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Progress in the South China Sea?

A Year After the Hague Ruling

Lynn Kuok

LYNN KUOK is Senior Visiting Research Fellow at the Centre for International Law, National University of Singapore, and Senior Research Fellow at the Centre for Rising Powers, University of Cambridge. Follow her on Twitter [@LynnKuok](#) ^[1].

July 12 marked the one-year anniversary of a [United Nations tribunal ruling](#) ^[2] in a case brought by the Philippines against China over the latter's claims and activities in the South China Sea. The ruling was a major victory for the Philippines, particularly the tribunal's decision on China's "nine-dash line," through which Beijing attempts to lay claim to vast areas of the South China Sea. A year to the day after the award, the Philippines issued a conciliatory [statement](#) ^[3] even as an energy official [announced](#) ^[4] that Manila would soon offer investors new oil and gas blocks at Reed Bank, off the Philippine coast but within the nine-dash line.

Beijing, for its part, has always made clear that it regards the tribunal's decision as "null and void" and of "no binding force." Statements from [Association of Southeast Asian Nations \(ASEAN\)](#) ^[5] states in the wake of the decision were muted. None urged China to adhere to the ruling; the strongest merely called for respecting international law.

Yet the impact of the decision cannot be determined by words alone. A year after the landmark award, ASEAN states appear to be more willing to assert their rights to resources in their exclusive economic zones (EEZs), and China's behavior is now more in keeping with the tribunal's decision.

MUCH ADO ABOUT NOTHING?

Some media reports and analysts have dismissed the decision as entirely ineffective. Territorial disputes in [the South China Sea](#) ^[6] continue to fester and are likely to do so for a long time. China's island-building, construction of facilities, and militarization of features in the area proceed unabated. The disagreement between China and the United States concerning rights concerning navigation, overflight, and military activities, manifested in [U.S. freedom of navigation operations](#) ^[7] and China's objections to them, likewise persists.

But the tribunal was never meant to resolve those issues. It did not rule on who has a better claim to sovereignty over land features in the South China Sea—it had no jurisdiction to do so. Rather, it ruled on the status and maritime entitlements of features in the Spratlys, in the south, and Scarborough Shoal, off the Philippine island of Luzon. The case centered on the interpretation and application of the United Nations Convention on the Law of the Sea, which governs whether a feature is a full island entitled to a 200-nautical-mile EEZ, a rock entitled to only a 12-nautical-mile territorial sea, or a low-tide elevation or submerged feature not capable of independent sovereignty claims or generating any maritime zones of its own.

In addition, the tribunal did not rule on the lawfulness of China's island-building, facility construction, or militarization of high-tide features. It did, however, find that China's occupation of and construction on Mischief Reef, a low-tide elevation in the Philippines' EEZ and continental shelf, were problematic given that the feature falls within the Philippines' jurisdiction.

Finally, the decision has only indirect implications for U.S. freedom of navigation operations inasmuch as it clarified the status and maritime entitlements of features in the Spratlys. In turn, the Trump administration's first such operation asserted high-sea freedoms around Mischief Reef, a feature the tribunal found generates no territorial sea. Beijing's response was to (wrongly) claim that the exercise "infringed upon China's sovereignty" and to object that the maneuver was done without China's approval. Beijing insists on authorization before foreign warships can exercise the right of innocent passage in its territorial sea—a requirement not found in the UN Convention on the Law of the Sea [8]. Beijing also dispatched military vessels and fighter planes to warn off the U.S. vessel.

GAME CHANGER ON RESOURCE RIGHTS

The real significance of the tribunal's decision was to clarify resource rights. Its main findings were twofold. First, it ruled that China cannot claim historic rights to resources in the waters within the nine-dash line if those waters are within the EEZs of other coastal states. Such rights were extinguished when China ratified the UN Convention on the Law of the Sea in 1996. Second, the tribunal ruled that none of the features in the Spratlys is entitled to a 200-nautical-mile EEZ. Like Scarborough Shoal, all of the Spratly features are at most rocks entitled to 12-nautical-mile territorial seas.

