



REEFS, ROCKS, AND THE RULE OF LAW

After the Arbitration in the South China Sea

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Security

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Introduction

This spring, the International Tribunal on the Law of the Sea under the Permanent Court of Arbitration at The Hague will issue a ruling in the case that has become known as *Philippines v. China*. The case, which was brought before the court in early 2013, will make headlines due to the significant spike in South China Sea tensions that has occurred since it began. It will also make history as perhaps the most ambitious and farthest-reaching case ever to have been heard pursuant to the Law of the Sea. The decision is likely to clarify several important issues at the heart of the South China Sea disputes as well as reduce the scope of the disputes. The tribunal will not, however, adjudicate questions of sovereignty – indeed, disputes over which country holds the title to which land features are likely to persist for years to come. Nonetheless, the case may set a new international precedent and impose reputational costs on China. The ruling may usher in a period of increased regional tensions in already hotly contested waters, but could also provide opportunities to defuse these long-standing maritime conflicts in the longer term.

Major milestones in the *Philippines v. China* case have been widely reported. The esoteric law that governs the proceedings and their nonpublic nature mean that the potential outcomes of the case and their political and legal implications are, however, not terribly well understood. The Tribunal's award will be legally binding on the Philippines and China, but will also reverberate throughout the region and the world. This CNAS brief looks ahead to the Tribunal's ruling, assesses the range of prospective decisions, and evaluates their broader implications.

Case Process and Timeline

The Spratly Islands have been the site of multiple competing sovereignty claims, but the Philippines is the first claimant state to submit the maritime disputes to arbitration under the U.N. Convention on the Law of the Sea (UNCLOS). Its decision to do so was precipitated by the 2012 Scarborough Shoal incident. The Philippine Navy attempted to interdict illegal Chinese fishing activities around the shoal, Chinese maritime law enforcement vessels intervened with its navy just beyond the horizon, and an international standoff ensued. The United States helped to broker an agreement that committed both China and the Philippines to withdraw from the area,

but only the Philippines complied. China has since maintained effective control over the shoal.¹

With negligible naval and coast guard capabilities, the Philippines had no hard power recourse. The Scarborough episode followed several other tense encounters between Philippine and Chinese vessels, and Manila could not guarantee that Beijing would not make future attempts to erode its control of the Spratly Islands features it holds. The United States and the Philippines have maintained a mutual defense treaty since 1951, but the nature of China's so-called "grey zone" incursion around Scarborough Shoal was such that it did not invoke the treaty provisions. The Scarborough incident was one of many activities that the Philippines felt China was conducting illegally in or near its own 200 nautical mile (nm) exclusive economic zone (EEZ). UNCLOS has compulsory and binding dispute resolution mechanisms, however, so the Philippines turned to the Law of the Sea.

Philippines v. China will make history as perhaps the most ambitious and farthest-reaching case ever to have been heard pursuant to the Law of the Sea.

In January 2013, the Philippines issued a Notification and Statement of Claim under Article 287 in Annex VII of UNCLOS, invoking a peaceful dispute mechanism. Both the Philippines and China have ratified the convention. In February 2013, China formally rejected the claim in a note verbale – a diplomatic protest – arguing that the Philippines was not only illegally occupying islands over which China held "indisputable sovereignty," but was also acting in violation of previous commitments by both countries to settle their disputes through bilateral negotiations. Citing the 2002 Declaration on the Conduct of Parties in the South China Sea, China demanded a return to bilateral negotiations "by sovereign states directly concerned."² The Chinese removed themselves from future discussions about the arbitration process. The arbitration procedures specified under UNCLOS Annex VII, however, allow cases to proceed without one party's participation and still result in a legally binding decision.³ The case then entered into binding arbitration under UNCLOS Annex VII, Article 9.

