

TRIBUNAL RULES IN FAVOUR OF THE PHILIPPINES IN DISPUTE OVER RIGHTS IN THE SOUTH CHINA SEA

The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)

Introduction

By an award handed down on 12 July 2016, an arbitral tribunal (Judge Mensah, President; Judge Cot; Judge Pawlak; Professor Soons; Judge Wolfrum) (“the Tribunal”) constituted under Annex VII to the United Nations Convention on the Law of the Sea (“UNCLOS”) in proceedings instituted by the Philippines against China. The Permanent Court of Arbitration acted as Registry for the arbitration.

The arbitration concerned historic rights and sources of maritime entitlements in the South China Sea, the status of certain maritime features and the entitlements that they can generate, and whether certain actions by China were contrary to UNCLOS. The Tribunal explicitly stated that it was not giving a ruling on issues of sovereignty nor was it delimiting any boundary between the Philippines and China.

Background

The South China Sea spans approximately 3.5 million square kilometers to the south of China and the west of the Philippines. The area has been the subject of longstanding territorial disputes amongst several South-East Asian States. In addition to being a crucial shipping lane, rich fishing ground and home to significant biodiversity, the area is believed to hold substantial oil and gas resources. The Spratly Islands are a constellation of small islands and coral reefs in the southern area of the South China Sea. Following the Japanese renunciation of all claim to the Spratly Islands by the Treaty of Peace between Japan and the Republic of China in 1952, no successor states were indicated in respect of the Spratly Islands and today there are overlapping jurisdictional claims from several states.

Previously China had adopted the position that it claims all territory in the South China Sea within a boundary known as the “nine-dash line”. This line skirts the land boundary of several other South-East Asian States, including Vietnam, Malaysia, Brunei and the Philippines. A map illustrating the nine-dash line is provided at the end of this mailing.

On 22 January 2013, the Philippines initiated the instant arbitration after China took control of Scarborough Shoal, a reef located around 140 miles off the coast of the Philippines. The Philippines expressly did not seek a determination of sovereignty over the islands but sought declarations regarding the status of certain features in the area and, consequently, the economic entitlements that their status gave rise to under UNCLOS.

Non-Participation by China

China adopted and repeatedly affirmed its position that it would not accept or participate in the arbitral proceedings. As permitted by Annex VII to UNCLOS, the Tribunal continued the proceedings in the absence of China.

Despite her official position, China did publish a Position Paper in December 2014 (followed up by official statements) to the effect that it considered that the Tribunal had no jurisdiction. In an effort to maintain fairness, the Tribunal considered the statements made by China during its jurisdictional deliberations.

By an award dated 29 October 2015, the Tribunal decided most of the jurisdictional issues and set a timetable for a hearing on the merits.

Decision on the Merits

The merits hearing was attended by representatives of Australia, Indonesia, Japan, Malaysia, Singapore, Thailand and Vietnam (all of whom were given observer status). The USA was denied observer status on the grounds that it was not a signatory to UNCLOS. Malaysia and Vietnam each submitted statements drawing attention to their own claims in the South China Sea and asked the Tribunal to be aware of and respect those claims.

The Tribunal substantially ruled against China.

Historic Rights and China's "Nine-Dash Line"

The Tribunal found that protections for pre-existing rights were deliberately not adopted in UNCLOS. UNCLOS was a comprehensive convention determining maritime rights. Thus, even if China had had historic rights, those rights were extinguished to the extent that they were incompatible with the Exclusive Economic Zones ("EEZs") provided for in UNCLOS.

In any event, although fishermen from multiple states, including China, had historically used the islands in the South China Sea, there was no evidence that China had ever had exclusive control over the area.

Overall, there was no basis in law for China to claim historic rights to resources within China's "nine-dash line".

