

CHAPTER IV
STRATEGIC RATIONALE BEHIND CHINA’S DECISION TO
REJECT THE HAGUE ARBITRAL TRIBUNAL RULING IN
THE SOUTH CHINA SEA CASE

This chapter will first give a general explanation about the United Nations Convention on the Law of the Sea (UNCLOS), the Permanent Court of Arbitration, and the South China Sea Arbitration (*Philippines v. China*) case, followed by the explanation on the strategic rationale behind China’s decision to reject the Hague arbitral tribunal ruling in the South China Sea case. This chapter will strengthen and develop the hypothesis that has been drawn earlier in the first chapter.

A. The South China Sea Arbitration (*Philippines v. China*) Case

The Permanent Court of Arbitration (PCA), which is served as the Registry to the South China Sea arbitration (*Philippines v. China*) case, is the oldest global institution for the settlement of dispute established by treaty at the First Hague Peace Conference in 1899. The Court gives a wide range of services for the resolution of international disputes. The parties concerned in a dispute can submit for resolution to the Court under its auspices. The PCA, unlike the International Court of Justice, has no sitting judges. The parties themselves select the arbitrators. All of the sessions in the PCA are held in private and are confidential. The Court also provides arbitration in disputes between international organizations and between states and international organizations (The Hague Justice Portal , 2016).

As the Registry, the PCA does not act as the arbitrator, and instead it is based on the Annex VII of the UNCLOS 1982. The Philippines’ move was based on the compulsory arbitration system set out by Part XV of the 1982 UNCLOS, under which both the Philippines and China, as parties to UNCLOS, are deemed to have accepted Annex VII arbitration thereof because neither of them has made a written declaration choosing one of the following compulsory procedures entailing binding decisions for the settlement of their disputes: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice

(ICJ), an arbitral tribunal constituted in accordance with Annex VII of UNCLOS, or a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS.

On the grounds that the Philippines' unilateral initiation of the arbitration was a violation of its obligation under international law and the Philippines' claims for arbitration did not come within the UNCLOS's compulsory dispute settlement procedures, China rejected the arbitration and returned the Philippines' notification. China's action has been consistent in her position of non-acceptance of and non-participation in the arbitration (PRC, 2014). Despite China's absence, an arbitral tribunal composed of five members, was established on June 21, 2013. Except for Judge Rüdiger Wolfrum (Germany) as arbitrator, who was appointed by the Philippines, all of the members—Judge Thomas A. Mensah (Ghana, as President), Judge Jean-Pierre Cot (France), Judge Stanislaw Pawlak (Poland) and Professor Alfred Soons (the Netherlands)—were appointed by the former ITLOS President and Judge Shunji Yanai at the request of the Philippines under Annex VII, Article 3 of UNCLOS (ITLOS, 2013).

The tribunal fixed March 30, 2014, by Procedural Order No. 1 of August 27, 2013, as the date on which the Philippines must submit its memorial (PCA, 2013a). The memorial, comprising 10 volumes totalling nearly 4000 pages, was electronically filed by the Philippines to the tribunal within this time frame (The Philippines' DFA, 2014). On June 3, 2014, the tribunal issued Procedural Order No. 2, setting December 15, 2014 as the date for China to submit its counter-memorial responding to the Philippines' memorial (PCA, 2014b). But China has not done so. Instead, China openly published the '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', challenging the tribunal's jurisdiction over the dispute (PRC, 2014) and communicating its position to the tribunal (PCA, 2014c).

On December 16, 2014, the tribunal requested by Procedural Order No.3, that the Philippines file a supplemental

written submission by March 15, 2015, addressing 26 questions it raised. China was requested to provide any comments in response to the Philippines' supplemental written submission by June 16, 2015 (PCA, 2014d). On March 16, 2015, the Philippines conveyed to the tribunal its supplemental submission, which comprised 12 volumes totalling over 3000 pages (The Philippines' DFA, 2015a). However, China has not responded to the Philippines' further submissions within the fixed time limit to do so. The tribunal issued its fourth Procedural Order on April 21, 2015, deciding to bifurcate the jurisdiction of the dispute from the merits of the dispute (PCA, 2015b). On July 7–13, 2015, the tribunal held the oral hearing on the jurisdiction and admissibility of the dispute in The Hague (PCA, 2015a).

