

**The Arbitral Award and Implications
for the Activities of Parties
in the South China Sea**

**Yann-huei Song
Research Fellow, Institute of European and
American Studies
Academia Sinica, Taipei, Taiwan**

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The SCS Arbitration Case

The Republic of the Philippines v. The People's Republic of China

PCA Case No. 2013-19

My Paper Consists of Eight Parts

- I. Introduction
- II. Background on the Arbitration Case and the Tribunal's Awards
- III. Activities Allowed under the UNCLOS in the SCS
- IV. Past Activities and Relevant Disputes in the SCS
- V. The Findings and Declarations in the *Dispositif*
- VI. States' and International Organizations' Reactions to the Award
- VII. Implications for the Activities Conducted by the Parties in the SCS and Beyond
- VIII. Concluding Remarks

The nature & location of the activities in the SCS will be affected by the Parties' reactions to the Ruling

- The reactions to the Tribunal's ruling by the two Parties to the SCS arbitration case, by other claimants to the SCS disputes, by external Parties or user States in the SCS, and by IGOs, such as the UN, ICJ, ITLOS, the EU, and the ASEAN, will affect the future development regarding the nature and location of the activities to be conducted in the SCS, which will in turn influence the regional efforts to maintain peace and stability in the Asia-Pacific region.

States' and Some IGOs' Reactions to the Ruling

- 7 countries expressly stated that the Award is binding.
- Such language was absent from India, South Korea, all ASEAN member states except the Philippines and Vietnam (or Singapore), the EU, the office of the UN Secretary General, and the ICJ office.
- 7 countries expressly stated that the award is not binding.

Responses to the South China Sea Arbitral Award

Recognize
the Award as
binding

Do not consider the
the Award binding

Australia
Canada
Japan
Philippines
New Zealand
Singapore
US
Vietnam

v.

China
Pakistan
Montenegro
Russia
Sudan
T/ROC/CT
Vanuatu

Both the UN and the ICJ issued statements, either distancing themselves from the Tribunal's award or stressing their own non-involvement in the SCS arbitration case.



The EU changed its previous position when it issued a statement on behalf of its member States in response to the Tribunal's ruling on July 15, 2016, in which it did not “support” or “welcome” the Award, but merely “acknowledged” it.



No mention of the SCS arbitral award nor a call on the PRC to comply with the Tribunal's ruling in the Joint Communique or Chairman's statements (July ~ September 2016)



49th ASEAN Foreign Minister's Meeting
(AMM)



28th and 29th ASEAN SUMMITS



Every ASEAN nation has its own set of interests and priorities with Beijing, which has become more influential in dictating their SCS policies.

The Philippines: A Wild Card in the Implementation of the Award?

- The Philippines is playing down the outcome of the SCS arbitration case.
- 9/16/2016 *The Philippine Star* reported that the Philippines is quietly making arrangements through diplomatic channels for bilateral talks with China without any preconditions to discuss their competing claims in the SCS.
- The Filipino fishermen and coastal guard vessels return to the waters near Scarborough Shoal.
- What next?

China's reaction to the Award

- 4th No – “No implementation”;
- The award is “null and void”;
- Urged to turn the page of arbitration;
- Focusing on PRC-Philippine bilateral talks;
- Studying the award in depth and preparing for needed responses, including legal countering arguments and policy options;
- Implementing the “dual-track approach” to manage the SCS dispute.

Taiwan's Responses to the Arbitral Award

- President Tsai said the July 2016 award is *totally unacceptable to the people and has no legally binding force on the ROC.*

US Reaction to the Award

- Binding;
- Urges PRC to comply with the ruling.
- Changing attitude of President Obama?
- What about the new Trump administration after Jan. 20, 2017?

	Parties to UNCLOS	Position on Article 121 at UNCLOS III	Calling ruling final and binding	Against ruling and no binding force	Supporting general principles, rule-based order, rule of law, UNCLOS, FON/Overflight
Country/ Organization					
PRC	✓			✓	✓
Malaysia	✓				✓
Taiwan	NO			✓	✓
Vietnam	✓		✓		✓
Cambodia	NO				✓
Indonesia	✓				✓
Myanmar	✓				✓
Philippines	✓		✓		✓
Singapore	✓	✓	✓		✓
Thailand	✓	✓			✓
Australia	✓	✓	✓		✓
Canada	✓	✓	✓		✓
India	✓				✓
Japan	✓	✓	✓		✓
Montenegro	✓			✓	✓
New Zealand	✓	✓	✓		✓
Pakistan	✓	✓		✓	✓
U.S.	NO		✓		✓
Russia	✓	✓		✓	✓
Sudan	✓			✓	✓
Vanuatu	✓			✓	✓
EU	✓				✓

Factors affecting Activities to be conducted by the Parties in the SCS

1. Remaining Sovereignty disputes;
2. The “9-dash line” not “illegal”;
3. A need to re-examine the maritime zonal & entitlement claims;
4. Claims to LTE’s sovereignty, HTF’s sovereign rights and jurisdiction are affected;
5. High seas areas in the SCS are enlarged;
6. A need to re-examine the issue concerning maritime boundary delimitation (re. Arts. 74 and 83; Non-existence after the ruling?)

