

The Rule of Law and the Path to a Just and Lasting Peace in the South China Sea

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Abstract

This article, by the lead counsel for the Philippines in the arbitration it brought against China under the United Nations Convention for the Law of the Sea, which resulted, in July 2016, in a unanimous award in favor of the Philippines on all key issues, sets forth the author's views on the critical findings by the arbitral tribunal, the impact of the award on the parties to the dispute and on the rule of law generally, and how the award can lead to a peaceful and equitable solution for China and its neighbors rimming the South China Sea, as well as a strengthening of the rules-based international order.

In this discussion of the *South China Sea* arbitration, in which I was privileged to serve as lead counsel for the Philippines, I will first summarize the key findings in the case. Then I will address its impact on the rule of law and the stability of the international legal system. And finally, I will offer my thoughts on how the arbitral award can serve as the basis for an equitable and lasting solution to the conflict between China and its neighbors in the South China Sea, as well as a strengthening of the rules-based international order as a whole.

The Philippines brought the case in January 2013 for two paramount reasons: First, China was insisting on exclusive jurisdiction over nearly all the waters and seabed of the South China Sea, within a so-called “nine-dash line” and the exclusive right to all of the natural resources within that line. China’s claim extended more than 650 miles from its coast and within 50 miles of the Philippines’ coast, and that is well beyond the 200-mile exclusive economic zone and continental shelf, to which China is entitled under the Law of the Sea Convention and it is well within the Philippines 200-mile entitlements. China depicted its nine-dash line claim in a map that it sent to the United Nations in 2009.

Based on its nine-dash line claim, Chinese law enforcement and naval vessels prevented Philippine fishermen from fishing in the waters encompassed by the nine-dash line and prevented Philippine licensees from exploring for oil and gas within the perimeter of the nine-dash line, while permitting Chinese nationals to carry out these activities.

The second principal cause of the Philippines’ resort to arbitration was China’s claimed sovereignty over all of the Spratly Islands, in the southern part of the South China Sea. The Spratly Islands consist of dozens of very tiny insular features, only a small number of which are above water at high tide and most of which are also claimed by the Philippines, Vietnam, or Malaysia. China occupied and built or started to build military facilities on top of seven of these features. China’s construction caused great environmental harm to these reefs and islands, which were previously some of the most pristine in the world. The Philippines claimed that China’s activities destroyed the surrounding marine environment including important fish breeding and feeding areas.

The Philippines had tried to address all of these issues with China by diplomacy over a

number of years, but China was inflexible. It demanded that the Philippines accept China's exclusive rights over all of the resources of the sea and seabed within the nine-dash line as well as Chinese sovereignty over all of the islands and other maritime features of the South China Sea. This would have amounted to a renunciation of the Philippines' rights under the Law of the Sea Convention. With diplomacy frustrated and military action out of the question, legal recourse became the only viable option for the Philippines.

But there were big challenges to bringing the case. First, an arbitral tribunal established under the Law of the Sea Convention has no jurisdiction over questions of land sovereignty, and for that reason the Philippines could not challenge China's assertion of sovereignty over the Spratly Islands or Scarborough Shoal, which represented a significant part of the conflict.

Second, the Philippines could not ask a tribunal to delimit a maritime boundary with China because China had exercised its right under Article 298 of the Convention to exclude itself from compulsory arbitral jurisdiction in regard to sea boundary delimitation.

The solution for the Philippines, after much thought, analysis and internal debate, was to bring a case about maritime entitlements rather than about sovereignty over islands, or delimitation of boundaries. Maritime entitlements, that is, the entitlements to the sea and seabed generated by coastal land territory – including a 12-mile territorial sea and 200-mile exclusive economic zone and continental shelf – are specifically provided for in the Convention; and thus, unlike sovereignty over coasts and islands, they do fall within the jurisdiction of an arbitral tribunal established under the Convention.