The Arbitration Tribunal rendered its award on jurisdiction on October 29, 2015, unanimously deciding that it has jurisdiction to consider seven of the Philippines' Submissions (No. 3, 4, 6, 7, 10, 11 and 13), concerning the status of Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef as an island or a rock; the status of Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef as low-tide elevations; the traditional fishing activities of Philippine nationals; and China's law enforcement activities—thus continuing its merits phase in late November of the year 2015. Logically, this would force China to reconsider its non-participation policy because the decision will legally eliminate China's obstacles to participation. One option available for China could be to take part in the next stage of the proceedings. China itself has stated that it respects the competence of judicial or arbitral bodies in deciding the jurisdictional dispute endowed by Article 288 (4) (PRC, 2014). It seems that China would respect the tribunal's positive decision on jurisdiction based on its full respect for 'the right of the States Parties to the Convention to choose the means of dispute settlement of their own accord', and could change its stance. In some defaulting cases, non-participating respondent states have participated anew in merits proceedings after the ICJ adjudicated that it had jurisdiction at the jurisdictional proceedings.

On July 12, 2016, the tribunal issued its ruling in Manila's case against Beijing's claims in the South China Sea. Based on the compulsory dispute settlement provisions under the UNCLOS, the tribunal ruled overwhelmingly in the Philippines' favor. China refused to participate in the arbitration and rejected the outcome.

B. Rejection as the Most Benefiting Decision for China in the Case of the Hague Tribunal Ruling over the South China Sea Dispute

In regard of the options that China's government has (accept or reject) in the case of the Hague tribunal ruling over the South China Sea dispute, rejection is the most benefiting decision for China. Although, by rejecting the tribunal's decision, China has to face more criticism and pressure from international entities, China still gains advantages which can be seen from the aspects of territorial integrity, military security, and economic well-being.

1. Territorial Integrity

Domestically, the Chinese leader and the people uphold the same view that the South China Sea is an inseparable part of China's territory. Following the issuance of the Tribunal Award to be in a high favor for the Philippines on July 12, 2016, the Government of the People's Republic of China released a statement regarding China's territorial sovereignty and maritime rights and interests in the South China Sea. The statement is to

“reaffirm China's territorial sovereignty and maritime rights and interests in the South China Sea, enhance cooperation in the South China Sea with other countries, and uphold peace and stability in the South China Sea” (Xinhua, 2016a).

In the statement, it is written that China's South China Sea Islands consist of the Dongsha Islands, Xisha Islands, Zhongsha Islands and Nansha Islands. The Chinese people has conducted activities in the South China Sea that can be traced back to over 2000 years ago. Along with that narrative, the statement that “the Chinese is the first to have discovered,

named, explored, and exploited the South China Sea and the first to have exercised jurisdiction and sovereignty over the water” has been consistently mentioned in China’s official documents. China also reaffirms that, after the Second World War has ended, China recovered and resumed the exercise of sovereignty over the South China Sea which had been occupied by the Japan during its war of aggression against China. In the 1947, the Chinese government reviewed and updated the geographical names of the South China Sea (Nanhai Zhudao) on which the dotted line is drawn. Since February 1948, the map was officially published and made known to the world by the Chinese Government (Xinhua, 2016a). Seen from those narrative, we can see that China’s territorial and maritime claims in the South China Sea are closely linked with China’s identity storyline. Therefore, in the eyes of Chinese people, the features in the South China Sea and the related waters are undisputedly parts of China’s historic territory (Casarini, 2017).

