



# ASEAN Focus



SPECIAL ISSUE ON THE  
**South China Sea Arbitration**  
RESPONSES AND IMPLICATIONS

# CONTENTS

- 1 EDITORIAL NOTES**
- 2 THE PHILIPPINES' SUBMISSIONS**
- 3 SUMMARY OF AWARD**
- 5 THE TRIBUNAL AWARD: WHAT IT MEANS**
- 8 THE REALITY OF CHINA'S LEGAL OBLIGATIONS  
IN THE SOUTH CHINA SEA**
- 10 THE PARADOX IN THE  
SOUTH CHINA SEA ARBITRATION**
- 11 THE PHILIPPINES: INTO STORMY WATERS AHEAD**
- 13 CHINA: THE TRIBUNAL AWARD AND ITS  
IMPLICATIONS ON THE SOUTH CHINA SEA DISPUTES**
- 15 WHAT DOES THE RULING MEAN FOR  
US-CHINA RELATIONS?**
- 16 WHAT IS AT STAKE FOR ASEAN?**
- 17 DEBUNKING THE MYTHS OF THE SOUTH CHINA SEA**  
*PERSPECTIVES FROM NEAR AND AFAR*
- 19 INDONESIA**
- 20 MALAYSIA**
- 21 VIETNAM**
- 22 AUSTRALIA**
- 23 INDIA**
- 24 USA**
- 25 THOUGHTS AND REFLECTIONS**
- 28 GLOSSARY**

**EDITORIAL CHAIRMAN**  
Tan Chin Tiong

**MANAGING EDITOR**  
Tang Siew Mun

**PRODUCTION EDITOR**  
Termsak Chalermphanupap

**CONSULTING EDITOR**  
Ian J Storey

**ASSISTANT  
PRODUCTION EDITOR**  
Jason Salim

**EDITORIAL COMMITTEE**  
Moe Thuzar  
Sanchita Basu Das  
Hoang Thi Ha  
Pham Thi Phuong Thao  
Nur Aziemah Aziz

**EDITORIAL ASSISTANT**  
Loh Yi Chin

The facts and views  
expressed are solely that  
of the author/authors and  
do not necessarily reflect  
that of ISEAS-Yusof Ishak  
Institute, their institutional  
affiliations and countries  
of citizenship. No part of  
this publication may be  
reproduced in any form  
without permission.

**ISEAS-Yusof Ishak Institute**  
30 Heng Mui Keng Terrace  
Pasir Panjang  
Singapore 119614  
Tel: (65) 6870 4509  
Fax: (65) 6778 1735

# Editorial Notes

The Chinese call it *Nan Hai*, the Malaysians call it *Laut Cina Selatan*, the Filipinos call it *Dagat Kanlurang Pilipinas* and the Vietnamese call it *Biển Đông*. Three years after the Philippines initiated proceedings against China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), the five judges on the Arbitral Tribunal finally rendered their long-anticipated judgement in a “unanimous Award” on 12 July 2016. In essence, the Philippines’ claims on the South China Sea (SCS) have been bolstered at the expense of China’s claims of historic rights behind the infamous nine-dash line. The award will have both immediate repercussions on the situation in the SCS, and long-term implications on regional security, the crucial Sino-US relations, and on the credibility and centrality of ASEAN as the premier promoter of regional stability, security, and prosperity.

To consider the SCS matter settled as a result of this award of the Arbitral Tribunal is wishful thinking. China has spent the weeks before and days after 12 July 2016 to ramp up publicity of its firm stance to “not accept, not participate, and not recognise” the judgement of the Tribunal, which it still insisted was illegally constituted – at least in its own interpretation of UNCLOS. Even the Philippines – which saw the handover of power from Benigno Aquino III to President Rodrigo Duterte just 13 days before the verdict was delivered – is hoping to reach out to China, with the hope of improving bilateral relations.

Meanwhile, ASEAN has yet to recover from yet another debacle at the Special ASEAN-China Foreign Ministers’ Meeting in Kunming, China a month ago, which saw an agreed-upon joint media statement by the ten ASEAN Foreign Ministers withdrawn due to vetoes presumably by China’s allies within ASEAN. An ASEAN statement on the outcome of the Tribunal’s award could not be issued owing to the lack of consensus. Although the SCS issue will continue to dominate ASEAN’s agenda for some time to come, it should not come to define the entirety of ASEAN and ASEAN-China relations.

It is imperative that all parties involved in the SCS disputes exercise restraint and let cooler heads prevail, and to resolve any and all differences peacefully in accordance with international law, including UNCLOS and the Treaty of Amity and Cooperation.

The ball is now in China’s court to manage the disputes so it does not get out of hand even if a solution is not yet within sight. As such, in order to help clarify the main points from the verdict, and assess its possible implications on the future of ASEAN, the South China Sea, and regional security, *ASEANFocus* is pleased to present this Special Issue dedicated to the Arbitral Tribunal’s award on the Philippines v. China.

At a very short notice, we have assembled a stellar line-up of academics, policymakers, and thought leaders from around the world to share their views on the award and the future of the SCS. This issue is peppered with background information on the SCS for an overview and quick understanding of this complicated subject.

Prof Robert Beckman starts us off with a much-needed précis and analysis of the award. Following that, Dr Justin Nankivell discusses the obligations of the parties to adhere to the award, while Dr Tseng Hui-Yi highlights some paradoxes inherent in the process. Prof Jay Batongbacal and Prof Zhu Feng will then explain the next steps for the Philippines and China respectively following the delivery of the Tribunal’s award. Dr Ian Storey and Dr Tang Siew Mun examine the award’s impact on the future of Sino-US relations and ASEAN respectively. Prof Wang Wen simplifies the totality of Chinese reservations with the award in ten points. Dr Dewi Fortuna Anwar, Mr Shahrman Lockman, Dr Le Hong Hiep, Dr Peter Jennings, Ambassador Shivshankar Menon, and Ms Bonnie Glaser each answers a few questions as we attempt to understand their respective countries’ perspectives on the issue at large. We end off with a list of Thoughts and Perspectives provided exclusively to *ASEANFocus* by some of the world’s leading experts and figures on a subject that has long been a central issue in regional security. ■

# The Philippines' Submissions

**O**n 22 January 2013, the Philippines initiated arbitration proceedings with the Permanent Court of Arbitration (PCA) in The Hague, the Netherlands, to clarify its conflicting claims with China in the South China Sea. Over the next two years, the five judges assigned to this case – Judge Thomas A. Mensah of Ghana (President), Judge Jean-Pierre Cot (France), Judge Stanislaw Pawlak (Poland), Professor Alfred Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany – deliberated on the Philippines' 15 submissions. These submissions essentially requested the Tribunal to find that:

- 1 China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea;
- 2 China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS;
- 3 Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
- 4 Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
- 5 Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
- 6 Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
- 7 Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;
- 8 China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;
- 9 China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
- 10 China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
- 11 China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;
- 12 China's occupation of and construction activities on Mischief Reef
  - (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
  - (b) violate China's duties to protect and preserve the marine environment under the Convention; and
  - (c) constitute unlawful acts of attempted appropriation in violation of the Convention;
- 13 China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;
- 14 Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
  - (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
  - (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
  - (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
  - (d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and
- 15 China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention. ■

1946

DECEMBER

Chinese Nationalist (Kuomintang) troops occupy Taiping (Itu Aba) Island – the largest island in the Spratly group with its own natural source of fresh water. The island remains under Taiwan's administration.

1947

DECEMBER

Taiwan publishes the "eleven dash line" map which marks its claim of jurisdiction in the South China Sea.

1974

JANUARY

China's People's Liberation Army (PLA) forces dislodge South Vietnamese forces from the Paracel Islands.

# Summary of Award

[Excerpted from the Press Release by the Permanent Court of Arbitration “THE SOUTH CHINA SEA ARBITRATION (THE REPUBLIC OF THE PHILIPPINES V. THE PEOPLE’S REPUBLIC OF CHINA)”, The Hague, 12 July 2016]

## **a** THE ‘NINE-DASH LINE’ AND CHINA’S CLAIM TO HISTORIC RIGHTS IN THE MARITIME AREAS OF THE SOUTH CHINA SEA

In its Award of 12 July 2016, the Tribunal considered the implications of China’s ‘nine-dash line’ and whether China has historic rights to resources in the South China Sea beyond the limits of the maritime zones that it is entitled to pursuant to the Convention.

The Tribunal examined the history of the Convention and its provisions concerning maritime zones and concluded that the Convention was intended to comprehensively allocate the rights of States to maritime areas. The Tribunal noted that the question of pre-existing rights to resources (in particular fishing resources) was carefully considered during the negotiations on the creation of the exclusive economic zone and that a number of States wished to preserve historic fishing rights in the new zone. This position was rejected, however, and the final text of the Convention gives other States only a limited right of access to fisheries in the exclusive economic zone (in the event the coastal State cannot harvest the full allowable catch) and no rights to petroleum or mineral resources. The Tribunal found that China’s claim to historic rights to resources was incompatible with the detailed allocation of rights and maritime zones in the Convention and concluded that, to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished by the entry into force of

the Convention to the extent they were incompatible with the Convention’s system of maritime zones.

The Tribunal also examined the historical record to determine whether China actually had historic rights to resources in the South China Sea prior to the entry into force of the Convention. The Tribunal noted that there is evidence that Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the South China Sea, although the Tribunal emphasized that it was not empowered to decide the question of sovereignty over the islands. However, the Tribunal considered that prior to the Convention, the waters of the South China Sea beyond the territorial sea were legally part of the high seas, in which vessels from any State could freely navigate and fish. Accordingly, the Tribunal concluded that historical navigation and fishing by China in the waters of the South China Sea represented the exercise of high seas freedoms, rather than a historic right, and that there was no evidence that China had historically exercised exclusive control over the waters of the South China Sea or prevented other States from exploiting their resources.

Accordingly, the Tribunal concluded that, as between the Philippines and China, there was no legal basis for China to claim historic rights to resources, in excess of the rights provided for by the Convention, within the sea areas falling within the ‘nine-dash line’.

## **b** THE STATUS OF FEATURES IN THE SOUTH CHINA SEA

In its Award of 12 July 2016, the Tribunal considered the status of features in the South China Sea and the entitlements to maritime areas that China could potentially claim pursuant to the Convention.

The Tribunal first undertook a technical evaluation as to whether certain coral reefs claimed by China are or are not above water at high tide. Under Articles 13 and 121 of the Convention, features that are above water at high tide generate an entitlement to at least a 12 nautical mile territorial sea, whereas features that are submerged at high tide generate no entitlement to maritime zones. The Tribunal noted that many of the reefs in the South China Sea have been heavily modified by recent land reclamation and construction and recalled that the Convention classifies features on the basis of their natural condition. The Tribunal appointed an expert hydrographer to assist it in evaluating

the Philippines’ technical evidence and relied heavily on archival materials and historical hydrographic surveys in evaluating the features. The Tribunal agreed with the Philippines that Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are high-tide features and that Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal were submerged at high tide in their natural condition. However, the Tribunal disagreed with the Philippines regarding the status of Gaven Reef (North) and McKennan Reef and concluded that both are high tide features.

The Tribunal then considered whether any of the features claimed by China could generate an entitlement to maritime zones beyond 12 nautical miles. Under Article 121 of the Convention, islands generate an entitlement to an exclusive economic zone of 200 nautical miles and to a continental shelf, but “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” The Tribunal noted that this

**1982**

**DECEMBER**

157 parties conclude negotiations over the United Nations Convention on the Law of the Sea (UNCLOS). To date 168 states have ratified the treaty. The US and Cambodia, among others, have signed but not ratified the treaty.

**1983**

1983: Malaysia occupies Swallow Reef.

**1986**

1986: Malaysian occupies Mariveles Bank and Ardasier Reef in the Spratlys.



provision was closely linked to the expansion of coastal State jurisdiction with the creation of the exclusive economic zone and was intended to prevent insignificant features from generating large entitlements to maritime zones that would infringe on the entitlements of inhabited territory or on the high seas and the area of the seabed reserved for the common heritage of mankind. The Tribunal interpreted Article 121 and concluded that the entitlements of a feature depend on (a) the objective capacity of a feature, (b) in its natural condition, to sustain either (c) a stable community of people or (d) economic activity that is neither dependent on outside resources nor purely extractive in nature.

The Tribunal noted that many of the features in the Spratly Islands are currently controlled by one or another of the littoral States, which have constructed installations and maintain personnel there. The Tribunal considered these modern presences to be dependent on outside resources and support and noted that many of the features have been modified to improve their habitability, including through land reclamation and the construction of infrastructure such as desalination plants. The Tribunal concluded that the current

presence of official personnel on many of the features does not establish their capacity, in their natural condition, to sustain a stable community of people and considered that historical evidence of habitation or economic life was more relevant to the objective capacity of the features. Examining the historical record, the Tribunal noted that the Spratly Islands were historically used by small groups of fishermen from China, as well as other States, and that several Japanese fishing and guano mining enterprises were attempted in the 1920s and 1930s. The Tribunal concluded that temporary use of the features by fishermen did not amount to inhabitation by a stable community and that all of the historical economic activity had been extractive in nature. Accordingly, the Tribunal concluded that all of the high-tide features in the Spratly Islands (including, for example, Itu Aba, Thitu, West York Island, Spratly Island, North-East Cay, South-West Cay) are legally “rocks” that do not generate an exclusive economic zone or continental shelf.

The Tribunal also held that the Convention does not provide for a group of islands such as the Spratly Islands to generate maritime zones collectively as a unit.

## C CHINESE ACTIVITIES IN THE SOUTH CHINA SEA

In its Award of 12 July 2016, the Tribunal considered the lawfulness under the Convention of various Chinese actions in the South China Sea.

Having found that Mischief Reef, Second Thomas Shoal and Reed Bank are submerged at high tide, form part of the exclusive economic zone and continental shelf of the Philippines, and are not overlapped by any possible entitlement of China, the Tribunal concluded that the Convention is clear in allocating sovereign rights to the Philippines with respect to sea areas in its exclusive economic zone. The Tribunal found as a matter of fact that China had (a) interfered with Philippine petroleum exploration at Reed Bank, (b) purported to prohibit fishing by Philippine vessels within the Philippines’ exclusive economic zone, (c) protected and failed to prevent Chinese fishermen from fishing within the Philippines’ exclusive economic zone at Mischief Reef and Second Thomas Shoal, and (d) constructed installations and artificial islands at Mischief Reef without the authorization of the Philippines. The Tribunal therefore concluded that China had violated the Philippines’ sovereign rights with respect to its exclusive economic zone and continental shelf.

The Tribunal next examined traditional fishing at Scarborough Shoal and concluded that fishermen from the Philippines, as well as fishermen from China and other countries, had long fished at the Shoal and had traditional fishing rights in the area. Because Scarborough Shoal is above water at high tide, it generates an entitlement to a territorial sea, its surrounding waters do not form part of the exclusive economic zone,

and traditional fishing rights were not extinguished by the Convention. Although the Tribunal emphasized that it was not deciding sovereignty over Scarborough Shoal, it found that China had violated its duty to respect to the traditional fishing rights of Philippine fishermen by halting access to the Shoal after May 2012. The Tribunal noted, however, that it would reach the same conclusion with respect to the traditional fishing rights of Chinese fishermen if the Philippines were to prevent fishing by Chinese nationals at Scarborough Shoal.

