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The South China Sea Arbitration

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Introduction

Since the 1970s, the South China Sea has been a nest of competing sovereignty claims over the island features and ocean spaces by a number of adjacent countries. Included in this is China's nine-dash line, first officially communicated in *notes verbale* to the United Nations in 2009.[1] In addition, China has recently engaged in, amongst other things, the physical enhancement of many of the small features of the Spratly Islands and enforcement of a moratorium on fishing in the South China Sea.

The decision of the *South China Sea Arbitration*[2] by a tribunal established pursuant to the UN Convention on the Law of the Sea[3] (UNCLOS) has landed in this cauldron. UNCLOS provides for compulsory adjudication of disputes concerning the interpretation and application of the Convention, subject to a number of exceptions. In 2013, the Philippines commenced the case against China.[4] Although a long-standing party to the Convention, China declined to participate in the establishment of the Tribunal or to appear before it.[5] In deciding not to appear, China has followed a small number of states that have similarly declined to participate in cases before the International Court of Justice (ICJ), as well as the more recent nonparticipation by the Russian Federation in UNCLOS procedures in the *Arctic Sunrise Case* brought by the Netherlands.[6]

There were fifteen Philippine Submissions dealt with by the Tribunal.[7] The Submissions that have received the most post-decision attention and that are the focus of this *Insight* include the legal validity of China's claim of rights within the nine-dash line in light of UNCLOS and what—if any—maritime zones appertain to the insular features in the South China Sea.

China viewed the principal subject matters in dispute as political and beyond the jurisdiction and competence of the Tribunal. The Philippines characterized the subject matters in dispute as involving the interpretation and application of UNCLOS and thus within the jurisdiction of the Tribunal. As a result of this difference of views, it was necessary for the Tribunal to assess whether it had jurisdiction to deal with the merits of the Philippine submissions.

The Tribunal held that it had jurisdiction to consider the merits of almost all the Submissions made by the Philippines and, overall, accepted the claims and arguments on the merits asserted by the Philippines.[8]

Legal Status of the Award

UNCLOS, the international legal basis for the arbitration, is very clear in Annex VII, Arbitration, Article 11 that “[t]he award of the arbitral tribunal shall be *final and binding* and without appeal It shall be complied with by the parties to the dispute.”[9]

Hence, there is no argument to be made that nonappearance by a state changes or effects the “final and binding” nature of the Award. Moreover, while China has asserted both after the release of the 2015 Award on Jurisdiction and the 2016 Award that the both are “null and void” and have “no binding force,”[10] there is no legal basis in UNCLOS for such assertions.

China has further stated that it “neither accepts nor recognizes” the Award.[11] There is a modest practice of states opting not to accept or recognize, and thus not comply with, decisions of the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and a tribunal established pursuant to UNCLOS.

Rocks/Low-Tide Elevations or Islands

Jurisdiction

The Philippines argued that the Tribunal had jurisdiction to determine whether certain insular features in the South China Sea were either rocks (entitled to a 12 nm territorial sea), low-tide elevations (no territorial sea), or islands (entitled to a 200 nm zone), even though the features in question were subject to territorial sovereignty disputes, as this involved interpretation of the relevant provisions of UNCLOS.[12]

China directly countered this, arguing that the heart of the dispute concerned territorial sovereignty, not the “interpretation or application” of UNCLOS. [13] In the alternative, China argued that the rock-or-island determination concerned maritime boundary delimitation, which, as result of China’s Declaration of August 26, 2006,[14] was exempted from compulsory adjudicative jurisdiction under UNCLOS.[15]

In reaching the conclusion that it had jurisdiction to determine the status of the contested features, the Tribunal stated that it “does not accept . . . that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterization” of the Philippine claims that the features were rocks or low-tide elevations.[16] In making this determination, it noted that none of the Philippine Submissions required a determination of sovereignty. [17]

The Tribunal did not accept China’s assessment of the dispute as involving maritime boundary delimitation, stating that it was “not convinced,” and that “[i]t does not follow . . . that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.”[18] More specifically, the Tribunal commented that entitlement to maritime zones “is distinct” from delimitation of those zones in an area where entitlements overlap.”[19]

Merits

In the period immediately prior to the issuing of the Award, China had significantly modified and enhanced numerous features in the Spratly Islands. The Tribunal clearly stated that UNCLOS “requires that the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human habitation.”[20]

The Tribunal accepted that in order to examine the Submissions regarding the location of the Philippine exclusive economic zone (EEZ), it was necessary to determine the legal status of all of the relevant high-tide features that are part of the Spratly Islands.[21] The Tribunal focused upon the six largest features, observing that if these were characterized as rocks under UNCLOS, then the same conclusion would apply to the other high-tide features in the Spratly Islands.[22]