In mid-2013, a five-member arbitral tribunal was convened under the International Tribunal on the Law of the Sea, registered at the Permanent Court of Arbitration at The Hague. In March 2014, the Philippines submitted to the Tribunal its written memorial – or formal petition to the court – presenting its legal analysis and evidence in ten volumes. The following month, China began its artificial island building in the Spratly Islands. As expected, China ignored the Tribunal’s December 2014 deadline for a counter-memorial. Instead, it issued a position paper outside of the purview of the arbitration reiterating why it believed the Tribunal did not have jurisdiction to arbitrate the case.⁴ In it, China restated its 2013 note verbale and further argued that, because the arbitration fundamentally dealt with questions of sovereignty over specific mid-ocean features, and the Tribunal was not empowered to rule on issues of sovereignty, the disputed features did not fall under the scope of UNCLOS’ dispute mechanism. China did not comment on the legal status of those features or their maritime entitlements, despite the fact that those are central to the Philippines’ case.⁵ Also in December 2014, Vietnam issued a statement to the Tribunal urging the rejection of China’s claims based on the so-called Nine-Dash Line.⁶

Following China’s failure to submit a counter-memorial, the Tribunal asked the Philippines to provide supplemental arguments on some outstanding questions it identified, which Manila delivered in March 2015. Oral arguments were held in July 2015, again in China’s absence. Philippine Secretary of Foreign Affairs Albert del Rosario spoke multiple times on behalf of his country’s legal team, arguing for a ruling on whether China’s Nine-Dash Line was legally permissible under UNCLOS. He charged that China’s island-building activities might be in breach of its treaty responsibilities to the marine environment, asserting that the Tribunal did indeed exercise jurisdiction over the issues at hand, and that bilateral negotiations had failed.⁷

The Tribunal then began deliberations, first over whether the Tribunal itself had been properly constituted and could exercise jurisdiction over the dispute before it. On October 29, 2015, it ruled that not only had its body been properly convened and could indeed exercise jurisdiction over most issues before it, but that China’s refusal to participate did not affect that jurisdiction.⁸ Since that date, the Tribunal has been considering the merits of the case and a ruling is expected in spring 2016.

Issues Before the Court

The Philippines has submitted 15 different claims, or specific questions of the legal application of UNCLOS, for consideration by the Tribunal. All of them have passed from the jurisdictional to the merits phase of the case in some form. The Tribunal found that it had jurisdiction over seven of the claims, while it deferred decision on seven others because they required further evidence and arguments during the merits phase. It also asked for clarification from the Philippines on one claim. The Tribunal will therefore make some decision on each of the 15 claims. Because Manila’s submission is not public, the authors cannot review each individual merit. We do know that they fall into roughly three categories: The Nine-Dash Line, the status of maritime features and their entitlements, and China’s activities in the Philippine EEZ.

The Nine-Dash Line

The star of the Philippines’ case is China’s Nine-Dash Line. The dotted boundary, which sweeps into the ocean and encompasses as much as 90 percent of the South China Sea, was first drawn by the Republic of China in the 1930s. When the Republic of China published it in 1947, the line had 11 dashes. The People’s Republic of China then adopted the boundary in the early 1950s and dropped two of the lines to settle a disagreement with Vietnam. In 2009, China submitted a Nine-Dash Line map to the U.N. Commission on the Limits of the Continental Shelf, stating that this was a “sovereign” boundary and implying that the line was internationally legitimate.⁹ Since that date, Chinese statements make clear the fact that China claims all of the *territory* inside the Nine-Dash Line. China has never clarified the status of the features it claims – that is, whether it believes them to be reefs, rocks, or islands – nor has it clarified the maritime claims it believes it derives from them. In the case before the Tribunal, the Philippines argues that the Nine-Dash Line is inconsistent with UNCLOS. Over the course of the proceedings, Chinese officials have issued statements, including the December 2014 brief, to clarify their position. They have made almost no attempt to explain or defend the Nine-Dash Line, however, leaving the international community to rely on other sources for what the line may mean and whether that is consistent with UNCLOS.



In this overhead image, Chinese artificial island construction is visible atop Subi Reef in the South China Sea's Spratly Island group. Mid-ocean features' maritime entitlements are generally derived from their natural state under UNCLOS, and artificial augmentations like these are not expected to alter the underlying feature's legal status. (DigitalGlobe via Getty)

If China wishes to defend the Nine-Dash Line based on historic rights, it would need to expressly argue this before the Tribunal.

