



The Republic of the Philippines vs. The People's Republic of China

Case No. 2013-19 in the Permanent Court of Arbitration
Before the Arbitral Tribunal constituted under UNCLOS Annex VII
12 July 2016
Mensah (President), Wolfrum, Pawlak, Cot, Soons, *Arbitrators*.



Dispute resolution under the UN Convention on the Law of the Sea

When a dispute exists between two states concerning the interpretation or application of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), they have a number of dispute settling mechanisms at their disposal. Apart from negotiations, or procedures established by general, regional, bilateral or other agreements, Part XV of the UNCLOS itself provides for conciliation, and several compulsory procedures entailing binding decisions. Among these compulsory procedures are judicial proceedings before the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice (ICJ); special arbitration, where the dispute relates to provisions on fisheries, the marine environment, marine scientific research, or navigation; and arbitration, governed by Annex VII of the UNCLOS.

After having exhausted political and diplomatic avenues for a peaceful negotiated settlement of its disputes with China over entitlements in the West Philippine Sea, which came to a boil in 2012 with the Scarborough Shoal standoff, the Republic of the Philippines initiated arbitration in January 2013. Arbitration was also seen as the most efficacious means of ensuring that the Rule of Law is preserved across the South China Sea, particularly since China's highly likely non-participation in legal proceedings will not preclude an arbitral tribunal from ruling on the merits of an issue.

Timeline

2013	
January 22	The Philippines serves China a Notification and Statement of Claim "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea". Solicitor General Francis H. Jardeleza, now Associate Justice of the Philippine Supreme Court, was the Republic's Agent in the arbitration. The Philippines appointed Rüdiger Wolfrum (Germany) as the first member of the arbitral tribunal to be constituted.
February 19	China sends the Philippines Note Verbal describing its position on South China Sea issues, returning the Notification and rejecting the arbitration.
February 21	China's deadline to appoint a second member of the arbitral tribunal, under Article 3 (b) of UNCLOS Annex VII lapses.
February 22	The Philippines requests ITLOS President Shunji Yanai for appointment of second member of the arbitral tribunal, in view of the lapse of China's deadline.
March 23	The ITLOS President appoints Stanislaw Pawlak (Poland) as the second member of the arbitral tribunal.
March 25	The Philippines requests the ITLOS President to appoint the remaining members of the arbitral tribunal, in accordance with Annex VII.
April 24	The ITLOS President appoints Jean-Pierre Cot (France), Ambassador M.C.W. Pinto (Sri Lanka) and Alfred Soons (the Netherlands), to the Tribunal. Pinto was further appointed president of the arbitral tribunal.
May 21	Ambassador Pinto elects to step down as member and president of the arbitral tribunal.
May 27	The Philippines requests the ITLOS President to fill the vacancy.
June 21	After consultations, Thomas Mensah (Ghana), also a former president of the ITLOS, was appointed member and president of the arbitral tribunal. Arbitrators Wolfrum, Pawlak and Cot are also presently sitting judges of the ITLOS.
July 11	The members of the arbitral tribunal (hereafter, the "Tribunal") holds its first meeting at the Peace Palace in The Hague, confirming earlier consultations to have the Permanent Court of Arbitration act as registry in the proceedings.