Unlike previous international tribunals that had accepted certain features as islands or rocks without explicitly applying UNCLOS Article 121(3),[23] the Tribunal analyzed its application in detail.[24] The Tribunal’s interpretation placed great emphasis on the physical conditions of the feature in question such as “the natural capacity, without external additions . . . to sustain human habitation or an economic life of its own.”[25] The Tribunal also delved into the definition of the terms involved in this standard. Additionally, the Tribunal directed that where the physical conditions did not determine clearly whether a feature is a rock or island then the historical use will be relevant. In this regard, the Tribunal concluded “that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.”[26]

Applying their understanding of Article 121(3) to the relevant high-tide features in the Spratly Islands, the Tribunal noted that although the features were “capable of enabling the survival of small groups of people”[27] and that the features could not be “dismissed as uninhabitable on the basis of their physical characteristics,” nevertheless, there was “no indication that anything fairly resembling a stable human community has ever formed on the Spratly Islands” with the result that all of the high-tide features were classed as rocks.[28]

The Nine-Dash Line and Historic Rights[29]

The principal jurisdictional question concerning the nine-dash line and possible Chinese historic rights therein was whether such a claim was captured by the wording of Article 298(1)(a)(i) of UNCLOS, covering “disputes . . . involving historic bays or title”[30] and thus that the Tribunal was without jurisdiction due to China’s 2006 Declaration.[31] On the merits, at issue was the relationship between the historic rights asserted by China within the nine-dash line and the rights of the Philippines based on UNCLOS in areas beyond China’s EEZ or continental shelf and within the EEZ or continental shelf of the Philippines.

To deal with both questions, the Tribunal assessed “the nature of any historic rights claimed by China” within the nine-dash line, which was “complicated by some ambiguity in China’s position.”[32] The Tribunal undertook an examination of China’s statements and actions[33] concluding “that China claims rights to living and non-living resources within the ‘nine-dash line’ but (apart from the territorial sea generated by any islands) does not consider that those waters form part of its territorial sea or internal waters.”[34]

The Tribunal indicated that the term historic title in Article 298 centered on the historic title wording in Article 12(1) of the 1958 Convention on the Territorial Sea and Contiguous Zone.[35] The Tribunal took the view that the 1958 “historic title” wording was tied directly to the historic terminology as used in the 1951 *Anglo-Norwegian Fisheries* case, where the area in question was “an area of sea claimed exceptionally as internal waters.”[36] Based upon this, the Tribunal took the view that the meaning of historic title in Article 298 was “claims to sovereignty over maritime areas derived from historical circumstances.”[37] Having determined that China was claiming historic rights and not historic title, the Tribunal concluded that China’s 2006 Declaration was not available as regards China’s historic claims.[38]

Concerning the merits, the relationship between the historic rights asserted by China within the nine-dash line and the rights of the Philippines based on UNCLOS, the Tribunal sided with the Philippines concluding that UNCLOS “leaves no space for an assertion of historic rights,” and that “China’s claim to historic rights to the living and non-living resources within the ‘nine-dash line’ is incompatible with the Convention.”[39]

Concluding Comments

In the immediate aftermath, the reactions indicate little hope that the *South China Sea Award* will result in a period of peaceful management of the tangled disputes within the South China Sea. China has loudly condemned the Award and a joint statement from ASEAN and China did not even mention it. Somewhat more encouraging are the preparatory talks that have taken place between the Philippines and China.[40]

It has long been recognized by those who have a significant history with the South China Sea disputes that if the numerous maritime features in the South China Sea were all categorized as either low-tide elevation or rocks, the result would be that the 200 nm zones in the region would be measured from the mainland coasts. This would cause almost all of the maritime claim disputes to become bilateral, rather than multilateral, which could in turn create a possibility for resolution and de-escalation. Part of this as well is that the nine-dash line be without legal effect. As of 2009, the South China Sea ASEAN states advocated such a position.[41] In light of the Tribunal’s ruling, this could be a potential path forward.

Article 121(3) was a provision of deliberately negotiated vagueness, thus Tribunal’s rock/island criteria can be viewed perhaps as “missionary” work. The rock or island criteria in the Award may result in states able to more readily reach maritime boundary agreements and adjudicative bodies more readily make such determinations. It will be future tribunals, courts, and state practice that will determine whether this “missionary” aspect of the Award finds favour.

Of final note, concerns about whether the Award and China’s rejection of it have undermined confidence in UNCLOS dispute resolution procedures are perhaps misplaced. Subsequent to the commencement of the *South China Sea Arbitration*, three parties have brought cases before ITLOS and two have commenced UNCLOS, Annex VII arbitration cases.

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[1] Permanent Mission of China to the U.N., Letter Dated May 7, 2009, from the Permanent Mission of China to the United Nations addressed to the Secretary-General, U.N. Doc. CML/17/2009 (May 7, 2009); Permanent Mission of China to the U.N., Letter Dated May 7, 2009, from the Permanent Mission of China to the United Nations addressed to the Secretary-General, U.N. Doc. CML/18/2009 (May 7, 2009).

