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Assessing Responses to the Arbitral Tribunal's Ruling on the South China Sea

*Ian Storey**

EXECUTIVE SUMMARY

- The Arbitral Tribunal's ruling is a major milestone in the development of the South China Sea dispute. It not only represents a sweeping victory for the Philippines, and a decisive defeat for China, but also has significant legal, strategic and geopolitical implications for countries across the Asia-Pacific region.
- Southeast Asian responses—including from the Philippines—have been cautious and measured, while China has angrily rejected the ruling.
- Philippine President Duterte must now chart a course which preserves its maritime rights and interests but does not alienate the Filipino people, the US or China.
- Tensions might ebb if China adopts a flexible and accommodating approach to the dispute, but will rise if it decides to defy the ruling and bolsters its military presence in the South China Sea. Certain Chinese responses could increase the risk of a confrontation between US and Chinese military forces.
- The ruling is likely to put ASEAN unity over the South China Sea under strain at a series of upcoming meetings.

* Ian Storey is Senior Fellow at the ISEAS-Yusof Ishak Institute and Editor of *Contemporary Southeast Asia*.

INTRODUCTION

The Arbitral Tribunal's ruling on 12 July 2016 in the Philippines versus China case concerning maritime rights and entitlements in the South China Sea was far more wide-ranging and clear-cut than many experts had expected.¹ The verdict represents a major legal victory for the Philippines and an overwhelming defeat for China. The judges ruled that China's "historic rights" claim to resources within the nine-dash line is invalid, that none of the geographical features in the Spratlys are islands entitled to a 200 nautical mile exclusive economic zone (EEZ), that China had violated the Philippines' sovereign rights in its EEZ by undertaking reclamation work and harassing Philippine fishing boats and survey vessels, and that Beijing's artificial island building had caused irreparable damage to the marine ecosystem and aggravated the dispute while legal proceedings were underway. The ruling's game changing provisions have significant implications for all parties to the dispute, as well as non-claimants and other major stakeholders. This paper focuses on regional responses to the verdict so far, and how the dispute might develop over the coming months.

RESPONSES TO THE RULING

While former President Benigno Aquino III—whose administration mounted the legal challenge against China's maritime claims at the International Tribunal on the Law of the Sea (ITLOS) in January 2013—described the ruling as "monumental" and a "victory for all" that will ultimately contribute to a resolution of the dispute, it has fallen to his successor, President Rodrigo Duterte, to negotiate, in his words, a "soft landing" with a humiliated China. When the award was issued, the Duterte administration's response was ultra low-key, and fulfilled a promise made by Duterte that he would not "flaunt" or "taunt" China with a favourable ruling. In a statement on 12 July, the Philippines merely said it "welcomed" the ruling and that a more detailed response would be issued at a later date. At a press conference the same day, Foreign Affairs Secretary Perfecto Yasay called on Filipinos to "exercise restraint and sobriety". Domestically the response has been overwhelmingly positive, and even jubilant.

Unsurprisingly, China reacted in high dudgeon. From the outset, China had refused to participate in the case and when the award was made Beijing declared it to be "null and void" and that it would neither recognize nor accept it. Senior Chinese officials questioned the judges' competence and integrity, while the state-run press denounced the ruling as a political conspiracy instigated by the US and Japan. Domestically the ruling was met with fury, and small anti-US protests took place in cities across China calling for a boycott of US (and Philippine) goods. Thus far, China has kept a lid on nationalist anger.

The ruling was also a severe blow to Taiwan whose South China Sea claims largely mirror those of China's. In early 2016, Taiwan had made a submission to the Tribunal arguing that

¹ "The South China Sea Arbitration (The Republic of the Philippines V. The People's Republic of China)", Press Release, The Hague, 12 July 2016.

Itu Aba —the largest of the Spratly features and occupied by Taiwan since 1956—was an island capable of sustaining human habitation and therefore entitled to an EEZ, an argument the judges ultimately rejected. Taiwan dismissed the ruling, reiterated its sovereignty claims in the South China Sea (though it did not mention “historic rights” nor the U-shaped line) and dispatched a warship to Itu Aba.

The award not only represents a legal victory for the Philippines but also one for Vietnam, Malaysia, Brunei and Indonesia in that the judges ruled that China cannot legally exploit maritime resources in areas where the nine-dash line overlaps with those countries’ EEZs. Nevertheless, Southeast Asian countries responded in a restrained manner, seemingly to avoid antagonizing China.

