

Implications of the July 2016 Arbitral Tribunal Ruling

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Introduction

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. While it left unresolved a number of sovereignty disputes – simply because the Tribunal did not have jurisdiction over certain matters – the Award has to a useful extent untangled the South China Sea disputes and created a new legal landscape. This brief explains the significance of the Award to coastal states bordering the South China Sea and ventures suggestions as to their future policy and action.

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 China¹ 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),² 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 UNCLOS³ 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.

¹ In this Brief, Taiwan is not mentioned as it is part of China and its sovereignty claim is exactly that of China.

² ‘The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982’ 1833 *UNTS* 396.

³ Article 121 entitled ‘Regime of islands’ reads:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

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 Sea⁴ encompassed within its infamous nine-dash line, which was officially introduced to the international community for the first time in May 2009.⁵ 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'.⁶ 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 [...]'⁷ and 'that none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf'.⁸ With regard to the Scarborough Shoal, the Tribunal also found has been a traditional fishing ground for fishermen of many nationalities,⁹ 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.¹⁰

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, unraveled 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.¹¹ 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

⁴ A very reliable calculation is that China's nine-dash line claim encompasses 62% of the South China Sea whose limits are defined according to the International Hydrographic Organization in its *S-23 Limits of the Oceans and Seas (1953)*. See *Limits in the Sea* No. 143, n 11.

⁵ The line was depicted in the maps attached to *Notes Verbales* of China sent to the UN Secretary-General to protest against the unilateral and joint submissions by Malaysia and Vietnam of their extended continental shelf claims in the SCS to the Commission on the Limits of the Continental Shelf in May 2009.

⁶ Award, *Dispositif*, para 1203.B.(2).

⁷ Award, *Dispositif*, para 1203.B.(6).

⁸ Award, *Dispositif*, para 1203.B.(7)(a).

⁹ Award, *Dispositif*, para 1203.B.(11).

¹⁰ According to the Tribunal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are above water at high tide while Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef and Second Thomas Shoal are low-tide elevations.

¹¹ Under the principle 'land dominates the sea', when sovereignty over the land is disputed, it necessarily follows that rights over sea generated from the land is disputed.

Tribunal.¹² 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,¹³ which remains to be disputed between China and Viet Nam.

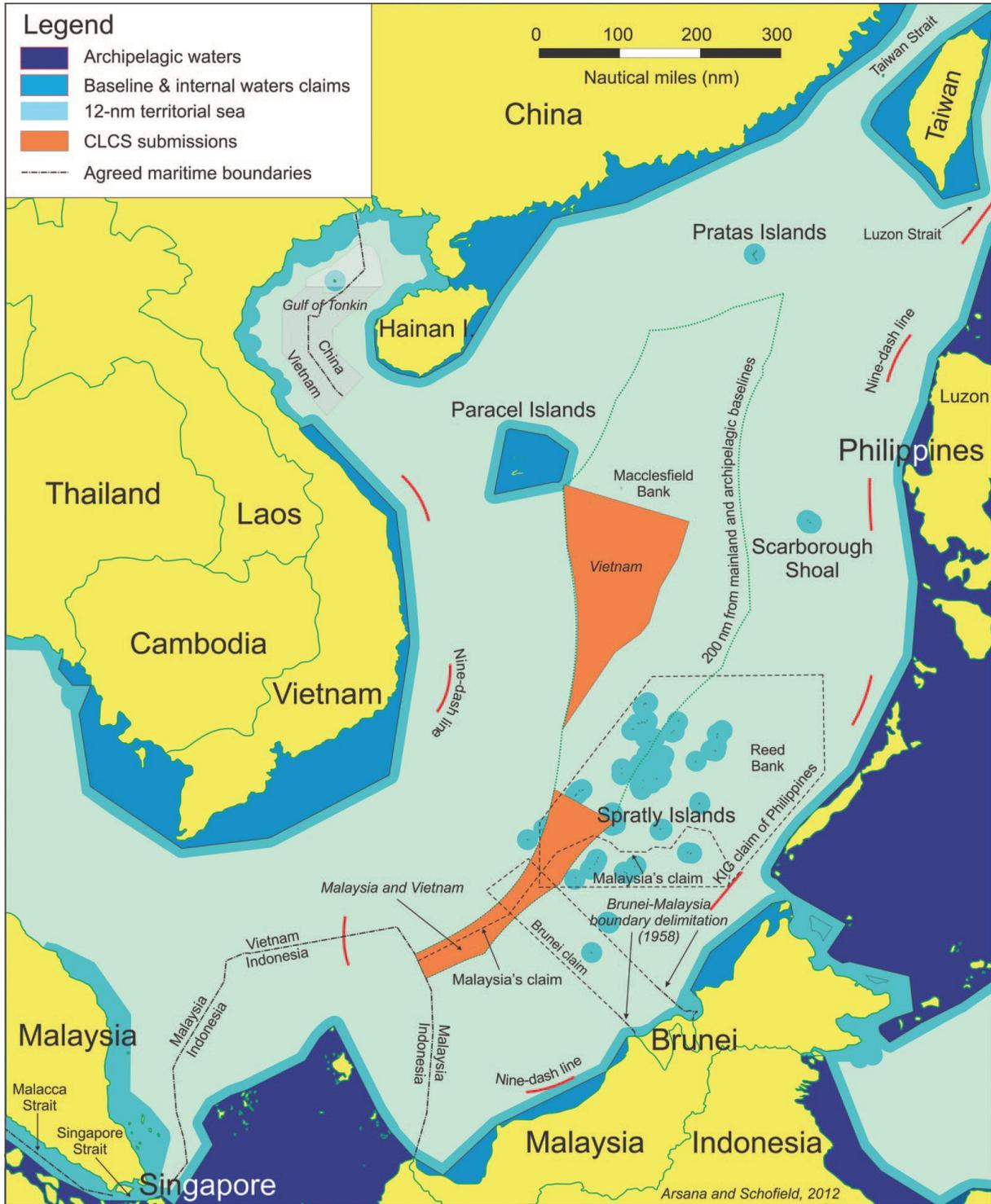
- It follows from the above that, the Philippines, Viet Nam and Malaysia can now confidently enjoy exclusive economic zone and continental shelf to their fullest extent in the central and the southern parts of the South China Sea without any fear of overlapping with the corresponding maritime zones generated 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.