July 29	China reiterates its rejection of the arbitration in a Note Verbale, returning with it communications and documents from the Tribunal.
August 27	The Tribunal adopts its Rules of Procedure. (Published on 3 February 2014) Only the Philippines submitted comments to the draft version of said Rules.
November 14	The Chinese Ambassador to the United Kingdom requests a meeting with the President of the Tribunal. The Tribunal sends a letter to remind the Parties to refrain from <i>ex parte</i> communications with members of the Tribunal; encouraging that questions of a procedural nature be directed to the Registry. The Tribunal also noted that the Registry had already discussed informal procedural questions with a representative of the Chinese embassy on two prior occasions.
2014	
February 28	The Philippines applies for leave to amend its Statement of Claim by adding a request to determine the status of Second Thomas Shoal under the UNCLOS. The Philippines' Amended Statement of Claim was subsequently accepted.
March 9	China prevents rotation and resupply of Philippine personnel stationed at the Second Thomas Shoal (Ayungin Shoal).
March 11	The Philippines' Department of Foreign Affairs summons the Chinese Charge d'Affaires to transmit a Note Verbale objecting to China's acts constituting a "clear and urgent threat to the rights and interests of the Philippines under the UNCLOS", and urging China to desist from further interference.
March 18	The Philippines writes to the Tribunal reserving its right to bring an application for provisional measures on account of China's recent conduct at Second Thomas Shoal, claiming that it "seriously aggravates and extends the dispute."
March 30	The Philippines files its Memorial and accompanying annexes, on the last day to submit the same, addressing matters relating to the jurisdiction of the Tribunal, the admissibility of its claims, and the merits of the dispute.
April 7	The Philippines writes the Tribunal anew, apprising it of China's most recent actions at the Second Thomas Shoal, and reiterates its reservation of rights, including the bringing of an application for provisional measures.
April 12	Viet Nam sends the Tribunal a Note Verbal seeking to be furnished copies of documents related to the proceedings, as its legal interests and rights may be affected by the arbitration. The Philippines disagreed with Viet Nam's claim that its interests and rights may be affected, but nevertheless consented to furnishing them with copies of documents in the interest of transparency, and since Viet Nam is among the coastal States in the South China Sea. The Tribunal subsequently agreed to grant Viet Nam access to the Memorial of the Philippines and its annexes, noting that it would consider in due course subsequent requests to access other documents.
May 14 - 15	The Tribunal meets in The Hague, drawing a proposed timetable for the proceedings. The Tribunal recalls China's position rejecting the arbitration, but notes that it remains open to China's participation in the proceedings.
May 15	The Philippines' Department of Foreign Affairs releases photos gathered from Philippine intelligence sources showing extensive reclamation by China on Mabini Reef (Johnson South Reef).
May 21	The Registry receives a Note Verbal from China again communicating its non-acceptance of or participation in the proceedings.
June 2	The Tribunal sets 15 December 2014 as China's deadline to submit a Counter-Memorial.
July 30	The Philippines writes to the Tribunal, drawing attention to China's land reclamation activities at McKennan, Johnson, Gaven and Cuarteron Reefs, expressing concern for the possible effects of the same on the maritime entitlements of the features, the marine environment, the significant departure from the <i>status quo</i> , among others. It also noted a State's obligation not to take action that might aggravate or extend a pending dispute, and recalled the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea.

December 5	The Ministry of Foreign Affairs of Viet Nam sends the Tribunal a Statement on the proceedings requesting that it give due regard to Viet Nam's position and legal interests, supporting the Tribunal's competence as to certain matters in the Convention, and rejecting any of China's claims based on the Nine-Dash Line, among others.
December 7	China publishes a Position Paper on the arbitration, maintaining that the Tribunal lacks jurisdiction to consider the Philippines' submissions, qualifying that it shall not be regarded as its acceptance of or participation in the arbitration. The next day, the Chinese Embassy in the Netherlands deposits a Note Verbal with the PCA attaching the Position Paper and its English translation.
December 15	China's deadline to submit a Counter-Memorial, as provided in the Tribunal's Procedural Order No. 2, lapses.
December 17	The Arbitral Tribunal requests the Philippines in its Procedural Order no. 3 to submit further written arguments on specific issues. In an accompanying letter, the Tribunal also invited the Parties to comment on the possibility of, among others, bifurcation of the proceedings; appointment of an expert hydrographer; a site visit; and <i>amicus curiae</i> submissions.
December 22	Viet Nam sends the Tribunal a Note Verbale, requesting to be furnished a copy of Procedural Order No. 3 and further communications between the Tribunal and the Parties.
2015	
January 22	The Philippine Coast Guard reports that at least 24 Chinese Utility Boats were seen collecting giant clams in the lagoon of Scarborough Shoal.
January 26	The Philippines sends two letters to the Tribunal. In the first letter, it stated that it would be appropriate to allow Viet Nam access to the requested documents. In the second letter, the Philippines opposed bifurcation of proceedings, and suggested standards for proceeding with the other proposals in the Tribunal's letter dated December 17.
January 29	The Philippine Coast Guard reports that three Philippine-flagged fishing vessels were intentionally rammed by a Chinese Coast Guard vessel in Scarborough Shoal, causing damage to the vessels and endangering the lives of the fishermen on board.
February 4	The Philippines' Department of Foreign Affairs hands over two protest notes to representatives of the Chinese Embassy in Manila, regarding the incidents at Scarborough Shoal.
February 6	The Chinese Ambassador to The Netherlands writes individually to the members of the Tribunal, advancing China's "omnibus objection to all procedural applications or steps that would require some kind of response from China". It also opposed intervention by other States, <i>amicus curiae</i> submissions, and site visits.
February 17	The Tribunal authorizes the Registry to provide Vietnam copies of the documents, also stating that it would address the permissibility of intervention "only in the event that Viet Nam in fact makes a formal application for such intervention".
February 25	The Philippines' Department of Foreign Affairs summons Charge d'Affaires of the Chinese Embassy in Manila to protest China's efforts at prohibiting Filipino fishermen's fishing activities at the Scarborough Shoal.
March 16	The Philippines submits a Supplemental Written Submission, on the last day to submit the same, under the direction of the new Agent, then Acting Solicitor General Florin T. Hilbay, who would later become Solicitor General. Viet Nam's Statement dated 5 December 2014 is included as Annex 468 to the Supplemental Written Submission.
April 20	The Philippine Military releases photos taken on April 11-12 showing massive reclamation activities and suggesting possible militarization of features in 7 areas of the West Philippine Sea (Mischief Reef, Subi Reef, Cuarteron Reef, Keenan Reef, Fiery Cross Reef, Gaven Reef, Mabini/Johnson Reef).