Since 1970, the U.S. Department of State has published a series of studies called “Limits in the Seas,” which provide detailed legal analyses of maritime boundaries. A December 2014 study, clearly timed to coincide with the arbitration, lays out three plausible rationales for the opaque line and evaluates each for its consistency with UNCLOS. The Nine-Dash Line may be a claim to only the territories within the line and their legal maritime entitlements; it may serve as a national maritime boundary and a claim to all the water inside the line; and it may be a claim to those waters by way of a “historic waters” claim.¹⁰

China’s own statements on the Nine-Dash Line may be consistent with a “territories plus maritime entitlements” interpretation. On many occasions, however, China has appeared to advance claims based on historic rights. Beijing has spoken of its “sovereignty” over the entire South China Sea.¹¹ It has also claimed expansive rights to extract natural resources inside the line well beyond its 200 nm EEZ. If China wishes to defend the line based on historic rights, however, it would need to expressly argue this before the Tribunal. It would also need to have demonstrated continuous authority of those waters and its neighbors have to assent to its exercise of historic rights.¹² China has not provided evidence to substantiate a historic rights argument.

Status of Features and their Maritime Entitlements

The Philippines has asked the Tribunal to rule on the status of the Chinese-occupied Spratly Islands features and their maritime entitlements – that is, whether specific features qualify as reefs, rocks, or islands, and whether they should be entitled to territorial seas, EEZs and continental shelves, or none of the above. Legal maritime entitlements under UNCLOS are significant because they bestow the coastal state with certain rights. A territorial sea is a boundary that extends no more than 12 nm from a land feature, and is generally regarded as the sovereign water of the coastal state, although other foreign ships are allowed innocent passage through the zone. An EEZ extends no more than 200 nm from coastal territory. EEZs are generally considered to be international waters, but the coastal state retains the right to extract resources – including fish, oil, and gas – within this zone. The continental shelf is the seabed adjacent to a coastal state’s shores. Under UNCLOS, land features designated as full-fledged islands are entitled to territorial seas, EEZs, and continental shelves; rocks may claim just a territorial sea; reefs or low-tide elevations (LTEs) have no legal maritime entitlements.

The Philippines argues that four of the features that China occupies are submerged at high tide, making them reefs or LTEs, meaning they are not entitled to any maritime zones. The Philippines maintains that Subi, Gaven, Hughes, and Mischief Reefs in the Spratly Islands, as well as Second Thomas Shoal, are all reefs or LTEs. These features are above water at low tide but submerged at high tide. Under UNCLOS Article

13, LTEs are granted no territorial sea, no EEZ, and no continental shelf. In fact, they are not even subject to sovereignty claims. The Philippines’ arguments are complicated by the fact that China has built artificial islands atop all four of these features since the arbitration began. The Philippines has submitted as evidence, however, numerous charts and surveys from multiple countries, all of which predate China’s building.

The Philippines also argues that four of China’s occupied features – Fiery Cross Reef, Johnson South Reef, Cuarteron Reef, and Scarborough Shoal – are rocks but not full-fledged islands. Under UNCLOS Regime of Islands, Article 121, rocks are a type of island with circumscribed maritime zones and are entitled only to a 12 nm territorial sea, but no EEZ or continental shelf. In adjudicating these questions, the Tribunal will once again have to grapple with China’s artificial island building on Fiery Cross, Johnson South, and Cuarteron Reefs, which has obscured these features’ true status. The judges will rely on surveys and charts from multiple countries that predate China’s land reclamation to determine how to classify these features.

The Philippines’ “rocks vs. islands” arguments are not limited to Chinese-occupied features, however. For the aforementioned Chinese-held features to be limited to 12 nm territorial seas at most, the Philippines must successfully argue that no other feature in the Spratly Islands is capable of generating an EEZ or continental shelf. After submitting its original memorial, the Philippines was asked to include an argument and evidence on the status of Itu Aba, which Taiwan has held since 1946. The Tribunal made this request because

China claims both Itu Aba and Taiwan itself as its sovereign territory. If China were to come into possession of Itu Aba, and the latter was legally considered an island, its EEZ would encompass several of the other features whose status is before the court.

It is worth noting that the Philippines has an abiding interest in the aforementioned features being ruled as reefs or rocks. If this were so, no feature in the Spratly Islands group would be entitled to more than a 12 nm territorial sea. This means there would be few meaningful encroachments to the Philippine EEZ, which extends 200 nm from the shores of its main archipelago.