Implications for the future

Activities at sea are regulated by reference to their relative locations in the different maritime zones as divided under UNCLOS, such as territorial seas, exclusive economic zone, continental shelf, high seas and the Area. The Award of 12 July 2016 has, as described in the previous section, enabled states to partition the South China Sea into different maritime zones under UNCLOS scheme. As such, it shed light on the present and future conduct of states in the South China Sea. Four issues may be listed here regarding present and future cooperative activities of states:

¹² See n 10 above.

¹³ There is no question of China's 'straight baselines' around the Paracel Islands given the Tribunal's finding in the South China Sea arbitration that China is not an archipelagic state and hence not allowed to enclose a group of islands (in that case the Spratly Islands) within a system of archipelagic or straight baseline, surrounding the high-tide features of the group, and accord it an entitlement to maritime zones as a single unit. See Award, para 573.



(Source: Clive Schofield & Andi Arsana, (2013) 107 AJIL 96)

- First, ASEAN and China can now know how to implement paragraph 6 of the Declaration of the Code of Conduct in the South China Sea of 2002, which envisages cooperative activities in non-sensitive areas, such as marine environmental protection, marine scientific research, safety of navigation and communication at sea, and combatting transnational crimes.

- Secondly, the biological context of the South China Sea is that valuable fish stocks in the South China Sea are highly migratory and can occur both within the exclusive economic zone and on the high seas, which mandates cooperation according to Article 63(2) of UNCLOS.
- Thirdly, that the SCS is a semi-enclosed sea means coastal states should cooperate with each other in the implementation of their rights and obligations under UNCLOS as envisaged by Article 123. The said article points to several activities which call for cooperation, including living resources management, environmental protection, scientific research... States bordering enclosed and semi-enclosed seas are also encouraged to invite 'other interested states or international organizations' to cooperate with them in implementing the article.
- Finally, China and ASEAN has agreed to expedite the consultations on a Code of Conduct in the South China Sea with a view to finishing its outline in the first half of 2017. It is important that the Tribunal's decision and its implications should be factored into the discussion between China and ASEAN in to the time to come.

On the other hand, there remain at list four issues that the Award has not fully addressed and which should be the subject of discussion between states concerned. They can be listed as follows:

- First, the claimant states in the sovereignty dispute over the Spratly Islands should, in the light of the Award, discuss with each other the status of the remaining features which have not been examined by the Tribunal. This will help clarify further the geographical scope of the disputed waters relating to the Spratly Islands.
- Secondly, the Award is the first judicial decision addressing thoroughly and authoritatively Article 121 of UNCLOS and its application to the features in the Spratly Islands. The Tribunal's reasoning will be useful for China and Viet Nam in their respective (re)examination of their positions regarding the status of the features in the Paracel Islands. This can help clarify further the disputed waters in the South China Sea as well as their impact on maritime zones of China and Viet Nam in the northern area of the South China Sea.
- Thirdly, the Tribunal has found that Scarborough Shoal has been a traditional fishing ground for fishermen of different nationalities, particularly China, the Philippines and Viet Nam. It is imperative that these three countries discuss an appropriate modality to manage and protect traditional fishing rights of their fishermen.
- Finally, given the fact that the Tribunal, having examined the historical records of the region, found that Scarborough Shoal has been a traditional fishing ground, it would be not far-fetched that the territorial seas around features in the Paracel Islands and Spratly Islands could be considered traditional fishing grounds for fishermen of different countries. Just as in the context of Scarborough Shoal, traditional fishing rights in the Paracel Islands and Spratly Islands again will raise the issue of their management and protection.

Conclusion

The 12 July 2017 Award by the Tribunal in the South China Sea Arbitration provides authoritative answers to many difficult legal questions that have long baffled countries in the region. On the other hand, there are also issues that the Tribunal has left unanswered due to its limited competence. But it is believed that if states in the region

conduct their activities with goodwill and in good faith, they will find valuable and helpful guidance from the Award for both those questions that have been answered and those that have not. This will help to manage disputes and promote cooperation for the sake of development in the South China Sea.