Vietnam came the closest to calling on both parties to abide by the ruling when it noted that China and the Philippines were both parties to the United Nations Convention on the Law of the Sea (UNCLOS) and that the award was legally binding. Fellow claimant Malaysia urged all parties to “fully respect legal and diplomatic processes”. Brunei did not issue a statement, but in a media interview Deputy Foreign Minister Dato Erywan Yusof said the country was “fully committed to ensuring the peaceful resolution of disputes” in accordance with UNCLOS. Although the ruling validated Indonesia’s long-standing position that it did not have a dispute with Beijing because China cannot legally claim ownership of resources in Indonesia’s EEZ, Jakarta merely asked the parties to exercise “self-restraint”, avoid activities that could undermine peace and stability in Southeast Asia and respect “international law” including UNCLOS.

Non-claimant Singapore underscored its neutral position and urged all parties to “fully respect legal and diplomatic processes, exercise self-restraint and avoid any activities that may raise tensions in the region”. In their statements, Thailand, Myanmar and Laos (as well as Singapore and Malaysia) emphasized the importance of implementing the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC) and expediting talks on a Code of Conduct (CoC). Thailand and Laos did not mention the importance of international law nor UNCLOS. Cambodia did not issue a statement, but a week before the ruling Prime Minister Hun Sen had echoed China by calling the case a “political conspiracy” and that he would not support any award.

As expected, the United States, Japan and Australia called on both parties to abide by the legally binding ruling. Due to divisions within its ranks, the European Union merely acknowledged the ruling and stated that the parties should resolve their disputes through peaceful means, clarify their claims and pursue them in accordance with international law, including UNCLOS.

WHAT HAPPENS NEXT?

Now that the Tribunal has issued its ruling, and the various parties have made their initial responses, all eyes will be on the subsequent moves of four key players: the Philippines, China, the US and ASEAN.

Duterte's Difficult Dilemmas

The Duterte administration faces a series of dilemmas that need to be resolved without alienating the Filipino people, the US or China. During the presidential campaign, Duterte was ambivalent about the arbitration process on the grounds that he did not think China would comply with the final ruling. Nevertheless, due to nationalist sentiment, he promised to respect the Tribunal's decision. He also suggested that once the award had been made, the dispute should be discussed at multilateral talks (involving the claimants, and America, Japan and Australia) and if those talks did not prove fruitful, bilateral talks, possibly with a view to reaching an agreement on joint development of maritime resources. The first suggestion is a non-starter as it is China's long-standing position that the dispute is a bilateral issue between China and each of the claimants separately. Following Duterte's victory at the polls, China seemed open to bilateral talks with the new administration. However, after the Tribunal had made its award, Chinese Foreign Minister Wang Yi told his Philippine counterpart on the side-lines of the Asia-Europe Summit in Mongolia that China would only agree to bilateral talks if the Philippines disregarded the ruling, and that if Manila did not do so, the two sides "might be headed for confrontation".² Given overwhelming public support in the Philippines for the ruling, it would be politically impossible for Duterte to put it aside. Accordingly, Yasay rejected China's precondition as "inconsistent with our Constitution and national interest". Disavowing the award would also put a strain on the Philippines' alliance relationship with the US which, as noted earlier, has called on both parties to abide by the ruling. It is unlikely that Beijing will agree to talks on the ruling with Manila because doing so might be viewed domestically as recognition of the award. If talks do not eventuate, and China continues to refuse to abide by the ruling, the Philippines could go back to ITLOS and protest its non-compliance. But China would regard this as a further provocation and Duterte's plan to pursue a more cooperative relationship with Beijing would be derailed. Resolving these dilemmas will require extreme political and diplomatic acumen and Duterte has little experience of foreign affairs. The President has appointed respected former President Fidel Ramos to be his special envoy to China.

China's Response: Three Possible Scenarios

Beyond its initial defiance and rejection of the ruling, how might China respond to the verdict in the coming months? There are three possible scenarios: best, bad and worst.

