

# Remarks on the 2<sup>nd</sup> Anniversary of the Arbitral Award On the South China Sea Dispute: ADR Forum

*Justice Antonio T. Carpio*

## **The July 12, 2016 Award in Essence**

The July 12, 2016 Award of the Arbitral Tribunal was a landmark ruling for three reasons. *First*, the Arbitral Tribunal ruled that China's so-called historic nine-dashed line cannot serve as legal basis to claim any part of the waters or resources of the South China Sea. China, like all other coastal states in the South China Sea, cannot claim maritime zones beyond what UNCLOS allows, that is, not exceeding 350 NM from the coastline. The result is that about 25 percent of the South China Sea are high seas, and all around the high seas are the exclusive economic zones of the adjacent coastal states. Of course, in the high seas and exclusive economic zones there is freedom of navigation and freedom of overflight as recognized under customary international law and UNCLOS.

*Second*, none of the geologic features in the Spratlys is capable of generating an exclusive economic zone. The result is that the Philippines has a full 200 NM exclusive economic zone facing the South China Sea. Excluded from this EEZ are the disputed high-tide geologic features which generate a territorial sea. As between China and the Philippines, these high-tide geologic features, involving territorial disputes, are: Johnson South Reef, McKennan

Reef and Scarborough Shoal. However, the Arbitral Tribunal ruled that the territorial waters of Scarborough Shoal are the traditional common fishing grounds of Filipino, Chinese and Vietnamese fishermen.

*Third*, certain features in the Spratlys, like Mischief Reef and Subi Reef, are low-tide elevations incapable of sovereign ownership. Moreover, Reed Bank, which is fully submerged, is part of the exclusive economic zone of the Philippines. This means that only the Philippines can put up structures on Mischief Reef, and that the gas and other resources in Reed Bank belong exclusively to the Philippines.

### **Tangible Acts Enforcing the Award**

After two years, has the Award been enforced? The Award can be enforced in two ways: *First*, when the parties to the Award – the Philippines and China - comply with the Award, either jointly or individually. *Second*, when other states adopt the Award by state practice.

Unfortunately for the Philippines, after the Award was issued, President Rodrigo Duterte hemmed and hawed whether to demand compliance from China. Finally, in December 2016, President Duterte declared he was “setting aside” the Award to secure loans and investments from China. The Department of Foreign Affairs clarified that the President will ask China for compliance at some future time during the term of the President. Thus,

effectively the President has placed in deep freeze any enforcement of the Award by the Philippines.

Fortunately for the Philippines, other states have adopted the Award by state practice. The Award affirmed the existence of high seas and EEZs in the South China Sea. This part of the Award has been enforced, and is being enforced, by many naval powers of the world by state practice through the exercise of freedom of navigation and overflight.

Immediately after the announcement of the Award, the U.S., U.K. and Australia declared that their navies and air forces will continue to sail and fly in the South China Sea in the exercise freedom of navigation and overflight. Subsequently, France declared that its naval vessels will also sail in the South China Sea in the exercise of freedom of navigation. Without much publicity, naval vessels of Canada, India and Japan also sail in the South China Sea in the exercise of freedom of navigation.

Thus, the freedom of navigation and overflight operations of many naval powers of the world effectively enforce the existence of high seas and EEZs in the South China Sea. These operations ensure that China's nine-dashed line, which encroaches on the EEZs of other coastal states, cannot claim any part of the waters or resources of the high seas and the EEZs of other coastal states.

The waters and fish in the high seas are part of the global commons, belonging to all mankind. The resources in the

EEZs – the fish, oil, gas and other minerals - can be exploited solely and exclusively by the adjacent coastal state. Clearly, the affirmance of the existence of high seas and EEZs around such high seas in the South China Sea, through the navigational and overflight operations of naval powers, redounds to the immense benefit of the Philippines, Vietnam, Malaysia, Brunei and Indonesia – the coastal states whose EEZs are encroached by China’s nine-dashed line.

These navigational and overflight operations prevent China from resurrecting the nine-dashed line, a claim that was declared legally baseless by the Arbitral Tribunal. In effect, these operations enforce the core legal ramifications arising from the Award – that there are high seas in the South China Sea, and around these high seas are the exclusive economic zones belonging to the adjacent coastal states, including the EEZ of the Philippines in the West Philippine Sea.

That is why the Philippines and the other coastal states should welcome, and even encourage, more freedom of navigation and overflight operations by other countries in the South China Sea. The more freedom of navigation and overflight operations that are conducted by other states, the stronger will be the enforcement of the Award. These operations assert and affirm, in accordance with international law as affirmed by the Award, that there are high seas and EEZs in the South China Sea. With these operations, China can no longer turn the South China Sea into a Chinese *Mare Nostrum*.

States conducting freedom of navigation and overflight operations should specifically invoke the Award to justify the actions of their navies and air forces in sailing and flying in the high seas and EEZs of the South China Sea. Specifically invoking the Award will draw stronger support for such navigational and overflight operations from the peoples of coastal states that rely on the Award to preserve and protect their EEZs from encroachment by China's nine-dashed line.

