

## **Prospects for the Code of Conduct in the South China Sea after Hague decision**

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On 12 July 2016, the Permanent Arbitration Court in The Hague issued the final decision in the case of the Philippines vs. China concerning some issues related to interpretation of the law of the sea (based on UNCLOS) and the South China Sea. The court's decision is in the Philippines' favor on almost all of the 15 points which the Philippines submitted. At the same time, the decision does by no means put an end to the disputes in the South China Sea and it remains to be seen how the relevant states would react to and implement the ruling. One possibility of the future dynamics is the decrease of tensions and reviving the talks between China and the relevant ASEAN states, potentially leading to a legally binding Code of Conduct in the relevant areas – something which has so far not been possible to conclude even after more than 15 years of negotiation.

### **The court award: Legal victory of the Philippines and loss for China**

After more than three years of consideration and decision taking, on 12 July 2016 the Permanent Arbitration Court in The Hague issued the final decision in the case of the Philippines vs. China concerning some issues related to the interpretation of the law of the sea (based on UNCLOS) and the South China Sea. This is, however, far from being an end of the territorial disputes in the area. The court did not rule on the question of sovereignty of more than 200 various types of land features and, likewise, it did not delineate maritime boundaries. It would be therefore wrong to conclude that Chinese claims of the land features in the sea were found invalid.

On the other hand, the court did rule that in the area of Spratly Islands, none of the land features qualifies as an 'island' in the legal sense based on the UNCLOS treaty. This is an important fact since only islands are legally entitled for the 200 nautical miles exclusive economic zone (EEZ), establishing rights for natural resources exploitation. The court also declared Chinese argumentation with the historic rights for the relevant waters and their expression in the form of 'nine dash line' covering most of the sea as incompatible with the UNCLOS.

This effectively means that no matter who wins the sovereignty over the relevant land features, most of the water in the sea would still be part of the EEZs counting from the littoral mainland. This presents a major blow for China (and Taiwan) which claim most of the South China Sea based on the ownership of the land features and their EEZs. At the same time, the decision strengthens positions of the remaining participants in the dispute (The Philippines, Vietnam, Malaysia, and Brunei), whose claims are mainly based on the proximity from their mainland and its EEZs.

### **Chinese reaction: demonstrative rejection and low profile**

Chinese position towards the court ruling has been the same since its beginning in early 2013 – China has claimed that the court has no right and jurisdiction to rule in given issues. Hence, China did not participate in the process and it asserted that it would not accept or recognize any decision taken. After the award, China announced the decision to be null and void.

It is well worth recalling that this behaviour is nothing unusual among the great powers. Out of five permanent members of the UN Security Council, each has in the past refused to accept a decision of an international court when it deemed the decision to go counter its national interests. Moreover, the U.S. is not a

member of many relevant international treaties and organizations, including the UNCLOS treaty (for this reason the U.S. representatives were not allowed to observe the court procedure). It is also interesting that beside China, also Taiwan refused to accept and recognize the decision of the arbitration. Although Taiwan is not a member of the UNCLOS, in the past it acted unilaterally in accordance with its provisions. However, Taiwan has occupied the largest of the Spratly land features Itu Aba (Taiping) and it strongly believes that it should be recognized as an island – something the court refused.

On the one hand, although the Chinese rhetorical reaction to the court decision was relatively strong and vocal, China has so far (as of 17 July) not conducted any openly aggressive steps (such as, for instance, a declaration of air identification zone, some limited military action against other countries' positions). China has even not announced yet a withdrawal from the UNCLOS treaty – something which might, at first sight, be seen as logical step after not recognizing the court ruling, although it would surely be perceived negatively around the world.

On the other hand, China did demonstrate its refusal of the decision with a few symbolic steps, such as the limited military drill and the fly-over in the relevant zone immediately after the decision announcement. This relatively restrained behaviour is in fact very much in line with Chinese interests. While the Chinese government must appease its nationalistic public by vocally defending national sovereignty and territorial integrity, it is also aware that the disputes are negatively affecting its international position and image. The government must effectively strike the right balance between the domestic and international environments, which are often asking for contradictory policies.

Moreover, the Chinese economy is heavily dependent on the maritime line passing through the sea. China has been consistent in affirming that it would not

affect the international trade route – and it is indeed unlikely it would have any interest to do so. Objectively speaking, China currently has no power to control the whole length of the sea line. Even if it gets under its control the South China Sea, its power projection would reach at most Malacca Strait. The rest of the vital route crosses the Indian Ocean, where China has only minimal control. For this reason, China has no incentive to demonstratively exercise any control in the sense of disrupting the trade for fear that other countries have even better position of doing the same elsewhere on the route. Obviously, in the age of globalized interconnected economies it is very hard to imagine that any country would benefit from disruption of the world’s busiest trade route.

