide elevations and therefore not entitled to any maritime zones and not subject to appropriation. In other words, China could not claim sovereignty over these features.

Third, the arbitral tribunal found that Chinese law enforcement vessels breached China's obligations under UNCLOS and the Convention on the International Regulations for Preventing Collisions at Sea (1972) by creating a "serious risk of collision and danger to Philippine ships and personnel" through their aggressive tactics, such as ramming.

Further, the tribunal found that China's maritime law enforcement vessels violated the Philippines' sovereign rights by interfering with commercial oil exploration operations, imposing an illegal moratorium on fishing, failing to prevent Chinese flagged vessels from fishing illegally, and preventing Filipino fishermen from engaging in traditional fishing.

Fourth, the arbitral tribunal found that China failed to meet its obligations to protect and preserve the maritime environment in the South China Sea. According to the ruling, China's construction of artificial islands "caused severe, irreparable harm to the coral reef ecosystem," and "China has not cooperated or coordinated with the other states bordering the South China Sea concerning the protection and preservation of the marine environment."

Fifth, the arbitral tribunal found that China's construction of artificial islands after the Philippines lodged its claims in January 2013 aggravated and extended the legal dispute over maritime entitlements and protection and preservation of the marine environment.

Under UNCLOS, the arbitral tribunal's award is binding on China and the Philippines; it must be complied with immediately and is not subject to appeal.

### **Responses by ASEAN States**

The general response by Southeast Asian states to the award by the arbitral tribunal overwhelmingly has been low key, muted, and in line with previous ASEAN declaratory policy that eschews mentioning China by name and refers elliptically to UNCLOS arbitration as "legal and diplomatic processes."

There are four Southeast Asian claimant states. They may be divided into two groups: the front-line states (the Philippines and Vietnam) and the other claimants (Malaysia and Brunei). Indonesia represents a special case because officially it does not view itself as a party to a maritime dispute in the South China Sea. However, illegal Chinese fishing and illegal law enforcement actions by China's Coast Guard in the waters near Natuna Island in Indonesia's EEZ have drawn Jakarta into a de facto maritime dispute with China.

As a result of national elections held in May 2016, Rodrigo Duterte was sworn in as the Philippines' new president on June 30, replacing Benigno Aquino, who initiated the arbitral proceedings against China in January 2013. The new Philippine administration issued a statement on July 12 that welcomed the arbitral tribunal's award and called "on all those concerned to exercise restraint and sobriety... The Philippines strongly affirms its respect for this milestone decision as an important contribution to ongoing efforts in addressing disputes in the South China Sea."

Duterte, however, has repeatedly stated he would set aside the arbitral tribunal's award and pursue bilateral discussions with China. In January 2017, at the 20th round of diplomatic consultations between the Philippines and China, the two sides agreed to establish a

bilateral mechanism on the South China Sea issue. Later, the media reported that these bilateral consultations would be held in May. As *The Diplomat* went to print, there have been no reports that these consultations have commenced.

Vietnam also responded to the award on the day it was issued. A spokesperson for the Foreign Ministry stated: “Vietnam welcomes the fact that, on July 12, 2016, the tribunal issued its award in the arbitration between the Philippines and China... Vietnam strongly supports the settlement of disputes in the East Sea [South China Sea] by peaceful means, including legal and diplomatic processes...”

Vietnam’s senior leaders have avoided specifically mentioning the arbitral tribunal’s award in public comments on the South China Sea. For example, newly appointed Minister for National Defense General Ngo Xuan Lich visited Beijing in August 2016 at the invitation of his counterpart. The Vietnamese media reported that Lich “affirmed Vietnam’s consistent stance that the two countries should observe common perceptions reached by their high-ranking leaders and solve disputes by peaceful means in line with international law, especially the 1982 UN Convention on the Law of the Sea.”