In the best case scenario, China continues to fulminate against the ruling, but refrains from undertaking any actions that raise tensions with the other claimants and stakeholders. In

² "Manila rejects Beijing's offer of bilateral talks", *Straits Times*, 20 July 2016.

such a scenario, Beijing might adopt a more flexible and accommodating approach to its neighbours. It would drop any preconditions for holding talks with the Philippines, and may even allow Filipino fishermen to return to Scarborough Shoal from which it has barred their entry since seizing the reef in mid-2012. Talks between the two sides could explore joint development initiatives, such as the extraction of natural gas at Reed Bank. China would also try to enhance trust with ASEAN by implementing some of the confidence-building measures in the DoC and moving forward with the CoC. Over time, China may gradually move its claims into line with UNCLOS by emphasizing its sovereignty claims over the geographical features in the Spratlys and dropping references to historic rights within the nine-dash line. A white paper issued by the Chinese government immediately after the ruling reiterated its sovereignty claims to atolls in the South China Sea without mentioning the nine-dash line; however, the overall tone of the paper was still inconsistent with the award as it repeated China's historic rights claim.³

In the bad case scenario, China continues to insist on its territorial and jurisdictional claims, increases its naval and coast guard presence and accelerates the military build-up on its artificial islands. This approach already seems in evidence. Within a few days of the ruling, Beijing announced naval exercises off Hainan Island, denied Filipino fishermen access to Scarborough Shoal, initiated regular air patrols over the South China Sea (beginning with a long-range bomber flight over Scarborough Shoal) and stated that it would continue to develop the facilities on its man-made islands. Further measures might include drawing straight baselines around the Spratlys—and declaring the maritime space within them as China's internal waters—and/or establishing an Air Defence Identification Zone (ADIZ) in an attempt to regulate civilian and military air traffic over the area.

In the worst case scenario, China not only increases its military presence in the Spratlys and declares an ADIZ, but also moves aggressively against the Philippines in an attempt to deter the other claimants from future legal challenges. The Chinese Navy might impose a blockade on Second Thomas Shoal, where the Philippines only has a tenuous hold, or attempt to remove the grounded warship on the atoll which is home to a handful of Filipino troops. In a grand gesture of defiance, Beijing might also start reclamation work at Scarborough Shoal. In extremis, China might withdraw from UNCLOS in protest at the ruling, though this is unlikely as it would further damage its international reputation and undermine its maritime rights and interests outside of the South China Sea dispute.

US Diplomatic and Military Responses

On the diplomatic front the US will continue to call on both parties—but especially China—to abide by the ruling, and will encourage other countries to do likewise. The role played by the US military in the South China Sea over the coming months will be largely contingent on China's actions. Senior US leaders have repeatedly stated that the country's armed forces will “continue to fly, sail, and operate wherever international law allows”. Accordingly, the

³ “China Adheres to the Position of Settling Through Negotiation and Relevant Disputes Between China and the Philippines in the South China Sea”, Xinhua, 13 July 2016.

US will be obligated to challenge a Chinese ADIZ—by flying military aircraft unannounced through it—and the drawing of straight baselines around the Spratlys by upping the tempo of Freedom of Navigation Operations (FONOPs) through what China would deem its internal waters. This would raise the prospect of regular close encounters between military aircraft and warships from the US and China. Although such encounters to date have been largely professional, they fuel tensions in US-China relations and a miscalculation by either side could result in a military incident which might escalate into a larger crisis. Chinese Admiral Sun Jianguo has reportedly warned the US that future FONOPs could result “in disaster”.⁴ If, as posited in our worst case scenario, China blockaded Second Thomas Shoal, or started terraforming Scarborough Shoal, this would be viewed by the US as extremely provocative and could trigger a military confrontation between China and the US in support of Philippine forces.

ASEAN under Pressure

As widely expected, ASEAN Foreign Ministers did not issue a stand-alone statement on the Tribunal’s ruling when they met in Vientiane on 24 July. Nor was the ruling mentioned in the final communique, apparently due to opposition from Cambodia. The episode once again underscored the problem of ASEAN unity over the South China Sea, and the ability of China to use its political and economic leverage over certain members—particularly Cambodia—to thwart ASEAN decision-making. ASEAN’s failure to speak with one voice on the issue damages its credibility. If tensions experience an upsurge in the coming weeks, this will likely have a negative spill over effect at the ASEAN Leaders’ Summit and East Asia Summit in September, and once again put stress on ASEAN unity over the South China Sea.

CONCLUSION

The Tribunal’s landmark ruling may well have brought the South China Sea dispute to an inflection point. If China uses the award as an opportunity to recalibrate its position by nudging its claims into line with UNCLOS, starts talks with the Philippines without preconditions and energizes the DoC/CoC process with ASEAN, tensions should ebb. But if China defies the ruling by resolutely asserting its claims and threatening Philippine interests, the dispute will enter a new phase of heightened tensions and uncertainty. All parties need to think carefully, and consider the risks, before making their next move.

⁴ “Freedom of navigation patrols may end ‘in disaster’: Chinese admiral”, Reuters, 18 July 2016.

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