Also, and this proved to be a critical point, maritime entitlements can be determined without the need for engaging in the delimitation of boundaries. In fact, Law of the Sea tribunals must determine the entitlements of the parties to a dispute prior to and separately from delimiting a boundary, because it is only when two States' entitlements overlap that a boundary needs to be created. And this can be illustrated by example. When you have State A and State B separated by a body of water that is greater than 400 miles, their respective 200 mile entitlements to an exclusive economic zone and continental shelf will not overlap. Each will enjoy the exclusive right to exploit the living and non-living resources in its own 200 mile zone. There is no need for a delimitation of a common boundary. By contrast, where States A and B are separated by less than 400 miles, their 200 mile zones will overlap, and a boundary will have to be drawn to separate their respective zones.

In the South China Sea, with the exception of a small area to the northwest of the Philippines' northernmost islands (and southeast of China's southern coast), the Philippines and China are separated by more than 400 miles. Accordingly, except for that small area their 200 mile maritime entitlements do not overlap, and there is no cause for boundary delimitation.

Accordingly, the Philippines believed that by asserting claims to establish its own maritime entitlements and challenge those claimed by China based on the nine-dash line, it would overcome China's anticipated jurisdictional challenges. And this proved to be correct. Although China did not formally appear in the arbitral proceedings, it submitted to the tribunal a written pleading setting forth its jurisdictional objections. The tribunal accepted China's written pleading and considered it as China's jurisdictional objections. China's main arguments were that the tribunal lacked jurisdiction over matters of land sovereignty and boundary delimitation, but the tribunal was able to reject these arguments, unanimously, because the Philippines had been careful not to raise issues of land sovereignty or boundary delimitation, but had presented its case entirely as one regarding maritime entitlements.

On the merits, the Philippines claimed exclusive entitlements extending out to 200 miles from its coasts in all of the areas that were beyond 200 miles from China's coasts. This included the exclusive right to the resources of the sea and the seabed, meaning all of the fish, and the oil and gas beneath the seabed, in those areas.

The Philippines accepted that, as a party to the Convention, China enjoyed all of the entitlements guaranteed to it by the Convention, but that these did not extend beyond 200 miles from its coasts; therefore, any Chinese claim beyond 200 miles was a violation of the Convention and of the Philippines' rights thereunder. The arbitral tribunal unanimously agreed with this proposition.

In reaching this decision, the tribunal carefully considered China's claim to the waters and seabed encompassed by the nine-dash line, based on China's alleged historic rights beyond those enumerated in the Convention. The tribunal found that China's claim was unlawful on two grounds: first, it determined that when States became parties to the Law of the Sea Convention, they necessarily abandoned all claims to rights in the sea whether based on history or otherwise that were contradictory with the provisions of the Convention and, further, that they were expressly required by the Convention to withdraw all contradictory claims. China's claims to areas of sea and seabed beyond 200 miles from its coasts were plainly contradictory to the express terms of the Convention and therefore they were found to be unlawful.

Second, the tribunal found that even under preconvention international law, China's historic rights claims were invalid. Under customary international law, a claim of historic rights may be lawful only if a State has in fact exercised authority over the maritime area in question: under a claim of right, continuously over a long period of time, *and* with the acquiescence of neighboring States. China's historic rights claim in the South China Sea satisfied none of these well-established criteria. The evidence showed that China had never exercised authority over any maritime areas beyond those very close to its mainland coast, let alone continuously for a long period of time, and that no other State had ever acquiesced to China's authority in these areas.

China claimed entitlements not only from its mainland coast, but also from the Spratly Islands based on its alleged sovereignty over them. Consequently, another important issue in the case was whether these features were capable of generating maritime entitlements; and if so, to what extent.

This matter turned on the meaning of Article 121 of the Convention. The article provides that islands generate the same maritime entitlements as mainland coasts including an exclusive economic zone and continental shelf. However, there is an important exception in paragraph 3 of that article for islands that are considered uninhabitable, specifically features that are incapable of sustaining human habitation or economic life of their own. Those islands have a maritime entitlement only to a 12-mile territorial sea. For that reason, the Philippines argued and presented voluminous evidence that none of the Spratly Islands was habitable in its natural state and that none of the features therefore generated entitlements beyond 12 miles. This was the first case in which any international court or tribunal was required to interpret article 121, paragraph 3 or determine whether and on what basis an island should be deemed incapable of sustaining human habitation or economic life.