A month later, Prime Minister Nguyen Xuan Phuc made an official visit to China at the invitation of his counterpart Premier Li Keqiang. The two ministers repeated past formulaic expressions about effectively implementing the Declaration on the Conduct of Parties in the South China Sea (DOC) and moving expeditiously toward a Code of Conduct in the South China Sea (COC). The joint communiqué issued after their meeting made no mention of the arbitral tribunal’s award.

Malaysia’s Foreign Ministry also issued a statement on July 13 that noted that the arbitral tribunal had issued an award. This statement hoped that:

*... all relevant parties can peacefully resolve disputes by full respect for diplomatic and legal processes, and relevant international law and 1982 UNCLOS. Malaysia believes that it is important to maintain peace and stability through the exercise of self-restraint in the conduct of activities that may further complicate disputes or escalate tension, and avoid the threat or use of force in the South China Sea.*

The next day, on July 14, Brunei's deputy minister for foreign affairs gave an exclusive interview to the Brunei Times in which he stated, "We are fully committed to ensuring the peaceful resolution of disputes, without resorting to threats or use of force in accordance with universally recognized principles of international law including the United Nations Convention on the Law of the Sea."

Indonesia issued two statements. The first statement was issued on July 12, before the arbitral tribunal's award was made public. The statement called "on all parties to exercise self-restraint and to refrain from any action that could escalate tensions."

Indonesia's second statement was made after the award's release and it contained no mention of the arbitral tribunal. This statement called on all parties "to exercise self-restraint and to refrain from any actions that could escalate tension, as well as to protect Southeast Asia region [sic] particularly from any military activity that could pose a threat to peace and stability, and to respect international law, especially UNCLOS... [and] to continue peaceful negotiations on their overlapping claims of sovereignty in the South China Sea in accordance with international law."

Myanmar's Ministry of Foreign Affairs issued a press release on July 13 that took note of the award by the arbitral tribunal and "urged all parties to exercise

restraint.” Cambodia, Laos, and Thailand all released neutral statements without mentioning the arbitral tribunal’s award.

### **ASEAN’s Diplomatic Stance**

In 1992, ASEAN issued its first statement of concern on the South China Sea in response to growing tensions between Vietnam and China over oil exploration activities in the waters around Vanguard Bank. From that time to the present, ASEAN has refrained from specifically mentioning China by name.

The arbitral tribunal’s award is a bilateral matter between the Philippines and China and under international law these two parties were expected to comply with it. However, given China’s extremely hostile condemnation of the legal proceedings and the final award, it is unrealistic to expect ASEAN as an organization to take note of the award or even call on China by name to implement it.


ASEAN foreign ministers convened in Vientiane from July 24 to 25, 2016, for a normal ministerial meeting. Four major documents were issued that, when taken as a whole, set out ASEAN’s consensus diplomatic stance on maritime disputes in the South China Sea.

First, ASEAN ministers took note of the 40th anniversary of the Treaty of Amity and Cooperation in Southeast Asia (TAC), adopted in 1976. The TAC legally bound each signatory not to “participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.” The TAC also set out a mechanism for the pacific settlement of disputes. Subsequently, 20 states acceded to the TAC, including China, India Japan, Russia, Australia, the United States, and the European Union.

The ASEAN Foreign Ministers’ Statement on the TAC noted that this treaty “is the key code of conduct governing relations between states” and that all parties,

including High Contracting Parties from outside Southeast Asia, should “continue to fully respect and promote the effective implementation of the TAC.”

Next, the ASEAN foreign ministers issued their 49th Joint Communiqué summarizing their deliberations. The South China Sea was addressed in a separate section that closely followed previous statements. For example, the ASEAN foreign ministers expressed



*... serious concern over recent and ongoing developments and took note of the concerns expressed by some ministers on the land reclamations and escalation of activities in the area, which have eroded trust and confidence, increased tensions and may undermine peace, security, and stability in the region.*

The foreign ministers also “emphasised the importance of non-militarization and self-restraint in the conduct of all activities, including land reclamation that could further complicate the situation and escalate tensions in the South China Sea.” The foreign ministers then “highlighted the urgency to intensify efforts to achieve further substantive progress on the implementation of the DOC in its entirety as well as substantive negotiations for the early conclusion of the COC including the outline and timeline of, the COC.”