Factors affecting Activities to be conducted by the Parties in the SCS

7. Increasing challenges for historic rights claim;
8. Spill-over effect on sovereignty, sovereign right and jurisdiction claims in northern sector of the SCS and beyond;
9. Possible effect on the implementation of the 2002 DOC and on-going consultation for the adoption of the COC in the SCS;
10. Increasing importance of Part 9 of UNCLOS, in particular, maritime cooperation obligations under Article 123;

Factors Affecting Activities to be Conducted by the Parties in the SCS

11. Increasing challenge for using the method of straight baselines for the purpose of drawing T/S in the SCS;
12. Possibility for the Arbitration case and the Award being cited in multilateral security dialogues or meetings, such as AMM, ASEAN summit, ARF, EAS, Shangari La Security Dialogue;
13. Possibility for the ruling being cited in support of respective maritime claims by the SCS claimants when talking with the PRC;
14. Increasing uncertainty regarding regional attempt to transform the contested SCS into a “Sea of Peace, Friendship, and Cooperation”.

Implications for the Activities of Parties in the SCS

- 1. It is likely that the areas in which fishing and oil and gas exploration or exploitation activities can be conducted by the nationals of the littoral States without intervention from foreign countries will expand as a result of the Tribunal's ruling.

Implications for the Activities of Parties in the SCS

- 2. It is likely to see the possibility of conflict at sea between the law enforcement officials of the claimant States in the SCS be reduced as historic rights to fishing and oil and gas exploration and exploitation activities were declared by the Tribunal as contrary to the UNCLOS and without lawful effect.
- However, this is subject to the willingness of China and Taiwan to clarify their position on the nature and meaning of “9-dash line” or “U-shaped line” and the rights claimed in the waters enclosed by the lines.

Implications for the Activities of Parties in the SCS

- 3. The Chinese 9-dash line claim is potentially weakened by the ruling because the Tribunal declared that the historic rights claims to the SCS resources, living or non-living, have no legal basis under the UNCLOS.
- The Chinese claims to maritime zones in the SCS, in particular, EEZ and continental shelf, are also shrunk and become fragmental because of the Tribunal's ruling.
- As a result, the activities to be conducted by nationals of PRC in the SCS based on the historic rights claim may be restrained.

Implications for the Activities of Parties in the SCS

- 4. It is likely to see continuity of patrolling activities, in particular, by the U.S., conducted in the waters or over the air near the features that are found by the Tribunal either as LTEs (such as Mischief Reef and Subi Reef) or rock (such as Fiery Cross Reef and Johnson Reef) in the SCS.
- However, the PRC will ignore the Tribunal's ruling and continue its activities that are related to fishing, oil and gas exploration, land reclamation, and law enforcement against foreign vessels in the waters enclosed within the "9-dash line".
- This will prolong or increase the present disputes in the SCS. It will also give rise to possible conflict at sea between Washington and Beijing.

Implications for the Activities of Parties in the SCS

- 5. It is likely that other claimants will conduct unilaterally seismic surveys and exploration or exploitation activities in areas of their EEZs enclosed within the 9-dash line or U-shaped line, because the ruling declared that none of the features in the Spratly Islands are capable of generating EEZ or continental shelf.
- This possibility, however, is subject to the development of China-Vietnam and China-Philippines relations, as well as the maritime cooperation projects in the process of implementing the 2002 DOC by China and ASEAN Member States and negotiating for the adoption of a COC in the SCS.

Implications for the Activities of Parties in the SCS

- 6. The exercise of sovereign right and jurisdiction in the waters near Mischief Reef and Subi Reef by PRC will be challenged because the Tribunal found that none of the HTFs in the Spratly Islands, including Taiping Island (Itu Aba), generate entitlements to an EEZ or continental shelf.
- It also declared that Mischief and Subi Reef are LTEs and therefore cannot be subject to possession, and that the two features are situated in the Philippines' EEZ and continental shelf.
- If no actions are taken by the Philippines, the Duterte administration will also face domestic political and constitutional problems.
- To avoid these challenges or problems, there is a need for China and the Philippines to enter into serious negotiation and arrive at an acceptable solution.

Implications for the Activities of Parties in the SCS

- 7. The traditional fishing grounds for the Chinese fishermen in the SCS will largely shrink.
- It is likely that the law enforcement activities conducted by PRC within the “9-dash line” will be challenged by other claimants to the SCS disputes, in particular, the Philippines, Vietnam, Malaysia, and Indonesia.
- PRC’s announcement of the moratorium on fishing in the SCS will be challenged, in addition to its relevant law enforcement actions against foreign fishing vessels.

Concluding Remarks

- The Tribunal's findings and declarations will have important implications for a host of activities (fishing, oil exploration and exploitation, marine scientific research, Freedom of Navigation operations, construction and land reclamation, law enforcement, and patrolling) conducted by the 2 Parties to the arbitration case, by other claimants to the SCS disputes, and by external Parties or user States such as the US and Japan in the SCS, particularly in the overlapping/contested waters within the "9-dash line".

Concluding Remarks

- It is likely that the Parties concerned will make adjustments to their SCS claims and positions in accordance with the Tribunal's ruling.
- The Tribunal's ruling is important as it is possibly to be cited to help determine the nature and scope of permissible activities in the SCS under the UNCLOS.
- One of the biggest challenges in the management of the potential conflicts in the SCS is the intention of the Philippines, other claimants to the SCS disputes, or external Parties to conduct activities in the waters enclosed within the "9-dash line" or in the areas near the man-made islands built by PRC for the purpose of either testing Beijing's willingness to comply with the decisions made by the Tribunal or forcing PRC to accept the outcome of the SCS.

Thank you very much for your attention!

Questions and Comments?