The tribunal delivered as part of its award an extensive analysis of the article's text and the manner in which it is to be applied. And it came to the conclusion, again unanimously, that none of the islands in question was habitable in its natural state and that none of them therefore generated entitlements beyond 12 miles. The result was that, except for the area northwest of the Philippines' coast where the entitlements generated by the Philippines' and China's mainland coast overlap slightly, and the 12-mile zones of some of the small islands claimed by China, the Philippines' exclusive economic zone and continental shelf are not overlapped by any entitlements that China may lawfully claim. On this basis, the tribunal ruled that it was unlawful for China to deprive the Philippines of the exclusive enjoyment of these areas of sea and seabed including the living and nonliving resources located there.

In regard to the impact of China's island-building and other activities on the marine environment, the tribunal retained its own independent experts to assess the harm caused

by these activities. The arbitrators found that the harm caused by China was devastating and irreparable, as the Philippines had claimed.

Thus, the Philippines prevailed on all its central claims; but as many have asked, “what does this mean if China does not comply with the award?” This is a legitimate question and one that reaches beyond China in this particular case, and it brings me to the second part of my analysis.

Put more broadly, the question might be phrased, what does it mean for the law of the sea and for the rule of law in general if States, especially great powers, refuse to comply with their legally-binding obligations under treaties to which they voluntarily became parties or with their obligations under judicial judgments or arbitral awards rendered by duly constituted and fully competent international courts or arbitral tribunals?

My first observation is that given the nature of the case, it would be extremely detrimental to the international legal order if China were to defy the arbitral award and if its defiance were to be accepted by the international community, and especially by the more than 160 States that are parties to the Law of the Sea Convention. This is a very special Convention. It was envisioned by its framers, including China (which played a large part in its adoption), as a constitution for the world’s oceans and seas, regulating virtually every activity, from navigation to environmental protection, to boundaries, to maritime zones, to rights to resources, to undersea cables, to deep seabed mining, and more. It has been one of the most successful treaties in the history of international law. It enjoys near-universal acceptance and it has kept peace and order on the seas and facilitated the orderly and equitable exploitation of resources for more than a generation.

China’s statements and actions in defiance of the arbitral award could threaten the viability of the Convention. If China can disregard the Convention’s most fundamental principles, then so can other States. This should not be acceptable to the international community and it should also be worrisome for China. China itself has much to lose from the unraveling or weakening of the Law of the Sea Convention. It has extensive rights in the South China Sea under the Convention that it would certainly not want to be challenged by other States. It might one day find these rights threatened by another great power with interests or naval forces in the South China Sea. In such case, the Law of the Sea Convention would protect China against the violation of its own rights unless the Convention has been weakened by China’s actions.

The United Nations Charter gives a special role to certain of the world’s most powerful States, including China. It makes them permanent members of the Security Council and it gives them veto power over council resolutions. But it does not exempt them from the rules set forth in the Charter or any other rules of international law; nor do United Nations conventions or other multilateral treaties make exceptions to their rules for the great powers. The same fundamental legal rules and principles reflected in international agreements like the Law of the Sea Convention or adopted by custom apply to all States, and it could not be otherwise. The majority of States simply would not accept being bound by rules that exempted other States solely on the basis of their size or power. They simply would not accept a system in which they are required to comply with the binding orders of competent international tribunals – but other States, even great powers, are not.

The great powers do set an example, however, and this can be either positive or negative. If they refuse to honor their legal obligations, then so will other States. And soon enough, international adjudication will be a hollow exercise. In 2012, when Columbia defiantly told the International Court of Justice that it would not comply with the Court’s judgment delimiting its maritime boundary with Nicaragua, it cited the United States’ rejection of a judgment in an earlier case brought by Nicaragua in the 1980s. China, too, cited the United States’ rejection of the Nicaragua judgment in support of its attempt to dismiss the arbitral award in the Philippines case.

Fortunately, these acts of defiance of international courts and tribunals are, at least so far, rare exceptions. The vast majority of States in the vast majority of cases comply with judicial

judgments and arbitral awards, even in cases where they consider themselves to have lost. The United States, despite the Nicaragua case, has a decent record of compliance with international judgments and awards overall. And so too does China, at least in the context of World Trade Organization panel rulings. There, China has generally complied with rulings that have gone against it.