### **Constitutional Duty of the State to Protect Its EEZ**

Under UNCLOS, the coastal state has the right to secure and protect the living and non-living resources in its EEZ by patrolling its EEZ. Naval and aerial patrols are, of course, necessary to protect a coastal state's exclusive economic zone from poachers and polluters.

The Philippine Constitution mandates that "the State shall protect its marine wealth in its xxx exclusive economic zone." Under the Constitution, the Armed Forces of the Philippines is "the protector of the State" and is mandated "to secure the sovereignty of the State and the integrity of the national territory." Thus, the Constitutional duty to protect our exclusive economic zone falls on the Armed Forces of the Philippines.

The only way to protect our exclusive economic zone is for the Philippine Navy and Philippine Air Force to conduct

naval and aerial patrols in our exclusive economic zone for that is how poachers and polluters in the exclusive economic zone can be detected, identified and apprehended. As the Commander-in-Chief of the Armed Forces under the Constitution, the President has the constitutional duty to ensure that the Armed Forces conduct regular naval and aerial patrols in our exclusive economic zone.

Philippine naval and aerial patrols in our exclusive economic zone is not about freedom of navigation or overflight but about protecting and safeguarding the exclusive right of the Philippines to the living and non-living resources in its own exclusive economic zone. I believe that the Filipino people would like to see such patrols conducted regularly and periodically as mandated by the Constitution. This is obviously demanded by the national interest of our country.

### **Enforcement of the Award by other ASEAN States**

There is only one country – Indonesia - that has invoked the Award for a purpose other than freedom of navigation and overflight. In July 2017 Indonesia renamed the waters in its EEZ in the South China Sea as the North Natuna Sea after Indonesia's Natuna archipelago that faces the South China Sea. Indonesia premised its action by citing the Arbitral Tribunal's ruling that China's nine-dashed line has no legal effect. In short, Indonesia enforced a ruling in the Award by state practice.

## **Enforcement of Ruling by the Philippines**

How can the Philippines enforce the ruling in a similar way, by actions that do not require China's participation? Let me cite some of these actions.

*First*, the Philippines and Vietnam can enter into a sea boundary agreement of their overlapping extended continental shelves beyond the Spratlys. The premise of this agreement is that there is no geologic feature in the Spratlys that generate an exclusive economic zone as ruled by the Arbitral Tribunal in the Award, and thus there are no overlapping exclusive economic zones between the Philippines and Vietnam, only overlapping extended continental shelves. The sea boundary will be the median line and there can be no dispute on this. Such an agreement adopts a ruling in the Award by state practice, even if China is not a party to the agreement.

*Second*, a similar sea boundary agreement can be entered into between the Philippines and Malaysia to delineate their adjoining exclusive economic zones between Borneo and Palawan. The premise of this agreement is again that none of the islands claimed by either country in the Spratlys generates an exclusive economic zone as ruled by the Arbitral Tribunal. Consequently, there are no EEZs from these islands that will overlap with the EEZ of Borneo or Palawan. Again, such an agreement adopts a ruling in the Award by state practice, even if China is not a party to the agreement.

*Third*, the Philippines can file with the UN Commission on the Limits of the Continental Shelf an extended continental shelf claim off the coast of Luzon facing the South China Sea. This is a unilateral act of the Philippines, just like the filing by the Philippines of its extended continental shelf claim in Benham Rise in the Philippine Sea. The Philippines does not need the consent or participation of China in filing this claim. The premise of this claim is that the Philippines has a full 200 NM EEZ off the coast of Luzon, as ruled in the Award of the Arbitral Tribunal. The UN Commission will have to respect the Award of the Arbitral Tribunal because the Arbitral Tribunal, just like the UN Commission, is a creation under the authority of UNCLOS. The decision of the UN Commission will apply the ruling in the Award that the Philippines has a full 200 NM EEZ off the coast of Luzon.

### **The Red Line on Scarborough Shoal**

Not all is doom and gloom with the Philippine Government's policy on the West Philippine Sea. I am heartened that Secretary of Foreign Affairs Peter Cayetano has drawn a red line on Scarborough Shoal. That red line is: China cannot build on Scarborough Shoal. This should be the red line of the Philippines and the Filipino people. The DFA should campaign among ASEAN states, in particular among those states prejudiced by the nine-dashed line, to make Scarborough Shoal also ASEAN's red line: that China cannot build on Scarborough Shoal.



The DFA should also campaign for the United States to make Scarborough Shoal the official red line under the Philippine-U.S. Mutual Defense Treaty. After all it was President Obama who originally told President Xi Jinping in 2015 that Scarborough Shoal was a red line. Moreover, the U.S. has recognized Scarborough Shoal as part of Philippine territory when the U.S. was still the colonial power in the Philippines.

### **A Long Struggle Ahead**

I have always said that defending Philippine maritime zones in the West Philippine Sea is an inter-generational struggle. Today is just the second anniversary of the July 12, 2016 Award. We have a long way to go but we must stay the course. We have moved forward even in the face of a reluctant Duterte Administration. With the support of the Filipino people, the peoples of UNCLOS member states, and the world's naval powers that seek to maintain the rule of law in the oceans and seas of our planet, we shall persevere, and we shall prevail.

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