

The South China Sea Arbitration Award: "A victory for all"

It is conceivable that the South China Sea Arbitral Award will continue to be a helpful guide leading the concerned parties to develop a viable rules-based order in the South China Sea, rather than allowing the region to become a 'might makes right' arena for interstate rivalry.

On July 12, 2016, the Arbitral Tribunal instituted under Annex VII of the 1982 Convention on the Law of the Sea (UNCLOS) issued its [final award](#) of significant importance on the South China Sea arbitration case (the Award). Since then, this landmark decision has inspired numerous discussions on legal issues and has been considered as providing a legal background for the maritime activities taken by various countries in the South China Sea.

The Award, with its findings, has contributed greatly to the development of the international law of the sea and advanced the legal debate on the South China Sea issues in many ways

1. The Award confirmed the universal and unified character of the UNCLOS, which established a legal framework for different maritime regimes from land territories, islands, rocks, low-tide elevations (LTE), the breadth of different maritime entitlements, and lawful activities at sea. The Award also confirmed that coastal states' rights and obligations were governed by UNCLOS provisions, and that, therefore, any maritime claims inconsistent with the UNCLOS should be rejected.^[1]
2. It gave clear explanations of the legal regime of exclusive economic zones and historic rights.^[2] The Award affirmed that UNCLOS superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein,^[3] and that China's 'nine-dash line' claim in the South China Sea was invalid.
3. The Award marked the first time that an international juridical body has clarified UNCLOS Article 121.3 on the definition of 'Rocks'. As such, the Arbitral Tribunal's ruling helped provide a clear picture of the disputes in the Spratlys and Scarborough Shoal by way of establishing that all the high-tide features in the South

China Sea could have only 12-nautical-mile territorial seas; and LTEs or submerged features are not subject of appropriation and do not generate entitlement to maritime zones.^[41]

4. The Award confirmed that any application of archipelagic straight baselines to the Spratly islands would be contrary to the UNCLOS.^[51]

5. The Award reaffirmed the obligation of all the States Parties to UNCLOS to protect and preserve the marine environment, and made it clear that any harmful activities to the South China Sea coral reef habitat, such as dredging and artificial island-building and construction activities, should be denounced.^[61]

6. The Award's conclusion on the status of insular features provided for the possibility of application of the high seas and Area regimes to a certain part in the center of the South China Sea, and for the observance of the freedom of high seas, including fishing rights, therewith.

In sum, the Award has served as a legal guideline for all the relevant States to review their positions and policies in the South China Sea. After a period of opting for caution and downplaying the victory that it won in the South China Sea arbitration, Manila gradually turned to confirm the value of the Award. In his [speech](#) during the United Nations General Assembly's annual meeting in September 2020, President Rodrigo Duterte stated that "the Award is now part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish or abandon." Secretary of Foreign Affairs of the Philippines Teodoro Locsin, in his [statement](#) on the 5th anniversary of the issuance of the Award, compared the ruling rendered by the South China Sea Arbitral Tribunal to "the North Star that will keep us on course in the present, and that will point us back to the right direction in the future." He said that the Philippines "firmly reject(s) attempts to undermine (the ruling), even erase it from law, history and collective memories." He further stated that the Award was "final," that it constituted "a milestone in the corpus of international law," and that it offered a valuable reference source for "countries with the same problematic maritime features" as those of the Philippines.

By stipulating that the maritime features in the Spratlys could not generate exclusive economic zones (EEZ) or continental shelves, the Award helped minimize the areas of disputes in the South China Sea and provided a basis for the delimitation of overlapping maritime zones there.

The Award apparently provided the impetus to Malaysia's decision on December 12, 2019 to lodge a [partial submission](#) for a continental shelf in the Northern part of the South China Sea that extended beyond 200 nautical miles from its baselines with the United Nations Commission on the Limits of the Continental Shelf (CLCS). This submission is admissible only if it does not create overlaps between the extended continental shelf claimed by Malaysia and those claimed by Viet Nam and the Philippines.

The Award has also provided an inspiration for regional and extra-regional countries to clarify their positions on the South China Sea issues. This was seen in the [diplomatic note exchange](#) during late December 2019-January 2021, which prompted a flurry of 25 notes verbales, 2 letters and one statement by 11 regional and extra-regional players on issues pertinent to the South China Sea region^[7] Except those of China, the diplomatic notes circulated during the recent note-verbale debate contained many common points:

- The unified and universal character of UNCLOS rendered it the most important legal instrument for tackling all matters and activities at sea.
- The South China Sea Arbitral Award of July 12, 2016 was final and binding to all parties to the case, herein China and the Philippines.
- Each high-tide feature in the Spratlys could only generate a territorial sea of 12 nautical miles; and any claims to maritime zones generated from submerged features or LTEs were inconsistent with the UNCLOS.
- The freedom of navigation and overflight in the South China Sea should be respected.
- The use of archipelagic straight baselines should be strictly limited to archipelagic States and was not permissible for the purpose of claiming maritime entitlements in the case of continental States' outlying archipelagos.
- Land reclamation or any artificial construction activities could change neither the legal regime nor

the classification of the maritime features in the South China Sea.

