



South China Sea Arbitration: Roots and Consequences

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An arbitration tribunal has unanimously rejected Chinese “historical rights” to the maritime areas of the South China Sea. The award is final and although it is not binding except on the parties and with respect to this particular dispute, the European Union has acknowledged it, adding to its legal force. However, China’s uncompromising attitude on this issue may increase tensions in the region. The possibility of incidents involving the Chinese and Philippine navies is growing, but the participation of American ships is less likely. The ruling may prompt China to denounce the Convention on the Law of the Sea and decreases the likelihood it will be ratified by the United States.

Historical Background. The roots of the territorial dispute over the South China Sea dates back to World War II. After defeating Nazi Germany in Europe, in 26 June 1945, the Allies set out the conditions for the surrender of Japan (the Potsdam Declaration). It assumed a reduction of Japanese territory to Hokkaido, Honshu, Shikoku and Kyushu, and other designated islands. The act of unconditional surrender of the Empire, signed on 2 September 1945, confirmed these findings. The Republic of China considered this to be a waiver of Japanese sovereignty over the archipelagos situated on the South China Sea. In 1947, China issued a claim called the “eleven-dash line.” These claims were upheld in 1949 by the People’s Republic of China by modifying the demarcation line to the “nine-dash line.” This line was then used to determine claims to disputed areas—the Paracel Islands, the Spratly Islands, the Pratas Islands, Macclesfield Bank and Scarborough Shoal.

The Paracel Islands were seized by the PRC in 1974 during the war in Vietnam. The Spratly Islands later became a source of conflict and various islands are occupied by military forces from Malaysia, Taiwan, the PRC, the Philippines and Vietnam.

The “nine-dash line”—the symbol of the Chinese claims—has been contested by Vietnam, the Philippines, Malaysia, Brunei, Japan and Taiwan. In 2002, ASEAN and China signed a Declaration on Conduct of Parties in the South China Sea that emphasised their desire to settle the conflict in accordance with international law by adopting “a Code of Conduct in the South China Sea.” In 2009, Vietnam and Malaysia notified the UN Commission on the Limits of the Continental Shelf of their intention to establish the outer limits of the continental shelf. In a reply sent to all members of the United Nations, the Chinese government presented a claim to the disputed areas. More than half of the seabed of the South China Sea is continental shelf and probably rich in oil and gas deposits. It is the second most used sea lane in the world, including the important sea route to the Strait of Malacca. This is also one of the world’s most important fisheries.

In 2011, Vietnam, Philippines, Malaysia, Brunei and China agreed a framework compromise, but failed to make it concrete. In January 2013, the Philippines decided to seek a legal solution through the arbitration procedure. China, however, did not recognise the tribunal and began strengthening its presence on the islands through the development of infrastructure—airports in the Spratly archipelago and by building artificial islands where, in addition to lighthouses, military installations were located, including radar stations and HQ-9 ground-to-air missile systems.

Legal Basis of the South China Sea Dispute. The Chinese claims are based on the norms of the customary international law of the sea. China justifies its claim through “historical rights” to the sea areas covered by the nine-dash line. China emphasises its lengthy, uninterrupted maintenance of the claim and exercise of territorial jurisdiction (in relation to the islands), and references the tradition of shipping and fishing practiced by Chinese sailors on the South China Sea in past centuries.

Other countries in the region are seeking protection in the standards of the UN Convention on the Law of the Sea (UNCLOS) of 10 December 1982, which regulates in a comprehensive manner the issue of territorial sovereignty and delimitation of maritime areas. As to the Chinese claims, those countries have raised the position that China is bound by UNCLOS because it ratified it in June 1997. UNCLOS is widely regarded as codification of the contemporary customary international law of the sea.

According to UNCLOS provisions, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Also, states can establish an exclusive economic zone—an area beyond and adjacent to the territorial sea, subject to the specific legal regime, 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 UNCLOS. A state has sovereign rights for the purpose of exploring, exploiting, and conserving natural resources in the sea as well as from the seabed and subsoil. This zone, however, may not extend beyond 200 nautical miles from the territorial sea. In addition, the coastal state must take into account the rights arising from freedom of navigation and overflight, laying of undersea cables and pipelines, and other actions consistent with international law.