The Tribunal also considered the effect of China’s actions on the marine environment. In doing so, the Tribunal was assisted by three independent experts on coral reef biology who were appointed to assist it in evaluating the available scientific evidence and the Philippines’ expert reports. The Tribunal found that China’s recent large scale land reclamation and construction of artificial islands at seven features in the Spratly Islands has caused severe harm to the coral reef environment and that China has violated its obligation under Articles 192 and 194 of the Convention to preserve and protect the marine environment with respect to fragile ecosystems and the habitat of depleted, threatened, or endangered species. The Tribunal also found that Chinese fishermen have engaged in the harvesting of endangered sea turtles, coral, and giant clams on a substantial scale in the South China Sea, using methods that inflict severe damage on the coral reef environment. The Tribunal found that Chinese authorities were aware of these activities and failed to fulfill their due diligence obligations under the Convention to stop them.

Finally, the Tribunal considered the lawfulness of the conduct of Chinese law enforcement vessels at Scarborough

1988

MARCH

PLA forces clash with South Vietnamese military personnel at Johnson Reef. 64 South Vietnamese military personnel were killed.

1990

JANUARY

Indonesia, with funding from Canada, initiates an informal approach to confidence-building in the South China Sea with its Workshop on Managing Potential Conflicts in the South China Sea. The 24th edition of the workshop was convened in October 2014 in Bali, Indonesia.

1991

Malaysia develops a holiday resort on Swallow Reef (Pulau Layang-Layang).

Shoal on two occasions in April and May 2012 when Chinese vessels had sought to physically obstruct Philippine vessels from approaching or gaining entrance to the Shoal. In doing so, the Tribunal was assisted by an independent expert on navigational safety who was appointed to assist it in reviewing the written reports provided by the officers of the Philippine vessels and the expert evidence on navigational safety provided by the Philippines. The Tribunal found that Chinese law enforcement vessels had repeatedly approached the Philippine vessels at high speed and sought to cross ahead of them at close distances, creating serious risk of collision and danger to Philippine ships and personnel. The Tribunal concluded that China had breached its obligations under the Convention on the International Regulations for Preventing Collisions at Sea, 1972, and Article 94 the Convention concerning maritime safety.

## **d** AGGRAVATION OF THE DISPUTE BETWEEN THE PARTIES

In its Award of 12 July 2016, the Tribunal considered whether China's recent large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands since the commencement of the arbitration had aggravated the dispute between the Parties. The Tribunal recalled that there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. The Tribunal noted that China has (a) built a large artificial island on Mischief Reef, a low-tide elevation located in the exclusive economic zone of the Philippines; (b) caused permanent, irreparable harm to the coral reef ecosystem and (c) permanently destroyed evidence of the natural condition of the features in question. The Tribunal concluded that China had violated its obligations to refrain from aggravating or extending the Parties' disputes during the pendency of the settlement process.

## **e** FUTURE CONDUCT OF THE PARTIES

Finally, the Tribunal considered the Philippines' request for a declaration that, going forward, China shall respect the rights and freedoms of the Philippines and comply with its duties under the Convention. In this respect, the Tribunal noted that both the Philippines and China have repeatedly accepted that the Convention and general obligations of good faith define and regulate their conduct. The Tribunal considered that the root of the disputes at issue in this arbitration lies not in any intention on the part of China or the Philippines to infringe on the legal rights of the other, but rather in fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea. The Tribunal recalled that it is a fundamental principle of international law that bad faith is not presumed and noted that Article 11 of Annex VII provides that the "award... shall be complied with by the parties to the dispute." The Tribunal therefore considered that no further declaration was necessary. ■

# The Tribunal Award: What It Means

BY ROBERT BECKMAN

**T**he Philippines initiated the arbitration proceedings on 22 January 2013. Although China decided that it would not appear or participate in the proceedings, the arbitration proceeded in its absence in accordance with the provisions of UNCLOS. After almost three years of proceedings, the five-member tribunal issued its award on jurisdiction on 29 October 2015. A hearing on the merits of the case was held late last November. The award on the merits was issued on 12 July 2016. The awards on both jurisdiction and the merits were by a unanimous decision of the five members of the tribunal.

## THE ROOT OF THE DISPUTES AT ISSUE BETWEEN THE PARTIES

The tribunal found that some of China's actions in the South China Sea were contrary to its obligations under UNCLOS and, in some cases, were an infringement of the rights of the Philippines. However, the tribunal noted that as a matter of principle, both China and the Philippines have accepted UNCLOS and the general obligation to comply with its provisions in good faith.

The tribunal stated that the root of the disputes at issue between the Philippines and China lies in fundamentally different understandings of their respective rights under UNCLOS in the waters in the South China Sea, and not in any intention by one of the parties to infringe the rights of the other.

It can be argued that this has indeed been the essence of the problem. Although China participated in the nine years of negotiations leading to the adoption of UNCLOS, and became a party to UNCLOS in 1996, China has interpreted and applied the provisions of the UNCLOS in the light of its own historical and cultural traditions.

China seems to have been unable to understand that UNCLOS was intended to establish a universal body of rules that is to be interpreted and applied by all state parties in the same manner, notwithstanding their historical and cultural traditions.

For example, China did not seem to understand that UNCLOS provides that coastal states have the sovereign right to explore and exploit all of the living and non-living resources in the 200-nautical-mile exclusive economic zone (EEZ) measured from their mainland coast, and that it was not compatible with the UNCLOS for China to assert "historic rights" to resources in the EEZ of other states based on its "nine-dash line" map.

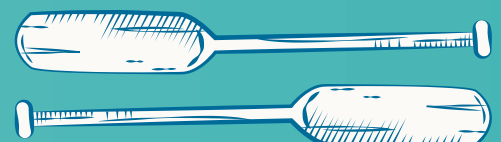
1992

FEBRUARY

China asserts sovereignty over both the Paracels and Spratly Islands with the passage of the Law on the Territorial Sea. China also awards a contract to Creston Energy Corporation to exploit oil in Vanguard Bank on Vietnam's continental shelf.

JULY

ASEAN Foreign Ministers issue the Declaration on the South China Sea, the first ASEAN official pronouncement on the South China Sea.



### **HISTORIC RIGHTS AND THE NINE-DASH LINE**

China's claim to historic rights within the nine-dash line, within the EEZ of the Philippines, was the major reason the Philippines instituted proceedings. Therefore, it was a major victory for the Philippines when the tribunal ruled that, to the extent that China claimed historic rights to resources in the waters inside its nine-dash line, such rights were extinguished when it ratified UNCLOS if those waters are now within the EEZs of other coastal states.

### **DISPUTES ON TERRITORIAL SOVEREIGNTY**

The Philippines did not raise any issue with respect to which state had a superior claim to sovereignty over the islands in the South China Sea. This is because an Arbitral Tribunal established under UNCLOS can only consider disputes on the interpretation or application of UNCLOS, and UNCLOS contains no provisions on how to resolve sovereignty issues.

Therefore, the award of the tribunal does not address the underlying dispute in the South China Sea - the competing claims to sovereignty over the islands.

Further, although the tribunal found that China's claim to historic rights in the nine-dash line is not compatible with UNCLOS, it did not rule that the nine-dash line per se is illegal or invalid. China is under no obligation to formally denounce the nine-dash line.

The nine-dash line is still relevant because it shows the location of the various islands in the South China Sea over which China claims sovereignty. The difference is that as a party to UNCLOS, China can claim sovereignty only over those islands that meet the definition of an island in Article 121 of UNCLOS, that is, naturally formed areas of land surrounded by and above water at high tide.

### **DISPUTES ON THE STATUS OF REEFS AND THEIR ENTITLEMENT TO MARITIME ZONES**

What the Philippines did assert was that there were disputes between China and the Philippines on the status and entitlement to maritime zones of the reefs occupied by China. In its award on jurisdiction, the tribunal held that it could consider these issues without considering who had the better claim to sovereignty over the reefs in question.

The Philippines admitted that several of the reefs occupied by China were "islands" as defined in Article 121 of UNCLOS because they were naturally formed areas of land surrounded by and above water at high tide. This meant that they were subject to a claim of sovereignty and entitled in principle to maritime zones.

### **ROCKS VERSUS ISLANDS**

However, the Philippines further asserted that none of the islands in Spratlys that were occupied by China was entitled to more than a 12-nautical-mile territorial sea. The

Philippines maintained that the islands occupied by China fell within the exception in Paragraph 3 of Article 121, which provides that "rocks which cannot sustain human habitation or economic life of their own are not entitled to an EEZ or continental shelf".

Most observers believed that this was the most difficult issue facing the tribunal. The tribunal examined the language of Article 121(3) in great detail, and in what is perhaps the boldest part of its decision, it ruled that none of the disputed islands in the Spratly Islands is an island entitled to an EEZ and continental shelf of its own.

The tribunal held that even Taiping, the largest natural island that is occupied by Taiwan, is a "rock" that is not entitled to an EEZ or continental shelf of its own because it cannot sustain human habitation or economic life.

### **SIGNIFICANCE OF DECISION THAT NO ISLANDS ARE ENTITLED TO AN EEZ**

The impact of the decision that all of the islands in the Spratlys are rocks entitled to no more than a 12-nautical-mile territorial sea should not be underestimated.

It means that there are no areas of overlapping EEZ claims in the EEZ of the Philippines.

Consequently, the Philippines has the exclusive right to develop the oil and gas resources in Reed Bank, the area off its coast which has the greatest potential for hydrocarbon resources. Exploitation of this area has been held up because China claimed a right to the resources because the area is within its nine-dash line.

This decision of the tribunal is also of great significance to Vietnam, Malaysia, Brunei and Indonesia. Given that the tribunal has ruled that China has no historic rights to resources in the EEZs of other states within the nine-dash line, and that none of the disputed islands is entitled to an EEZ of its own, it means that China has no legal basis under UNCLOS to claim that it has a right to share the fishing or hydrocarbon resources in the EEZs of the ASEAN claimants bordering the South China Sea.

### **LOW-TIDE ELEVATIONS**

The tribunal also agreed with the submission of the Philippines that several of the reefs occupied by China were low-tide elevations rather than islands. Consequently, they are not subject to a sovereignty claim unless they are within 12 nautical miles of an island, and they are not entitled to any maritime zones of their own.

The tribunal's decision on Mischief Reef is particularly troublesome for China.

The tribunal ruled that Mischief Reef is a low-tide elevation,

**1994**

China builds two concrete structures at Mischief Reef, about 135 km from the Philippines' Palawan Island. The Chinese occupation of Mischief Reef was discovered in February 1995 that led to a joint statement by ASEAN Foreign Ministers expressing their "serious concern" over the developments in the South China Sea.

**1997**

**MARCH - APRIL**

China removes the oil rig which was set up in disputed waters with Vietnam after completing its exploration work.



not an island, and that it is located within the EEZ of the Philippines. Therefore, under UNCLOS, the Philippines has jurisdiction and control over the Mischief Reef, and it has the exclusive right to authorise and regulate the construction, operation and use of installations and structures on the reef. Consequently, the tribunal ruled that the installations and structures built by China on Mischief Reef are legally under the jurisdiction and control of the Philippines.

The tribunal also held that the Second Thomas Shoal is a low-tide elevation within the EEZ of the Philippines. This is the reef on which the Philippines intentionally stranded a vessel in order to try to prevent China from occupying it. As a result of the award, this reef is legally under the exclusive jurisdiction of the Philippines, and any actions by China to interfere with the resupply of the vessel would be unlawful.

### ISLAND BUILDING AND CONSTRUCTION ACTIVITIES

The award of the tribunal is also important for what it says and does not say regarding China's construction activities (island building) in the Spratly Islands.

First, the tribunal made it clear that China's land reclamation activities were in violation of its obligations to protect and preserve the marine environment, including its obligations to conduct an environmental impact assessment (EIA) for planned activities in accordance with international standards, and to make the results of the EIA available.

Second, the tribunal held that the construction activities were unlawful because they aggravated and extended the ongoing dispute that was before the international tribunal. In addition, China's construction activities destroyed evidence of the natural condition of the features in question, even though the status of such features was a matter pending before the tribunal.

Third, it should be noted that the tribunal did not rule that it was unlawful in principle for China to undertake construction activities on the disputed islands that it occupies.

Also, the tribunal did not discuss whether it was lawful for China to change the status quo in the South China Sea by building airstrips and other facilities on the islands it occupies. There are no provisions in UNCLOS on these issues, and the Philippines made no argument that the construction activities were in principle contrary to the provisions of UNCLOS.

Fourth, there is nothing in the decision which would make it unlawful for China to construct military installations on the islands it occupies, with the exception of Mischief Reef.

### CONSEQUENCES OF THE AWARD TO STATES BORDERING THE SOUTH CHINA SEA

China's initial reaction to the award has not been unexpected. It has stated that it does not recognise the legitimacy of the award and that the award will be treated as null and void.

In practice, however, the award will be a "game changer". The award has not only clarified in several ways how UNCLOS applies to the complex disputes in the South China Sea, but it has also brought home to all concerned the importance of UNCLOS in establishing a rules-based order for the oceans and seas, including the South China Sea.

The ASEAN claimants and Indonesia can be expected to strongly support the decision as its reasoning applies equally to their EEZ claims. They will strongly oppose any attempt by China to assert a right to the natural resources within their EEZs on the basis that it has historic rights within the nine-dash line.

### CONSEQUENCES FOR THE INTERNATIONAL COMMUNITY

The award ensures that the waters in the South China Sea outside the 12-nautical-mile territorial sea from the islands will be open to all states to exercise freedoms of the high seas, including overflight, navigation and military activities. This will be welcomed in particular by the United States and its allies in the region.

States concerned with the importance of a rules-based order for the oceans will point out that the award is final and binding, and call on China to carry out its activities in accordance with the award. However, such calls will appear hypocritical if those same states do not first reflect on the implications of the award on their own claims and activities.

Observers will be quick to point out that states such as Japan and the United States currently claim an EEZ from islands which according to the tribunal's interpretation of Article 121(3), are rocks entitled to no more than a 12-nautical-mile territorial sea. Also, the United States should refrain from criticising China for not participating in the case and implementing the award until it becomes a party to UNCLOS and is itself subject to the system of compulsory binding dispute settlement set out in the UNCLOS. ■

*Robert Beckman is the Head of the Ocean Law & Policy Programme at the National University of Singapore (NUS) Centre for International Law as well as an Associate Professor at the NUS Faculty of Law.*

*This article first appeared in The Straits Times on 14 July 2016. The abridged version is republished here with the kind permission of The Straits Times and the author.*

#### APRIL

The Philippine Navy orders a Chinese speedboat and two fishing boats to leave Scarborough Shoal, a reef disputed by the Philippines and China. Philippine fishermen remove Chinese markers and raise their flag. China sends three warships to survey Philippine-occupied Panata and Kota Islands.

#### 1999

#### JUNE

Malaysia occupies Investigator Shoal and Erica Reef in the Spratlys.

#### JULY

At the sidelines of the ASEAN Regional Forum meeting in Singapore, China agrees to start discussions with ASEAN on a Code of Conduct in the South China Sea.