- Claims of historic rights in the South China Sea were unlawful and inconsistent with international law, particularly the UNCLOS.

Additionally, the Award has significantly impacted on ASEAN's position with regard to the South China Sea disputes given the regional grouping's pursuit of centrality in the Indo-Pacific. Notably, the Chairman's Statements of the [36th](#) and the [37th](#) ASEAN Summit reaffirmed the importance of upholding international law, including the UNCLOS. The Statements stated that the UNCLOS provided "the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests over maritime zones." The Statements also stated that the UNCLOS "sets out the legal framework within which all activities in the oceans and seas must be carried out." All this suggests that the Award has facilitated the development of a common ASEAN stance on how to resolve the South China Sea issues.

Through recent statements by the US Department of State, the new Biden Administration has confirmed that it would follow the policy of its predecessor with regard to the South China Sea issues. During his [press briefing](#) on February 19, 2021, State Department Spokesperson Ned Price reiterated the position the US had taken in its [statement of July 13, 2020](#) regarding maritime claims in the South China Sea. Specifically, the July 2020 US statement pointed out that:

- i. The US recognized that the Arbitral Tribunal's decision was final and carried legal force for both China and the Philippines, and thus Washington was aligning its position on China's South China Sea claims with this decision;
- ii. The PRC could not lawfully assert any maritime claims, including EEZ claims, that were derived from Scarborough Reef and the Spratlys Islands and that covered areas that the Arbitral Tribunal found to be in the Philippines' EEZ or on its continental shelf;

- iii. The US rejected Chinese claims to waters beyond a 12-nautical-mile territorial sea derived from islands China claimed in the Spratlys;
- iv. Any PRC action to harass other states' fishing or oil developments in waters under other countries' jurisdiction or to carry out such activities unilaterally was unlawful. It was specifically mentioned that those waters included the areas surrounding Vanguard Bank (off Viet Nam), Luconia Shoals (off Malaysia), Natuna Besar (off Indonesia), and waters in Brunei's EEZ.

Additionally, the July 2020 US statement also reiterated a pledge to “stand with the international community in defense of freedom of the seas.” To uphold that pledge, the US has been working out plans to conduct freedom of navigation operations with its allies, including Australia, France, Germany and the United Kingdom, in the South China Sea in recent months.

The active participation of many regional and extra-regional states in the recent diplomatic note exchange surely did not signify the formation of an alliance against China in the region. Instead, the 2019-2021 note-verbale debate demonstrated that the relevant countries are increasingly able to find a common legal ground on which to discuss the South China Sea issues. That common ground starts with the recognition that all disputes must be resolved in accordance with international law, and that a return to the power politics or *'might makes right'* is simply unacceptable.

Unfortunately, the evidence suggests that China is still holding onto its [*'Four Nos'* policy](#) in the South China Sea - that is, no acceptance, no participation, no recognition and no implementation of the South China Sea Arbitration Award. One year after the issuance of the Award, the Chinese Society of International Law (CSIL) published a 500-page treatise entitled “The South China Sea Arbitration Awards: a Critical Study,” in which it argued that the ruling rendered by the South China Sea Arbitral Tribunal was erroneous. China has also actively engaged in *'lawfare'* in the South China Sea, while seeking to augment its presence there by establishing administrative control over disputed territories, proposing names for undersea features, and passing domestic laws to enforce its jurisdiction over its claims in the region (such as the January 2021 Coast Guard Law and the April 2021 Revised Maritime Traffic Safety Law). Additionally, while China continues to flout the ruling by the Arbitral Tribunal, it has undertaken to make major adjustments to its legal position on the South China Sea, most notably by remodeling

its 'nine-dash line' claims into some curious '*Four Sha*' claims. At the same time, China has also attempted to pick and choose which provisions of the UNCLOS it wants to abide by - an approach that does not conform with the spirit and concept of 'package deal' promoted during UNCLOS negotiations.

Certainly, any change will need time to sink in the consciousness of the international community. The South China Sea Arbitral Award has now become an important part of our history and our present as well as an undeniable fact. It is conceivable that this Award will also continue to be a helpful guide leading the concerned parties to develop a viable rules-based order in the South China Sea, rather than allowing the region to become a 'might makes right' arena for interstate rivalry.

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(*) After the issuance of the Arbitral Award, former President Benigno Aquino III (1960-2021) said that this ruling should be viewed as a "victory for all", not just for the Philippines. <https://globalnation.inquirer.net/141043/aquino-on-arbitral-court-ruling-a-victory-for-all>.

[1] The Final Award of the South China Sea Arbitration case, available at <https://pcacases.com/web/sendAttach/2086>, paragraphs 277-278.

[2] Final Award, Paragraph 243.

[3] Final Award, paragraph 643-645.

[4] Final Award, paragraph 643-645.

[5] Final Award, paragraph 575.

[6] Final Award, paragraph 1181

[7] As noted, there are: 1 statement pronounced by Brunei Darussalam, China (9 notes verbales and 1 letter), Malaysia(3 notes), the Philippines (3 notes), Viet Nam (3 notes), Indonesia (2 notes), Australia, France, Germany, the United Kingdom, Japan (1 note each) and the United States (1 letter).

