



The Shifting Sands below the Sea: The landmark decision on the South China Sea, and its implications for Australia and Timor Leste

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Yesterday the Permanent Court of Arbitration in The Hague, constituted under the *United Nations Convention on the Law of the Sea (UNCLOS)* issued its final award in *The Republic of Philippines v The People's Republic of China* (the **Arbitration**). That Arbitration – in which China refused to participate – and the arbitral awards – which China has refused to accept – risk escalating tensions in the South China Sea and set the stage for future proceedings under international law against China to protect states' sovereignty over their exclusive economic zones (**EEZs**) in the South China Sea. It also carries real implications for other boundary disputes as well as oil and gas production, navigation, customs, fisheries and sub-sea infrastructure in disputed areas, including the area in dispute between Australia and Timor-Leste in the Timor Sea.

Most significantly, the Tribunal rejected China's longstanding assertion of sovereignty over much of the South China Sea based on claimed historical rights extending to the "nine dash line". In doing so, the Tribunal iterated the central role of UNCLOS as the basis of states' maritime entitlements. The Tribunal also held that China had engaged in multiple breaches of international law through its interference in the sovereignty of the Philippines, facilitation of illegal fishing; prevention of the exercise of traditional fishing rights; construction activities that caused severe harm to the environment; operation of maritime vessels in a dangerous manner; and aggravation of the dispute. Although the Tribunal determined that it did not have jurisdiction over two parts of the Philippines' claim, the award represents a resounding loss for China and a carefully-worded rebuke of China's activities in the South China Sea.

Part 1: Background to the Arbitration

The South China Sea contains important shipping lanes through which more than one quarter of the world's trade passes. It also contains fishing reserves and natural resources in the seabed. The South China Sea is a flashpoint of territorial tensions. China has asserted an expansive "historical" claim over much of the South China Sea. China's territorial claim is opposed by the Philippines, Vietnam, Malaysia and Brunei, who each claim their own EEZs and maritime features. These claims draw those states into dispute with China and, in some cases, each other.

The Philippines commenced the Arbitration on 22 January 2013. However, China objected to the jurisdiction of the Tribunal on the basis that it had chosen not to accept the dispute resolution procedure under UNCLOS for disputes involving: delimitation of territorial seas, EEZs or continental shelf between states; military activities and law enforcement; or a matter with which the United Nations Security Council is engaged (the **Reservation**). Consequently, it refused to accept or

participate in the Arbitration.

The catch-22 for China between participating in the Arbitration and refusing to participate in order to impugn the legitimacy of the Arbitration is clear. Yet, this was not the first time that China has refused to participate in an international court or tribunal. China also refused to participate in the only case brought against it in the Permanent Court of International Justice (or the International Court of Justice as it is now known).¹

China's non-participation is also consistent with its approach to international law. That approach is grounded in its own ancient civilisation and history. Rather than being based on sovereign equality between states under international law (which, at least nominally, is how the West approaches international law), the Chinese tributary approach to international law rests on a hierarchy in which other states are ordered below, and relative to, China. The Arbitration must be viewed in this context. As China re-establishes itself as a global power and takes its historic and traditional position in world affairs, its conception of international law will collide with the current Western-oriented approach and provoke tensions in the establishment of a sustainable and equitable rules-based order in the Asia Pacific.

Part 2: Implications

General implications

The future of economic and diplomatic relations in the region will turn on the reaction of China and South-East Asia to the Tribunal's award. Although a Chinese Foreign Ministry spokesperson has previously described the Tribunal's preliminary award as "null and void"² and China has repeatedly affirmed its unwillingness to accept the Tribunal's determination, technically the award is binding on China.³ Indeed, in seeming anticipation of China refusing to accept the award, the Tribunal expressly rejected China's earlier criticism of the Tribunal's jurisdiction and its refusal to accept the Tribunal's preliminary award.⁴

China's response to the Arbitration highlights the enforcement conundrum at the heart of international law and, so, the international legal system. If China refuses to accept the Tribunal's rejection of its "historical" claim over parts of the South China Sea, tensions between states with EEZs in the South China Sea and China may escalate and China could again find itself before an international tribunal or court. In turn, that may lead to a Chinese withdrawal from key international institutions and multilateral treaties in favour of bilateral treaties and ad-hoc arrangements that allow China to exert its economic and military power, undiminished by principles of sovereign equality. Indeed, China is already adopting such an approach. China has announced that it will establish an "international maritime judicial centre", its own international court in China to hear maritime disputes, although no further details of the court have been released since it was announced in March this year. The problem for other states of suing China, in China, is clear.

