



Philippines v. China — Implications of the Arbitral Award

Kawano Mariko, Professor, Faculty of Law at Waseda University

On 12 July 2016, the Arbitral Tribunal rendered an Arbitral Award in the *Philippines v. China* case. The Philippines instituted the arbitral proceedings in accordance with Section 2 of Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) in 2013. Despite China's rejection of the arbitral proceedings, the Arbitral Tribunal, in its Award of 29 October 2015, found that it had jurisdiction over seven of the Philippines' fifteen submissions, reserving consideration of its jurisdiction over seven others to the merits phase and requesting the Philippines to clarify the last. In its Award of 12 July 2016, the Tribunal found that China's claim to the South China Sea on the basis of the "nine-dash line" was incompatible with the UNCLOS and that there was no evidence supporting the "historic rights" of China. In accordance with the relevant provisions of the UNCLOS, it decided the status of the maritime features concerned on the basis of their earlier, natural condition prior to the onset of significant human modification. It also admitted most claims of the Philippines with regard to the violation of the obligations under the UNCLOS by China. It further stated that dredging, artificial island-building and construction activities on the maritime features concerned undertaken by China after the institution of the arbitral proceedings had aggravated and extended the dispute between the Parties.



Kawano Mariko, Professor, Faculty of Law at Waseda University

Importance of the Compulsory Jurisdiction in Accordance with Part XV of the UNCLOS

It should be noted that the Tribunal confirmed the importance of the compulsory jurisdiction in its Awards. China had argued that the unilateral reference of the dispute by the Philippines constituted the abuse of the procedure under the UNCLOS and affected the process of negotiations, including the negotiations between ASEAN member States and China to adopt the Code of Conduct in the South China Sea with legally binding effect. The Tribunal stated in its Award of 29 October 2015 that unilateral reference of a dispute to compulsory jurisdiction as such did not constitute the abuse of procedure and that it was the right of the Philippines as a State Party to the UNCLOS. In its Award of 12 July 2016, the Arbitral Award also referred to the difficulties caused by the rejection of the proceedings by China.

First, it should be pointed out that as a State Party to the UNCLOS, China is under an obligation to facilitate the arbitral proceedings. Moreover, it would have been strategically better for China to appear before the Tribunal for two principal reasons: China should have exercised its right to nominate one arbitrator of its own choice and to nominate the other three arbitrators by agreement between the Parties, and China should have argued preliminary objections before the Tribunal.

Second, it should be noted that in many cases unilaterally referred to international courts and tribunals, the Parties have continued their negotiations even after the initiation of proceedings. In some cases, Parties have successfully reached agreement for the final settlement of their dispute even before the final judgment or award. In those cases, the unilateral reference of a dispute to an international court or tribunal changed the relationship between the Parties in direct negotiations which had been deadlocked.