Since the founding of the People’s Republic of China on 1 October 1949, China has been firm in upholding her territorial sovereignty and maritime rights and interests in the South China Sea. China has issued a series of legal instruments to solidify its claim, such as the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea, the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, the 1996 Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea, and the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (Xinhua, 2016a). Thus, it can be implied that China has been seriously maintaining its claims in the South China Sea.

With regard to the Arbitral Tribunal in the South China Sea (*Philippines v. China*) case in 2013-2016, the Ministry of Foreign Affairs of the People's Republic of China solemnly declares that the award is null and void and

has no binding force. China neither accepts nor recognizes it (Xinhua, 2016b). China's rejection to the result of the tribunal has always been consistent. As China has stated in 2014 position paper, the arbitration breaches the agreement between China and the Philippines, violates the UNCLOS, and goes against the general practice of international arbitration (PRC, 2014). Therefore, according to China, the arbitral tribunal has no jurisdiction over the matter (Radio, 2019). Furthermore, regarding China's interest in the South China Sea, several Chinese policymakers of the People's Liberation Army have asserted that the South China Sea is now the part of China's "core national interest" (Casarini, 2017). Therefore, it is within China's rights to defend the territorial sovereignty over the South China Sea.

In reaffirming China's stance in the South China Sea dispute to the ASEAN member states, in April 2016, the Chinese Foreign Minister Wang Yi established 'a four-point consensus' during his visit to Brunei, Cambodia, and Laos. In the consensus, both China and the three countries agreed that (1) the issue in the South China Sea should not affect China-ASEAN relations, (2) every sovereign states is free to choose their own ways to solve the disputes and it should not be imposed by unilateral decision, (3) the dialogues and consultations on the disputes over territorial and maritime rights and interest should be directly concerned under Article 4 of the DOC, and (4) peace and stability in the South China Sea can be maintained by China and ASEAN member states through cooperation (Ministry of Foreign Affairs of the People's Republic of China, 2016). Therefore, in regard of China's decision to reject the result of the Arbitral Tribunal's ruling, China's position has always been clear that she prefers to solve the problem by negotiations and consultations. China, as a state party to UNCLOS, supports and respects the treaty's principles and spirit. What China opposes is not UNCLOS and compulsory arbitration, but the tribunal's abuse of power in handling the case (Ying, 2016). Bringing the disputes to be resolved on bilateral basis through negotiations will benefits China. As a large and

powerful country, China can swing its weight against much smaller and weaker claimants (Panda, 2016).

From the way Chinese government has been responding to the recent South China Sea dispute, it can be seen that China has become more assertive in their policies. According to Michael Yahuda, China's new assertiveness in the South China Sea are stemmed from four factors: 1) China's perception of the shift in power balance, 2) the growing national interest that includes the maritime area, 3) the advancing military capability to consolidate its claim, and 4) the rising patriotic sentiments among the Chinese people, both the elites and the ordinary citizens (Yahuda, 2013). However, Klaus Heinrich Raditio in his book titled "*Understanding China's Behavior in the South China Sea*" assesses that Yahuda's view which suggesting that China's behaviour is motivated by patriotic sentiment is quite flawed, because in a political system like China, public participation is not involved in the matter of foreign policy making. Instead, he supports Peter Dutton's view which suggests that China's main objection in the South China Sea are regional integration, resource control, and enhanced security (Raditio, 2019). Even though Dutton's view seems closer to determine China's interests in the South China Sea, Nicola Casarini argues in her article titled "*A Sea at the Heart of Chinese National Interest*" that it is important to cater to Chinese people's growing aspiration. Thus, by taking more assertive policy in the South China Sea, it is hoped that the action can consolidate the CCP's leadership and maintain their legitimacy.

