

Permanent Court of Arbitration tribunal issues landmark interpretation of UNCLOS in Philippines v China arbitration

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Introduction

On 12 July 2016, a five-member arbitral tribunal (the Tribunal) constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) issued its long-awaited award on the merits in an arbitration brought by the Philippines against China.

The tribunal's jurisdiction is derived from UNCLOS; all State parties to UNCLOS agree to compulsory dispute settlement procedures under Part XV, Section 2 of the treaty. China objected to the tribunal's jurisdiction on the basis that it had submitted a declaration at the time it ratified UNCLOS, exempting disputes over sea boundaries and land territory from compulsory arbitration. On this basis, China did not participate in the arbitration.

The tribunal emphasised that China's non-participation did not deprive it of jurisdiction (Annex 7, article 9 of UNCLOS). Nevertheless, in deciding on its jurisdiction, it considered a position paper that China published in December 2014 setting out its views on the tribunal's jurisdiction.

On 29 October 2015, the tribunal issued its Award on Jurisdiction and Admissibility (the Award), holding that it had jurisdiction over seven of the matters raised in the Philippines's submissions and reserving the issue of its jurisdiction with respect to seven other submissions for decision together with the merits. Subsequently, the tribunal held that it had jurisdiction over the other submissions as well. Generally, the tribunal held that the Philippines's submissions did not require it to adjudicate on a sea boundary dispute or issues of sovereignty over land territory.

The Award

The arbitration revolved around whether China's claim to sovereignty over much of the South China Sea was compatible with UNCLOS. The tribunal ruled in favour of the Philippines on almost all issues, in particular that:

- (1) China's historic rights in the South China Sea, if any, were extinguished when it ratified UNCLOS;
- (2) none of the features China has occupied in the Spratly group generate an Exclusive Economic Zone ('EEZ'): many, being rocks, do not even have a territorial sea;
- (3) China violated the sovereignty of the Philippines over its EEZ;
- (4) China breached its obligations to protect and preserve the marine environment; and

(5) China's activities aggravated the dispute.

The Tribunal did not, however, have jurisdiction over sovereignty claims. It could not, therefore, decide which State has sovereignty over features or on the legality of China's activities on features with territorial seas.

The first noteworthy aspect of the Award is the holding that any historic rights China previously had in the South China Sea, insofar as they are incompatible with the EEZs of other States, were relinquished when China ratified UNCLOS (at [271]). The Tribunal found that there was no evidence that China had historically exercised exclusive control over the South China Sea. Prior to UNCLOS, any waters outside of territorial seas would have constituted the high seas. Therefore, Chinese navigation and fishing in the South China Sea were simply exercises of high seas freedoms rather than of any historic rights (at [270]).

The Tribunal emphasised that the underlying rationale of UNCLOS was to give resources in EEZs to coastal States; correspondingly, States with only a presence on small features would not have the same entitlements as coastal States (at [517]-[519]). The Tribunal noted that the drafters of UNCLOS had explicitly rejected proposals for it to recognise the historic rights of States (at [250]).

On the status of features, the Tribunal held that several of the features China has occupied are low-tide elevations ('LTEs') as defined in article 13(1) of UNCLOS: these included Mischief Reef and Second Thomas Shoal (at [646]-[647]). LTEs are not entitled to maritime zones of their own and cannot be the subject of a sovereignty claim unless they are within 12 nautical miles ('NM') of an island (UNCLOS, article 13(2)).

The second noteworthy (and perhaps the most remarkable) aspect of the Award is the Tribunal's interpretation of article 121(3) of UNCLOS, which states:

"Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

The Tribunal held that a feature is not a rock if, objectively speaking, it can, in its natural condition, sustain either a stable community of people or an economic activity that is not dependent on outside resources or is not purely extractive in nature (at [504]-[505]).

On this basis, the Tribunal concluded that all the high-tide features in the Spratlys are rocks (at [643]-[646]): these include Scarborough Shoal, Johnson Reef, Fiery Cross Reef and Itu Aba Island. Therefore, each feature only has a 12-mile territorial sea and not an EEZ.

In so concluding, the Tribunal noted that modern habitations on many of these features, being dependent on outside resources, are not evidence of whether they can sustain human habitation or economic activity in their natural condition (at [578]). Temporary occupation of the features in the past also did not amount to habitation by stable communities and all historical economic activity had been purely extractive (at [624]). In fact, the Tribunal presumed that if a feature has never hosted a stable community, "the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation" (at [549]).