There are important reasons why States on the whole generally comply even with unfavorable judicial or arbitral outcomes. First, there is an advantage in finally resolving a dispute with another State. Even if the resolution is less than fully desirable, the alternatives – prolongation of the conflict, tension, instability in the bilateral relationship and the imminent or eventual possibility of armed conflict – are often worse.

Second, neighboring States can never move out of the neighborhood. Geographical proximity among States is permanent. Disputes between neighbors are inevitable. If State A doesn't comply with the judgment or award resolving today's dispute, how can it expect its neighbor, State B, to comply with one in tomorrow's dispute? By refusing to comply, State A will have removed judicial or arbitral recourse from the list of possible means of resolving a future dispute that cannot be resolved diplomatically. What alternative does that leave it?

Third, there is the value of stature, prestige, and reputation, which translates into influence on the international level. States enhance their stature and with it their influence when they demonstrate that they are law-abiding, including by complying with international judgments and awards. For this reason, States inevitably seek to justify their actions on the basis of international law. We see this in all kinds of situations, even where the reliance on international law seems misplaced. China itself argued to the world that its nine-dash line claim was based on international law, namely its alleged historic rights.

My point here is not that States *correctly* invoke international law to justify their policies and actions, simply that they feel the need to invoke it as justification. And that is because they consider it important to their own self-interest to be seen by their neighbors and by the international community as a whole as law-abiding and respectful of the rights of other States.

Finally, I believe that the majority of States understand that the alternative to a rules-based international order is chaos. Respect for the rule of law not only serves ethical and moral interests, including justice and fairness, but practical ones. It fosters predictability, stability, security, and peace in international relations. These are goals shared by most States most of the time.

Two recent examples illustrate the point. The case of Bangladesh against India was brought under the same provisions of the Law of the Sea Convention as the Philippines' case against China. The arbitral award was widely viewed as more favorable to Bangladesh, and the arbitrator appointed by India issued a strong dissenting opinion. Nevertheless, India quickly announced that it would respect and comply with the award, and it has done so. The second example is Japan's acceptance of the judgment of the International Court of Justice in the whaling case despite its understandable disappointment with the result.

There can be no greater proof of a State's commitment to the rule of law than its compliance with judgments and awards that displease it. There is also no better way to strengthen the international legal order generally. When States like Japan and India set positive examples like these, other States are encouraged to follow. In fact, great powers may have the greatest interest in preserving the existing international order and their own privileged levels of influence under it. Maintaining and strengthening that order requires them to accept the consequences on those occasions when its rules are applied against them. No great power can reasonably expect to win its case automatically every time. There will be times when its behavior is found to be unlawful, but that may present as much of an opportunity for strengthening the legal order as a challenge to it.

There might be no better way to promote the rule of law than for a great power like the United States or China to accept and comply with an adverse judicial judgment or arbitral award. In fact, they have done so at least from time to time because they understand that there is no viable alternative to a rules-based system that will protect over the long-term their interests in a more orderly and secure world.

We may have an imperfect international legal order, but it is far better than having no rules-based system at all. The great powers may be powerful enough to get away with defying court orders and arbitral awards from time to time, but this is not a sufficient reason to legitimize such behavior by granting them exemptions from the rules, or adopting a policy of not seeking to hold them accountable for their unlawful acts. To the contrary, it is preferable to have a legal system that occasionally proves too weak to contain the lawless excesses of the most powerful States, rather than an even weaker system that, in formal recognition of its weakness, tolerates such excesses and avoids treating them as unlawful, or, worse yet, have no system at all.

In my opinion, the response to the imperfections of the international legal order should be to continue working to make the system better and stronger, and the rules more universally enforceable. There is, to be sure, a long way to go, but since the end of World War II great progress has been made, and there is no reason to give up the effort to make all States, including the most powerful, accept legal accountability for their breaches of the applicable rules.

In addition to these systemic considerations, there are particular reasons why, in regard to the South China Sea, China, with the passage of time, the dilution of passions, and the sober-minded reflection of an enlightened leadership, might come to see the award in the Philippines case as more of an opportunity for gain than as a defeat. And these bring me to the final part of my discussion: how the award may serve as a basis for peaceful and permanent resolution of the conflict.