2. Military Security

To safeguard China's interest and exercise its maritime rights in the South China Sea, China strengthens its military capability and increases its military presence in the area. From Chinese perspective, it remains important to defend the unresolved territorial disputes where China has claimed but did not control, such as in Taiwan and the areas in the East and South China Sea. By building capabilities which the US

calls as ‘anti-access/area denial’ (A2AD), China’s military presence in the disputed area does not try to control them, but rather to deny access to other countries to operate freely in the area. The A2AD capabilities consist of a whole set of conventional means, which include the attack submarines, ballistic and cruise missiles, land-based aircraft, cyber-attacks, and possibly many others. In a scenario where China has to face a major military campaign, China’s military capabilities and physical presence in the disputed area will allow China to have a better control over the territory (Turcsanyi, 2018).

China’s military rise can be seen from the data on military budget. In regional context, China’s military expenditure has overtaken Japan since 2004. The number is now significantly overgrowing in aggregate numbers of all the actors in the Indo-Pacific region. From the chart below, it is evident that China has been increasing their military power over the past decades.

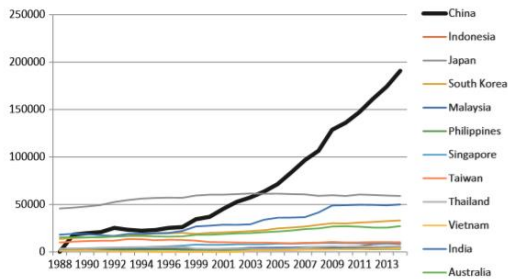


Figure 4. 1 Military expenditures of major players in the Indo-Pacific region (Excluding the U.S. and Russia) (mil USD) (Turcsanyi, 2018)

China has an obvious advantage over other claimants in the South China Sea because numerically, China surpasses other claimants’ military hardware. It is not surprising, considering the big differences in military expenditures, economies, and sizes. To give a clear idea about the comparison in the military strength of major players in the South China Sea, the Global Firepower project provides the simplest available source.

Table 4. 1 Relevant military hardware of the major players in the South China Sea (*Global Firepower*)

	Overall l rank	Aircraft carriers	Total Aircraft	Submarines	Destroyers	Frigates	Helicopters	Patrol Craft
USA	1	19	13,444	75	62	6	6084	13
Russia	2	1	3547	60	15	4	1237	14
China	3	1	2942	68	32	48	802	138
India	4	2	2086	14	10	14	646	135
South Korea	7	1	1451	15	12	11	679	80
Japan	9	3	1590	17	43		638	6
Indonesia	12		420	2		6	152	66
Australia	13	2	417	6		14	166	13
Taiwan	15		815	4	4	20	307	51
Thailand	20	1	551			7	282	31
Vietnam	21		289	5		7	150	23
Singapore	26		262	6		6	71	12
Malaysia	35		227	2		2	79	41
North Korea	36		944	70		3	202	211
Philippines	40		135			3	91	38

Furthermore, to solidify its hold on the South China Sea despite competing territorial claims, China is rapidly transforming numerous reefs of the Spratly Island group into military installations. The bases will be used to constrain the activities of competing countries' military in the region. To appear more than adequate in supporting air traffic monitoring and enforcement in the area, China were to declare an Air Defense Identification Zone over the South China Sea. The strategic importance of China's expansion in Spratly Islands was made evident in September 2014, when the commander of the PLA Navy, Wu Shengli, personally made an inspection of each of the newly filled-in reefs. In a presentation to Taiwanese legislators, China's President Xi Jinping had personally authorized five of Beijing's new military sites in the Spratly Islands. Among the features in Spratly Island, China has been establishing military bases in Fiery Cross Reef, Johnson South Reef, Mischief Reef, Hughes Reef, Gaven Reef, Cuarteron Reef, Subi Reef, and Eldad Reef (Lee, 2015).

