

# 4

## Do Regimes Matter?

### Implications of the 2016 UNCLOS South China Sea Ruling for a Rules-based order in the Indo-Pacific

Dr. Laura Southgate



The Philippines' 2013 decision to initiate proceedings against China at the Permanent Court of Arbitration (PCA) under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) was a result of the ongoing, heated sovereignty dispute

between the two countries over maritime territory in the South China Sea. China claims historical rights to all territory within the 'nine-dash line', an undefined demarcation that encompasses the majority of the South China Sea. This has created conflict with a number of small claimant states in Southeast Asia and other regional powers such as the United States, Japan, India and Australia. China's militarization of islands in the disputed waters and the assertive tactics it has used to defend its sovereignty claims are symptomatic of its growing status as Great Power in the international system. These actions have also increasingly challenged the existing rules-based order in the Indo-Pacific. As stated by President Obama in April 2015, "where we get concerned with China is where it is not necessarily abiding by international norms and rules and is using its sheer size and muscle to force countries into subordinate positions."<sup>1</sup> The Philippines' attempt to have its sovereign rights in the South China Sea acknowledged under international law represents a direct challenge to China's regional claims. China's response to the PCA ruling provides a window through which to examine both the existence of a rules-based order in the Indo-Pacific and its future prospects as China increasingly seeks to exert its influence in the international system.

## **UNCLOS Ruling and Its Aftermath**

China responded dismissively to the Philippines' arbitration case by refusing to participate in proceedings. China's Ministry of Foreign Affairs released a 'position paper' in December 2014 claiming that territorial sovereignty over maritime features was beyond the scope of the Convention.<sup>2</sup> This did not deter the PCA, which ruled in July 2016 that China's claim to historic rights to resources in the South China Sea were "incompatible with the exclusive economic zones provided for in the convention" and that "there was no legal basis" for China to claim historic rights within the nine-dash line.<sup>3</sup> The groundbreaking ruling had little immediate impact on the dispute, however. China dismissed the ruling as a "null and void decision" and "nothing more than a piece of paper."<sup>4</sup> The Philippines' new President Rodrigo Duterte stated that he would "set aside the arbitral ruling" in favor of economic incentives from China.<sup>5</sup> This was confirmed by the Philippines' Foreign Secretary Perfecto Yasay Jr., who stated that the Philippines "won't take any steps against China" and that he wanted "to make sure that there will be no further actions that will heighten the tensions between the two countries,

particularly in the Scarborough Shoal."<sup>6</sup> Yasay concluded: "we cannot stop China at this point in time...we will continue to pursue peaceful means" to the dispute.<sup>7</sup> Despite the brokering of a 'status-quo' between the Philippines and China, whereby the latter purportedly agreed to halt further expansion in the South China Sea,<sup>8</sup> reports from as early as November 2017 suggested that China had continued to develop facilities in the Paracel Islands, in addition to a military buildup in the Spratly Islands.<sup>9</sup>

In the wake of the UNCLOS ruling, China has also pursued a new legal basis for its territorial interests in the South China Sea. It has done so by re-packaging its sovereignty claims to appear more consistent with UNCLOS. Employing a new legal tactic referred to as a legal warfare, or 'lawfare' approach, China's 'nine-dash line' narrative has been de-emphasized in favour of a 'Four Sha' claim.<sup>10</sup> Translated as 'four sands', this new position sees China asserting sovereignty over four island chains: the Pratas Islands, Paracel Islands, Spratly Islands and Maclesfield Bank area. In adopting this approach, China has attempted to strengthen its legal claims in the South China Sea by claiming the Four Sha as part of

China's 200-mile Exclusive Economic Zone (EEZ), and by asserting that they are part of China's extended continental shelf.<sup>11</sup> As noted by two prominent international legal experts, while "this new Chinese legal strategy is even weaker than the Nine-Dash Line given [that] it clearly violates UNCLOS," China "may have concluded that it can better shape (or undermine, depending on your viewpoint) the law of the sea by adopting UNCLOS terminology."<sup>12</sup> Thus China's 'Four Sha' claim attempts to circumnavigate existing law and re-conceptualize the existing rules-based order in support of Chinese state interests.

