

Legal and Geographical Implications of the South China Sea Arbitration

The paper explores the potential implications of the South China Sea arbitration legally and geographically, both for the South China Sea and beyond.

Introduction

On 12 July 2016 the Arbitral Tribunal in the case between the Philippines and China delivered its *Award*, following its earlier 29 October 2015 *Award on Jurisdiction and Admissibility*. The Tribunal was constituted under Annex VII of the United Nations Convention on the Law of the Sea (LOSC), having been initiated by the Philippines. The Permanent Court of Arbitration in The Hague acted as the registry for the case and venue for hearings. China, for its part, returned the Philippines' notification of its claims, argued that the Tribunal lacked jurisdiction to hear the case, and has rejected the Tribunal's *Award*.

The objective of this *Issue Brief* is to evaluate concisely the status of the *Award* before highlighting the main findings of the Tribunal, notably in relation to the regime of islands, historic rights and environmental obligations. The paper then explores the potential implications of the arbitration legally and geographically, both for the South China Sea and beyond.

Status of the Award

Both the Philippines and China are parties to LOSC. Consequently, both States are subject to the Convention's dispute resolution provisions. Part XV of the Convention, which deals with the settlement of disputes, provides for "compulsory procedures entailing binding decisions" and it is these that the Philippines invoked in order to bring the case. However, immediately subsequent articles of the Convention outline limitations and exceptions to the applicability of such binding dispute settlement provisions. In particular, States have the option to declare that the aforementioned dispute resolution mechanisms do not apply where concurrent consideration of "any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" is required, where disputes related to "sea boundary delimitations" are involved, or should "historic bays or titles" be involved. China activated these exceptions through a Declaration made on its ratification on 7 June 2006.

The Philippines in its *Statement of Claim* was careful to frame its questions so as to avoid issues of sovereignty and maritime delimitation, instead raising issues which it contended arise from the interpretation and application of LOSC. China, in contrast, argued in a "Position Paper" that, fundamentally, the disputes in question related to sovereignty and, if not that, then issues of maritime delimitation were implicated and that therefore the Tribunal lacked the jurisdiction to hear the case.

The Tribunal addressed this fundamental difference of view as to whether it had jurisdiction to hear the case at considerable length in both its initial *Award on Jurisdiction and Admissibility* and the first part of its final *Award*. The detailed reasoning devoted to the jurisdictional aspects of the case arguably indicates an acknowledgement by the Tribunal of the delicacy of addressing the issues raised by the Philippines without the express consent of China. Ultimately the Tribunal found that it did have the necessary jurisdiction to rule on almost all of the issues raised by the Philippines.

Concerning the existence of sovereignty disputes over islands in the South China Sea and the submissions on the part of the Philippines, the Tribunal observed that it did “not see that any of the Philippines’ Submissions require an implicit determination of sovereignty”, underscored that the Philippines had “expressly and repeatedly” requested the Tribunal to refrain from ruling on sovereignty, and undertook “to ensure that its decision neither advances nor detracts from either Party’s claims to land sovereignty in the South China Sea.”

With regard to issues of maritime boundary delimitation, the Tribunal drew a distinction between determining whether maritime entitlements exist versus the delimitation of such entitlements where they overlap. The Tribunal also emphasised that the Philippines had not asked it to delimit a maritime boundary.

Concerning whether historic bays or titles were involved in the questions before it the Tribunal sought, at some length, to distinguish between historic rights, historic waters, and historic title in the context of the application of LOSC, Article 298. The Tribunal concluded that this exception related to “disputes involving historic title” and that as China in the South China Sea amounted to “a constellation of historic rights short of title”, this exception under Article 298 also did not apply. The Tribunal further considered whether the Declaration on a Code of Conduct on the South China Sea represented a bar to the Philippines invoking arbitration through the Convention or whether an adequate exchange of views between the parties had occurred prior to the Philippines seeking dispute settlement through arbitration, and concluded that neither of these objections to the Philippines’ conduct had merit.

China, as noted above, refused to acknowledge the legitimacy of the Tribunal, did not participate directly in its proceedings, and has also robustly rejected its final Award. However, there appears little basis for the latter assertions under the Law of the Sea Convention. The Arbitral Tribunal arose from LOSC and was satisfied that, in keeping with its powers under the Convention, it had the necessary jurisdiction to address the vast majority of the issues and questions posed to it by the Philippines. Moreover, under the Convention the Tribunal’s Award is explicitly “final and binding and without appeal.”

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