The Tribunal therefore established a very high threshold for proving that an island is not a rock. While it could be argued that this high threshold is not reflective of the interconnectedness of modern human communities, the better view is that it is more consonant with what the drafters of UNCLOS intended.

Thus, on the basis that China was acting within the EEZ of the Philippines, the Tribunal held that China violated the sovereignty of the Philippines in its EEZ by:

- (1) interfering with petroleum exploration in Reed Bank;
- (2) prohibiting fishing by Philippine vessels;
- (3) protecting and failing to prevent Chinese vessels from fishing at Mischief Reef and Second Thomas Shoal; and
- (4) constructing installations and artificial islands at Mischief Reef without authorisation by the Philippines.

In particular, the Tribunal's holding on Mischief Reef may pose problems for China. This feature now falls within the Philippines EEZ: therefore, the Philippines legally has jurisdiction and control over Mischief Reef and installations that China has constructed on it. In addition, since Mischief Reef does not generate a territorial sea, nations such as the United States and Australia may extend their freedom of navigation and overflight operations to within 12 NM of Mischief Reef. This could lead to tense engagements with Chinese military vessels and aircraft.

Interestingly, the Tribunal held that both China and the Philippines had historic rights in the territorial sea around Scarborough Shoal (at [805]). Therefore, in preventing Philippine fishermen from accessing the Shoal, China violated its duty to respect the historic rights of the Philippines (at [812]). Furthermore, China also breached its obligations under the Convention on the International Regulations for Preventing Collisions at Sea 1972 when its vessels, in preventing Philippine vessels from entering the Shoal, created a serious risk of collision with Philippine vessels (at [1109]).

As a consequence of the Tribunal's decision on this point, any area beyond the territorial sea would be the Philippines's EEZ and China would have no historic rights therein. This raises the question of how the two States will exercise their co-existing historic rights within the territorial sea of Scarborough Shoal. As the Tribunal had no jurisdiction over sovereignty claims, it could not have ruled on this question.

The Tribunal also held that China's land reclamation and construction of artificial islands in the Spratlys, and failure to prevent Chinese fishermen from harvesting endangered sea life, breached its obligations under articles 192 and 194 of UNCLOS to preserve and protect the marine environment (at [992]). China's activities, such as constructing a large artificial island on Mischief Reef and destroying evidence of the natural condition of the features, were also held to have aggravated and extended the dispute (at [1181]).

China's reaction to the award

Following publication of the Award, the Foreign Affairs Committee of China's National People's Congress issued a statement asserting (*inter alia*):

- (1) that China has sovereignty over four groups of islands (including the Spratlys), which have internal seas, territorial seas and contiguous zones, and are entitled to EEZs and continental shelves; and
- (2) that China has historical rights in the South China Sea.

This statement appears to be the first time that China has explicitly set out these particular legal positions. Interestingly, it makes no mention of the so-called 'nine-dash line' that has hitherto formed the basis of its claim to the South China Sea.

Effect and implications of the Award

The Award is final and binding on both parties (article 296 of UNCLOS) and it is hoped that China will

comply with it voluntarily. This is an opportunity for China to repair any reputational damage resulting from its non-participation in the arbitration. In any event, even if China does not comply, the Award confirms the compulsory nature of the UNCLOS dispute resolution mechanism and reinforces the rule of law in the oceans. The Award also upholds the EEZ regime, one of the predominant aspects of the Law of the Sea. It should, however, be noted that UNCLOS lacks a formal enforcement regime; there is, therefore, no legal means of enforcing China's compliance with the Award. Nonetheless, China's failure to comply with the Award could naturally have negative ramifications for its international reputation.

One of the most significant implications of the Award is that it may encourage States to compromise on sovereignty claims in the South China Sea while favouring joint development instead. Joint development may be the most practical and peaceful way for States to exploit resources in this contentious region. A feature like Scarborough Shoal, where multiple States have historic rights, is an ideal subject for joint development. In this regard, the Award could be a starting point for improved diplomatic relations between the States. China has urged the Philippines to return to bilateral negotiations. For its own part, the Philippines has indicated willingness to conduct negotiations with China and explore the possibility of joint development.

The Tribunal observed that the disputes arose, not because either State intended to infringe the rights of the other, but from "fundamentally different understandings of their respective rights under the Convention" (at [1198]). On this note, given that the Award has clarified each State's rights in the disputed area, there is still reason to hope that they will both respect it, modulate the tone of their exchanges with each other and moderate their future conduct in accordance with it.