## **Regimes, Sovereignty and Power**

China's actions raise a number of interesting questions regarding the importance of regimes in the international system and what happens when states seek to pursue their own interests to uphold state sovereignty. According to Hans Morgenthau, "international law owes its existence and operation to two factors, both decentralized in character: identical or complementary interests of individual states and the distribution of power among them."<sup>13</sup> In many respects, power dynamics are at the center of international law enforcement, whereby

"it makes it easy for the strong both to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy."<sup>14</sup> Legal rules therefore only serve to satisfy the interests of the most powerful. This is supported by Robert Gilpin, who argues that "the primary foundation of rights and rules is in the power interests of the dominant group or states in a social system."<sup>15</sup> China's reaction to the UNCLOS South China Sea ruling demonstrates how international laws exist and operate on the basis of powerful state interests. Great Powers will seek to undermine existing laws when conflictual matters of state sovereignty and territorial integrity are at stake. The doctrine of sovereignty is both an operating principle enshrined in international law *and* a principle that can be used as a tool to circumvent or manipulate international law in support of state interests.<sup>16</sup> Underlying this argument is the crucial role of state power and the distribution of capabilities in the international system.

China's largely successful attempts to reconfigure international law in the South China Sea is evidence of its growing regional and international power. It is also testament to the continued applicability of regimes insofar as they can be used

to support a state's agenda. As this case study shows, a powerful state will seek to challenge international law if it is in its interest to do so, particularly as it relates to a core security concern such as state sovereignty. This treatment of international law is certainly not new, nor limited to actions conducted by China. However, it is indicative of the type of behavior we can expect to see repeated as China seeks to exert its influence over the Indo-Pacific as its power rises. If successful, a new type of rules-based order may develop, one that does not necessarily reflect the existing status quo. As far as the existing order reflects US interests, Great Power security competition cannot be ruled out. For smaller states in the international system, the

UNCLOS ruling will undoubtedly act as a valuable lesson: that while all states, regardless of their size, have recourse to the international courts, little can be done to enforce a ruling if a powerful state chooses to ignore it. ■

### **Dr. Laura Southgate**

Dr. Southgate is lecturer in politics and international relations at Aston University, deputy co-director of the Aston Centre for Europe, and author of *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (Bristol University Press, 2019).

---

## **Notes**

1 “Obama says China bullying smaller nations in South China Sea row,” *The Guardian*, April 10, 2015, <https://www.theguardian.com/>.

2 Ministry of Foreign Affairs of the People's Republic of China, “Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines,” December 07, 2014, <http://www.fmprc.gov.cn/>.

3 Permanent Court of Arbitration, The Hague, “Press Release: The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China),” July 12, 2016, <https://pca-cpa.org/>.

4 Richard Javad Heydarian, “Has Duterte's China engagement backfired?,” *Asia Times*, July 14, 2017, <http://www.atimes.com/>.

5 Jim Gomez, “Duterte says he'll set aside sea feud ruling against China,” *Philstar*, December 17, 2016, <http://www.philstar.com/>.

6 Gomez, “Duterte says he'll set aside sea feud ruling against China.”

7 Ibid.

8 Manuel Mogato, “Philippines says China agrees on no new expansion in South China Sea,” *Reuters*, August 15, 2017, <https://www.reuters.com/>.

9 “As attention focuses on North Korean threat, Beijing quietly expanding South China Sea militarisation,” *Japan Times*, November 1, 2017, <https://www.japantimes.co.jp/>.

10 Mark J. Valencia, “China, US Both Using Lawfare in the South China Sea,” *The Diplomat*, October 12, 2017, <https://thediplomat.com/>.

11 Patricia Lourdes Viray, “South China Sea: China has new claim to nibble more land from Taiwan, Vietnam, the Philippines? “The Four Sha Claim,” *Philstar*, September 27, 2017.

---

12 Julian Ku and Chris Mirasola, “The South China Sea and China’s “Four Sha” Claim: New Legal Theory, Same Bad Argument,” *Lawfare*, September 25, 2017, <https://www.lawfareblog.com/>.

13 Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred Knopf, 1965), 277.

14 Morgenthau, *Politics Among Nations*, 294.

15 Robert Gilpin, *War and Change in International Politics* (Cambridge: Cambridge University Press, 1981), 35.

16 Anthony Clark Arend, “Do Legal Rules Matter?

International Law and International Politics,” *Virginia Journal of International Law* 38, no. 2 (1997): 107–53, at 142.

#### **Disclaimer**

The views and opinions expressed or implied in *JIPA* are those of the authors and should not be construed as carrying the official sanction of the Department of Defense, Air Force, Air Education and Training Command, Air University, or other agencies or departments of the US government or their international equivalents.