# The Reality of China's Legal Obligations in the South China Sea

EVEN AS CHINA REFUSES TO RECOGNISE THE ARBITRAL TRIBUNAL'S DECISION,  
BEING A PARTY TO UNCLOS MEANS IT NONETHELESS HAS SOME OBLIGATIONS TO FULFIL.

BY JUSTIN D. NANKIVELL

In international law, compliance and obligation are the central terms from which the strength and efficacy of law in the international legal system can be measured. In 'hard cases' in which sovereignty, territory (land or ocean), and control over resources are at stake, the limits of law to bind the parties where they likely will not, or have not, received a favourable outcome is brought into stark relief. Such is the case in the South China Sea for China, given the overwhelming degree to which China's legal claims under United Nations Convention on the Law of the Sea (UNCLOS) remain well outside conventional legal interpretation. This is all the more striking as UNCLOS is the most celebrated multilateral treaty constructed by international society, one that knits together the world in allowing commerce, people, cultures, and ideas to generate international pluralism and global prosperity. UNCLOS, properly understood, is the constitution of the oceans.

Regardless of the scope and significance of the legal verdict handed down to China by the UNCLOS Tribunal, what obligations does China bear to comply with the verdict, and does China have any legal recourse or legitimate position not to comply? [1]

The law is quite clear on these questions. State parties to UNCLOS are legally bound by its provisions, and China has been a party since 1996. When ratifying UNCLOS, states accept prior to adoption the compulsory dispute procedures for the settlement of disputes in Part XV. In the situation of a dispute between the parties that cannot be resolved through negotiation, either party can bring the dispute to an international court or tribunal absent the other parties consent, a process present in over ninety international legal

agreements. The court or tribunal has the right and legal competence to decide questions of jurisdiction. As UNCLOS was constructed as a 'package deal', states are precluded from selecting parts of the Convention to be bound by, and whether diplomatically present or not, all parties are formally obligated to ensure that the tribunal's work is achieved.

In relation to the South China Sea Arbitration, the Tribunal held that all fifteen submissions fall within the interpretive and/or applicative scope of UNCLOS, and that a formal 'dispute' existed between the parties. The primary issue turned on whether UNCLOS removed any claims to historic rights that China could claim (to territory, fishing, or resource extraction), or whether such rights could exist parallel in customary international law alongside the Convention. In adjudicating this overarching element of the case, the judges had set earlier precedent that state non-appearance before a tribunal is at cross-purposes with Part XV of the Convention and both states remain legally obligated to comply with the award. [2] On this point, international jurisprudence is clear.

China therefore has no legal recourse in this case, as no appeal system exists in UNCLOS and the Tribunal's award is final. In hindsight, China should have appeared before the Tribunal given that international judges favour appearance for reasons of clarity and enhanced authority associated with international dispute settlement. China had argued publicly that the case turned on issues of sovereignty and maritime boundary delimitation, and that Article 298 – the opt-out clause on exceptions to historic titles – was triggered formally by China. This argument implied that determining sovereignty over a maritime feature must

2001

APRIL

A US Navy EP-3E signals intelligence aircraft and a PLA Navy J-8II interceptor fighter collide mid-air about 110 km away from Hainan Island. This incident caused the death of one Chinese pilot, and the US Navy plane made an emergency landing and remained on Hainan Island for 10 days.

2002

NOVEMBER

ASEAN Foreign Ministers and Chinese Special Envoy Mr. Wang Yi (who is now the Foreign Minister of China) sign the Declaration on the Conduct of Parties in the South China Sea (DOC).

precede examination of an entity's classification and jurisdictional boundary (whether island, rock, or low-tide elevation). Maritime delimitation was central to deciding such questions, and as both of these issues were beyond the scope of UNCLOS dispute settlement, the Tribunal did not possess jurisdiction.

China also sought to have the tribunal recognise Article 298 which possibly removed dispute settlement from issues of historic claims linked to the nine-dash line. Article 298 was likely the only area that China could have found legal recourse, but the Tribunal removed this possibility in the award as China's possible historic rights were in conflict by the EEZ rights of the coastal states.

Given that the Tribunal largely rejected China's arguments in toto, Chinese compliance will be refracted through its position that China bears no legal obligations to the Philippines. China now exits the formal realm of international law into the world of international politics, where the legal verdict and the material and strategic conditions in the Indo-Asia Pacific region set the parameters and conditions under which the world's most intractable dispute will play out. We now enter the second critical phase of the South China Sea dispute – that of the possibility and basis for legal compliance, in evaluating how and in what ways international law matters in the South China Sea. [3] ■

*Dr. Justin D. Nankivell is the Associate Dean for Academics at the Daniel K. Inouye Asia-Pacific Center for Security Studies. The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Daniel K. Inouye Asia-Pacific Center for Security Studies, the Department of Defense, or the U.S. Government.*

[1] PCA Case No. 2 2013-19 – *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*.

[2] *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, ITLOS Case no. 22, 2013, Order (22 November, 2013)*.

[3] For analysis of the first phase leading up to the Tribunal's verdict, see Justin D. Nankivell, "The Role and Use of International Law in the South China Sea Dispute", *Maritime Awareness Project (MAP)*, April 2016, <http://maritimeawarenessproject.org/2016/04/14/the-role-and-use-of-international-law-in-the-south-china-sea-disputes/>

“THE COURT OR TRIBUNAL HAS THE RIGHT AND LEGAL COMPETENCE TO DECIDE QUESTIONS OF JURISDICTION. AS UNCLOS WAS CONSTRUCTED AS A ‘PACKAGE DEAL’, STATES ARE PRECLUDED FROM SELECTING PARTS OF THE CONVENTION TO BE BOUND BY, AND WHETHER DIPLOMATICALLY PRESENT OR NOT, ALL PARTIES ARE FORMALLY OBLIGATED TO ENSURE THAT THE TRIBUNAL’S WORK IS ACHIEVED.”

## 2004-2005

China, the Philippines and Vietnam agree to a three-year Joint Marine Seismic Undertaking (JMSU) to explore for oil in disputed waters. In 2008 the JMSU expired amid controversy in the Philippines that the agreement was unconstitutional.

## 2007-2008

China puts pressure on international energy companies not to participate in energy projects in Vietnam's coastal waters claimed by Beijing.



# The Paradox in the South China Sea Arbitration

BY KATHERINE TSENG HUI-YI

**O**n 12 July, the Arbitral Tribunal established under Annex VII in the Law of the Sea Convention issued the award for the first South China Sea arbitration. This award shed light on the rapidly-changing landscape of international adjudication.

## THE AWARD AND INSTITUTIONAL LESSONS

First, this award has reminded us of how a proliferation of special legal regimes, along with the establishment of special tribunals since the 1990s, has re-shaped the legal landscape of international law.

It was in the 1990s that there began a proliferation of these special tribunals, a corollary of the booming of special legal regimes. Three most frequently-cited examples are the World Trade Organisation Dispute Settlement Body, the European Court of Human Rights, and the International Tribunal for the Law of the Sea (ITLOS). This special tribunal is the default choice of the list of semi-compulsory mechanisms listed in Part XV (Settlement of Dispute), Articles 279 to 299, in the Law of the Sea Convention. The ITLOS is the primary choice. In this sense, its role and responsibility are different from the conventional international court.

These special tribunals deem themselves as a role of norm-advancement of these special legal regimes, and their responsibilities lie in developing the jurisprudence and establishing the spirit of rule of law of these special legal regimes. Therefore, they tend to adopt a rather adventurous attitude, and tend to be more amenable to creative ideas. Not surprisingly, their rulings can be read as rather aggressive, in particular to the more disadvantaged parties. Their primary purpose is not dispute settlement. Despite these proactive attitudes and aggressive decisions, they often emphasise inter-state cooperation as an important element. It is thus often described that these special tribunals are transforming the international legal system from a law of co-existence to a law of co-operation.

This Tribunal seemingly fully lives up these observations, even at the cost of further catalysing the tension.

## THE PARADOX OF HISTORIC ARGUMENT

China has relied heavily on historic arguments in its South China Sea claims. Yet, historic argument is a double-edged sword that every claimant should handle with extra caution.

On one hand, historic arguments tend to be self-claimed, and self-justified. Further, historic arguments generally are regarded as hindsight, for the purpose of serving certain policy goals. Despite the fact that these historic incidents did occur, they were conducted generally for purposes very different from those outlined in contemporary disputes. As a result, these historic evidences tend to be selective in nature and reconfigured in the narrative, in order to serve the interests of contemporary government. This echoes one enduring inquiry, the interpretation of history and the objectivity of the interpretation.

On the other hand, historic argument is as troublesome as nationalist sentiment can be. International courts and tribunals generally render historic argument a secondary position in their list of considerations. Realistic factors, such as effective controls and consistent management, are attached with primary importance. The logic is that sovereignty is one most sacrosanct claim vested upon every nation state. A nation state should not be subordinated to any authorities claiming over-supremacy, in whatever manifestation, above them. International judiciary organ is actually assuming such a supra-state role, when states bring their disputes to international courts and tribunals. In particular, when states claim historic argument, it is even more troublesome. To determine a contemporary dispute based on historic argument likely will influence the compromise reached in the legal instrument, in this case, the Law of the Sea Convention, which reflects a consensus among various interested groups, and a delicate balance among obligations of different generations. A decision based on historic arguments is also running the risk that the hard-won consensus on national/racial equality is to be overshadowed, because such a decision suggests, however implicitly, a judgement on the supremacy of one nation/race to another.

The arbitration has come to an end, but a new era is opened. The reality is, by not being able to tackle the South China Sea issue, China's regional policies, such as the 21<sup>st</sup> century Maritime Silk Road plan, may be attenuated, discredited and to the extreme, debilitated. China needs to deal with these facts before they turn to dire realities. ■

*Dr Katherine Tseng Hui-Yi is Research Associate at the East Asian Institute, National University of Singapore.*

2009

MARCH

The USS Impeccable and five Chinese vessels are involved in a confrontation off the southern island of Hainan. While the Chinese accused the US ship for conducting activities within its exclusive economic zone, the Pentagon stressed on the harassment caused by the Chinese vessels and reiterating that the Impeccable was conducting routine operations in international waters.

MAY

Malaysia and Vietnam make a joint submission to the Commission on the Limits of the Continental Shelf (CLCS), in accordance with Article 76, Paragraph 8 of UNCLOS. China responds with a note verbale, which among others matters, asserts its "indisputable sovereignty over the islands in the South China Sea and the adjacent waters."

# Into Stormy Seas Ahead

THE PHILIPPINES WOULD DO WELL TO TAKE THE NECESSARY STEPS TO LEVERAGE ON THE ARBITRAL TRIBUNAL'S AWARD TO A SATISFACTORY RESOLUTION.

BY JAY L. BATONGBACAL

The judgement of the UNCLOS Annex VII Arbitral Tribunal in the case against China is a boon to idealism in international law: a David v. Goliath story whose euphoric energy is still crackling through the Philippines one week after. Some sectors heavily criticised the Duterte administration's somber announcement of the victory last week, as the geopolitical tremors from the arbitration rumbled across the region. But with Beijing and Taipei erupting in nationalist firestorms repudiating and attacking the award, the subdued declaration is an entirely appropriate response.

Ironically, the more China openly denies and declares it will ignore the ruling, the more it becomes obvious to the international community that China has a moral obligation to comply. In recent days, China's outrage has taken a turn for the worst, officially launching *ad hominem* and racist attacks against the judges of the Tribunal, and recklessly undermining international institutions and processes. The latest innuendos of corruption in the Tribunal reflect the depth of its desperation to be heard by the international community. The dispatch of a nuclear bomber to bombastically assert sovereignty over a semi-submerged shoal and intimidate a smaller and nearly defenseless neighbour is disproportionate and surreal propaganda overkill.

International arbitration between States, unlike international commercial arbitration, has no enforcement mechanism other than moral persuasion based on sound legal

reasoning. States suffer reputational damage by non-compliance, which has a substantive impact in the real world despite being an abstract concept. Especially in a globalised world, international relations are ultimately underlined by perceptions of trust, confidence and reliance on the State's word. China is inflicting even much more reputational damage all by itself, not only through non-compliance with the Award, but through its vociferous and open display of defiance and declaration of intention to subvert it, together with the international institutions and processes connected with it. The Philippine government's decision "to not taunt or flaunt" the arbitration against China is turning out to be the correct one, because now it is China that is doing all of the taunting and flaunting.

In the current state of China's rage, standing firm and rejecting calls to junk the Award is the correct opening move for what could be another long, drawn-out stand-off. The asymmetry of raw economic and military power between the two sides only serves to emphasise that this is a moral struggle for supremacy between abstract principles and *realpolitik*. The Philippines would do well to allow China to vent its ire while remaining silently steadfast with its commitment to the lawful and legally binding decision of the Tribunal. At the same time, it should remain vigilant

over its maritime frontiers and call out any attempts to again change the *status quo*, as well as further contravention of the Tribunal's rulings particularly against the aggravation of the disputes and infliction of massive damage to the marine environment. A renewed

“EFFORTS TO ARRIVE AT LEAST AT A BILATERAL SETTLEMENT OF THE MARITIME DISPUTES AMONG THE ASEAN CLAIMANTS WOULD CONTRIBUTE TO THE CONSTRUCTION OF A PRINCIPLED, COOPERATIVE, AND ORDERLY REGIME, WITH OR WITHOUT CHINA'S INVOLVEMENT.”

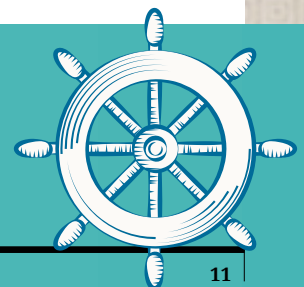
2010

APRIL

China places a sovereignty marker on James Shoal (Beting Serupai), located 80km from the Malaysian coastline.

JULY

US Secretary of State Hillary Clinton announces at an ASEAN Regional Forum (ARF) meeting in Hanoi that the US has "a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea". The statement draws a strong rebuke from Chinese Foreign Minister Yang Jiechi, who reminds ASEAN foreign ministers that "China is a big country and other countries are small countries."



“IN THE MEANTIME, THE PHILIPPINES CAN CONTINUE TO SEEK THE SUPPORT OF ITS LIKE-MINDED AND NATURAL ALLIES IN ASEAN AND THE ASIA-PACIFIC AND TOGETHER DETERMINE THE PATHWAYS FOR A PRINCIPLED RESOLUTION OF THE DISPUTES.”

emphasis on peaceful resolution and seeking a principled settlement based on international law should also be made. China’s saber-rattling in the region only serves to further alienate its neighbours and further prove the Philippines’ basic position that between the two parties, the option of using force actually remains with China.

In the near-term and as a practical matter, the Philippines could give China time to cool off. A cooling-off period would not be unusual from the standpoint of negotiations, and both parties really do need some time to appreciate the full implications of the Tribunal’s nearly 500-page decision.

In the meantime, the Philippines can continue to seek the support of its like-minded and natural allies in ASEAN and the Asia-Pacific and together determine the pathways for a principled resolution of the disputes. The Philippines should not forget that the South China Sea disputes are not between it and China alone; technically it also has pending bilateral disputes with its neighbours Vietnam, Malaysia, and Brunei. The Award has allocated maritime space in the South China Sea in a way generally consistent with the UNCLOS-based positions recently taken by these other claimant States. Efforts to arrive at least at a bilateral settlement of the maritime disputes among the ASEAN claimants would contribute to the construction of a principled, cooperative, and orderly regime, with or without China’s involvement.

