

Rapporteur's Report

Common Themes from the “Workshop on Recent Developments in the South China Sea Arbitration and their Implications”

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Executive Summary

This report¹ summarizes nine common themes addressed at the “Workshop on Recent Developments in the South China Sea Arbitration and their Implications” held October 7-8, 2015, in Taipei.

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¹ This report includes brief summaries of common themes discussed at the workshop. It does not necessarily reflect the views of any of the workshop's participants or cooperating institutions.

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Nine common themes discussed by the speakers, panelists, and participants at the “Workshop on Recent Developments in the South China Sea Arbitration and their Implications” are identified in this report. The following key points and summaries do not represent a comprehensive list of the issues covered at the workshop.

1. Pivotal Moment

The workshop convenes at a pivotal moment in the South China Sea maritime territorial disputes.

In July 2015, the Permanent Court of Arbitration in The Hague concluded its hearing on jurisdiction and admissibility regarding the arbitration case initiated by the Republic of the Philippines on January 22, 2013.

In its “Sixth Press Release” regarding the arbitration case, released on July 13, 2015, the Permanent Court of Arbitration noted that it “will endeavour to issue its award on such issues of Jurisdiction and Admissibility that it determines appropriate as soon as possible and expects to do so before the end of the year.”

The workshop takes place in the interim period following the conclusion of the hearing and before the announcement of the award.

2. Implications of the Award

The arbitral tribunal’s award will have implications for regional and international relations.

The award will generate official and unofficial responses from SCS claimants and non-claimants, which may include the following:

1. Selective incorporation. Claimants and non-claimants will selectively make use of aspects of the award that further their own interests by incorporating it into official policies and political rhetoric.
2. Dismissal. Claimants and non-claimants whose interests are challenged by the award may dismiss it in part or in its entirety.

3. Acceptance. Claimants and non-claimants whose interests are partially satisfied may weigh the costs and benefits of acknowledging the authority of the arbitral tribunal in the case. Stakeholders may reluctantly accept certain aspects of the award counter to their interests in order to take advantage of other aspects that further their interests.

Depending on the details of and responses to the award, it may potentially lead to a significant reshaping of the SCS disputes.

3. Expected Outcomes

Although predicting the details and implications of the award is guesswork at the present time, expectations of the arbitral tribunal are that it will:

1. be unlikely to provide an unexpectedly clear-cut decision or resolution or decide that it has unexpectedly broad jurisdiction in the case,
2. be reluctant to make a decision that prevents the Philippines from continuing with its arbitration case, and
3. likely provide enough of a decision to answer some but not all unresolved questions about the case.

4. Limitations of the Legalist Approach

Although legal issues are a crucial aspect of the South China Sea disputes, the legalist approach is just one way of understanding sovereignty issues in the region.

History, regional and international power dynamics, the behaviors of state and non-state actors, and many other issues must also be taken into account in order to work towards a comprehensive understanding of South China Sea issues.

The legalist approach is unlikely to lead to a resolution on its own.

Several camps have formed regarding the legalist approach:

1. Some stakeholders have pushed for a primarily international law-based resolution to the disputes (e.g., Japan, U.S.).
2. Some have suggested that international law is inadequate given the context of the South China Sea disputes and the issue that claims and occupations in many cases preceded relevant international laws (e.g., China, Taiwan).
3. Some have had mixed policies that attempt to use both legalist and other approaches depending on the context (e.g., Philippines, Vietnam).

5. Ambiguity

Ambiguity is an integral part of the systems that govern regional and international interactions between states.

This includes policy ambiguity, legal ambiguity, strategic ambiguity, cartographic ambiguity and so forth.

Ambiguity is apparent in the South China Sea policies of all parties involved in the disputes, including both claimants and non-claimants.

Ambiguity is also apparent in international law, including UNCLOS.

In many cases, this ambiguity is deliberate.

In many cases, this ambiguity is in the interests of the state or other actor who advances it.

In some cases, ambiguity can lead to misunderstandings and misinformation, even when that is not the intention of such ambiguity.

6. Misunderstandings and Misinformation

Misunderstandings and misinformation hinder progress on building mutual trust and promoting cooperation between parties involved in the South China Sea disputes.

Governments, institutions, and media from all involved parties have had a part in this.

This has resulted in a trust deficit in regional interactions.

Policy statements that are less ambiguous can have a real effect on moving the SCS issues forward.

7. Image/Reputation Problems

Ambiguity and misinformation as well as the political rhetoric and concrete actions of involved parties have resulted in image/reputation problems for many claimants and non-claimants. Examples of these issues mentioned at the workshop include:

1. China is portrayed as “aggressive” and a “bully” in the region, particularly by the policymakers and media of countries with conflicting interests. According to some observers, China may be “losing the war on words.”
2. As a result of its arbitration case, the Philippines is portrayed as acting unilaterally in violation of the spirit of the Declaration on the Conduct of Parties in the South China Sea. Commentators have also suggested that the Philippines has actively sought to promote a negative image of China through its arbitral proceedings and internationalization of the dispute.
3. The U.S. is portrayed as trying to manipulate the disputes to maintain a sort of hegemony in the region. It has also been suggested that the extent of its involvement in the issue has moved beyond what is necessary to maintain its interests in freedom of navigation in the region.
4. Because of its increasing involvement in the disputes, Japan is portrayed as returning to its imperial history. The controversial reinterpretation of Article 9 of its constitution in 2014 has been a particular cause for concern in the region.
5. Even the arbitral tribunal is now at risk of appearing either biased or meaningless depending on what its award is and what the responses to that award are.

These image/reputation problems are real and significant and are something that all parties need to work on.

Meaningful progress could be made by decreasing ambiguity of relevant policies and instances of cooperation between parties.

8. Importance of History

History matters in the South China Sea maritime territorial disputes.

Regardless of whether or not historical entitlement is grounds for territorial claims, history is an essential component of both understanding the disputes and working towards a resolution.

Previous territorial disputes and arbitration cases offer lessons for the South China Sea disputes. These include disputes in the East China Sea (Diaoyu/Senkaku), Sea of Japan (Dokdo/Takeshima), Indian Ocean (Chagos Archipelago), Philippine Sea (Okinotorishima), Arctic Ocean (Arctic Sunrise case), Red Sea (Hanish Islands), and elsewhere.

9. Possibility of Cooperation

There is general agreement that regional cooperation is possible, and no workshop participants are of the view that there is no way forward in the disputes.

Even though there are many points of contention between claimant and non-claimant states regarding South China Sea issues, there are equally many points of agreement.

These points of agreement are a potential foundation for cooperation and moving towards a resolution.

Platforms for dialogue offer opportunities for increasing mutual understanding, clarifying relevant information, and brainstorming possibilities for an eventual resolution to the disputes.

The constructive discussions and sharing of expertise during the workshop represent an example of the possibilities for cooperation between people with diverse perspectives from different claimant and non-claimant national backgrounds.