In a development that was little noticed at the time, the ASEAN foreign ministers extracted a key section from a statement issued in February 2016, and to give it emphasis inserted it as the second paragraph in their 49th Joint Communiqué. The extract stated, “We reaffirm our shared commitment to maintaining and promoting peace, security and stability in the region, as well as to the peaceful resolution of disputes, including full respect for legal and diplomatic processes, without resorting to the threat or use of force, in accordance with the



universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea...” [emphasis added]. As noted above, this elliptical phrase was a reference to the award by the arbitral tribunal.

On July 25, ASEAN foreign ministers met with their Chinese counterpart and issued a joint statement on the DOC. This document committed all parties to implement the DOC in its entirety, to work “substantively towards the early adoption” of the COC, and “to exercise self-restraint in the conduct of activities that would exercise or escalate disputes and affect peace and stability.”

To make their point, the ASEAN foreign ministers’ joint statement reiterated the wording of the 2002 DOC that self-restraint included such activities as “refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features...” This wording could be read as a reference to Scarborough Shoal, which is uninhabited, although it is regularly visited by Chinese fishermen. Additionally, Chinese Coast Guard vessels are permanently stationed there.

The fourth document to be issued by the ASEAN foreign ministers was a general Joint Statement on Peace, Security, and Stability in the Region. This document called on other states to respect ASEAN’s norms and principles.

The July round of ASEAN ministerial and related meetings was followed by the 28th and 29th ASEAN summits, which were held back-to-back in Vientiane from September 6 to 7, 2016. The ASEAN heads of government issued a statement that reproduced verbatim the seven paragraphs on the South China Sea from the 49th ASEAN Joint Communique and expressed their support for the “full respect for legal and diplomatic processes.”

ASEAN leaders also welcomed the adoption of the ASEAN-China Joint Statement on the DOC, the ASEAN-China Joint Statement on the Application of the Code of Unplanned Encounters at Sea (CUES) in the South China Sea, and the Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States in China in Response to Maritime Emergencies in the Implementation of the Declaration on Conduct of Parties in the South China Sea.

If the ASEAN statements released in 2016 after the arbitral tribunal issued its award represented a united front on the South China Sea, ASEAN's 30th Summit, held in Manila in late April 2017 under the chairmanship of the Philippines' Duterte, witnessed a setback.

International media reported intense wrangling among the leaders on the wording of the chairman's draft statement, particularly over recent Chinese militarization of its artificial islands. The final statement issued by the chair contained only two paragraphs on the South China Sea, which repeated past ASEAN formulations. It was buried at the very end of the document. The statement noted blandly that leaders "took note of concerns expressed by some leaders over recent developments in the area" rather than the "serious concerns" noted in 2016. There was no mention of the arbitral tribunal's award, although paragraph seven called for the peaceful settlement of disputes "including full respect for legal and diplomatic processes."

### **How Did China and Major External States React?**

In the aftermath of the arbitral tribunal's ruling, China was not only dismissive of the award, but mounted displays of military force over the Spratly Islands. On July 18, 2016, China aired a video showing two J-11 fighters and an H-6K bomber flying over Scarborough Shoal. In September, Chinese H6-K bombers, Su-30 jet fighters, and air refueling tankers conducted a combat training exercise over the Bashi Channel to the north of the

Philippines. And in December, China deployed a Xian H-6 nuclear bomber to patrol around the nine-dash line, which denotes China's claims to the South China Sea.