The Philippines should also continue to build up and diversify its security partnerships with external powers. The convergence of certain aspects of its interests over freedom of navigation and overflight with those of the US, Japan, Australia, India and others, continues to provide a soft protective cover against China’s flexing of its naval muscle. An expanding network of security partnerships remain to be the best deterrence against rash unilateralism and militarism advocated by certain sectors.

What happens next will depend on China. Without compromising principles or international law, the Philippines need not do anything but weather China’s wrath like a rock in stormy seas. ■

*Dr. Jay L. Batongbacal is Associate Professor of Law at the University of the Philippines (UP) College of Law and Director of the the UP Institute for Maritime Affairs and Law of the Sea.*

## 2010

### JULY

The 1st ASEAN Maritime Forum (AMF) held in Surabaya, Indonesia for ASEAN countries to discuss maritime-related issues.

## 2011

### MAY - JUNE

Vietnam accuses Chinese patrol boats for deliberating cutting the cables of Vietnam’s Binh Minh 02 ship while the ship was conducting seismic surveys off the continental shelf of Vietnam.

### NOVEMBER

ASEAN and China announce a \$500m Maritime Cooperation Fund at the 14th China-ASEAN Summit.

# The Tribunal Award and Its Implications on the South China Sea Disputes

AS MUCH AS CHINA REMAINS OPPOSED TO THE ARBITRAL TRIBUNAL'S AWARD,  
DIPLOMATIC PRAGMATISM IS THE KEY TO MANAGING THE SOUTH CHINA SEA DISPUTES.

BY ZHU FENG

**T**he release of the Arbitral Tribunal's award on the Philippines' claims against China on 12 July 2016 attracted global concern. Similarly, China was anxiously awaiting for the announcement of the award. The result is, of course, fully irritating. Against all expectations, China did not predict that the award would go that far to overwhelmingly favour the Philippines. Beijing's wrath was instantaneously unleashed, but fortunately only literally and rhetorically.

In fact, China was not hopeful at all that the Arbitral Tribunal's award would produce any positive outcome for it. Even with the many speculations that the award could have preserve some delicate balance between Manila and Beijing, the Chinese government did not assume that it would be in China's favour. Beijing has vowed to ignore The Hague-based Arbitral Tribunal which declared its jurisdiction over the Philippines' memorials at the end of October 2015, and has consistently and firmly contended instead that Arbitral Tribunal has no jurisdiction over what are essentially are sovereignty disputes. The release of the award definitely suggests that the other shoe did drop when the "renter came back at midnight," but the ruling left behind a big bang.

China's responses have come in rapid volleys. The Chinese Ministry of Foreign Affairs immediately released two statements – one protesting the award by clearly calling it "null and void", and the other reaffirming Chinese claims over the South China Sea. In a media interview the night after the ruling's release, Chinese Foreign Minister Wang Yi reconfirmed China's massive opposition and rejection of the ruling. A day later on 13 July, Beijing published its first White Paper on the South China Sea disputes entitled "China

Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea." State Councillor Yang Jiechi – China's top diplomat – publicly spoke against the ruling, defended China's position in the South China Sea disputes and proposed Beijing's willingness to negotiate with the Philippines on the basis of respect for history and abiding by international law. Mr. Yang even treaded softly into some "tentative measures with regards to joint development," supposedly with Manila, in order to discard the sea row.

Beijing's vocal denial of the Tribunal's award is very understandable. The ruling is quite reckless, outrageous and unjust in deed. It dismisses China's nine-dash-line claims in the resource-rich waters of the South China Sea, and ruled that China's call to "historic rights" was illegitimate. The worst part of the ruling was the judges' determination that that Itu Aba Island was not an "island" and as such was not legally entitled to the 200 nautical miles of exclusive economic zone surrounding it. Even the Taipei Government rapidly responded by declaring its non-acceptance and non-implementation of the Tribunal's award. There were many other aspects out of the award that severely hurt Beijing – attributing Chinese moves in the South China Sea to aggravation of tensions; condemning China as a leading source of ecosystem degradation; and disrupting the Philippines from lawfully fulfilling its maritime rights. From Beijing's perspective, the Tribunal notoriously and unfairly took the side of Manila and abused its judicial power.

China's strident critique to the Arbitral Tribunal and its ruling is not a hollow bell, and the pitfalls of the award is self-evident given its remarkable controversies. Beijing

2012

APRIL

Tensions rise between China and the Philippines at Scarborough Shoal when the Philippine Navy apprehends eight Chinese fishing vessels operating in the vicinity. After a tense period, both sides allegedly agree to withdrawal from the area. The Philippines withdraws but the Chinese remained and denied there was such an agreement.

JULY

ASEAN Foreign Ministers fail to issue a joint communique at the 45th ASEAN Ministerial Meeting for the first time in its history. Following Indonesian Foreign Minister Marty Natalegawa's "shuttle diplomacy" the foreign ministers subsequently adopt a post-meeting statement – the Six-Point Principles on the South China Sea.



“THE TRIBUNAL AWARD DOES NOT PROVIDE “WHITE-OR-BLACK” CHOICE FOR THE WORLD. INSTEAD, IT COULD EMINENTLY OFFER A REAL BOOST TO REALISTIC MANAGEMENT IN THE SOUTH CHINA SEA DISPUTES GIVEN THAT CHINA, THE US AND THE PHILIPPINES MIGHT BE PERHAPS TEMPTED FOR A “SOFT LANDING” FROM THE CURRENT PREDICAMENT IN THE SOUTH CHINA SEA.”

seems fully determined to disregard the ruling even “at reputational cost” as China will not have any pathway to gracefully accept the ruling. Even with this, the real consequences of the ruling so far have proven to be better than what they are supposed to be. Beijing did not take any ruthless actions to showcase its rage in the South China Sea. No matter how inflamed it is, there is no sign that China would extend its presumed “assertiveness” in the region. Instead, Beijing speaks harshly, but acts softly.

Predictably, China will continue to move on that path over time. Namely, Beijing will not provoke any sides unless it was once again irritated by “real actions” such as American warships’ routine sail-ins or jet flyovers to Chinese reclaimed islands, the Philippines’ frequent rallying for international pressure to enforce the ruling, or an appeal to international jurisdiction by other claimant states without China’s consent. It is quite unlikely that this self-restraint would diminish unless other players do not reciprocate. It seems that Beijing is resolutely and astutely embarking on a new tactic of “soft trades soft, while tough begets tough.” It suggests that China will never submit to any international pressure to comply with the ruling amidst unaffordable mortification.

Nevertheless, Beijing and the entire region should be encouraged to walk out of the shadow of the Tribunal award. The criteria for regional members to gauge the implications of the ruling needs to be practical and attainable. In other words, understanding the current opportunity to undercut real tensions and disputes, which have lingered in the

South China Sea in recent years, should be a priority. Regional members do not have to unrealistically obey the oversimplification of international law. The Tribunal award does not provide “white-or-black” choice for the world. Instead, it could eminently offer a real boost to realistic management in the South China Sea disputes given that China, the US and the Philippines might be perhaps tempted for a “soft landing” from the current predicament in the South China Sea.

Conclusively, there is no legal solution explicitly laid out, if agreeable and achievable at all, from the Tribunal award. Its feasibility hinges on the rollout of diplomatic engagement and pragmatic negotiations between Beijing and Manila. Without such diplomatic pragmatism, the award would turn out to be nothing but an “alarmist reminder” to mounting risks if mismanaged. China is standing up for international law by justly rejecting the arbitration it has not consented to and unjustly treated by.

Finally, Beijing should calmly recognise the adversarial fallout from the ruling. By all means, the imposition of the ruling is a legal and diplomatic setback. China cannot get mired in the post-arbitration ruling wrath and angst. To cope with current policy peril, Beijing needs to boldly display its resilience to squarely and candidly respond to growing “China anxiety” in the region. ■

*Dr. Zhu Feng is Executive Director and Professor at the China Center for Collaborative Studies of South China Sea, Nanjing University, China.*

## 2012

### SEPTEMBER

Indonesia circulates a “zero draft” of a Code of Conduct in the South China Sea to ASEAN members on the sidelines of the UN General Assembly in New York.

### OCTOBER

The 1st Expanded ASEAN Maritime Forum (EAMF) held in Manila to engage ASEAN’s 8 Dialogue Partners on maritime issues at the Track 1.5 level.

### DECEMBER

Two Chinese fishing boats cut the cable of Vietnam’s Binh Minh 02 while it was conducting a seismic survey 43 miles southeast of Con Co Island off Vietnam’s Quang Tri province. Chinese official denied it and accused Vietnam of “seriously infringing” on China’s sovereignty and maritime interests.



# What does the Ruling Mean for US-China Relations?

BY IAN J. STOREY

**B**eijing's defiant response to the Arbitral Tribunal's decision to reject China's claims to "historic rights" within the nine-dash line will likely lead to an upswing in tensions in the South China Sea. That would not be good for US-China relations and, by extension, regional security.

Since the late 2000s, the South China Sea dispute has generated a good deal of rancour between Washington and Beijing. The US has accused China of using bullying and coercive tactics to pursue its claims, militarising the dispute and undermining international legal norms and regimes. China has accused America of stirring up tensions as a pretext to increase its military presence in Asia.

A week before the ruling, in a speech delivered in Washington, Dai Bingguo, China's former point man on foreign affairs, stated that the two countries did not have a fundamental clash of interests in the South China Sea, and that the dispute should not be allowed to define bilateral relations. Yet fundamental interests are at stake, including respect for international law, freedom of navigation and overflight, US credibility and perhaps even whether America can retain primacy in Asia. As such, it is a defining issue in US-China relations.

In the immediate aftermath of the ruling, the US welcomed the ruling as an important step towards a peaceful resolution of the dispute, and noted that as the ruling was legally binding, it expected the Philippines and China to abide by it. Predictably, however, Beijing said it would not recognise nor comply with the Tribunal's decisions.

We can anticipate that China will not restrict itself to a rhetorical denunciation of the sweeping ruling—nationalists will demand action from the government to underscore the country's sovereignty and jurisdictional claims. Beijing has a range of options, all of which could trigger potentially dangerous encounters between the armed forces of China and the US. The establishment of a Chinese Air Defence Identification Zone over the Spratlys would be challenged by US aircraft, possibly leading to confrontations in the air. China might draw straight baselines around the Spratlys and declare internal waters within those lines. As this would be a violation of UNCLOS, the US Navy would likely conduct Freedom of Navigation Operations (FONOPs) through those waters. In light of the Tribunal's decision that Subi, Hughes

and Mischief Reefs —three features China has terraformed into artificial islands—are low-tide elevations and therefore not entitled to a 12 nautical mile territorial sea, the US will probably carry out FONOPs in the vicinity of these features anyway. China's response to the US Navy's three previous FONOPs in the South China Sea have been relatively restrained—a more muscular response in which the Chinese Navy tries to impede the passage of US warships cannot be ruled out. Of much greater concern would be if China sought to punish the Philippines (and thereby deter other Southeast Asian countries from challenging its claims) by blockading Filipino Marines on Second Thomas Shoal—and maybe even trying to remove the grounded warship they are based on—or start to transform Scarborough Shoal into another artificial island. Beijing might assess that an America distracted by domestic problems and the upcoming presidential election would not respond—but this would be a miscalculation, and any attempt to coerce the Philippines could spark a serious military standoff with the US.

The Tribunal's ruling could portend an inflection point in the long-running dispute: either China takes this opportunity to recalibrate its policy and implement a more pragmatic approach by bringing its claims into line with UNCLOS and starting talks with the other claimants, or it doubles down on its existing policy of strident assertiveness. If the latter, Sino-US relations, and the region as a whole, are in for a bumpy ride. ■

*Dr. Ian J. Storey is Senior Fellow at the Regional Strategic and Political Studies Programme, ISEAS-Yusof Ishak Institute.*

“FUNDAMENTAL INTERESTS ARE AT STAKE, INCLUDING RESPECT FOR INTERNATIONAL LAW, FREEDOM OF NAVIGATION AND OVERFLIGHT, US CREDIBILITY AND PERHAPS EVEN WHETHER AMERICA CAN RETAIN PRIMACY IN ASIA. AS SUCH, IT IS A DEFINING ISSUE IN US-CHINA RELATIONS.”

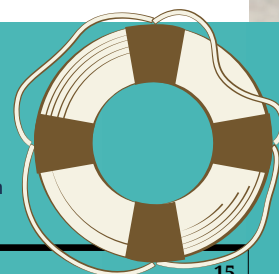
2013

JANUARY

The Philippines files a case at the International Tribunal for the Law of the Sea challenging the legality of China's jurisdictional (but not sovereignty) claims in the South China Sea. China refuses to participate in the case. Despite China's refusal, ITLOS appoints five judges to an Arbitral Tribunal at the Permanent Court of Arbitration (PCA) to hear the case.

DECEMBER

China begins reclamation work seven of the features it occupies in the Spratlys. Over the next three years China builds up military and civilian infrastructure on these seven artificial islands.



# What is at stake for ASEAN?

BY TANG SIEW MUN

**T**he Arbitral Tribunal's award on the Philippines v. China case on the South China Sea (SCS) puts ASEAN in a dilemma.

Manila's move for adjudication was seen in 2013 by ASEAN as a wrong tactical step that undermined its efforts towards engaging China multilaterally in striving for a binding Code of Conduct. There was also sense of disappointment within ASEAN circles that Manila neglected to undertake prior consultation with the grouping on this important development. Thus, ASEAN could theoretically and diplomatically distance itself from the Arbitral Tribunal's award and treat the adjudication as a national matter of the Philippines.

However, the political rendering of the matter is not as clear-cut. It would be difficult for the ASEAN member states to completely distance themselves from the ramifications of the award.

Furthermore, the Philippines could hardly be faulted for seeking relief from international law when confronted by what Manila perceives to be an intractable situation considering the rule of law is one of the tenets of the ASEAN Charter.

Rather than revisiting events three years ago, ASEAN's focus and energy are better directed at improving intra-regional coordination – especially on political-security issues – and to address the important aspect of strategic trust within the association. More importantly, ASEAN has to forge a consensus on how to move forward in the “new political normal” on the South China Sea in the wake of the Arbitral Tribunal's award.

It is up to Manila and Beijing to work out their differences as ASEAN does not hold a position on the merits of the maritime disputes. However, this does not mean that ASEAN is indifferent to the disputes. ASEAN has registered its concerns over the destabilising effects of the disputes as early as 1992 when it issued the Declaration on the South China Sea. While ASEAN's interest in maintaining regional stability remains resolute, the SCS disputes has given ASEAN a new cause for concern.

The larger issue of the SCS relates to ASEAN-China relations. Both sides have plenty to gain – and lose – if bilateral ties turn sour. The point that China is ASEAN's largest trade partner has often been made, especially by China. What is often overlooked is China's growing trade surplus with ASEAN. According to ASEAN Secretariat statistics, China ran a US\$78.4 billion trade surplus with ASEAN in 2015. This suggests that China has as much as ASEAN, if not more, to lose if the decaying strategic trust spills over into economic cooperation.