UNCLOS Entitlements for Mid-Ocean Features

	EXCLUSIVE ECONOMIC ZONE (200 NM)	CONTINENTAL SHELF	TERRITORIAL SEA (12 NM)
Naturally occurring island	X	X	X
Rock			X
Reef/Low-tide elevation	No entitlement	No entitlement	No entitlement

China's Activities in the Philippine EEZ

A third set of issues concerns who has access to natural resources and where, an issue on which UNCLOS provisions provide the Tribunal with relatively specific legal guidance. The Philippines argues that China has been exploiting natural resources from its EEZ and continental shelf, as well as preventing it from conducting its own fishing, natural resource extraction, and surveys inside of its EEZ. The enforcement of laws and regulations by coastal states, the delimitation of EEZs, and continental shelves and the legality of artificial island building are all explicitly regulated by UNCLOS, bolstering the Philippines' confidence to pursue rulings on all three issues.¹³

Past as Prologue?

Two pieces of international case law are considered especially relevant to *Philippines v. China*. The International Court of Justice (ICJ) previously decided *Nicaragua v. Colombia* (2012) and *Romania v. Ukraine* (2009), both of which concerned maritime boundaries. These prior cases provide potential precedent for

maritime border delimitation, albeit in an environment where the status of land features had already been identified, unlike in the South China Sea.

In *Nicaragua*, the court considered what maritime borders to afford Nicaragua and Colombia, where Colombia possessed islands near Nicaragua's coast. Here, the ICJ decided that these small islands with tiny natural coastlines could not compare to Nicaragua's expansive mainland coastline, and so afforded Colombia's islands only a 12 nm territorial sea enclosed entirely within Nicaragua's otherwise-uninterrupted EEZ. Similarly, in *Romania*, the two Black Sea nations quarreled over maritime delimitations regarding Ukraine's tiny Snake Island, which Ukraine argued had the effect of substantially enlarging the waters to which it could lay claim. Romania instead asserted that the feature had no economic significance. Indeed, the ICJ found it so inconsequential that to consider it "a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography."¹⁴

Many of the mid-ocean features at issue in *Philippines v. China* are well inside the Philippines' notional EEZ as delimited from the coasts of its mainland islands. The *Nicaragua* and *Romania* decisions suggest that the Tribunal may be inclined to find that many of the disputed features in question would at most be entitled to a 12 nm territorial sea, but not to their own continental shelf or EEZ.

Anticipating the Tribunal's Decision

Multiple motivations will inform the Tribunal's ruling. The five-member panel is well aware that this is the most closely watched international maritime case in UNCLOS history, and one that has substantial implications for the Law of the Sea as well as politics in the region. It will seek to be faithful to precedent, but will also be aware that it is setting a far-reaching precedent of its own. The Tribunal will seek to inject maximum legal clarity into the South China Sea disputes and to reduce their scope, while also issuing a ruling that will be viewed as legitimate. This will encourage other claimants to pursue arbitration.



Fiery Cross Reef, following extensive land reclamation operations, is now host to what appears to be a military-grade 3,000-meter airstrip. The Philippines contends that Fiery Cross is not legally an island, but a rock, and entitled to no more than a 12 nm territorial sea, limiting the scope of the feature's otherwise de facto Chinese control. (DigitalGlobe via Getty)

The Nine-Dash Line

The Tribunal will probably rule that the Nine-Dash Line is inconsistent with UNCLOS. There are at least two different ways that it could make this ruling, however. The first would be simply to declare that the claims implied by the Nine-Dash Line are illegal under UNCLOS. A second approach would simply be to rule that some plausible interpretations of the Nine-Dash Line are inconsistent with UNCLOS, and that UNCLOS supersedes any preexisting historical claims when no historic rights argument has been affirmatively advanced.

This first approach would have the advantage of being maximally clear and definitive. The second, however, would offer some opportunity for China to save face. Rather than strike down China's line as "illegal," a Tribunal ruling that it is strictly subordinate to UNCLOS would offer China the opportunity to bring its claims into compliance with the Law of the Sea over time. There is little chance that China will simply abandon its Nine-Dash Line, but if the court leaves it with some room to maneuver, it may see fit to gradually reframe its claims in a manner more consistent with UNCLOS. China could, for example, shift its public statements on the Nine-Dash Line to sound less like a "historic rights" claim and more like a "territory plus maritime entitlements" claim.

An adverse ruling on the Nine-Dash Line also has important implications for Taiwan. Taiwan is not represented before the Tribunal, and it does not actively press its claims within its Eleven-Dash Line the way that China does its own.¹⁵ The historical genesis of these demarcations is the same, however. If the Nine-Dash Line is struck down, we may expect to see the new Democratic Progressive Party government on Taiwan minimizing the role of the Eleven-Dash Line in its South China Sea policy, and elevating UNCLOS in its own public positions.