China has also consistently stated that it would prefer to resolve maritime disputes bilaterally, rather than multilaterally (and in doing so has iterated its traditional tributary approach to international relations). Any Chinese withdrawal from multilateral treaty-making should be cause for concern for investors and states as it decreases the prospects of comprehensively addressing international economic and political challenges through collective action. It also increases the real and political risks of investing in those areas.

For maritime and extractive organisations involved in the South China Sea or reliant on shipping lanes passing through the region, the award presages heightened uncertainty and tension between China and the Philippines, Vietnam, Malaysia, Brunei and Indonesia. Given the importance of the sea lanes passing through the South China Sea to East Asia, it also carries clear implications for Taiwan, Japan and the Koreans. For extractive organisations, in particular, any failure to finally draw maritime boundaries, or at least resolve to jointly develop resources in a contested area, creates uncertainty and risk that will undermine attempts by any of the littoral states to licence and exploit natural resources in the South China Sea.

Implications for Australia and Timor-Leste

Beyond the South China Sea, the award has important implications.

For Australia, the award brings into stark focus the ongoing dispute with Timor-Leste over the delimitation of the Timor Sea and the claims of espionage that have undermined the Treaty on Certain Maritime Arrangements in the Timor Sea (**CMATS**) between Australia and Timor-Leste. On 23 April 2013, Timor-Leste commenced arbitration against Australia under the Timor

Sea Treaty seeking to set aside CMATS, although the proceedings have not progressed. More recently, Timor-Leste sought to commence conciliation proceedings with Australia under UNCLOS.⁵

Like China, Australia issued a reservation to the dispute resolution procedure in UNCLOS after its ratification on 5 October 1994. That reservation is not dissimilar to China's Reservation. In the Arbitration, the Tribunal demonstrated that it will exercise a broad jurisdiction that pushes right up to the edges of such reservations in order to arbitrate disputes under UNCLOS. While the Tribunal did not determine the maritime boundary between China and the Philippines, it had no compunction in asserting the comprehensive scope of UNCLOS for states parties in delimiting maritime boundaries. Consequently, if CMATS were invalidated or set aside diplomatically, the Tribunal's award raises the prospect that Timor-Leste might successfully initiate an arbitration against Australia seeking a determination of the entitlements of Timor-Leste and Australia (but not delimitation of the maritime boundary between the two states) notwithstanding Australia's reservation. If that were to occur, Australia could not escape the application of UNCLOS – and the likely application of the equidistance principle – to the dispute between Australia and Timor-Leste.

If the equidistance principle were applied to the Timor Sea, Timor-Leste's sovereignty would extend beyond the existing maritime boundary. This would likely result in the substantial overhaul of the existing regime governing the extraction of hydrocarbons from the area between Australia and Timor-Leste. Importantly, it would also likely give Timor-Leste control of the development of the Greater Sunrise field (and all, or the lion's share of, the revenues delivered from its development).

Australia has implored all states to act consistently with international law in the disputes over maritime boundaries in the South China Sea. This morning on Radio National, the Foreign Minister stated that Australia will also abide by international law in such disputes. Applying the Tribunal's reasoning in the Arbitration, that would effectively mean that Australia would need to finally abandon its own expansive claims in the Timor Sea and accept the application of the equidistance principle in the delimitation of the maritime boundary between the two states. The Tribunal's award and, in particular, its position on reservations to UNCLOS such as those made by Australia and China indicate that compliance with international law mandates that Australia adopt a new approach in its conciliation with Timor-Leste. That approach should reflect solely and fully the principles of UNCLOS and the equidistance principle.

Part 3: The Four Disputes in the Arbitration

The Arbitration involved four disputes.

Dispute 1: The Source of States' Maritime Entitlements

The Tribunal's award falls short of delimiting the boundaries between China and the Philippines in the South China Sea; indeed, the Tribunal would not have had jurisdiction to delimit the maritime boundary due to China's Reservation to UNCLOS. However, the Tribunal determined the "entitlements" of states that would allow for the boundaries to be delimited.

China's claim to the South China Sea extending to the "nine dash line" was based on claimed historic rights. According to the Tribunal, China had asserted such rights in three ways:

- (a) licensing of arrangements for the exploitation of petroleum blocks by the China National Offshore Oil Corporation in maritime areas beyond 200nm from any maritime feature claimed by China;
- (b) objecting to the Philippines' award of petroleum blocks in maritime areas claimed by China on the basis of the nine dash line; and
- (c) restricting fishing in the South China Sea in areas within China's jurisdiction.