[2] In re Arbitration Between the Republic of the Philippines and the People’s Republic of China, PCA Case No. 2013-19, Jurisdiction and Admissibility (Oct. 29, 2015), <http://www.pca-cpa.org> (<http://www.pca-cpa.org>) [hereinafter Award on Jurisdiction]; In re Arbitration Between the Republic of the Philippines and the People’s Republic of China, PCA Case No. 2013-19, Award (July 12, 2016), <http://www.pca-cpa.org> (<http://www.pca-cpa.org>) [hereinafter Award].

[3] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[4] In re Arbitration Between the Republic of the Philippines and the People’s Republic of China, PCA Case No. 2013-19, Philippines Memorial, Vol. III, Annex 1 (Jan. 22, 2013) (“CJe ober“VII, art. 11.he disputee arbitration,d the legal status of insular features in the South China Sea.CJe ober“VII, art. 11.he disputee arbitration,d the legal status of insular features in the South China Sea. [hereinafter Philippines Memorial], *available at* <http://www.pcacases.com/pcadocs/The%20Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29> (<http://www.pcacases.com/pcadocs/The%20Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29>)

[5] See *id.*, Annex 2, 3.

[6] See Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, Request for the Prescription of Provisional Measures, Order of Nov. 22, 2011, [hereinafter Arctic Sunrise], *available at* https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf).

[7] Award, *supra* note 2, at ¶ 112.

[8] *Id.* ¶ 1203.

[9] UNCLOS, *supra* note 3, Annex VII, art. 11 (emphasis added).

[10] *Statement of the Ministry of Foreign Affairs on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines*, Ministry of Foreign Aff. People’s Republic of China (Oct. 30, 2015), www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml; (http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml;) *Statement of the Ministry of Foreign Affairs on the Award of 12 July 2016 of the Arbitral Tribunal Established at the Request of the Republic of the Philippines*, Ministry of Foreign Aff. People’s Republic of China (July 12, 2016), *at* www.fmprc.gov.cn/nanhai/eng/snhwtlcw_1/t1379492.htm (http://www.fmprc.gov.cn/nanhai/eng/snhwtlcw_1/t1379492.htm) [hereinafter *July Foreign Ministry Statement*].

[11] *July Foreign Ministry Statement*, *supra* note 10.

[12] Award on Jurisdiction, *supra* note 2, at ¶ 140.

[13] *Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, Ministry of Foreign Aff. People's Republic of China (Dec. 7, 2014), www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368899.htm (http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368899.htm).

[14] *Declarations and Statements*, Division for Ocean Affairs and the Law of the Sea (Aug. 26, 2006), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China (http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China) after ratification [hereinafter *China Declaration*].

[15] UNCLOS, *supra* note 3, art. 298(1)(a)(i).

[16] Award on Jurisdiction, *supra* note 2, at ¶ 152.

[17] *Id.* ¶ 153.

[18] *Id.* ¶ 155.

[19] *Id.* ¶ 156.

[20] Award, *supra* note 2, ¶ 306.

[21] *Id.* ¶¶ 393–96.

[22] *Id.* ¶ 407.

[23] UNCLOS, *supra* note 3, art. 121.

[24] Award, *supra* note 2, ¶¶ 475–538.

[25] *Id.* ¶ 542.

[26] *Id.* ¶ 549.

[27] *Id.* ¶ 615.

[28] *Id.* ¶¶ 621–22. Itu Aba (Taiping) is under the control of Taiwan.

[29] Part of this section has been drawn, with modification, from T.L. McDorman, *The 2016 South China Sea Arbitration: Comments on the Nine-Dash Line and Historic Rights* (July 2016) (paper prepared for the “Public International Law Colloquium on Maritime Disputes Settlement” sponsored by the Chinese Society of International Law, Hong Kong).

[30] Award on Jurisdiction, *supra* note 2, ¶ 152; Award, *supra* note 2, ¶ 171; see UNCLOS, *supra* note 2, art. 298(1)(a)(i).

[31] *China Declaration*, *supra* note 14.

[32] Award, *supra* note 2, ¶¶ 171, 180.

[33] See *id.* ¶¶ 172–87, 200, 207–14.

[34] *Id.* ¶ 214, 232.

[35] Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

[36] Award, *supra* note 2, ¶ 221.

[37] *Id.* ¶ 226.

[38] *Id.* ¶ 229.

[39] *Id.* ¶ 261.

[40] See *Courting New President, China Slows Island-Building off Philippine Coast*, Sept. 25, 2016, N.Y. Times, at A8.

[41] See Award, *supra* note 2, ¶ 449.

The logo for 'insights' features the word in a lowercase, sans-serif font. The 'i' is a golden-yellow color, while the remaining letters 'nsights' are a dark blue. The letters are closely spaced and have a slight shadow effect.

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