Status of Features and Maritime Entitlements

It seems highly likely that the Tribunal will make a judgment on the status of at least *some* of the features on which the Philippines has requested a ruling as well as their maritime entitlements. It has found that it has jurisdiction to do so without ruling on questions of sovereignty. Failure to make a ruling on this issue would mean that all of the features in question could theoretically be entitled to full EEZs and continental shelves, leaving the South China Sea a maritime morass. The Tribunal need not rule on the status of *all* features for which it has considered evidence to rule on some of them, however.

The Tribunal is most likely to rule on the reefs vs. rocks question – that is, whether Subi, Mischief, Gaven, Hughes, and Second Thomas Shoal should be considered submerged features that do not have maritime entitlements. Although China has built on top of four of these features, the Philippines' counsel has submitted copious evidence from several different countries, and the question of whether these features are LTEs is ultimately a binary one: According to UNCLOS Article 13, a feature is considered an LTE if it is submerged at high tide. LTEs are not entitled to EEZs, continental shelves, or territorial seas – in fact, they are not subject to sovereignty claims at all and are considered part of the seabed. If the evidence before the court points to the fact that these four features qualify as LTEs, the Tribunal will be inclined to rule them as such, as this will significantly reduce the scope of the maritime disputes in the Spratly Islands.

There is little chance that China will simply abandon its Nine-Dash Line, but if the court leaves it with some room to maneuver, it may see fit to gradually reframe its claims in a manner more consistent with UNCLOS.

The Philippines' request that the Tribunal rule four other features as rocks rather than full-fledged islands is a thornier one, however. Under UNCLOS Article 121, rocks are considered a type of island entitled only to a territorial sea, but no continental shelf or EEZ. Under Article 121.3, rocks are naturally formed features that are above water at high tide, but full-fledged islands must also be able to sustain human habitation and an economic life of their own. How would the Tribunal determine whether the Spratly features in question meet these qualifications?

The legal factors and tests involved in determining whether a feature can sustain human habitation and economic life are not well developed or agreed upon. Many experts point to the existence of fresh water as a criterion, as it allows life and economic activity. Beyond the aforementioned cases, however, there is little legal precedent off of which the Tribunal can base an island vs. rocks ruling. Cases before the International Court of Justice and International Tribunal on the Law of the Sea have failed to clarify the ambiguity in Article 121.3.¹⁶

Implications of Alternate “Rocks” Rulings





The Philippines' legal team presents its case in oral arguments at The Hague. The Chinese team's seats stand empty. (Courtesy of Permanent Court of Arbitration)

The Tribunal may be especially hesitant to rule on the rocks vs. islands question in the case of Itu Aba, which has been held by Taiwan since 1946. Itu Aba is the largest natural feature in the Spratlys, so if it does not qualify as an island, no other Spratly features should. Taiwan, however, has not had the opportunity to present information on Itu Aba's status before the Tribunal, and it could be reasonably argued that Itu Aba can support human and economic life. The Tribunal may therefore be wary of ruling Itu Aba a rock, lest this result in backlash from Taiwan and others in the region.

On the other hand, the Tribunal may opt to rule Itu Aba a rock in an effort to inject maximum clarity into the South China Sea disputes. There is precedent in the *Nicaragua* and *Colombia* cases for limiting insular features to 12 nm maritime entitlements to reduce their effects on the maritime entitlements of coastal states – an approach that might be thought of as a form of geographic pragmatism. Yet the authors assess that this is not the most likely outcome, given the ambiguities in Article 121.3.

The Tribunal need not rule on every feature to rule on some, however. It may find it prudent to set aside the question of Itu Aba's status for jurisdictional or other reasons, and to rule on the rocks vs. islands question for Chinese-occupied features. Prior to China's island building, Fiery Cross Reef, Johnson South Reef, Cuarteron Reef, and Scarborough Shoal were speck-like

outcrops. It is much more difficult to argue that these features could sustain human habitation or economic life in their prior states. If the Tribunal sets aside Itu Aba and decides to rule on Chinese-held features, it could rule that all four of these are rocks and entitled only to a 12 nm territorial sea. It could also choose to make this determination about just some Chinese-held features, depending on where available survey evidence is most compelling.