<p>April 21</p>	<p>In its Procedural Order No. 4, the Tribunal considered China’s Position Paper and other communications to the same body as a “plea concerning jurisdiction”, which, under the Tribunal’s Rules of Procedures, necessitates a hearing on the question of jurisdiction, treated as a preliminary objection. Bifurcation of the proceedings was also found to be appropriate – that is, the conduct of separate hearings on jurisdiction and the merits of the case.</p> <p>In an accompanying letter, the Tribunal explained that it does not intend to open the hearing to the public, and will have to subsequently consider whether representatives of interested States may attend as observers, and whether verbatim records of the hearings will be made public at a later date. The Tribunal also sought the parties’ views as to whether a reservation of time in the next year should already be made in case of subsequent hearing on the merits, as well as the ascertainment of the availability of potential technical experts who may assist the Tribunal.</p> <p>The Tribunal would later ask Parties to reserve dates in late November 2015.</p>
<p>April 27</p>	<p>The Philippines writes the Tribunal (which letter was received only on May 21), describing China’s current engagement in massive land reclamation projects at various features in the South China Sea. In light of such deeply troubling activities, and the serious harm that may be caused to the marine environment, the Philippines suggested that a merits hearing be provisionally scheduled at the earliest possible date.</p>
<p>June 11</p>	<p>Malaysia requests the Tribunal in a Note Verbale to be furnished documents related to the proceedings, and for a small delegation of representatives to be permitted to attend the Hearing on Jurisdiction as observers.</p>
<p>June 16</p>	<p>China’s deadline to provide comments in response to the Philippines’ Supplemental Written Submission lapses.</p>
<p>June 21</p>	<p>Philippines expresses that it has no objections to Malaysia’s request. The Tribunal would later permit Malaysia access to certain documents and attendance at the Hearing on Jurisdiction.</p>
<p>June 23</p>	<p>The Tribunal writes to the Parties in preparation for the Hearing on Jurisdiction, setting out a list of issues that the Philippines might wish to address in the Hearing.</p>
<p>June 26</p>	<p>Japan requests permission to be allowed to attend the Hearing on Jurisdiction as an observer. The Philippines did not object and the same would be subsequently granted.</p>
<p>June 29 - 30</p>	<p>The Tribunal receives similar requests to have small delegations from Viet Nam, Indonesia and Thailand to attend the Hearing on Jurisdiction as observers. The Philippines did not object to the requests. The Tribunal would subsequently grant the same and reminded that their role would be to watch and listen, not to make statements.</p>
<p>July 1</p>	<p>China’s Ambassador to the Netherlands sends a second letter to the members of the Tribunal recalling China’s consistent policy and practice of dispute resolution through negotiation and consultation, and its legitimate right under the UNCLOS to not accept imposed solution or unilateral resort to third-party settlement. Further, it noted that China’s position had been elaborated in its Position Paper.</p>
<p>July 7</p>	<p>The Embassy of Brunei Darussalam in Brussels asks to be provided transcripts of the arbitration and any other relevant information as soon as it becomes available. The request would later be granted, as well as similar requests by the various observer delegations.</p>
<p>July 7-13</p>	<p>The Tribunal convenes for hearings on jurisdiction and admissibility. Representatives of Malaysia, Indonesia, Vietnam, Thailand and Japan appeared as observers.</p> <p>On July 12, the Philippines submits to the Tribunal a copy of a Note Verbale from the Embassy of China in Manila dated 6 July 2015; Annex 583 comprising a list of data of satellite photos and navigational charts; and a list of new Annexes that have been referred to in the oral pleadings.</p> <p>After the closing statement by the Agent, the Presiding Arbitrator invited the Philippines to submit further written responses on matters that may have been raised during or after the</p>