In September 2016, China took its most audacious step in militarizing its artificial islands by constructing reinforced hangars capable of housing 24 military aircraft on Fiery Cross, Subi, and Mischief Reefs. Later in the year, China erected hexagonal structures and installed Close In Weapon Support Systems and anti-aircraft guns on all of its artificial islands.

China also continued to apply diplomatic pressure on ASEAN and other states to refrain from making critical remarks about its behavior. For example, at the 3rd ASEAN Defense Ministers' Meeting Plus (ADMM+) held in Kuala Lumpur on November 4, 2016, China lodged strong objections to any critical references to the South China Sea in a draft joint declaration. When ASEAN bowed to China and removed the offending references, the United States objected. Consequently, no joint declaration was issued. Malaysia's defense minister issued a chairman's statement that elided the entire controversy and only briefly mentioned the South China Sea.

China's intimidating diplomatic posture failed to deter the United States and its allies Australia and Japan from publicly supporting the award by the arbitral tribunal. On July 25, the three countries issued a joint statement after their annual trilateral strategic dialogue. The statement declared that "the ministers expressed their strong support for the rule of law and called on China and the Philippines to abide by the arbitral tribunal's award of July 12 in the Philippines-China arbitration, which is final and legally binding on both parties."

The defense ministers from Australia, Japan, and the United States reiterated their support for UNCLOS and international arbitration at the Shangri-La Dialogue in

Singapore in June 2017. U.S. Defense Secretary James Mattis stated:

*The 2016 ruling by the Permanent Court of Arbitration [sic] on the case brought by the Philippines on the South China Sea is binding. We call on all claimants to use this as a starting point to peacefully manage their disputes in the South China Sea. Artificial-island construction and indisputable militarization of facilities on features in international waters undermine regional stability.*

Australia's Defense Minister Marise Payne echoed these remarks: "Australia calls on all countries to act in the South China Sea in ways that are consistent with international law, including the decision of the 2016 arbitral tribunal." And Japan's Defense Minister Tomomi Inada stated bluntly, "Regarding the South China Sea, the final award was rendered in the arbitration between the Philippines and China in July 2016. Despite the fact that this award is binding on both parties, the construction of outposts in the South China Sea and their use for military purposes continues."

### **What Are ASEAN's Next Steps?**

Despite ASEAN's general inability to mention the arbitral tribunal in any of its official statements, the group's diplomatic strategy has moved forward. In 2016, ASEAN and China adopted the CUES, the Guidelines for Hotline Communications in emergencies, and reached agreement on a draft framework of the Code of Conduct. The CUES is voluntary and does not apply to military vessels. With their arrival at a draft framework, China and ASEAN are poised to start discussions on the Code of Conduct in the South China Sea.

According to ASEAN diplomats, there are four substantive issues that need to be resolved now.

First, the current draft framework on the COC does not mention the geographic area of coverage. China insists that the COC should only apply to the waters around the Spratly group and that Scarborough Shoal and the Paracel Islands be excluded. The second issue to be resolved concerns enforcement; ASEAN wants the COC to be legally binding and China opposes this. The third and related issue concerns how the COC is to be adopted. China proposes that the COC be signed by all 11 foreign ministers. ASEAN would like to see the COC ratified by national legislatures to make it legally binding. Fourth, there are a number of technical issues that need to be addressed, including how to resolve differences over interpreting the COC and how to resolve actual disputes and incidents at sea.

### **China Has Been Let Off the Hook**

A year after the arbitral tribunal issued its award in the case of the Philippines v. China, neither party has taken steps to comply with the ruling. The inaction by both parties has weakened the fabric of international law in general and UNCLOS in particular, undermining the rules-based international order in the maritime domain. None of the ten members of ASEAN and indeed ASEAN itself dare mention the arbitral tribunal or its award in their official statements on the South China Sea to this day. This has had the effect of letting China off the hook to pursue its continued consolidation and militarization of the Spratly group in the South China Sea.

### **The Author**

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