China's Activities in the Philippine EEZ

The Tribunal seems likely to rule that at least some of China's activities inside of the Philippine EEZ are inconsistent with UNCLOS. This may include China's interference with Philippine fishing activities, its exclusion of fishermen from Scarborough Shoal, or its efforts to prevent Manila from resupplying its position at Second Thomas Shoal. On the question of artificial island building, the Tribunal is likely to find that China should have conducted an impact survey and refrained from causing massive environmental damage by way of land reclamation. It may also rule that the land reclamation China has conducted within the Philippine EEZ, including its building at Mischief Reef, is expressly prohibited by UNCLOS.

After the Arbitration: Regional and Global Implications

The authors assess that the Tribunal's ruling will be favorable to the Philippines on many but not all of the merits under consideration. The Tribunal will almost certainly find that the Nine-Dash Line is inconsistent with UNCLOS. It seems likely that it will find that four of the features China occupies are LTEs as opposed to rocks. It may also rule that some features are rocks as opposed to full-fledged islands. If some of China's features are ruled to be rocks at most, they will be entitled to no more than a 12 nm territorial sea and will effectively be enclaved. This will significantly restrict China's legal rights to extract resources in the Philippines' EEZ and will significantly reduce the scope of the South China Sea maritime disputes. The Philippines and China are, of course, just two of five claimants that hold territory in the Spratly Islands. Furthermore, any overlapping maritime boundaries that remain between the Philippines and China will still need to be delimited under Articles 74 and 83 of UNCLOS, which govern the delimitations of EEZs and continental shelves.

Implications for Future Arbitration

One of the most significant implications for a Tribunal ruling is the example it may serve for other claimants. If arbitration clarifies these tangled maritime disputes, others may follow suit. Vietnam, which has dealt with conflicting claims with China as well as incursions into its waters by Chinese-owned drilling rigs, has begun to contemplate international arbitration. In 2014 it issued the aforementioned statement to the Tribunal, endorsing the court's jurisdiction, rejecting China's Nine-Dash Line, and asking for "due regard" to Vietnam's own rights and interests.¹⁷ January 2016 saw a leadership shuffle elevating relatively more China-friendly officials to the upper ranks of the Communist Party of Vietnam, perhaps making such legal action somewhat less likely in the short term.¹⁸ Over the long term, however, these disputes are unlikely to be otherwise resolved, and arbitration will probably remain an attractive backup plan.

Indonesia, though not a claimant to South China Sea territory, has had persistent disputes with China over its Natuna archipelago. The Indonesian foreign ministry has stated that it does not recognize China's Nine-Dash Line as consistent with international law, and has indicated that it too could turn to an international tribunal.¹⁹

Perhaps seeking to head off such action, China issued a first-ever public statement clarifying that it claimed no sovereignty over the Indonesian archipelago. Apparent magnanimity was also paired with an implicit warning to Indonesia to stay in its lane, however; Chinese Foreign Ministry spokesman Hong Lei stated, "The Indonesian side has no territorial claim to China's [Spratly Islands]. The Chinese side has no objection to Indonesia's sovereignty over the Natuna islands."²⁰

Though their maritime disputes are largely concentrated in the relatively distant East China Sea, Japan and China have long sparred over uninhabited features in the waters separating the two countries. Undersea resource extraction has recently dominated the ongoing dispute. Japan demands that China cease construction of oil and gas exploration platforms in contested areas of the East China Sea, which appears to contravene a 2008 agreement between the two to jointly develop the contested waters. Should bilateral negotiations continue to prove fruitless, Japan's ruling party has said it is exploring recourse through international arbitration.²¹

One of the most significant implications for a Tribunal ruling is the example it may serve for other claimants.

Even Malaysia, which has also traditionally shied away from more vocal disputes over competing South China Sea claims, has begun speaking out against Chinese claims in firmer terms. While it has not yet directly raised or implicitly threatened the pursuit of an arbitration case against China, Malaysia has begun deploying more legalistic vocabulary. In late 2015 the country's deputy prime minister, without naming China directly, said that claiming vast parts of the South China sea "due to historical narrative is invalid," and asked whether it made sense for coast guard facilities to be built on islands more than 3,000 kilometers away from an unnamed country's mainland.²² Malaysia's interest in an international legal recourse may well grow as South China Sea tensions continue to do the same.

Implications for China

Despite the fact that China has declined to participate, the Tribunal's decision has profound implications for the country. Beijing has made clear that it will not recognize or comply with the ruling. The decision will nonetheless be binding on China. A critical question is, however, whether China will simply decry and then ignore the decision, or whether it will take actions to oppose it.