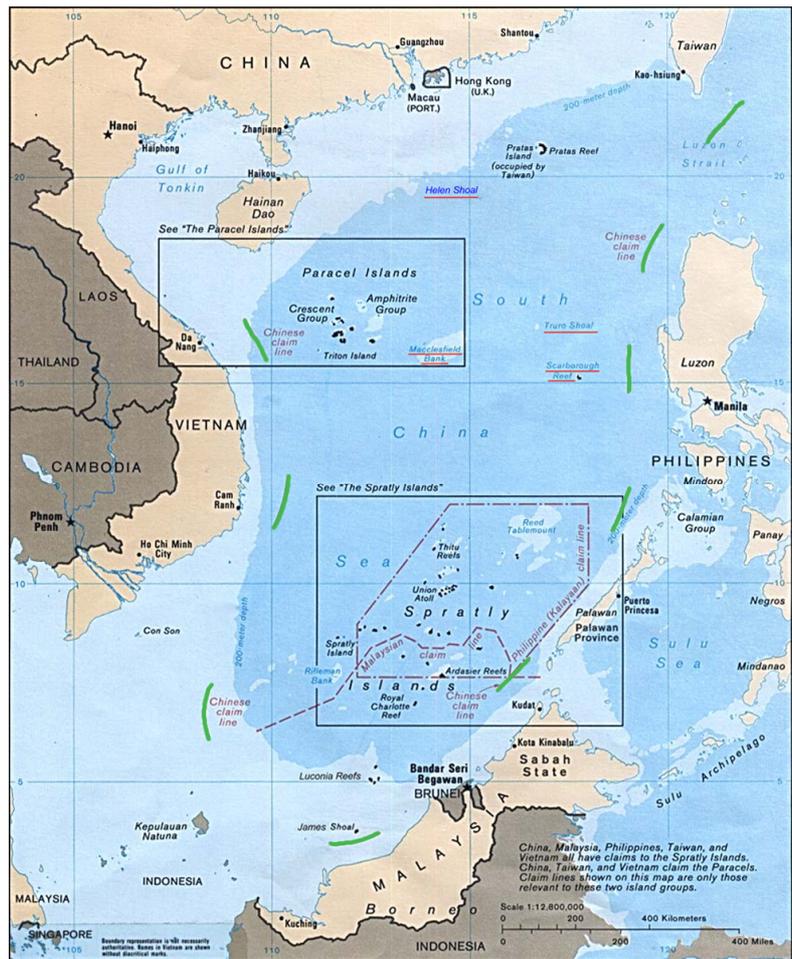
Post-Award Process and the Final Settlement of the Dispute

After the Arbitral Award of 12 July 2016, China immediately declared that it rejected the Award. The Philippines and the international community have to cooperate to convince China to comply with the Award and ensure its effectiveness.

Article 296 of the UNCLOS and Article 11 of Annex VII provide for the legally binding effect of an award on the parties to the dispute while the international community lacks the ultimate organ for the enforcement of the judgment or award of international courts and tribunals. In unilaterally referred cases, the post-judgment/award process is crucial for the final settlement of the dispute. In that process, negotiations on the basis of the judgment or award should be pursued amicably and faithfully.

In the present case, the effects of the findings concerning China’s historic rights in the South China Sea within the nine-dash line, the status of the maritime features concerned, the violation of the obligation to protect and preserve the marine environment, and the violation of the obligation to refrain from the aggravation and extension of the dispute after the initiation of the arbitral proceedings may be particularly noted.

The Tribunal found that China’s claim for its jurisdiction to the maritime areas within the nine-dash line and the arguments on the basis of its historic rights were incompatible with the UNCLOS, that the maritime features concerned were “low-tide elevations” or “rocks,” and that China breached the obligations under the UNCLOS through its activities. These will constitute the essential basis for the post-award negotiations. The concerns of the Tribunal with the aggravated situation after the initiation



The Tribunal found that China’s claim to the South China Sea on the basis of the “nine-dash line” [green dashes] was incompatible with the UNCLOS and that there was no evidence supporting the “historic rights” of China.

Source: Public Domain via Wikimedia Commons

of the arbitral proceedings are reflected in its findings concerning the violation of the obligations to protect and preserve the marine environment and to refrain from the activities which aggravated and extended the dispute after the initiation of the arbitral proceedings. In the post-award process, this obligation of self-restraint must be seriously taken into account.

The Award could examine only a part of the dispute in the South China Sea. The whole dispute is much more complicated and multinational. The States interested in this maritime area should consider the way to take advantage of the Award in their negotiations towards the final settlement of the whole dispute. The Award is expected to constitute the basis for the cooperation of all the interested States and the recovery of the stability and rule of law in this maritime area. The fact should be fully recognized that honour and reputation is very important in the international community.

Reprint from The Japan Journal, August 2016 (Vol. 13 No.5), pp. 16-17.

KAWANO Mariko

Professor in the Faculty of Law at Waseda University.