Privileging one dimension – even one as important as economics – over political and strategic interests is untenable. It is for this reason that ASEAN member states must exercise due diligence over the possible trade over-dependence on a single country, no matter how friendly or close it is.

From a big picture perspective, the SCS disputes are less about rights over fishery stocks and petro-carbon resources, and more about how a big country relates to their smaller neighbours. The power asymmetry between China and ASEAN is accentuated by the gargantuan Chinese economy, which is almost four times larger than all the ASEAN economies combined. This inconvenient truth will continue to colour, but hopefully not dictate, ASEAN-China relations. Against this strategic reality, the lesson of the Melian Dialogue, “*the strong do what they have the power to do and the weak accept what they have to accept,*” presents a perpetual strategic concern for ASEAN states when dealing with China. It is for this reason that Chinese actions and responses will be closely scrutinised in ASEAN for crucial insights into Chinese thoughts on the use and utility of power.

Additionally, the externalities of this power asymmetry are accentuated by the overlay of power politics between China and the US. Unfortunately, ASEAN is caught in the middle of the power rivalry between the two major powers. To posit that ASEAN is a puppet dancing to the tune of the master thousands of miles away belies the reality that ASEAN has always strived for strategic autonomy – as best as a collection of ten small states could do. Thus, it is important for ASEAN to step up to ensure that the major power rivalry does not affect the region any more than it already has. It is just as important for China to accept ASEAN as a constructive partner in managing the SCS tensions. China should view ASEAN as a part of the SCS solution and not the problem. With the breakdown of direct diplomatic negotiations between the Philippines and China – literally before it begun – China has very few alternatives for a face-saving strategy out of the Arbitral Tribunal imbroglio.

The “regional” Code for Unplanned Encounters at Sea (CUES) and the Code of Conduct in the South China Sea are within reach of ASEAN-China cooperation to regain control of the SCS narrative and reduce regional tensions. Short of a political miracle, the SCS disputes are unlikely to be resolved anytime soon. Allowing the disputes to fester through “island” reclamations, military drills and a war of words will only exacerbate existing fissures, and this will be to nobody's interest and benefit. ■

*Dr Tang Siew Mun is Head of the ASEAN Studies Centre at ISEAS-Yusuf Ishak Institute.*

2014

JANUARY

Chinese state news agency Xinhua reports that three Chinese warships performed an oath swearing ceremony off James Shoal, located 80km off the Malaysian coast. The “incursion” was denied by the Malaysian Navy.

APRIL

The United States and the Philippines sign the Enhanced Defense Cooperation Agreement (EDCA), which allows the US military to maintain a rotational presence at Philippine military bases.

MAY - JUNE

The Chinese National Offshore Oil Corporation (CNOOC) deploys the Haiyang Shiyou 981 (HYSY 981) oil platform into waters near the disputed Paracel Islands, triggering a major crisis in Sino-Vietnamese relations. Anti-Chinese demonstrations turn into riots in some Vietnamese cities leading to the deaths of several PRC citizens.

# Debunking the Myths of The South China Sea

TEN MYTHS NEED TO BE ADDRESSED IN ORDER TO BETTER UNDERSTAND CHINA'S POSITION ON THE SOUTH CHINA SEA ISSUE.

BY WANG WEN

**T**hroughout its history, the South China Sea (SCS) has remained a “sea of peace” untouched by large-scale battles. The SCS arbitration, however, is turning this region into a powder keg. All too often, the public discourse involving China and the SCS has only made an already complex subject more complicated. There is an urgent need to clarify the underlying myths.

## [MYTH #1]

### CHINA'S STANCE AGAINST THE SOUTH CHINA SEA ARBITRATION VIOLATES INTERNATIONAL LAW

By initiating the arbitration case, the Philippines has broken its own commitment made in the Declaration on the Conduct of Parties in the SCS, signed between China and members of the Association of Southeast Asian Nations, which states that disputes should be resolved by those countries directly involved, through friendly consultations and negotiations.

Based on the declaration, China's stance on the arbitration has been firm and clear, which can be summarised as “non-acceptance, non-participation, non-recognition, and non-execution”

The nature of the dispute involves two separate issues: one is the sovereignty claim over Nansha Islands, and the other is maritime rights. Not only are territorial issues beyond the scope of the UN Convention on the Law of the Sea, China had also lodged a declaration with the UN in 2006 – in accordance with Article 298 of UNCLOS – that it does not accept any of the compulsory dispute settlement procedures with regard to disputes on maritime delimitation. Thus, neither can the Philippines initiate a compulsory arbitration under this

convention, nor does the Permanent Court of Arbitration at The Hague have the jurisdiction to adjudicate on the case.

## [MYTH #2]

### THE “NINE-DASH LINE” DOES NOT COMPLY WITH THE LAW OF THE SEA

The accusation does not hold water at all. To begin with, the nine-dash line predated UNCLOS. In 1948, for example, the Chinese government published the dotted line map to reaffirm China's sovereignty and relevant rights in the SCS. The convention does not exclude historical rights and has made repeated references to “historical bays” and “historical titles” which speak volumes about its respect for historical rights.

Furthermore, the UNCLOS preamble mentions the desirability to “establish through this Convention, with due regard for the sovereignty of all states, a legal order for the seas and oceans”. This makes clear that the issue of territorial sovereignty is not subject to UNCLOS. Therefore, it cannot be used as a basis to judge China's nine-dash line.

## [MYTH #3]

### CHINA CLAIMS SOVEREIGNTY OVER THE WHOLE SOUTH CHINA SEA

Incorrect media reports, to some extent, have led to this misunderstanding. The fact is, no country, including China, claims sovereignty over the whole SCS. The core of the SCS issue relates to the disputes over sovereignty and maritime administration of parts of Nansha Islands between China and other claimant countries. China's position is clear and consistent: it has indisputable sovereignty over the SCS islands, and their adjacent waters, but not the whole SCS.

“BY INITIATING THE ARBITRATION CASE, THE PHILIPPINES HAS BROKEN ITS OWN COMMITMENT MADE IN THE DECLARATION ON THE CONDUCT OF PARTIES IN THE SCS, SIGNED BETWEEN CHINA AND MEMBERS OF ASEAN, WHICH STATES THAT DISPUTES SHOULD BE RESOLVED BY THOSE COUNTRIES DIRECTLY INVOLVED, THROUGH FRIENDLY CONSULTATIONS AND NEGOTIATIONS.”

## DECEMBER

Despite its refusal to participate in the PCA hearings, China submits a Position Paper extensively outlining its claims.

## 2015

### MAY

Japan approves the sale of ten high-speed patrol boats to the Philippines. The deal is financed by a \$150 million low interest loan provided by Japan. The vessels will be delivered progressively from the third quarter of 2016 to 2018.

## 2015

### OCTOBER

The USS Lassen conducts a “Freedom of Navigation Operation” (FONOP) through waters near Subi Reef, one of China's artificial islands.



**[MYTH #4]**

**CHINA THREATENS FREEDOM OF NAVIGATION AND OVERFLIGHT IN THE SOUTH CHINA SEA**

The shipping lanes of the SCS are among the busiest in the world, and between 70 and 80 per cent of China's maritime transport of energy and goods passes through these waterways. Ensuring freedom of navigation and overflight in this region meets not only the requirement of international law but also China's fundamental interests. All countries have unimpeded access to normal navigation and flight activities in the SCS under international law, over which there is no disagreement.

**[MYTH #5]**

**CHINA INTENDS TO CHANGE THE "STATUS QUO" IN THE SOUTH CHINA SEA**

What exactly is this "status quo"? Before 2013, the term rarely featured in diplomatic discussions on SCS disputes. Then came the US strategy of rebalancing to the Asia-Pacific, and claimants in the disputed seas began to embrace the idea of defending the "status quo". It should be clear that China does not recognise the so-called status quo of the Philippines and other countries that are occupying Chinese islands and reefs through illegal means.

**[MYTH #6]**

**CHINA IS BUILDING "ARTIFICIAL ISLANDS" IN THE SOUTH CHINA SEA**

The construction activities on China's islands and reefs are conducted on natural features over which China has sovereignty and which form part of the Nansha Islands. They are fundamentally different from the "artificial islands, installations and structures" defined in the Law of the Sea.

**[MYTH #7] CHINA'S RELEVANT ISLANDS AND REEFS ARE LOW-TIDE ELEVATIONS WITH NO TERRITORIAL STATUS**

In accordance with international law, China's sovereignty over the Nansha Islands covers not only the islands itself, but also shoals, reefs and cays that form the Nansha Islands and related waters. In 1935, 1947 and 1983, the Chinese government published the names of the SCS islands, including the collective and individual names of the Nansha Islands, including its components and various natural features. China's sovereignty over the Nansha Islands and its components has a full historical and legal basis.

Some countries have tried to separate the Nansha Islands from its components, wilfully claiming that the related

natural features have no territorial status. This is nothing but an out-of-context interpretation of international law.

**[MYTH #8]**

**CHINA IS ACCELERATING THE MILITARISATION OF THE SOUTH CHINA SEA**

Since its rebalance to the Asia-Pacific, the US has deepened its intervention in the SCS disputes. To accuse China of militarising the SCS is groundless. On the contrary, the SCS is being militarised by high-profile displays of military strength as evidenced by the frequent and large-scale military drills by certain countries and their allies. China is committed to a path of peaceful development. The constructions in the SCS are mainly for civilian purposes, and with the acknowledged goal of better safeguarding China's territorial sovereignty and maritime rights and interests.

**[MYTH #9]**

**CHINA'S CONSTRUCTION ACTIVITIES DAMAGE THE CORAL REEFS AND MARINE ECOLOGY**

As the owner of the Nansha Islands, China cares more than any other countries about the ecological preservation of the islands, reefs and the surrounding waters. Its construction activities place equal importance on environmental preservation.

**[MYTH #10]**

**CHINA IS BECOMING ASSERTIVE IN THE SOUTH CHINA SEA**

This seems to be the consensus in the media, academic journals and other professional venues. In fact, China's actions in the SCS are necessary to protect its legitimate interests, and are justified reactions to provocations by other claimant states. The tensions in the region can be attributed to collusion between the US and the claimant states. It is popularly believed that, without Washington's backing and high-profile policy of "returning to Asia", regional states would not be so eager to challenge China's interests in the SCS. ■

*Professor Wang Wen is the Executive Dean of the Chongyang Institute for Financial Studies at Renmin University, China.*

*This article first appeared in the South China Morning Post on 10 July 2016. The abridged version is republished here with the kind permission of the South China Morning Post and the author.*

**2015**

**OCTOBER**

The PCA rejects China's assertion that it does not have jurisdiction to hear the case brought by the Philippines and goes on to hear the merits of the case.

**NOVEMBER**

ASEAN decides not to issue a joint declaration at the Third ADMM-Plus due to disagreement on how to refer to disputes in the South China Sea among its members.

**2016**

**30 JANUARY**

The USS Wilbur Curtis conducts a FONOP near China's Triton Island in the Paracels.

**FEBRUARY**

China deploys surface-to-air missiles on Woody Island in the Paracel Islands. The information was made public after the conclusion of a special US-ASEAN Leaders Summit between US President Barack Obama and the ten ASEAN leaders held in Sunnylands, California.

# Perspectives from Near and Afar

ASEANFOCUS HAS INVITED SIX PROMINENT PERSONALITIES TO SHARE WITH US THEIR THOUGHTS ON HOW THEIR RESPECTIVE COUNTRIES MIGHT PERCEIVE THE ARBITRAL TRIBUNAL'S RULING AND ITS IMPACT ON THE REGION. THESE ARE THEIR PERSONAL VIEWS.

## PERSPECTIVE FROM INDONESIA

### DR. DEWI FORTUNA ANWAR

IS DEPUTY FOR GOVERNMENT POLICY SUPPORT AT THE SECRETARIAT OF THE VICE PRESIDENT OF THE REPUBLIC OF INDONESIA.

#### WHAT IS THE SINGLE MOST SIGNIFICANT OUTCOME OF THE ARBITRAL TRIBUNAL'S RULING, AND WHY?

The ruling has awarded the Philippines most of the claims it brought against China regarding the disputed waters of the South China Sea. The ruling has ruled that China's claim to most of the South China Sea as bounded by the Nine-Dash Line has no legal basis. The single most significant outcome of the ruling is that it has clarified once and for all that claims to the waters in the South China Sea can only be recognised in accordance to the stipulations laid out in the UNCLOS 1982. Adherence to international law, including UNCLOS 1982, should be the primary basis of international relations.

#### WHAT IMPACT DOES THE RULING HAVE ON INDONESIA'S POSITION ON THE DISPUTE IN THE SOUTH CHINA SEA IN GENERAL, AND ON CHINA'S INTRUSION INTO THE NATUNA ISLAND'S EXCLUSIVE ECONOMIC ZONE (EEZ) IN PARTICULAR?

The ruling has reaffirmed Indonesia's position in the South China Sea. In accordance with UNCLOS, Indonesia only shares maritime boundaries with Malaysia and Vietnam; and Indonesia is not a party to any of the territorial disputes in the South China Sea. China's intrusion into Indonesia's EEZ around the Natuna Island based on the former's Nine-Dash Line claim clearly violates UNCLOS. Even if China were to own all of the maritime features in the SCS, none of which are recognised as islands with rights to EEZ, there is no potential entitlement for China's maritime claim to overlap with Indonesia's EEZ in the South China Sea.

#### WHAT NEW ROLE (IF ANY) DO YOU SEE INDONESIA, EITHER THROUGH TRACK 1 OR VIA TRACK 1.5, PLAYING IN THE MANAGEMENT OF CONFLICTS IN THE SOUTH CHINA?

Indonesia has been consistent in promoting dialogues and opposing the threats, let alone the use of force, in settling the myriad disputes in the South China Sea. For years Indonesia has convened the Track 1.5 Workshops on Managing Conflicts in the South China Sea aimed at creating trust and finding common grounds for practical cooperation. Within ASEAN, Indonesia has been at the forefront in getting the Declaration of Conduct of Parties in the South China Sea (DoC) be implemented and in pushing for a more binding Code of Conduct to be finalised and agreed by all of the parties, including China. Indonesia had played a leading role in the international negotiations and acceptance of

UNCLOS, so it is likely that Jakarta will continue to call on all parties to exercise restraint and to respect international laws, including UNCLOS.

#### INDONESIA HAS BRUSHED OFF FROM BEING LABELLED A SCS CLAIMANT STATE BY CATEGORICALLY DENYING THE VALIDITY OF CHINA'S NINE-DASH LINE. HOWEVER, CHINA'S PROCLAMATION OF PARTS OF THE NATUNA ISLAND'S EEZ AS CHINESE "TRADITIONAL FISHING GROUNDS" AND INCREASED CHINESE FISHING ACTIVITIES IN THOSE WATERS HAVE PUT JAKARTA'S STEADFAST POLICY TO THE TEST. WHAT IS INDONESIA'S "RED LINE" FOR IT TO ACCEPTING THE "REALITY" OF BEING A CLAIMANT STATE?

