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After South China Sea Ruling

Good Fences or Good Neighbours: Implications for Maritime Boundaries

By Sam Bateman

Synopsis

The 12 July 2016 arbitral tribunal ruling in The Hague has specified that there are no islands in the Spratly group capable of generating a full set of maritime zones. This has theoretically helped agreement on maritime boundaries in the South China Sea but many problems still remain.

Commentary

THE WORLD was a simpler place when countries could only claim a three nautical mile (nm) territorial sea. All this has changed. Countries now require maritime boundaries if they have territory within 400 nm of each other - and more where there is an entitlement to an outer continental shelf beyond the exclusive economic zone (EEZ).

Maritime boundary-making is especially difficult in semi-enclosed seas, such as the South China Sea with numerous overlapping zones of jurisdiction. Few maritime boundaries have been agreed so far in the South China Sea. There are some continental shelf boundaries but few EEZ boundaries.

Good Fences or Good Neighbours?

Despite the old adage that “good fences make good neighbours”, sometimes it is impossible, for a variety of reasons, to build good “fences” in the sea. Agreement on further boundaries in the South China Sea is complicated by geography with the mainland states of China and Vietnam looking across to the offshore states of the

Philippines, Malaysia, Brunei and Indonesia, and the consequent need for tri-points where pairs of bilateral boundaries intersect.

The extant claim by the Philippines to Sabah also prevents boundary agreements between Malaysia and the Philippines.

While the recent ruling by the Arbitral Tribunal in The Hague on the dispute between China and the Philippines in the South China Sea has theoretically “cleared the air” with some aspects of maritime boundary-making, in practical terms it may not have helped the situation.

Islands and Rocks

The surprising feature of the ruling was the judgment that there are no “fully entitled” islands in the Spratly group. There are numerous ramifications of this judgment, including for the status of other islands in the South China Sea. Islands in both the Paracel and Pratas groups are much larger than in the Spratlys and likely to satisfy the criteria to be regarded as “fully entitled” islands. Maritime boundaries near the Paracels are also not possible while sovereignty over this group is disputed between China and Vietnam.

Theoretically the ruling that there are only ‘rocks’ in the Spratlys provides a basis for a system of EEZ boundaries in the South China Sea with a number of enclaved territorial seas around the “rocks”.

There may even be a patch of high seas in the middle of the sea although this may be closed off in part by the outer continental shelf claims by Vietnam and Malaysia. Vietnam could also help “clear the air”, as well as bolster ASEAN solidarity, by dropping its claim to features within the EEZs of Malaysia and the Philippines.

Complications

The importance the tribunal attached to EEZ jurisdiction may reinforce the nationalistic attitude the littoral states attach to their EEZs. They will be looking for “fences in the sea” rather than recognising that maritime boundaries are not an end in themselves but rather a means of effectively managing maritime space. This should be the basic objective of all the littoral states to the South China Sea. It is also their obligation under Part IX of UNCLOS dealing with cooperation in semi-enclosed seas.

There are other issues which complicate maritime boundary agreements in the South China Sea. Negotiation and adoption of a maritime boundary is fundamentally political, and the politics of maritime boundary-making restricts effective governance of the South China Sea. A country’s negotiators will be influenced by national sentiment and reluctant to concede sovereignty or sovereign rights over maritime space that the community regards, rightly or wrongly, as part of their own country.

Unfortunately this is the situation now in the South China Sea where the national media of claimant countries, including the Chinese media, have given wide coverage to the disputes. The recent ruling may reinforce these sentiments.

Another issue in determining maritime boundaries in the South China Sea is whether or not EEZ and continental shelf boundaries should coincide. Different approaches to this issue are evident around the world, depending as much as anything on the state of the bilateral relationship between the neighbouring countries. If the relationship is sound, overlapping jurisdiction may be feasible, but if it is not, the parties are unlikely to achieve the necessary level of agreement and cooperation.

While the general trend is to have coincident continental shelf and EEZ boundaries, this is not always possible, and states with overlapping claims may adopt separate boundaries for the EEZ and the continental shelf. This may be the case where a continental shelf boundary was agreed, largely on the basis of geological considerations, prior to wide acceptance of the EEZ regime under UNCLOS.

This issue is already a problem in the South China Sea where Indonesia and Malaysia have agreed a continental shelf boundary east of the Natuna islands, but no EEZ boundary. Malaysia wants the EEZ and continental shelf boundaries to coincide, but this is opposed by Indonesia. Similarly, Indonesia and Vietnam have agreed a continental shelf boundary but no EEZ boundary.

Need for Changed Mindsets

The South China Sea situation will only be settled when the bordering countries change their mindsets from one of sovereignty, sole ownership of resources and seeking “fences in the sea” (i.e. establishing maritime boundaries between neighbouring countries) to one of functional cooperation and cooperative management.

A cooperative management regime is the only solution to the problems of the South China Sea. The most acceptable framework for such a regime would be a web of provisional arrangements covering cooperation for different functions with perhaps even different areas for each function.

These functions include joint development of oil and gas resources, fisheries management, marine safety, marine scientific research, good order at sea, and preservation and protection of the marine environment. Regardless of whether or not maritime boundaries are agreed, urgent safety, resource and environmental problems dictate the need for increased dialogue and cooperation.

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