It is possible that Beijing will attempt to respond to the ruling with a regulatory or legal declaration of its own. Analysts have long speculated that China may declare a South China Sea air defense identification zone (ADIZ), as it did in the East China Sea in 2013. ADIZs are not international legal mechanisms or linked to the Law of the Sea. Rather, they are regulatory zones that individual states establish to monitor civil air traffic and are governed by the Convention on Civil Aviation.²³

Despite its non-legal nature, China's East China Sea ADIZ appears to have been an attempt by Beijing to establish administrative authority over the Senkaku Islands, which it included in this zone in its declaration. China has not fully enforced its East China Sea ADIZ since 2013, which suggests that it may be willing to declare a South China Sea ADIZ even if it does not have the capabilities to fully implement one there. China's construction of long runways and sophisticated radar on its artificial islands have significantly improved its ability to monitor air traffic in the Spratlys, and it has had similar capabilities in the Paracel Islands for many years.

In March 2016, China announced that it would produce a new "basic maritime law" between 2016 and 2020 to strengthen maritime law enforcement and its maritime interests. Beijing has already produced domestic laws that contradict basic tenets of UNCLOS, including its 1992 Law on the Territorial Sea and Contiguous Zone and its 1998 Exclusive Economic Zone and Continental Shelf Act.

China may turn to an ADIZ, new domestic law, or both in the weeks and months following the Tribunal's decision. Beijing may calculate that these provide domestic and even weak international justification for South China Sea activities that the Tribunal has ruled to be inconsistent with UNCLOS. New domestic, unilateral actions will not, of course, supersede UNCLOS, and China will face reputational costs if it declares new legal or regulatory zones in an effort to supplant the Tribunal's decision.

Given that this case has been in process for three years and that the timing of the decision is fairly predictable, it is also possible that China will take some actions in or around the Spratly Islands that anticipate the Tribunal's ruling. Many experts have speculated that Beijing executed its swift and systematic island-building campaign in 2014–2015 with the aim of completing these projects before a decision was rendered. Prior to a final ruling, China may engage in a final spate of construction to cement its position in the Spratlys.²⁴

The Tribunal's decision will likely also present some face-saving opportunities for China. If the decision invalidates the Nine-Dash Line by implication only, and rules on the status of some but not all of China's features, China may actually see fit to bring its claims closer to the letter of the ruling over time. We should not expect to see this in the weeks or even months after the decision is handed down, but a decision that avoids direct invalidation of the Nine-Dash Line and deprives many but not all of China's features of their maritime entitlements would likely preserve the most plausible path for long-term compliance.

A critical question is whether China will simply decry and then ignore the [Tribunal's] decision, or whether it will take actions to oppose it.

Implications for ASEAN

The Tribunal's ruling will also have implications for the Association of Southeast Asian Nations (ASEAN) and its member states. The Philippines is, of course, a member of ASEAN, as are Vietnam, Malaysia, Indonesia, and Brunei – the other Spratly Islands claimants besides Taiwan. ASEAN has not endorsed the Philippines' legal case, but it recently ended its summits with statements that clearly endorse the rule of law as a means of settling disputes and reaffirmed the organization's support for UNCLOS. ASEAN is likely to issue some form of statement on the ruling, be it a standalone statement following the decision, or language in its broader statement at the ASEAN Regional Forum this summer. The statement is unlikely to be terribly strong, but will presumably reiterate ASEAN's support for UNCLOS and the rule of law.

China's decision to flout the ruling will win it no favor with ASEAN or its members. China's 2014–2015 island building and refusal to agree to a freeze on land reclamation have already damaged ASEAN hopes for a near-term, binding Code of Conduct with China. But China's decision to expressly disobey the rule of law may leave its members even more pessimistic about dispute management mechanisms that rely on Beijing. Neither China nor ASEAN are likely to abandon the Code of Conduct entirely, but the prospects for such an agreement beyond ASEAN members are dim.

Implications for the United States

The United States is not a South China Sea claimant and has not directly supported the Philippines' case while it has been in process. Since 1995, however, it has articulated international law as one of its abiding national interests in the South China Sea, and Washington has endorsed Manila's decision to use international legal mechanisms to settle these disputes. The United States and many of its close regional partners will therefore seek to support and reinforce the Tribunal's decision. The critical question for Washington is how best it can accomplish that, given that it knows China will not comply and that the United States cannot compel it to do so.