Indonesia steadfastly adheres to its position that it is not a claimant in the SCS territorial disputes and has never recognised the validity of China's Nine-Dash Line. As such, Indonesia does not recognise China's proclamation of parts of the Natuna Island's EEZ as Chinese "traditional fishing grounds", nor has there ever been any agreement between Jakarta and Beijing that Indonesia would allow Chinese fishermen using traditional ways to fish in these waters. (Indonesia and Australia signed an agreement which allows traditional fishermen from Indonesia to fish in Australian waters.) Indonesia views all illegal, unregulated and unregistered (IUU) fishing activities by Chinese or fishermen of other nationalities in Indonesia territorial seas and EEZ simply as transnational crimes that they must be firmly dealt with in accordance with Indonesian laws.

#### HOW WOULD YOU ADVISE ASEAN TO MOVE FORWARD IN MANAGING ITS RELATIONS WITH CHINA IN THE WAKE OF THE RULING?

First and foremost, ASEAN members must remain united and not become divided over the issue of the South China Sea. China is a very important partner of ASEAN as a whole, as well as of individual ASEAN members, but the relationship must not become too asymmetrical. Therefore, ASEAN members should work hard and seriously preserve ASEAN's unity and centrality in managing relations with major powers, including with China. While maintaining close and friendly relations with China, ASEAN should make it clear that it expects China to respect international laws, including UNCLOS, and that any unilateral action by China that can destabilise regional peace and stability will harm China's relation with ASEAN. ■

2016

MARCH

More than 100 Chinese fishing boats sighted near Luconia Shoals, which is located within Malaysia EEZ off the coast of Sarawak. The same month, the government-linked Chinese (Taiwan) Society for International Law submits an Amicus Curiae brief to the PCA to counter the Philippines' assertion that Taiwan-controlled Itu Aba is not an island.

APRIL

China announces that it had reached a four-point "consensus" with Brunei, Cambodia and Laos on the South China Sea. However, subsequently Cambodia officially denies the existence of such a consensus, while Brunei does so unofficially.



PERSPECTIVE FROM  
**MALAYSIA**

**SHAHRIMAN LOCKMAN**

IS SENIOR ANALYST AT THE INSTITUTE OF STRATEGIC AND INTERNATIONAL STUDIES (ISIS), MALAYSIA.

**WHAT IS THE SINGLE MOST SIGNIFICANT OUTCOME OF THE ARBITRAL TRIBUNAL'S AWARD, AND WHY?**

The Tribunal's Award on Philippines v. China will have lasting and profound implications at the global and regional levels. For Malaysia, the most consequential ruling was that China had no legal basis to claim historic rights to the resources in the waters encompassed by its nine-dash line map. Indeed, the Tribunal affirmed the primacy of UNCLOS in determining maritime rights and entitlements in the South China Sea.

**HOW DOES THE AWARD EFFECT MALAYSIA'S POSITION AND POSTURING WITH RESPECT TO ITS POSITION IN THE SOUTH CHINA SEA DISPUTES?**

Malaysia's interests have been greatly served by this decision. Thanks in no small measure to its offshore fields in the South China Sea, Malaysia is Southeast Asia's second-largest producer of oil and natural gas and the world's third-largest exporter of LNG. Depending on global energy prices, the sector contributes between 20 to 30% of the Malaysian government's revenues.

As profound the implications were, they were hardly reflected in Malaysia's perfunctory statement on the Tribunal's Award. Issued in the late evening of 12 July, the five-paragraph statement was mainly a reiteration of long-standing positions. The closest it got to welcoming the decision was to state that "all relevant parties can peacefully resolve disputes by full respect for diplomatic and legal processes; and relevant international law and 1982 UNCLOS."

**WHAT IMPACT DO YOU FORESEE THE AWARD HAS ON MALAYSIA'S RELATIONS WITH CHINA?**

Malaysia's caution should not have come as a surprise. Like many other countries, Malaysia wished to avoid giving China an additional pretext for a disproportionate response following the Tribunal's decision. Moreover, economic realities weigh heavily on Malaysia's calculations. With trade hovering around the US\$100 billion mark, China is

Malaysia's biggest trading partner while Malaysia is China's third-largest in Asia after Japan and South Korea.

**MALAYSIA'S RESPONSE TO CHINESE INTRUSIONS INTO ITS EXCLUSIVE ECONOMIC ZONE (EEZ) HAS BEEN HAPHAZARD, A STATE OF AFFAIRS WHICH COULD ONLY BE ATTRIBUTED TO "MISCOMMUNICATIONS" AMONGST ITS LINE AGENCIES. HOW DO YOU READ THE MINISTRY OF FOREIGN AFFAIRS, MALAYSIAN ARMED FORCES AND MALAYSIAN MARITIME ENFORCEMENT AGENCY'S RESPONSE TO THE AWARD?**

It should not be assumed, however, that Malaysia is relatively unperturbed. Indeed, there are elements in the Malaysian Government that have become more forward-leaning on the South China Sea issue. Principal among these is the Foreign Ministry. In recent years, it has sought to encourage ASEAN to be more forthright in its statements on the South China Sea, even as Malaysia's national responses have remained understated. The Malaysian Maritime Enforcement Agency (MMEA) has also shown a growing preference for robust measures, particularly in response to the growing incursions of Chinese fishing vessels – and possibly China's maritime militia – in Malaysia's EEZ.

**IN LIGHT OF THE AWARD, HOW DO YOU SEE MALAYSIA PROCEEDING TO PROTECT ITS SOVEREIGN RIGHTS IN THE SOUTH CHINA SEA?**

The shape of Malaysia's collective posture in the coming months, however, is difficult to predict. What is certain, however, is that the persistent presence of the China Coast Guards in Malaysia's EEZ since 2013 has led to a rising undercurrent of reserve towards China within growing sections of the Malaysian Government. China's refusal to recognise the Tribunal's Award denies the region a seminal opportunity to move forward. In the long run, this may well compel Malaysia to recalibrate its stance on the South China Sea. ■

**2016**

**MAY**

The USS William P. Lawrence conducts a FONOP near China's artificial island at Fiery Cross Reef.

**MAY**

During a state visit to Vietnam, US President Barack Obama announces the lifting of the US embargo on sales of lethal weapons to Vietnam. Separately, Indian warships visit Cam Ranh Bay, Vietnam in yet another sign of the budding Indo-Vietnamese security ties.

**MAY**

The Indonesian navy detains a Chinese fishing vessel after it entered Indonesia's exclusive economic zone surrounding the resource-rich Natuna islands archipelago.

**JUNE**

US alleges Chinese fighter aircraft made an "unsafe" interception of a US Navy EP-3 over the South China Sea. China confirms the interception but denies it was "unsafe."

**WHAT IS THE SINGLE MOST SIGNIFICANT OUTCOME OF THE ARBITRAL TRIBUNAL'S AWARD, AND WHY?**

The most significant ruling in the award is probably the status of features in the Spratlys. Together with the tribunal's award on the invalidity of China's nine-dash line claim, this ruling helps to narrow down the scope of the South China Sea disputes.

As far as Vietnam is concerned, the award erases the overlapping zones between China's claims and Vietnam's exclusive economic zone (EEZ) measured from its mainland. This important precedent also implies that features in the Paracels, which are quite similar to those in the Spratlys in terms of size and nature, may not be entitled to an EEZ. Therefore, Vietnam will be in a better position to protect its legitimate EEZ off its central coastline, which has been subject to encroachments by China in the past.

**WHAT IMPACT DOES THE AWARD HAVE ON VIETNAM'S APPROACH TOWARDS THE SOUTH CHINA SEA DISPUTES?**

The tribunal's award will put pressure on Vietnam to clarify its claims in the South China Sea and bring them into conformity with UNCLOS. It also enlightens Vietnam on how it can pursue legal means to protect its legitimate interests in the South China Sea.

**WHAT LESSONS WILL VIETNAM DRAW FROM THE PHILIPPINES' DECISION TO SEEK LEGAL ASSISTANCE THROUGH THE ARBITRAL TRIBUNAL ON THE SOUTH CHINA SEA DISPUTES?**

The lesson for Vietnam is that international law can be a powerful tool for small countries to protect their legitimate interests in the face of a big power. Therefore, in the long run, Vietnam may consider arbitration proceedings against China regarding claims over the Paracels, especially if China continues with its aggressive behaviours towards Vietnam.

**VIETNAM HAS IMPROVED SECURITY TIES AND COOPERATION WITH THE MAJOR POWERS, ESPECIALLY THE US AND JAPAN, IN RECENT YEARS. TO WHAT EXTENT DOES RISING TENSIONS IN THE PARACEL AND SPRATLY ISLANDS FACTOR INTO THESE DEVELOPMENTS? IS THERE A RETHINKING WITHIN THE VIETNAMESE POLICY CIRCLES OF THE THREE "NOS" POLICY (NO MILITARY ALLIANCES, NO FOREIGN MILITARY BASES IN VIETNAM, AND NO RELIANCE ON EXTERNAL POWERS FOR VIETNAM'S DEFENCE)?**

The firming-up of Vietnam's relations with the major powers is part of its broader strategy of "diversifying and multilateralising" its foreign relations. The strategy is not necessarily aimed at China. However, China's increasing assertiveness in the South China Sea does encourage Vietnam to accelerate this effort, as closer relations with major powers puts Vietnam in a better strategic position to counter China's pressures.

Vietnam is likely to maintain its so-called "three no's" policy, as abandoning the policy threatens to destabilise its relationship with China. While Vietnam is determined to resist China's pressures in the South China Sea, a stable and healthy relationship with China is also vital to its security and economic well-being.

**WHAT IS THE IMPACT OF THE ARBITRAL AWARD IN THE LARGER CONTEXT OF THE SINO-VIETNAMESE AND THE ASEAN-CHINA RELATIONS?**

The award's impact on Vietnam's relations with China as well as ASEAN-China relations will largely depend on China's reactions. If China ignores the ruling and keeps acting aggressively, a heightened state of tensions in the South China Sea should be expected, and regional security will suffer. If China exercises self-restraint and gradually warms up to the ruling, there will be a better chance for China's relations with Vietnam and other ASEAN states to prosper. ■

**JUNE**

The Special ASEAN-China Foreign Ministers Meeting held in Kunming, China on 14 June was marked with controversy over the retraction of the ASEAN joint statement which carried a critical tone over developments in the South China Sea.

**JULY**

PCA releases its award on the Philippines' submission on the South China Sea.



**WHAT IS THE SIGNIFICANCE OF THE ARBITRAL TRIBUNAL'S AWARD FOR AUSTRALIA?**

Australia's 2016 Defence White Paper released in February, refers no less than 56 times to the importance of a 'rules based global order' as being a critical underpinning of Australia's security. The award provides a key demonstration of the 'rules based global order' at work. Australia's Foreign Minister, Julie Bishop, issued a statement following the release of the award. It said, "*Adherence to international law is the foundation for peace, stability and prosperity in East Asia, as it has for many years. This decision is an important test case for how the region can manage disputes peacefully.*"

Although Bishop's statement was strong, it is notable that Australia has stopped short of actually sailing a navy vessel within 12 nautical miles of a contested feature in the South China Sea. When the opposition spokesperson on defence Senator Stephen Conroy said that such a freedom of navigation operation should be undertaken, Julie Bishop rejected his call, saying that such an action amounted to '*urging an escalation of tensions.*'

**WHAT EFFECT WOULD THE AWARD HAVE ON AUSTRALIA'S APPROACH TOWARDS THE SOUTH CHINA SEA DISPUTES?**

Speaking on Perth radio, Julie Bishop foreshadowed substantial Australian involvement in regional diplomacy following the award, "*I expect to be speaking with counterpart ministers over the coming few days and most certainly when I attend the ASEAN Regional Forum and the East Asia Summit in mid-July. All of the relevant parties will be represented there and I'm sure that this will be a topic of considerable discussion. But it does give our region an opportunity to demonstrate how we can negotiate disputes peacefully.*"

Having been though one of the longest election campaigns in Australian history and with Malcolm Turnbull's new cabinet only announced on 18 July, an early business item for the National Security Committee of Cabinet will be to shape Australia's future strategy to the South China Sea. This will be a difficult task. Mr Turnbull and Ms Bishop are mindful of the need to tread carefully with China, such is the country's importance to Australia's rather fragile economic growth.

**WILL AUSTRALIA CONTINUE TO CONDUCT FREEDOM OF NAVIGATION AND OVERFLIGHT MARITIME OR AIR PATROLS IN THE SOUTH CHINA SEA – EITHER INDIVIDUALLY OR IN COLLABORATION WITH OTHER SECURITY PARTNERS?**

Australia's position on this issue is somewhat unclear. The Government maintains that it regularly undertakes such patrols in the South China Sea. For example, Julie Bishop has said that "*... as we've done for many decades, Australian ships and aircraft will continue to exercise rights under international laws of freedom of navigation and overflight. We've already been doing that, we'll continue to do it.*"

However, when asked if Australian Navy vessels sail within 12 nautical miles of disputed features, the Minister's answer was less precise: "*Well I won't comment on the specific details of what our Australian Defence Force activities are, but we certainly exercise the right of freedom of navigation, freedom of overflight.*"

This contrasts with the view put by Labor's Stephen Conroy, quoted here by the Australian Broadcasting Corporation: "*Julie Bishop continues to pretend that Australia has been engaging in what's referred to as Freedom of Navigation operations or FONOPs. When I've questioned the Department of Defence officials at Senate Estimates they've made it very clear, they are not authorised to enter into any of these disputed areas.*"

In practice it seems only to be the United States which has sailed ships within 12 nautical miles of disputed territories.

**WHAT PRACTICAL MEASURES COULD AUSTRALIA OFFER TO LITTORAL SOUTHEAST ASIAN STATES TO STRENGTHEN THE RULE OF LAW, FREEDOM OF NAVIGATION AND OVERFLIGHT, AND TO PROMOTE MARITIME DOMAIN AWARENESS?**

The 2016 Defence White Paper sets out an agenda for increasing defence and security cooperation with a large number of countries in what the paper calls the Indo Pacific region. In particular the policy statement focusses on building closer defence ties with many Southeast Asian states: "*Australia has a strong foundation of longstanding bilateral and multilateral partnerships with countries in South East Asia which have an interest in maritime security in the region. This includes Indonesia, Singapore, Malaysia, Brunei, the Philippines, Thailand and Vietnam. Defence will have enhanced capability to make meaningful contributions to operations addressing shared regional security challenges and humanitarian assistance and disaster relief efforts.*"

ASEAN countries should anticipate increased Australian interest to cooperate on a range of practical measures, focussed on enhancing maritime cooperation in the region, including enhanced intelligence and information sharing; greater opportunities for individual and unit training; expanded maritime exercises and training, including bilateral and multilateral exercising; industry collaboration in the acquisition and sustainment of defence equipment and; enhance sharing of data to support maritime situational awareness in the South China Sea and elsewhere.

Many of these activities already form the basis of close Australian defence and national security relationships with regional partners, the 2016 Defence White Paper points to an intention to substantially expand such cooperation. ■



**AMBASSADOR SHIVSHANKAR MENON**

IS DISTINGUISHED FELLOW AT BROOKINGS INSTITUTION, WASHINGTON, D.C., AND FORMER NATIONAL SECURITY ADVISOR AND FOREIGN SECRETARY OF INDIA.

**HOW IS THE ARBITRAL TRIBUNAL'S RULING VIEWED WITHIN THE INDIAN SECURITY AND FOREIGN POLICY ESTABLISHMENTS?**

The official Indian response has been careful, stressing the importance of respect for international law of the sea embodied in UNCLOS, India's interest in freedom of navigation in these waters, and counseling restraint on the parties as they seek a peaceful negotiated settlement.