Although technically binding only on parties to the arbitration, the tribunal's decision has bolstered the position of ASEAN littoral states in the South China Sea [9]. It has clarified that the EEZ entitlements of the Philippines, as well as Brunei, Indonesia, Malaysia, and Vietnam, are unencumbered by China's nine-dash line or any claimed EEZ from features in the Spratlys. Areas of overlap in the Spratlys are now limited to a 12-nautical-mile ring around rock features. Beyond these areas, China has no claim recognized under international law to fish or to extract oil or gas in the EEZs of other states outside the EEZ generated from China's mainland.

BEIJING'S BEHAVIOR

In assessing the impact of the award, what China and ASEAN states do is at least as important as what they say.

In official statements issued on the day of and after the judgment, Beijing appeared to expressly assert, for the first time, that China's maritime claims in the South China Sea include "historic rights." It did not specify what it means by this. However, if Beijing is claiming historic rights to resources within the entirety of the nine-dash line (rather than historic fishing rights within territorial seas), its assertion flies in the face of the judgment.

In May this year, Beijing also imposed an annual fishing ban, which overlapped with the EEZs of the Philippines and Vietnam but excluded the Spratlys. The ban, which will be in place until September, is clearly problematic in light of the ruling.

However, the extent to which Beijing has actually sought to enforce the ban for non-Chinese fishing vessels in areas outside China's EEZ is unclear. There were reports [10] in June of its targeting Vietnamese fishermen near the Paracels in the northern part of the South China Sea. But China, Taiwan, and Vietnam all claim sovereignty over these features, and their status and maritime entitlements were not considered by the tribunal.

In a positive sign, there have been no public reports of Chinese navy or coast guard vessels supporting illegal fishing within the Indonesian EEZ since the award. This is in stark contrast to highly publicized episodes in Indonesia's EEZ in March, May, and June 2016. In the first of these incidents, a Chinese coast guard vessel rammed an Indonesian law enforcement vessel to secure the release of a Chinese boat being towed away for illegal fishing.

Further, since October 2016, Beijing has also reportedly ^[11] permitted Philippine and Vietnamese fishermen to return to Scarborough Shoal after blockading it since 2012. This move is consistent with the tribunal's ruling that fishermen from China, the Philippines, Taiwan, and Vietnam all enjoy traditional fishing rights in the territorial sea of Scarborough Shoal, and these rights were not extinguished by the UN Convention on the Law of the Sea.

A senior Chinese general reportedly ^[12] cut short an official visit to Vietnam in June this year because of news that Hanoi had begun drilling in a disputed area that Beijing had previously leased out to a different entity. But Beijing has done nothing to stop Hanoi's drilling, nor has it made any public statement condemning it. The tribunal's award has made clear that China has no legitimate claim to resources in this area.

Beijing's response was far less bellicose than the threats of war it allegedly ^[13] made in May this year after news that Manila wanted to develop Reed Bank. Exploration in this disputed area had been suspended in late 2014 while legal proceedings were ongoing. Beijing has not responded to Manila's latest announcement that it will resume drilling for oil and gas in December. How Beijing chooses to react in the event that Manila proceeds will be critical.

It is still too early to conclude that the tribunal's decision has positively shaped conduct in the South China Sea. But a careful examination of events since July 2016 suggests that ASEAN states appear to be more willing to assert their rights to resources in their EEZs and that Beijing (with the exception of its continued presence on and fortification of Mischief Reef) has kept its actions if not its words broadly within the letter of the ruling.

Whether Beijing's behavior should be attributed to its appreciation that flouting the ruling undermines trust and respect for China or to a more short-sighted desire to avoid direct confrontation just before its critical nineteenth party congress ^[14] in September remains an open question. Whatever the case, respect for international law is critical to China's long-term interests in peace and stability. Beijing will do well to recognize this and act accordingly.

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[4] <http://www.reuters.com/article/us-southchinasea-philippines-idUSKBN19X1AO>

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- [13] <http://www.straitstimes.com/asia/se-asia/chinas-xi-threatened-war-if-philippines-tried-to-enforce-south-china-sea-arbitration>
- [14] <https://www.foreignaffairs.com/articles/china/2017-07-05/leaks-lies-and-chinese-politics>