Measuring the effort done by China to safeguard its rights for sovereignty and maritime entitlements in the South China Sea, it is comprehensible that China chooses to reject the result of the Arbitral Tribunal's ruling. China's effort in strengthening its military capabilities and military presence in the South China sea will effectively fortifying its trade and route security, upsetting any potential threat from other major players in the area, and protecting further activity in oil and gas exploration.

3. Economic Well-Being

The South China Sea is a key commercial area which connects Asia with Europe and Africa. Besides that, its seabed is rich with natural resources, such as oil, gas, and fish. The US Energy Information Administration estimates the South China Sea contains at least 11 billion barrels of oil and 190 trillion cubic feet of natural gas. Other has estimated that the area contains as high as 22 billion barrels of oil and 290 trillion cubic feet of gas. The South China Sea also

accounts for 10 per cent of the world's fisheries, making it a key source of food for hundreds of millions of people (SCMP, 2019).

As China's economy has rapidly grown over the past 30 years, it has led to a rising energy demand in the country. The South China Sea has become China's major source and important passage to meet its high demand for energy and resources. In 2012, China has become the world's second largest oil importer and consumer after the US. According to the US Energy Information Administration (EIA), in 2013, China has surpassed the US as the world's largest oil importer (Zhou W. , 2015). For fishing activity, China's catch in South China Sea has the total of 17 million tons, or a global share of 19% in 2016 according to FAO report (FAO, 2016). It is 2 million tons bigger than the total catch from all of ASEAN countries with a coastline in the South China Sea (Austin, 2019). For trading activity, a total of US\$3.37 trillion of international trade passes through the South China Sea. It is equal to one third of global shipping. In 2016, 80 per cent of China's oil imports arrive via the Strait of Malacca, in Indonesia, and then sail across the South China Sea. Given the significance of the South China Sea for Chinese trade activity, it is understood that China wants to preserve the free flow of trade in the area (CSIS China Power Project, 2019).

Thus, rejecting the result of the Arbitral Tribunal's ruling will enable China to continue what it has enjoyed so far in exploiting the resources in the South China Sea and taking advantage of its strategic position. Taking account on how much China's economy relies on the South China Sea, it is understandable that China wants to defend their *status quo*.

C. The Responses from International Entities

Despite the PCA being less powerful than the ICJ, ignoring a finding of the PCA would still be significant, as it would amount to ignoring international law. The members of the UN Security Council still has the ability to seek its

permanent members to discuss and seek for resolution on the matter. Rejecting the PCA's finding could be highly damaging to the credibility of UNCLOS, and the decades of diplomatic work that its successful negotiation entailed. The UNSC could classify the South China Sea issue as a dispute causing international friction. However, the UNSC's efforts are inevitable when China and Russia would prevent the UNSC from discussing the issue.

The US and the UK are taking a strong line in responding to this issue. President Barack Obama has strongly emphasized respecting the PCA's findings despite the US not ratifying UNCLOS (Obama, 2016). UK Prime Minister David Cameron has stated that he expects China to abide by the result of the arbitration (Asthana, McCurry, & Wintour, 2016). France is more difficult to predict, only that it and EU members have been calling for resolution of the South China Sea disputes through international law.

Some of the non-permanent members such as Japan and Malaysia might be willing to support a UN Security Council discussion of the case. Japan supports the 'rules-based global order' in relation to the South China Sea. Malaysia is one of the claimant states in the South China Sea and appears to be increasingly concerned about the situation. However, it might still want to maintain a 'special bilateral relationship' with China and to date, it has been unwilling to publicly confront China's actions (Raymond, 2016).

In defense of China's decision to reject the finding of the PCA, Allison wrote in his recent essay that it is unlikely to discover a permanent member of the UN Security Council that has ever complied with the PCA's rulings on issues involving the Law of the Sea. He further argues that none of the permanent members of the UN Security Council have accepted any international court's decision when it infringed their sovereignty and national security interests. Therefore, China will only be doing what other great powers have done repeatedly when it rejects the decision of the Hague's tribunal ruling (Allison, 2016).