Unofficial opinion has hailed the ruling as a clear vindication of the Philippines' position and a rejection of the legal basis of China's claims to historic rights in these waters.

More thoughtful commentary has commented that the ruling will test ASEAN, is unlikely to affect the behaviour of claimants or change facts that exist or are being created, and that China could well use the gaps in the ruling to justify its future actions.

**WHAT ARE INDIA'S INTERESTS IN THE SOUTH CHINA SEA AND HOW DOES NEW DELHI PURSUE THOSE INTERESTS?**

India's primary interest in the South China Sea is freedom of navigation in these waters. Over half of India's exports by sea flows east of India. It is important that disputes such as these be settled in accordance with international law, which in this case is UNCLOS, to uphold a rule-based international order. India also has a strong interest in the peaceful resolution of disputes in this region which is critical to India's security and future prosperity.

**WHAT ROLE DOES INDIA ENVISION PLAYING IN THE SOUTH CHINA SEA DISPUTES?**

The primary role in settling these disputes peacefully is naturally that of the parties, assisted by the international community and legal order. India should be ready to work with her friends in the region to achieve a peaceful negotiated settlement of these disputes.

**WHAT DO YOU SEE AS ASEAN'S BIGGEST CHALLENGE IN PLAYING A MEANINGFUL AND CONSTRUCTIVE ROLE IN THE SOUTH CHINA SEA DISPUTES?**

A meaningful ASEAN role assumes ASEAN unity, which requires an internal understanding on accommodating differing interests of various ASEAN countries I believe that this is possible, as ASEAN's history shows. Thereafter, the external environment, particularly major Pacific and Indian Ocean trading powers like the US, Japan and India should be supportive, politically and diplomatically and legally, of the role that ASEAN marks out for itself. ■

**BONNIE GLASER**

IS SENIOR ADVISER FOR ASIA AND DIRECTOR OF THE CHINA POWER PROJECT AT THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, WASHINGTON, D.C.

**WHAT IS THE MOST IMPORTANT TAKE-AWAY FROM THE PCA RULING, AND WHY?**

China's claims to any "historic rights" to waters inside the nine-dash line are contrary to UNCLOS and invalid. The only definition of the nine-dash line that is consistent with UNCLOS is a claim of sovereignty over the land features and the maritime zones each is legally entitled to under UNCLOS. None of the land features in the Spratlys are islands; they are either rocks that are entitled to no more than a 12nm territorial sea or features that are submerged at high tide and therefore not entitled to any maritime zone. This is important because China submitted to the United Nations in May 2009 a map containing the nine-dash line, but did not clearly state what the line represented. There have long been unsettled debates in China over whether the line was a national boundary, a claim of historic rights within the line, or just a claim to the land features inside the line. The first two definitions are now clearly not valid. China can no longer legally harass or otherwise interfere with fishermen from other countries or energy exploration activities taking place in waters that are outside of 12nm of any feature that China occupies in the Spratlys.

**WILL FONOPS CONTINUE TO BE THE DEFINING FEATURE WHICH UNDERLINES US COMMITMENT TO ITS ALLIES IN EAST ASIA? ARE THERE OTHER WAYS OF SIGNALING THIS COMMITMENT?**

The primary purpose of FONOPs is to maintain freedom of navigation and overflight in the world's oceans. The US Freedom of Navigation (FON) programme has been in place since 1979 with the goal of preserving this national interest. The vast majority of FON operations are conducted quietly and routinely. US commitment to allies and partners in the region are demonstrated in various ways. Militarily, the US has been conducting exercises unilaterally, bilaterally and multilaterally. US naval presence in the South China Sea has increased substantially over the past few years. Recently, the US dispatched two carrier battle groups to the South China Sea. Diplomatically, the US has spoken out forcefully and repeatedly against provocations by China and other parties, and has urged that claimants exercise self-restraint. The US is also working with its allies to help smaller countries have better maritime domain awareness through capacity building programmes. I expect all these activities will continue. Anxiety about US commitment and staying power is virtually a permanent feature of the security landscape in the Asia-Pacific region, and is difficult to fully assuage. At this particular juncture, American politics and the upcoming US election is exacerbating those anxieties. FON operations alone will not ease these worries, but US strategy towards the region includes more than just FON operations.

**US FREEDOM OF NAVIGATION OPERATIONS (FONOPS) AND OVERFLIGHT IN THE SOUTH CHINA SEA HAVE ELICITED STERN RESPONSES FROM CHINA TO A POINT THAT THE ACTION-REACTION DYNAMICS FROM BOTH SIDES HAVE RAISED THE POSSIBILITY OF AN ACCIDENTAL MILITARY CLASH. IS THERE AN INFLECTION POINT WHERE FONOPS AND**

**OVERFLIGHT MAY DO MORE HARM THAN GOOD FOR SOUTHEAST ASIAN PEACE AND STABILITY?**

Since October 2015, the US has conducted three FONOPs in the South China Sea. Although China has denounced these operations, the Chinese have been very cautious to not interfere with them. No PLA navy vessels or aircraft have operated close to US destroyers conducting FONOPs. Despite some reports to the contrary, both US and Chinese military operators have adhered to the procedures that they agreed upon in the Memorandum of Understanding on the Rules of Behavior for Safety of Air and Maritime Encounters signed in September 2015. It is possible in the future that China will use its military militia to interfere with a US FON operations in ways that could increase the risk of accident, but I expect that the Chinese will remain cautious. China does not seek a military confrontation or mishap with the United States. President Xi Jinping has instructed pilots and navy commanders to refrain from dangerous behaviour in the air and at sea. Neither the US nor China would benefit from a military conflict. The risk of conflict between Chinese and US military assets in the Spratlys and Paracels, where FON operations are being conducted, is lower than in areas close to China's coastline where the US conducts frequent close-in surveillance flights and Chinese fighter jets scramble and intercept them.

**WHAT WILL BE THE IMPACT ON THE US REBALANCE TO ASIA IF THERE WILL BE INDEED A SECURITY POLICY SHIFT IN MANILA UNDER THE NEW DUTERTE ADMINISTRATION TO SEEK ACCOMMODATION WITH CHINA?**

This question is difficult to answer without knowing what kind of "accommodation" the Philippines might seek with China. If Manila and Beijing agree to set aside their sovereignty dispute and seek cooperation on an equal footing, this could be a positive outcome. For example, China might agree to stop harassing Filipino fishermen who are fishing around Scarborough Shoal, especially now that the Tribunal has ruled that both China and the Philippines have traditional fishing rights in the 12nm around that land feature. China might also agree to remove its coast guard vessels that are conducting around-the-clock patrols around Second Thomas Shoal. In the past, one of the key obstacles to bilateral cooperation was Beijing's insistence that Manila recognise Chinese sovereignty as a precondition to joint development. Contrary to Chinese media claims that the US hopes to drive a wedge between China and its neighbours, a mutually beneficial accommodation between the Philippines and China would be in American interests. The Duterte Administration can maximise leverage over China by maintaining close ties with the United States as it engages in bilateral talks with China. An improvement in Philippines-China relations therefore is not likely to come at the expense of the US-Philippines relationship.

The rebalance to Asia is likely to endure regardless of the future of relations between China and the Philippines. Growing US interests in Asia are a result of a mix of economic, political, military and strategic factors. It is not an exaggeration to say that US interests are inextricably linked to Asia and it is therefore likely that the United States will expand and deepen its commitment to the region in the years to come. ■

# Thoughts and Reflections

ASEANFOCUS IS HONOURED TO EXCLUSIVELY FEATURE THE OPINIONS OF SOME OF THE MOST INFLUENTIAL INTERNATIONAL THOUGHT LEADERS ON THE IMPACT OF THE ARBITRAL TRIBUNAL'S AWARD. THESE ARE THEIR PERSONAL VIEWS.

**AMB. RODOLFO C. SEVERINO, JR.**  
**ASEAN SECRETARY-GENERAL (1998-2002)**

“Even as ASEAN members emphasise the importance of restraint and rules-based practices, some realities remain. Taking a moral high ground to convince China to honour the Arbitral Tribunal’s award may not work, but constructive diplomacy might, as China and the US have different interests in the region. External perceptions of ASEAN will now be refracted through the significant bilateral relations between some ASEAN members and China.”

**AMB. ONG KENG YONG**  
**ASEAN SECRETARY-GENERAL (2003-2008)**

“The perception will always be that ASEAN cannot hold together on issues concerning the South China Sea. I will cherish memories of those days when ASEAN could engage all countries interested in Southeast Asia in a strategic demonstration of equality and mutual respect and trust.”

**PROF. NICK BISLEY**  
**LA TROBE UNIVERSITY, AUSTRALIA**

“The Australian government was pleased that the findings of the Arbitral Tribunal so firmly backed the Philippines. The official response has been carefully calibrated so as not to inflame relations with China and Canberra is closely coordinating its approach with Washington and other allies. The decision is likely to increase pressure on Canberra to take part in FONOPs, a step so far it has resisted due to its economic ties to China.”

**THE HON. GARETH EVANS**  
**FOREIGN MINISTER, AUSTRALIA (1988-1996)**

“If China takes a hardline path, or fails to moderate its behaviour significantly in the months ahead, the case for further international pushback by Australia– including freedom-of-navigation voyages within 12 nautical miles of Mischief Reef and other artificial islands in that category – will become compelling. But right now it is in everyone’s interest to give China some space to adjust course and to reduce, rather than escalate, regional tensions.”

**MS. MARINA TSIRBAS**  
**THE AUSTRALIAN NATIONAL UNIVERSITY**

“Maintaining a rules based global order is important to Australia and for international security. Australia will strongly support upholding the ruling and UNCLOS – which is part of that normative order and which all parties had a role in shaping – and will expect others to do so. In the lead up to summit season and China’s G20 hosting, all leaders will need to carefully manage next steps. Claimants will need

to discuss a way forward. Australia will take a measured approach and look at how ASEAN responds. Much will depend on how China reacts.”

**PENGIRAN DATO PADUKA OSMAN PATRA**  
**PERMANENT SECRETARY, PRIME MINISTER’S OFFICE, BRUNEI (2008-2012)**

“The misgivings and tense atmosphere generated following the award rendered on 12 July by the Arbitral Tribunal serves as a major challenge to the countries in the region. It is the responsibility of ASEAN and China to dedicate their efforts to building high-level trust and confidence and implement commitments to resolve the issues on the ground in good faith through constructive engagement, dialogues and consultations.”

**AMB. POU SOTHIRAK**  
**EXECUTIVE DIRECTOR, CAMBODIAN INSTITUTE FOR COOPERATION AND PEACE**

“The Arbitral Tribunal ruling on 12 July on the contentious sovereignty and maritime claims in the SCS will have long term implications on ASEAN-China relations. The Arbitral Tribunal should weigh carefully between the international legal context and an enforceable peaceful resolution to avoid full-blown conflicts which could destabilise security in the Asia-Pacific region.”

**PROF. DAVID WELCH**  
**UNIVERSITY OF WATERLOO, CANADA**

“Canada appreciates the complexity of the issues in the South China Sea and welcomes efforts to manage or resolve disputes peacefully in accordance with international law. With its G7 partners, Canada hopes and expects that parties will receive the decision in the constructive spirit intended by the tribunal.”

harass other claimants and reclaim reefs to build its military presence. Beijing's rejection of The Hague questions its role as a UN P-5 member maintaining the international peace and security."

**THE HON. HITOSHI TANAKA**  
**VICE MINISTER OF FOREIGN AFFAIRS, JAPAN (2002-2005)**

"In light of the Arbitral Tribunal's ruling, I sincerely hope that China will carefully consider its future conduct in the South China Sea. China's reaction will be under the scrutiny of the international community as a significant indication of its attitude to the international rules based order."

**PROF. LEE CHUNG MIN**  
**YONSEI UNIVERSITY, REPUBLIC OF KOREA**

"One of the most significant consequences of the tribunal's ruling is that it has forced China to show its true composure to all Asian states and the world; namely, that China expects other states to respect its claims to sovereignty 100% while only selectively accepting the sovereignty of other states. China can reject the findings but whatever thin measure of trust it had built up since reforms began has been damaged irreparably and irreversibly."

**TAN SRI DR. SYED HAMID ALBAR**  
**MINISTER FOR FOREIGN AFFAIRS, MALAYSIA (1999-2008)**

"The energy-rich, strategic waters of the South China Sea can either be a source of friction or platform to build cooperation. Any outcome of the Arbitral Tribunal will not resolve the dispute because all claimant states have their own arguments and rationale. Unilateral approaches could antagonize other claimants and further jeopardize the conflict management process. A well-meaning mechanism is needed to de-escalate the tension in order to prevent the SCS from being an international flashpoint. I think Malaysia will continue to preserve a good overall relationship with Beijing and on a regional perspective, it will continue to push for significant progress on an elusive binding Code of Conduct (COC) on the South China Sea."

**PROF. DATO' DR ZAKARIA AHMAD**  
**DEPUTY VICE CHANCELLOR (RESEARCH), HELP UNIVERSITY, MALAYSIA**

"The Arbitral Tribunal ruling does not alter the circumstances Malaysia must navigate to ensure its territorial integrity and a Code of Conduct in the South China Sea that attains conflict management, if not resolution. Uppermost is the imperative to restore ASEAN unity in the face of an overarching China with its political clout and economic overtures."

**PROF. DAVID CAPIE**  
**VICTORIA UNIVERSITY OF WELLINGTON, NEW ZEALAND**

"Soon after the ruling was announced Foreign Minister Murray McCully released a brief and very general comment calling on "all states" to respect it and emphasizing the importance of international law. New Zealand hopes the decision can be a "platform for resolving" the dispute, including through renewed negotiations between the parties."

**DR. RUAN ZONGZE**  
**EXECUTIVE VICE PRESIDENT, CHINA INSTITUTE OF INTERNATIONAL STUDIES**

"Under no circumstances China's territorial sovereignty and maritime rights and interests shall be affected by the ruling. It is fatally flawed, ridiculous and misleading. It will be wrong for anyone to use the award as the basis to make further provocative move in the South China Sea. China's repercussion will largely rest upon the response of countries concerned."

**DR. ANTONIO MISSIROLI**  
**DIRECTOR, THE EUROPEAN UNION INSTITUTE FOR SECURITY STUDIES**

"The European Union has always been a fervent supporter of a rules-based international order and of existing mechanisms of international law for the settlement of disputes. Brussels has followed the Philippines v. China case with great interest and its statement reflects its past declarations on the issue – urging involved parties to refrain from unilateral action and abide by the Tribunal's ruling."

**PROF. BRAHMA CHELLANEY**  
**CENTER FOR POLICY RESEARCH, INDIA**

"India is deeply concerned about China's rebuff of the international-tribunal ruling. In recent years, India has complied with adverse rulings against it by international tribunals in separate disputes with Bangladesh and Pakistan. India would like China to emulate its example and not act in a manner that allows brute power to trump international law."

**AMB. ARIF HAVAS OEGROSENO**  
**DEPUTY COORDINATING MINISTER OF MARITIME AFFAIRS AND RESOURCES, INDONESIA**

"The arbitration is a test for many. It is a test for China, a big country that has a permanent seat in the United Nations Security Council, as well as the other claimants on its position towards international law. It is a test to our region that is seen as paradoxical: 21st century economies with 19th century territorial ambitions."