A first step will be a public diplomacy campaign following the decision, through which U.S. leaders support the Philippines and the ruling in the region and at home. Assuming China quickly restates its noncompliance, U.S. leaders should publicly and privately call on it to comply, and reiterate with no equivocation that the

decision is binding on all parties. Several U.S. partners, including Australia, Japan, and India, have voiced public support for the arbitration process, and Washington should encourage them to make robust statements following the decision as well.

Second, in October 2015, the United States resumed freedom of navigation operations (FONOPS) in waters surrounding the Spratly Islands. Although they use naval vessels and aircraft to send their signals, FONOPS are primarily a legal tool designed to contest spurious claims to water and airspace. If China restates claims to sovereign water or airspace that are inconsistent with the Tribunal's ruling, Washington should use FONOPS to contest these swiftly and publicly, and should plan its FONOPS to reflect the Tribunal's decision. It should continue to do so as a matter of routine thereafter.

Third, if the Tribunal does indeed rule several features to be LTEs and China rejects the decision, the United States and its partners should change the way they talk about these features. Under UNCLOS, not only do reefs not come with any maritime entitlements, they are not subject to sovereignty claims at all. Following the ruling, then, China's outposts on Mischief, Subi, and Gaven Reefs may become "illegal occupations." They should be referred to as such in public and in private to increase the reputational cost that Beijing pays for its noncompliance.

The critical question for Washington is how best [to support and reinforce the Tribunal's decision] given that it knows China will not comply and that the United States cannot compel it to do so.

Fourth, the United States should use the Tribunal's ruling to encourage other claimants to adhere to and employ international law. Washington should convene other Southeast Asian claimant states to discuss the implications and future potential for arbitration on the sidelines of ASEAN and other regional forums. The State Department should also produce another paper in its Limits in the Seas series that explores in depth the legal implications of the Tribunal's decision, and suggests how subsequent arbitration and maritime boundary delimitation might proceed. Even if China does not comply with the ruling, the United States should harness the legal momentum from the decision.

Finally, assuming the United States does initiate a public diplomacy campaign supporting the arbitration process, it can expect China to point out the fact that Washington itself has not ratified the UNCLOS treaty. The United States adheres to UNCLOS as customary law, so this is mostly a convenient talking point for Beijing, but China's artificial islands have made international law a particularly important tool in the South China Sea. If the United States hopes to encourage partners to support the Philippines, and other claimant states to pursue legal processes, it should strive to lead by example. There is no hope that the current U.S. Senate will ratify the treaty, but with an election fast approaching the administration should prepare an UNCLOS ratification plan for the new president to implement.

Conclusion

The International Tribunal on the Law of the Sea's decision in *Philippines v. China* will be a landmark case no matter which of the previously discussed permutations of decisions the Tribunal hands down. Rarely has an international legal process cut directly to the core of such an important set of geopolitical issues. When the Philippines initiated its case three years ago, it would have been impossible to imagine how prominent and how dynamic the Spratly Islands disputes would have become by 2016. From all of the actors involved, this demands a tenuous balancing act: How will they use the decision to further their own legal and political interests, while keeping it in context of the broader strategic challenges that will continue to plague the South China Sea?

For China, this presumably means making good on its promise to repudiate the decision without alienating other regional states so much that they are dissuaded from future cooperation. For the Philippines, this means welcoming the ruling and support from friends and allies, but tempering expectations that China will comply in the near term. For the United States, this means rallying public support for the process and its outcome, while still encouraging China to take the face-saving off-ramps that the Tribunal is likely to leave open for it. For ASEAN as an organization and for other regional states, this likely means endorsing UNCLOS and international law in a consistent manner without alienating China. For other claimant states, it means taking a hard look at the political and legal risks and rewards that may come from their own decisions to pursue arbitration.

The Tribunal's ruling will likely usher in a period of heightened regional tensions as the relevant players jockey to maximize the political mileage they can derive from the decision. With any hope, however, all will place this much-awaited ruling in its historical and geopolitical context, and acknowledge that it is an early step toward longer-term clarity in the South China Sea that may not yield immediate tangible changes. Indeed, the ruling's greatest political value will come if it sets meaningful precedent and is embraced by the region as legitimate and useful. This may, in turn, help to catalyze future cases that reduce the vexing disputes in the South China Sea.

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