The Status of Certain Features in the South China Sea for the purposes of UNCLOS

The Tribunal evaluated whether certain reefs which China claimed were above water at high tide (and therefore, under UNCLOS, generated entitlement to a 12-nautical mile territorial sea). These reefs had been modified significantly as a result of land reclamation and construction that obscured their natural condition – thus the Tribunal had recourse to archival materials and historical hydrographic surveys for their objective analysis.

Under Article 121 of UNCLOS, "islands" generate an EEZ and continental shelf, whilst "rocks which cannot sustain human habitation or economic life of their own shall have no

exclusive economic zone or continental shelf'. This depends on an objective assessment of a feature in its natural condition. The fact that there were currently official Chinese personnel on some of the features was not reflective of their natural capacity. The historical evidence showed that the Spratly Islands had historically been used by fishing groups and that several fishing and guano mining enterprises had been attempted. However, such transient use was not capable of generating extended maritime zones for any of the Spratly Islands either individually or as a collective unit.

Thus the Tribunal considered itself able to declare certain areas of the sea (that did not overlap with any possible Chinese entitlement) to be within the EEZ of the Philippines, and could make this determination without delimiting a boundary.

The Lawfulness of Certain Chinese Activities in the South China Sea

Having found that these areas were within the EEZ of the Philippines, the Tribunal found that China had violated that EEZ and therefore the sovereign rights of the Philippines. This had occurred through interference with Filipino fishing and petroleum exploration, construction of artificial islands and failing to stop Chinese fishing vessels from operating in the EEZ.

Further, fishermen from both the Philippines and China had traditional fishing rights at Scarborough Shoal. By restricting fishermen from the Philippines from accessing Scarborough Shoal, China had unlawfully interfered with these rights. At times, this restriction had amounted to dangerous physical obstruction which constituted a breach of the Convention on the International Regulations for Preventing Collisions at Sea 1972.

The Environmental Damage caused by China in Breach of UNCLOS

China had recently carried out large-scale land reclamation projects, including constructing seven artificial islands in the Spratly Islands. China's actions had breached an obligation enshrined in UNCLOS to protect fragile ecosystems. In particular, the Chinese Government had been aware that Chinese fishermen had been harvesting endangered species using techniques that were highly destructive to the fragile coral reef environment.

China's Aggravation of the Dispute

The Philippines raised several complaints regarding actions from China that had aggravated the dispute. The Tribunal found that it did not have jurisdiction to consider the legal ramifications of a stand-off between Philippine marines and Chinese naval vessels at Second Thomas Shoal because this constituted "military activities" expressly excluded from UNCLOS.

By contrast, China's large-scale land reclamation projects and the construction of artificial islands since the Philippines commenced proceedings in 2013 was a breach of a State's obligations under the dispute resolution provisions of UNCLOS not to take any steps to aggravate an existing dispute. Further aggravation could be seen in China's causing irreparable environmental damage and destroying evidence of the natural condition of certain features in the South China Sea within the subject matter of the dispute.

Concluding Remarks

One of China's objections to the Tribunal taking jurisdiction was that the underlying subject-matter of the dispute concerned matters of political sovereignty that a UNCLOS Tribunal was not competent to determine. However, the Tribunal explicitly stated that it was not delimiting the boundary between China and the Philippines or making a determination of sovereignty, merely determining the status under UNCLOS of maritime features. Before the Final Award was issued, several international law experts, including former judges of the International Court of Justice, had publicly criticised the Tribunal's approach to jurisdiction in this case – to the effect that it is impossible, or at least artificial, to separate issues of sovereignty away from issues of economic maritime entitlements.

Although the Tribunal rejected the Philippines' request for a declaration that China should bring conduct in line with UNCLOS, on the grounds that there was a basic rule of public international law that States must comply with their treaty obligations, it is axiomatic that the award is binding on both China and the Philippines. However, China has expressed its adamant intention not to respect the award. As with many matters of international law, and notwithstanding the fact that China is both a signatory to UNCLOS and a permanent member of the United Nations Security Council, an intransigent attitude by one party may cause significant problems in the enforcement of the Tribunal's decision.



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