The characterisation of the rights of China was pivotal to the justiciability of the maritime entitlements of China and the Philippines. If the Tribunal had determined that China's rights amounted to "historic title" (rather than mere historic rights), the Tribunal would not have had jurisdiction to arbitrate the maritime entitlements of the states due to China's Reservation. However, the Tribunal held that:

"China does not claim historic title to the waters of [the] South China Sea, but rather a constellation of historic rights short of title".⁶

The Tribunal went on to reject “historic rights” as a basis of maritime entitlements under UNCLOS. UNCLOS is a “comprehensive” treaty framework that supersedes historic rights and agreements that are inconsistent with its terms.⁷ However, if a state’s historic rights in a maritime area rise to the level of “historic title”, the jurisdiction of a tribunal under UNCLOS may still be excluded (in effect, carving historic title out of the scope of UNCLOS if a state issues a reservation to this effect).

The Tribunal emphasised that its determination that historic rights could not form the basis of a state’s entitlements under UNCLOS would not bring about a significant change in the rights of the states parties. This was because the rights exercised by China in the South China Sea to the nine dash line were not sufficient to give rise to historic rights that might be recognised and protected under international law. Instead, the rights of navigation and fishing exercised by China and Chinese nationals were no more than the exercise of *freedoms* permitted under international law (and therefore imposed no disability on other states), while the exploration and exploitation of natural resources was not of sufficient long-standing to be “historic”.⁸

The Tribunal’s conclusion that historic rights cannot form the basis of maritime entitlements under UNCLOS foreshadows disputes with the other littoral states in the South China Sea: Vietnam, Malaysia and Brunei. Such states may initiate proceedings in order to have their entitlements to an EEZ extending beyond the nine dash line declared or to protect the interests of their nationals and extraction efforts.

Dispute 2: The Characterisation of Certain Maritime Features

The characterisation of maritime features as a “low-tide elevation”,⁹ an “island” or a “rock” determines the effect of those maritime features for the territorial sea, contiguous zone, EEZ and continental shelf of a state. If a high-tide elevation is an island, for example, it generates the same maritime entitlements as other land territory.¹⁰ However, if a high-tide elevation cannot sustain human habitation or economic life, it is merely a “rock” and has no EEZ or continental shelf.¹¹ An island is thus a high-tide elevation that is not a rock.

China had engaged in large-scale modifications of coral reefs in the South China Sea, including the erection of buildings and airstrips on the reefs. Both “low-tide elevations” and “islands” are defined in UNCLOS as “a naturally formed area of land ...”.¹² So it is not surprising that the Tribunal determined that “human modification” of land areas could not change the status of those maritime features. That is, a country could not convert “the seabed into a low-tide elevation or a low-tide elevation into an island”.¹³ Consequently, the Tribunal determined the status of the maritime features that were the subject of the dispute on the basis of their features *prior to human modification*.

However, before the award, it was less clear whether human modifications could convert a rock into an island by rendering it capable of habitation or supporting economic life. This uncertainty stemmed from the structure of Art 121. The ability to support human habitation or economic life is not a *positive* requirement for a high-tide elevation to be an island; rather, the inability to sustain human habitation or economic life renders a high-tide elevation a rock. One might have argued, therefore, that the “natural formation” requirement does not affect the distinction between rocks and islands, only the distinction between submerged features, low-tide elevations and high-tide elevations. However, the Tribunal rejected this argument and held that the overall “status of a feature must be assessed on the basis of its natural condition” and “natural capacity”.¹⁴ This conclusion is consistent with the purpose of UNCLOS recorded in the preamble and the travaux préparatoires and prevents the use of UNCLOS to extend the maritime zones of a state through colonisation and development of rocks into islands. The Tribunal stated that:

“If States were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials, then ... [Art 121(3)] could no longer be used as a practical restraint to prevent States from claiming for themselves potentially immense maritime space.”¹⁵

The Tribunal expounded detailed guidance on the requirements for a high-tide elevation to be capable of “sustain[ing] human habitation or economic life”.¹⁶ Of particular significance to the dispute was the Tribunal’s determination that:

(a) human habitation requires “non-transient inhabitation ... by a stable community of people for whom the feature constitutes a home and on which they remain”¹⁷ and is not satisfied by “groups [who] are heavily dependent on outside supply”,¹⁸ and

(b) “economic life” must be that of the maritime feature itself rather than the waters around the maritime feature (such as

extractive activity in the surrounding waters).¹⁹

The Tribunal therefore held that Scarborough Shoal; Cuarteron Reef; Fiery Cross Reef; Johnson Reef; McKennan Reef; Gaven Reef (North); and the Spratly Islands were rocks rather than islands, while Hughes Reef; Gaven Reef (South); Subi Reef; and Mischief Reef were low-tide elevations. Accordingly, the low-tide elevations generated no maritime zones and the rocks generated no EEZ or continental shelf.

Dispute 3: China's Activities in the South China Sea

The activities of China and Chinese nationals engaged in fishing activities in the South China Sea gave rise to five principal disputes about the lawfulness of those activities.

