

Implications of the July 2016 Arbitral Tribunal Ruling

For a considerable time now efforts to manage disputes and promote cooperation in the South China Sea have been inhibited by the lack of an equitably defined geography of disputed and non-disputed maritime zones in the South China Sea. The Award rendered by the Tribunal on 12 July 2016 in the so-called South China Sea arbitration initiated by the Philippines against China has put an end to that situation, thus opening up new cooperation opportunities for states in the region.

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The South China Sea after 12 July 2016

Today it is almost a truism that there are intractable sovereignty disputes in the South China Sea, namely over the Paracel Islands between China and Viet Nam, the Spratly Islands between Brunei, China, Malaysia, the Philippines and Viet Nam, Scarborough Shoal between China and the Philippines. But as commentators rightly observe, these tiny features do not possess much intrinsic value in themselves but in their potential for generating extensive maritime zones under the United Nations Convention on the Law of the Sea (UNCLOS), which in turn enables the title holders to gain access to valuable marine resources in the South China Sea. That potential hinges upon the interpretation of Article 121 of UNCLOS that distinguishes between ‘fully entitled islands’ which are capable of generating an exclusive economic zone and continental shelf of their own and rocks which are not. China maintains that all the groups of islands that it claims sovereignty are ‘fully entitled islands’ – a position contradicted by all other claimants.

Besides its extensive maritime claims based a liberal reading of Article 121 of UNCLOS, China also claims under the doctrine of historic rights access to marine resources in a large swath of the South China Sea encompassed within its infamous nine-dash line, which was officially introduced to the international community for the first time in May 2009. To support its claim, China argues that the concept of ‘historic rights’ is based on general international law and not superseded by UNCLOS, which contrasts with the Philippines’ position that UNCLOS constitutes the sole basis for maritime entitlements in the South China Sea.

The Tribunal made clear in its 12 July 2016 Award that it did not deal with the sovereignty disputes in the South China Sea. But for the two disputes concerning maritime entitlement claims in the South China Sea as described above, the Tribunal gave authoritative answers. It declared ‘that [...] China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under Convention’. With

regard to the interpretation and application of the Article 121, the Tribunal found that the features of the ‘Scarborough Shoal ... are rocks that cannot sustain human habitation or economic life of their own [...]’ and ‘that none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf’. With regard to the Scarborough Shoal, the Tribunal also found has been a traditional fishing ground for fishermen of many nationalities, including China, the Philippines and Viet Nam. Given the Philippines’ limited submission, the Tribunal also made specific determination with regard to the status of only ten features in the Spratly Islands.

While the Award is legally binding upon the parties to the dispute, by defining the limits of maritime entitlements of China and the Philippines, the Tribunal has, to some extent, unravelled the myths of disputed and non-disputed waters in the South China Sea. A new legal landscape in the South China Sea can be described as follows:

- There is no disputed water created by China’s nine-dash line claim. The disputed waters are now limited to the maritime zones of the Paracel Islands and the Spratly Islands because of the disputed sovereignty over these islands. In case of the Spratly Islands, the disputed waters are limited to the territorial seas of the high tide features, some of which have already been determined by the Tribunal. Likewise, in the case of Scarborough Shoal, the disputed waters are limited to its territorial seas with a proviso that these waters are also the traditional fishing grounds for fishermen from China, the Philippines and Viet Nam. The disputed waters relating to the Paracel Islands depend on the status of the high tide features in this group of islands, which remains to be disputed between China and Viet Nam.
- It follows from the above that, the Philippines, Viet Nam and Malaysia can now confidently enjoy exclusive economic zone and continental shelf to their fullest extent in the central and the southern parts of the South China Sea without any fear of overlapping with the corresponding maritime zones generated from the Spratly Islands. In the northern area, the limits of Viet Nam’s exclusive economic zone and continental shelf can only be determined after the status of the Paracel Islands is determined.
- Beyond the limits of the coastal states’ 200 nm exclusive economic zones will be the high seas where every state enjoy certain freedoms as provided under UNCLOS. (see Map below)
- At present, given the pending submissions of Viet Nam and Malaysia, there remains in the South China Sea part of the Area subject to the regime of common heritage of mankind. Whether this will still be the case in the future depend on the future submissions by the coastal states, e.g. the Philippines, regarding their respective extended continental shelves.

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