First, China may come to appreciate that its core interests in the South China Sea have not been affected by the award. China's claim of sovereignty over all the islands, which it apparently considers vital to its strategic interests, is unaffected by the award because the tribunal did not have jurisdiction to address questions of sovereignty over islands. Accordingly, China can comply with the award without relinquishing either its sovereignty claim in general or its control over the small islands and rocks it currently occupies. Likewise, the award does not diminish China's freedom of navigation or overflight, or its ability to conduct naval exercises or other military activities in the South China Sea.

Under the award, the Philippines is obligated to respect China's freedom of navigation and overflight within the Philippines' own exclusive economic zone. China's freedoms of navigation and overflight, including for its naval and air-forces, are therefore fully protected.

What have been affected by the award, principally, are access to resources and protection of the marine environment. China may no longer lawfully claim for itself exclusive entitlement to the resources within the nine-dash line, but must respect the exclusive economic zone and continental shelf of the Philippines and, by implication, those of the other coastal States in the region. China also may not lawfully continue to destroy environmentally-sensitive coral reefs and their ecosystems for the purpose of building and expanding artificial islands.

But these should not be difficult consequences for China to accept. Until now, China and its neighbors along the South China Sea have been engaged in a competition for resources, especially fish and hydrocarbons. China's claim of exclusive entitlement to these resources based on the nine-dash line was explicitly rejected by all of the other coastal states even before the arbitration. China had to resort to shows of force on various occasions against vessels and nationals of the Philippines, Indonesia and Vietnam to enforce its claims. The risks of open conflict were growing. The award provides an equitable basis for a peaceful solution of this conflict. To be sure, it reinforces the positions of the Philippines, Indonesia and Vietnam among

others on the unlawfulness of China's nine-dash line claim and it encourages them to continue to assert their rights as against China within their own 200-mile exclusive economic zones and continental shelves. But at the same time, the award provides a path for China to negotiate its way out of a dangerous impasse of its own making and avoid a prolonged and destabilizing conflict not only with the Philippines, but with Vietnam, Indonesia, and others.

This certainly raises the benefit for China in ultimately finding an accommodation with its largest Southeast Asian neighbors, all of which have rejected China's nine-dash line claims and are unlikely ever to accept them. And such an accommodation should be possible. First, on issues like protecting the marine environment, China and its neighbors would appear to have common interests. All of the relevant States have strong interests in promoting the sustainability of fish stocks, which are an important source of nutrition for all of the local populations. On other issues, compromise should also be possible. Unlike sovereignty over land or islands, natural resources and access to them, whether fish or hydrocarbons, are more easily divisible. By recognizing that its neighbors too have rights as set forth in the Convention and reaffirmed in the arbitral award, China would be able to free itself to negotiate equitable sharing arrangements in regard to fish catches and oil and gas development.

China can thus become an indispensable partner to its neighbors in these activities. It is the only coastal State along the South China Sea with the financial and technological capacity to facilitate exploitation of hydrocarbons without participation from western or other extra-regional players. Good faith negotiations based on respect for the legal rights of all coastal States, including China's own, could produce a settlement favorable to every one of them.

For these reasons, I believe the arbitral award offers China as well as the Philippines and the other coastal States along the South China Sea the best path toward a secure, just, and lasting arrangement for the peaceful and equitable enjoyment of the sea and its resources. And this is why I believe there is reason to hope that China, in its wisdom, will ultimately come to the same conclusion and find an honorable way to reach a reasonable accommodation with its neighboring States based on its recognition of their and China's own fundamental rights under the Law of the Sea Convention as spelled out in the arbitral award.

Such an agreement, in my view would serve the interests of China, the Philippines, the other coastal States in the region, and the international community as a whole. It would strengthen the Law of the Sea Convention and the international legal order generally. For this to happen, it requires mainly for China to come to the enlightened conclusion that its long-term interests, like those of most other States, are best served by respecting, promoting, and strengthening the rule of law and recognizing the legal rights of all States, and by working with neighboring States in partnership for the sustainable and equitable enjoyment of the South China Sea and its resources.

This is an outcome that an enlightened Chinese leadership may come to see as a win-win situation for both China and its neighbors, and one that the international community would be wise to encourage.