First, the Philippines alleged that actions by China violated the sovereignty of the Philippines. China objected to the Philippines granting of concessions over blocks within part of the Philippines' continental shelf (the Reed Bank).²⁰ However, the Tribunal held that merely informing the Philippines (or informing a private party that has been granted a concession by the foreign state) of China's claims to sovereignty over the maritime area did not constitute a breach of UNCLOS absent some coercive conduct.²¹ Although China's objections were incorrect about the law (as stated by the Tribunal), China's objections were made in good faith and, the Tribunal concluded, could not constitute a breach of UNCLOS.²²

However, other actions by China went beyond a mere assertion of a claim to the maritime area. These included:

(a) China's inducement of a vessel hired by the operator of a concession granted by the Philippines to cease operations and depart from the area on the basis of China's claim to sovereignty, which contravened Art 77 of UNCLOS as the actions occurred on the continental shelf of the Philippines;²³ and

(b) China's moratorium on fishing in an area forming part of the EEZ of the Philippines, which contravened Art 56 of UNCLOS.²⁴

Second, the Philippines alleged that China's failure to prevent Chinese nationals from illegally exploiting fish reserves ("living resources") in the EEZ of the Philippines contravened its obligations under UNCLOS. Article 62(4) of UNCLOS imposes an obligation on nationals fishing in the EEZ of another state to comply with the laws and regulations of that state.²⁵ Similarly, Article 58(3) of UNCLOS obligates states exercising rights or duties in the EEZ of another state to "have due regard to the rights and duties" of that other state. The Tribunal interpreted Article 58(3), consistently with existing jurisprudence, as obligating China "to take ... necessary measures to ensure that their nationals and vessels flying their flag are not engaged in [illegal, unreported and unregulated] fishing activities".²⁶ The Tribunal determined that China had not simply failed to exercise due diligence but had acted in coordination with Chinese vessels engaged in illegal fishing by escorting and protecting those vessels. The Tribunal therefore held that China was in breach of Article 58(3) of UNCLOS.²⁷

Third, the Philippines alleged that China had contravened Article 2(3) of UNCLOS by preventing Filipino fishermen from exercising traditional fishing rights in Scarborough Shoal (regardless of which state exercises sovereignty over Scarborough Shoal). The Tribunal held that Filipino fishermen – as well as the fishermen of other nationalities such as China and Vietnam – had traditional fishing rights at Scarborough Shoal and that China had unlawfully prevented those fishermen from exercising their fishing rights.²⁸

Fourth, the Philippines alleged that China had failed to protect and preserve the marine environment in breach of multiple articles of UNCLOS by allowing harmful fishing activities and engaging in harmful construction activities.²⁹ The Tribunal had reserved its decision on jurisdiction over this allegation until the merits stage but, having determined that China's island-building activities were for civilian and not military purposes, the Tribunal considered that it had jurisdiction.³⁰ The Tribunal found that China's construction activities had caused severe harm to the coral reef and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species.³¹ The Tribunal also found that Chinese authorities had knowledge of and supported Chinese fishermen harvesting endangered sea turtles, coral, and giant clams on a substantial scale and who had employed methods that inflicted severe damage on the coral reef. China was therefore in breach of Articles 192, 194(1), 194(5), 197, 123 and 206 of UNCLOS.³²

Fifth, the Philippines alleged that China had breached the Convention on the International Regulations for Preventing Collisions at Sea (**COLREGS**) and, as a result, Article 94 of UNCLOS by operating its law enforcement vessels in a dangerous

manner that created a serious risk of collision by obstructing Filipino vessels.³³ The Tribunal agreed, finding that China had breached both treaties.

Dispute 4: China's Aggravation of the Dispute

The final dispute involved allegations by the Philippines – that were accepted by the Tribunal – that China had aggravated and extended the dispute since the commencement of the Arbitration through its interference in the Philippines rights of navigation; prevention of the rotation and supply of Filipino personnel stationed on the Second Thomas Shoal (which was within the EEZ of the Philippines); and its dredging, artificial island-building and construction activities.

To the extent that China's alleged aggravation of the dispute involved "military activities", the Tribunal determined that it did not have jurisdiction to arbitrate on the legality of China's conduct as a result of China's Reservation. The Tribunal held that it did, however, have jurisdiction to arbitrate the legality of China's dredging and construction activities, which fell outside the scope of China's reservation.³⁴

The Tribunal determined that China was subject to a general duty under international law not to allow any step "to be taken that might aggravate or extend the dispute" and that such a step would also be inconsistent with Articles 296 and 300 of UNCLOS.³⁵ The Tribunal held that China's dredging, construction and island-building activities aggravated and extended the dispute in contravention of general international law and UNCLOS. In doing so, China not only interfered in the EEZ of the Philippines but caused "irreparable harm to the coral reef habitat" in the South China Sea.³⁶

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