### **The Philippines: Wild Card**

Perhaps even more important than the reaction of China is now for the future development of the dispute behaviour of the Philippines, which at the moment is in an interesting domestic political situation. After the six year tenure of the president Aquino, mere two weeks before the court decision, new president Duterte was installed. It was Aquino who commenced the ruling and elevated the South China Sea disputes to one of the most important foreign-policy and security issues of the state. The Philippines thus became during his presidency the most vocal rival of China in the area.

This position, however, is not obvious. During the Arroyo presidency in 2001-2010 the Philippines started to cooperate with China in the area and they reached an agreement on joint-development of economic resources. The agreement later became publicly known and was linked to corruption practises of high ranking officials in the administration. The public attitude strengthened and this likely contributed to the strong anti-China position in the South China Sea of the subsequent president Aquino.

Yet nowadays it seems that the new president Duterte would move the Filipino position vis-à-vis China again towards attempting to reach an agreement. The main topics of the new president is not the South China Sea disputes but more so fight against drug-related crime, separatist tendencies in the Southern part of the country, and in general domestic struggle against crime. With regards the South China Sea, president Duterte already commented that he would forget about it if China would build a railway in the country. Furthermore, Filipino public opinion is not so strictly anti-Chinese as the one in Japan or partly Vietnam, making a possibility of agreement more vital.

The shift in the Filipino position is well visible from the reaction of Manila to the ruling. Instead of celebrations, which could have been appropriate considering the almost absolute legal victory, it simply announced it was 'studying' the decision. It can be also assumed that aside of 'studying' the Filipino government would quickly start negotiations with China with the goal of finding a generally acceptable 'face-saving' solution of current situation.

### **The next step: upcoming ASEAN summit**

The important role for the future dynamics of the disputes in the region plays the Association of the Southeast Asian Nations (ASEAN), which will meet in late July for its annual summit, this time in Vientiane, Laos. The South China Sea was in the past a major friction point within the Association, leading to the historical shameful moment in 2012, when ASEAN for the first time failed to produce a communiqué after its summit in Cambodia, reportedly due to the Cambodian lack of will to mention the disputes in any way. It is therefore a question how the ten countries would deal with the issue this year. At the same time, Laos is generally considered to be a country which is closer to China and as the only landlocked country of ASEAN it has little interest in the maritime disputes.

It would be very important what position ASEAN takes this time since it can legitimize certain approach of behaviour. As the matter of fact, it is unlikely that the ten countries would find consensus in taking a strong stance which would call directly on China to immediately implement the decision or pressure it in other ways. It is far more likely that ASEAN would agree to note the court ruling more indirectly and they would try to create a space for negotiation with China.

### **Path towards the new agreement in the South China Sea?**

The first reactions of the involved actors in the dispute seem to suggest that the court ruling could lead indirectly to the lowering of tensions in the region. The new Filipino government did not welcome the decision with much triumphalism, possibly also adding to the possibility of re-opening the talks with China.

At the same time, China expectedly announced it would not recognize or accept the decision, but it also did not conduct any step which could be viewed as openly aggressive or provocative. It is also unlikely that it would undertake such steps unless it feels that it must respond to something it would see as a provocation.

A somewhat surprising implication of the new development might be a lowering of the direct importance of the U.S. in the dispute. The U.S., together with the EU and other countries, accepted the decision of the court and would like to see it implemented. The U.S. is probably going to continue with its freedom of navigation operations in the area, now even backed by the legally binding interpretation of the court. However, if the Philippines and other regional countries choose to negotiate with China instead of directly oppose it, Washington might find itself in a position of being seen as a conflict factor not only by China, but also by other regional countries. This can prompt it into

reconsideration of its overall regional approach and possibly adopting less visible roles than in the past few years, when its approach collided with the one of the Philippines.

This policy paper paints a picture of ‘cautious optimism’ as one potential future path of the South China Sea dispute. However, it must be emphasized that this is conditional on a few issues, most importantly the type of behaviour of China and the Philippines and other claimants. As for China, the expectation is that it would continue in restrained matter, would not adopt any new assertive policies in the area, and – importantly – it would be willing to offer some compromise and/or rewards for the involved ASEAN countries during the negotiation. On the side of ASEAN, the cautious optimist scenario would require the countries to give China a chance to negotiate and reach a mutually face-saving solution. At the end, even if the two side succeed in reaching an agreement, it would be most likely just about establishing a mechanism of managing the area without solving the underlying question of sovereignty.

It is unclear what kind of – if any – agreement could be reached between the ASEAN countries and China regarding the dispute in the near future. It should be recalled that the two sides has been talking to (and over) each other for more than 15 years regarding the Code of Conduct in the area. Back in 2002, the talks led only to the legally unbinding Declaration of Conduct. Ever since, the talks towards the legally binding Code of Conduct have been unsuccessful, many reports citing Chinese lack of will as the main cause. In fact, the current situation might present a needed incentive for China and other countries to sit together, compromise, and produce the document. This might eventually present the much needed face saving solution, which would to some extent proved the regional solution as working, while on the other hand it would take implicitly into account the Hague court decision.