Arbitration Proceedings. The Philippines sought to defend its claims through arbitration under the provisions of Part XV UNCLOS. Based on Article 286, any dispute concerning an interpretation or the application of UNCLOS may be submitted to the court or tribunal having jurisdiction under Annex VII of the Convention at the request of any party to the dispute. The appearance of both parties is not necessary and absence does not delay the proceedings. The Philippines demanded, first, a decision whether the Chinese claims on the territories within the “nine-dash line” are lawful under UNCLOS. Second, it wanted to know whether the disputed islands are significant enough to lay claim to an exclusive economic zone that comprises them. Third, the Philippines challenged certain Chinese activities in the area, including fishing, dredging and law enforcement patrols, as well as Beijing’s reclamation of land and construction of artificial islands in the Spratlys, which the claimant cited as examples of the abuse of good faith.

China did not accept arbitration and refused to participate in the proceedings on the grounds that territorial sovereignty not subject to assessment under UNCLOS. China’s position referred to the voluntary Code of Conduct in the South China Sea. Also, China cited its reservation of 2006 under Article 298 of UNCLOS in which China opted out of compulsory arbitration (it applies, however, only to certain categories of disputes).

The court was constituted in June 2013 as a panel of five judges and decided that the Permanent Court of Arbitration in The Hague would serve as the registry of the proceedings. Despite the negative position of the PRC, in October 2015 the Tribunal confirmed its jurisdiction in the case and on 12 July of this year, ruled in favour of the Philippines in the territorial disputes in the South China Sea. In referring to China’s claims, the Tribunal stressed that the ruling does not apply to territorial sovereignty nor to delimitation of maritime areas. The tribunal unanimously ruled, however, that China has no “historical rights” based on the “nine-dash line.” The arbitrators also found that the islands of the Spratly archipelago were not sufficient to constitute the basis of an exclusive economic zone. The panel also found that Chinese reclamation activity there has caused irreparable damage to the environment and it asked the Chinese government to stop further activities in the South China Sea. Through such actions, the Tribunal stated, China is responsible for the aggravation of the dispute between the parties.

Consequences of the Dispute. The ruling is final but has binding force only with respect to this particular dispute and only on the parties involved. Legal instruments to enforce its implementation are lacking, however. That stated, the decision is important because it affirms the existence of certain norms of international law. The arbitration process seeks to show that a claim is well founded in fact and law. The tribunal’s finding that China aggravated the dispute and is a violation of the principle of good faith should be emphasised.

The PRC’s position has not changed. It has declared that the tribunal has no jurisdiction over the case and so any award is null and void. China probably will increase its diplomatic and propagandistic actions to gather support from as many countries as it can. The tribunal’s decision was publicly supported by Japan. The United States urged both sides to comply with international law, including ensuring the freedoms and right of navigation, overflight and laying of undersea cables and pipelines, and other internationally lawful uses of the sea. The European Union on 15 July, in a declaration by the High Representative on behalf of the EU, acknowledged the award rendered by the tribunal as being committed to maintaining legal order of the seas and oceans based upon principles of international law. The joint EU statement is a failure of Chinese diplomacy, which tried to prevent it.

The tribunal’s decision in opposition to the PRC could lead to the termination of UNCLOS by China, especially since Vietnam and Malaysia also may follow with further arbitration. For the same reasons, the likelihood of the ratification of UNCLOS by the United States is decreasing. If the PRC excludes itself from the Convention, that would represent a significant weakening of treaty norms of the international law of the sea.

China has also reacted angrily to the ruling and this may lead to increased tension in the region. Incidents involving the Chinese and Philippine navies could happen, although it is less likely that U.S. ships exercising their freedoms and rights of navigation will be involved in those incidents. China’s position is unchanging and its actions have deteriorated relations through a goal of *fait accompli*, especially its plans to establish an Air Defence Identification Zone covering the South China Sea.

Poland supports the position expressed by the EU in the joint statement but also should push for a solution based on international law while calling on China to respect the decision of the tribunal. It should emphasise the need for a peaceful solution to the conflict, pointing to the PRC’s special responsibility as a superpower and permanent member of the Security Council.