**DR. MASASHI NISHIHARA, PRESIDENT, RESEARCH INSTITUTE FOR PEACE AND SECURITY, JAPAN**

"The Tribunal's historic judgement, supporting the rule of law under UNCLOS, prescribes how the issues in the South China Sea should be settled. China can no longer

**PROF. AILEEN BAVIERA**  
**UNIVERSITY OF THE PHILIPPINES DILIMAN**

“The new situation creates incentives for resuming Philippines-China dialogue. Fortuitously for Manila, the ruling and strong international support give it leverage in negotiations. Fortunately for Beijing, the Duterte government has the will to make hard choices. Both sides need wisdom not to squander opportunities to reach just and peaceful outcomes.”

**THE HON. HARRY L. ROQUE, JR.**  
**MEMBER OF THE PHILIPPINES HOUSE OF REPRESENTATIVES**

“The recent arbitral victory has clarified issues which should lead to a diplomatic solution to the Spratlys Island disputes. While it has not resolved the dispute since the Tribunal is bereft of jurisdiction to rule on the issue of the disputed islands, it has debunked historical waters as a basis of title which should simplify the issues for resolution. It has placed the Philippines on equal footing with China in negotiating lasting solution to the dispute.”

**AMB. BILAHARI KAUSIKAN**  
**AMBASSADOR-AT-LARGE, MINISTRY OF FOREIGN AFFAIRS, SINGAPORE**

“The Arbitral Tribunal award is of immense legal importance. It has brought legal clarity to several crucial issues. But the disputes in the SCS are primarily political and diplomatic issues and the law is only one factor in managing them. Of course, should China respect the Arbitral Tribunal award, that would go a very long way to ensure that the disputes will be peacefully managed. It will be a strong signal of China’s intentions in dealing with small countries on its periphery and not just in Southeast Asia.”

**DR. THITINAN PONGSUDHIRAK**  
**DIRECTOR, INSTITUTE OF SECURITY AND INTERNATIONAL STUDIES, THAILAND**

“With a looming constitutional referendum and a foggy return to electoral rule of sorts, Thailand is so mired in its domestic imbroglio that it is unable to take a leadership or interlocutor role. Its default position is to urge all sides to abide by international law. Given the Tribunal’s decision, the Thai line on international law compliance is an automatic endorsement that goes against China’s nine-dash-line claims. China has not overtly compelled Thailand to take a different position as yet, and so Thailand’s military government would most likely keep its head down and eschew controversy in hope that the maelstrom blows over before long.”

**DR. PATRICK CRONIN**  
**SENIOR ADVISOR & SENIOR DIRECTOR, ASIA-PACIFIC SECURITY PROGRAM, CENTER FOR A NEW AMERICAN SECURITY, USA**

“The ruling handed down from the Arbitral Tribunal is a landmark statement about the primacy of the UN Convention on the Law of the Sea. Now it is up to the other claimant states, the region, and the international community to help enforce this milestone judgment. China must be persuaded to eventually do the right thing and comply with an international law it has voluntarily signed and ratified.”

**PROF. DONALD K. EMMERSON**  
**STANFORD UNIVERSITY, USA**

“In contrast to Beijing’s fulminations, Washington has merely called the ruling “an important contribution” to peaceful dispute resolution in the South China Sea, albeit “legally binding” on China and the Philippines. A question now is the extent to which, at the imminent AMM/ARF/EAS-FMM meetings in Vientiane, Chinese fury will again split/censor/silence the ASEAN member states.”

**DR. SATU LIMAYE**  
**DIRECTOR, EAST-WEST CENTER, USA**

“The Obama administration, key members and committees of Congress, and the two leading presidential candidates all welcome the Arbitration Tribunal’s July 12th South China Sea ruling. Official circumspection belies a sense of victorious validation of the U.S. assessment that China’s claims were not in accordance with international law. However, neither U.S. executive nor congressional approaches to the SCS disputes will change absent dramatic actions by any of the parties. And calls in Congress for U.S. UNCLOS ratification are likely to be seen as even more irrelevant by ratification opponents.”

**PROF. ANDREW NATHAN**  
**COLUMBIA UNIVERSITY, USA**

“Nothing in the tribunal decision will force China to vacate the seven sand islands it has already built and garrisoned. The blow to China’s reputation as a “peacefully rising” superpower clearly does not bother Beijing decision-makers. Instead, they think it is beneficial for regional neighbours to get used to the fact that, as former foreign minister Yang Jiechi once put it, “China is a big country and other countries are small countries, and that is just a fact.”

**DR. NGUYEN VU TUNG**  
**PRESIDENT, DIPLOMATIC ACADEMY OF VIETNAM**

“The July 12, 2016 award of the Arbitration initiated in accordance with Annex VII of UNCLOS is a landmark endorsement for the prevail and systematic effect of UNCLOS in allocating states’ rights and obligations for a good order at sea. This will give rise to new opportunities for peace and cooperation in the South China Sea.” ■



# GLOSSARY

**Air Defence Identification Zone (ADIZ):** According to the Code of Federal Regulations of the United States of America, ADIZ are areas of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security.

**Breadth of the Territorial Sea:** Article 3 of UNCLOS states that “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”

**Cay:** The 2012 International Court of Justice’s decision in the Territorial and Maritime Disputes between Nicaragua and Colombia (Nicaragua v. Colombia) described cays as “small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by wind.”

**Code of Conduct in the South China Sea (COC):** The DOC contains a commitment among ASEAN member states and China to work towards the realisation of a Code of Conduct in the South China Sea (COC). The ASEAN side wishes to make the COC a legally-binding agreement. Discussions on a COC have been underway in the ASEAN-China Senior Officials Meeting (SOM) on the Implementation of the DOC.

**Code for Unplanned Encounters at Sea (CUES):** A series of protocols for the safety of naval vessels negotiated at the 2014 US-led Western Pacific Naval Symposium, which includes participation of China and eight ASEAN countries. The idea of an additional CUES in the South China Sea was floated by Singapore as a means to defuse tensions in the South China Sea. The proposed protocol expands its coverage to include coast guards and fishing vessels.

**Commission on the Limits of the Continental Shelf (CLCS):** “Facilitate(s) the implementation of the United Nations Convention on the Law of the Sea (the Convention) in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.

**Declaration on the Conduct of Parties in the South China Sea (DOC):** A political statement signed by ASEAN Foreign Ministers and China’s Special Envoy in 2002 to put in place an ASEAN-China cooperation framework for confidence-building measures and functional projects in the South China Sea.

**Exclusive Economic Zone:** Article 55 of the UNCLOS defines the EEZ as “an area beyond and adjacent to the territorial sea [up to 200 nautical miles], subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”

**Freedom of Navigation Operations (FONOPS):** The US Navy conducted FONOPS operations in the South China Sea in October 2015, January 2016 and May 2016. The White House says such operations are meant to display US commitment to defending freedom of navigation in the South China Sea and to reaffirm US determination to “sail, fly, and operate wherever international law allows” even though the US has not yet ratified UNCLOS.

**International Tribunal for the Law of the Sea (ITLOS):** An independent judicial body located in Hamburg and established by UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. The President of ITLOS appointed four of the five judges deliberating the Philippines v. China case in the Arbitral Tribunal.

**Island:** As defined in Article 121 of UNCLOS, an island is “a naturally formed area of land, surrounded by water, which is above water at high tide.”

**Joint Development:** Zou Keyuan (2006) sees it as “(a) is an arrangement between two countries; (b) is usually concerned with an overlapping maritime area; (c) can be used as a provisional arrangement pending the settlement of the boundary delimitation disputes between the countries concerned; (d) is designed to jointly develop the mineral resources in the disputed area or a defined area shared by two countries.”

**Low-tide Elevation:** Article 13 of UNCLOS defines a low-tide elevation as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.” If a low-tide elevation is wholly outside the territorial sea of a coastal state, it will not create additional territorial waters on its own.

**Permanent Court of Arbitration (PCA):** An intergovernmental organisation of 121 member states located in The Hague and established in 1899 to facilitate arbitration and other forms of dispute resolution between states. It is not a court

in the traditional sense, but a permanent framework for arbitral tribunals to resolve specific disputes.

**Reef:** A submerged feature that does not break the surface unless in low tide, reefs projects nothing, but land reclamation and construction of artificial islands over disputed reefs in recent years have profound security implications in the South China Sea.

**Rock:** According to UNCLOS, rocks, unlike islands, “cannot sustain human habitation or economic life of their own” and “shall have no exclusive zone or continental shelf”.

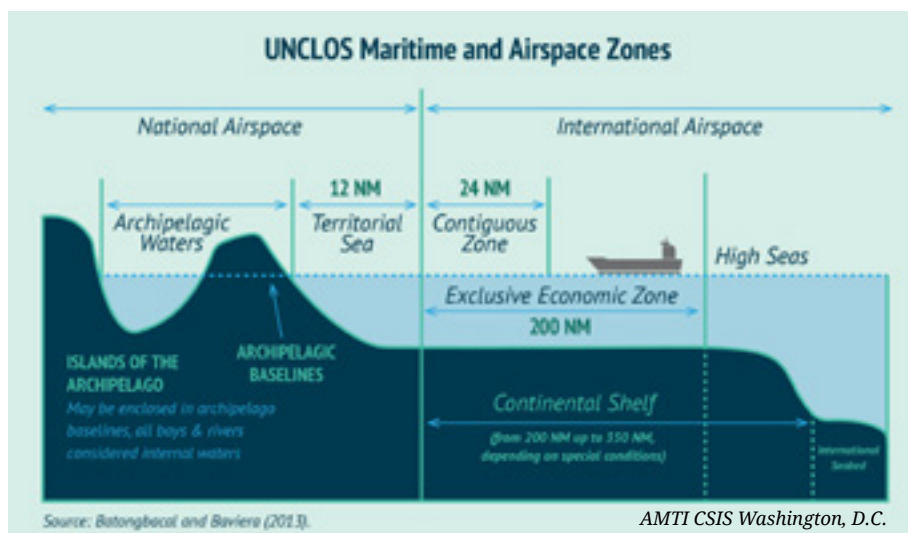
**Sea Lines of Communication (SLOC):** The primary maritime routes between ports, used for trade, logistics and naval forces. The South China Sea is widely recognised as one of the most important SLOCs in the world.

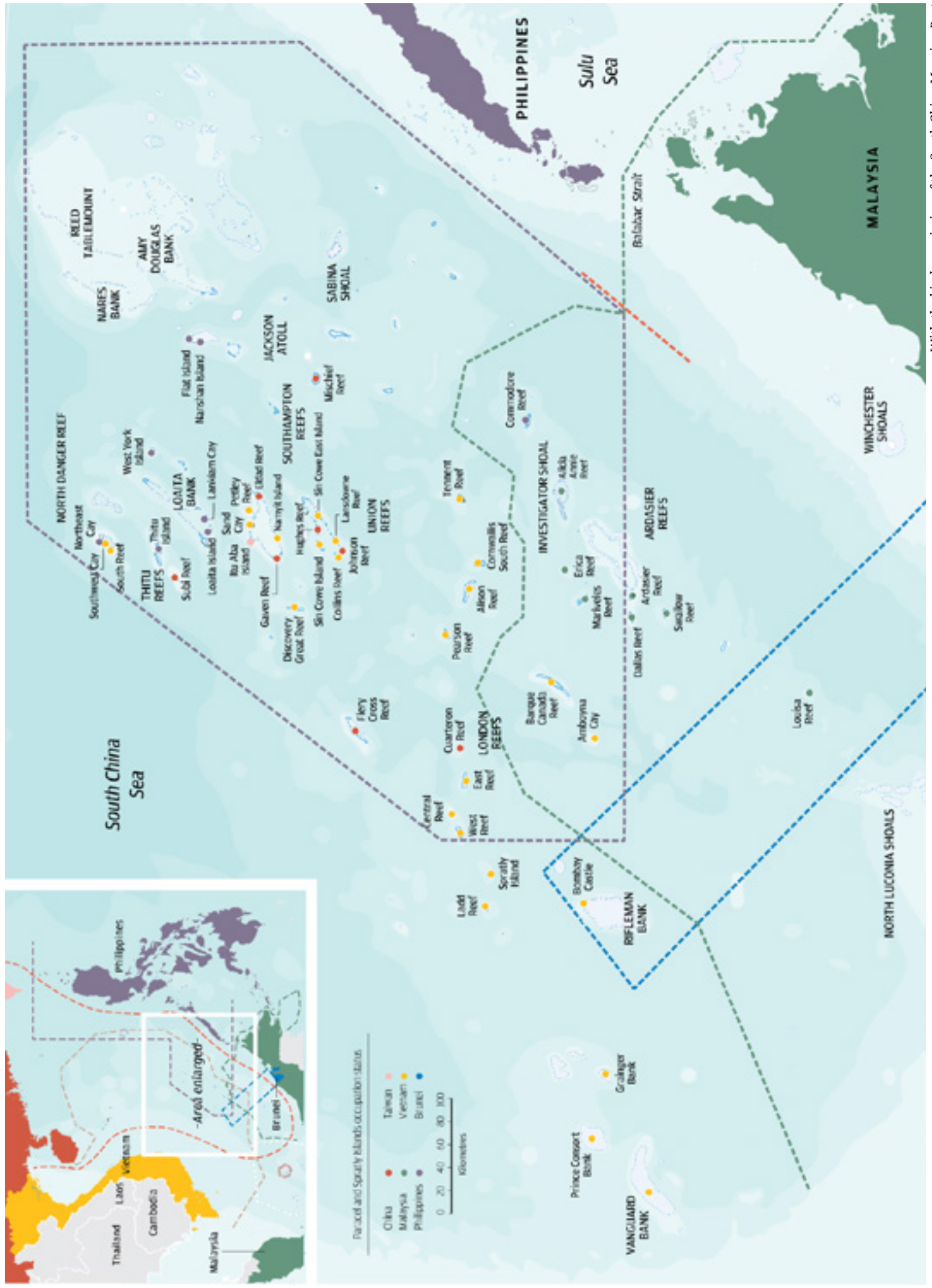
**Shoal:** A submerged coral reef that is mostly below water but has rocky protrusions above water during high tide, a shoal projects only territorial waters.

**Territorial sea:** Article 2 of UNCLOS defines that “the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”.

**Traditional fishing rights:** The term is not explicitly defined in any international convention – including UNCLOS – although there are provisions relating to it. Polite Dyspriani (2011) defines it as “fishing rights granted to certain groups of fishermen of a particular State who have habitually fished in certain areas over a long period”.

**UNCLOS:** The United Nations Convention on the Law of the Sea is the primary law of the sea. UNCLOS was concluded in 1982 during the Third UN Conference on the Law of the Sea, and came into force in 1994. As of June 2016, 167 states and the European Union have ratified the Convention. However, a few signatory states have not yet ratified it, including the US and Cambodia.





With the kind permission of the South China Morning Post

## ASEANFocus

is published by the ASEAN Studies Centre  
at ISEAS-Yusof Ishak Institute

ISEAS-Yusof Ishak Institute  
30 Heng Mui Keng Terrace  
Pasir Panjang  
Singapore 119614

Tel: (65) 6870 4509 Fax: (65) 6778 1735