	Hearing, by July 23, which China may comment on by 17 August.
July 23	The Philippines filed its Written Responses to the Tribunal's July 13 Questions.
August 7	The Tribunal proposes to appoint Mr. Grant Boyes (Australia) as the Tribunal's expert hydrographer. The Philippines had no objection, but proposed a clarification to the draft Terms of Reference, that in providing the Arbitral Tribunal with technical assistance, the Expert shall respect that it is the Arbitral Tribunal, and not the Expert, that makes any determination as to legal questions.
August 17	China's deadline to comment on the Philippines' Written Responses lapses.
August 24	China publishes "Foreign Ministry Spokesperson Hua Chunying's Remarks on the Release of the Transcript of Oral Hearing on Jurisdiction by the South China Sea Arbitral Tribunal Established at the Request of the Philippines", where the spokesperson recalled and expounded its position, and elaborated legal grounds for its non-acceptance and non-participation.
September 10	The Tribunal informs the parties of a request by the Embassy of Singapore in Brussels seeking observer status at any future hearing. The Philippines did not object to the request. The Parties were invited to comment on a provisional schedule for the Hearing on the Merits in November.
September 27	The Tribunal requests further information from the Philippines about certain annexes in the record.
October 7	The Philippines responds to the Tribunal's requests.
October 29	The Tribunal renders an Award on Jurisdiction and Admissibility.
November 6	The observer States that attended the Hearing on Jurisdiction, as well as Brunei and Singapore, were advised that they could send delegations of up to five representatives as observers. The Philippines seeks leave to present for examination two experts, Professor Clive Schofield and Professor Kent Carpenter.
November 10	The Tribunal provides an "Annex of Issues the Philippines May Wish to Address" as a guidance for the Hearing on the Merits.
November 14	The Philippines sought leave to supplement its written pleadings with additional documentary and testimonial evidence and legal authorities. These were later granted.
November 18	The Tribunal forwards to the Parties a Note Verbale from the Embassy of the United States requesting to send a representative to observe the hearing. The communication characterized the US as a "major coastal and maritime State" that is "continuing to pursue its domestic Constitutional processes to accede to the [UNCLOS]". The Philippines had no objections to this request.
November 23	The Tribunal decides that only interested States parties to the UNCLOS will be admitted as observers. The United Kingdom's Embassy sends a Note Verbal to the Tribunal applying for "neutral observer status". The Philippines had no objection to the same. The Tribunal later granted the request.
November 24	The Australian Embassy requests the Tribunal to be allowed to observe the Hearing on the Merits, specifying, among others, that a significant proportion of its global seaborne trade passes through the South China Sea. The Philippines did not object to the request. The Tribunal later granted the request.

November 24 - 30	<p>Hearing on the Merits were conducted at The Hague. The Philippines' Agent, Solicitor General Florin T. Hilbay delivered introductory remarks. The Philippines' Counsel, Mr. Paul S. Reichler, Professor Philippe Sands QC, Mr. Lawrence H. Martin, Professor Bernard H. Oxman, Professor Alan Boyle, and Mr. Andrew Loewenstein presented the Philippines' legal arguments. The Tribunal also heard expert testimony from Professor Clive Schofield and Professor Kent Carpenter. The Philippines' closing statement was delivered by the Philippines' Secretary of Foreign Affairs, H.E. Albert Ferreros del Rosario.</p> <p>Representatives of Australia, Indonesia, Japan, Malaysia, Singapore, Thailand, and Vietnam attended the Hearings as observers. The UK did not attend the Hearings, after all.</p>
November 30	The Philippines' Agent submits its Final Submission in written form.
December 1	The Tribunal notes that the Final Submissions reflected three amendments to Submissions No. 11, 14 and 15, thus: on China's failure to protect and preserve the marine environment around 6 reefs; and on dredging, artificial island-building and construction activities in 7 reefs. As to Submission No. 15, which the Philippines was directed to clarify, the Philippines sought a declaration that "China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the [SCS] with due regard to those of the Philippines under the Convention."
December 9	China's deadline to submit comments on the amendments made by the Philippines lapses.
December 14	The Philippines submits documents that have been referenced or requested during the Hearing, including EOMAP satellite bathymetry analysis pertaining to the nature of certain maritime features located between Thitu and Subi Reef.
December 16	The Tribunal grants the Philippines leave to make the above amendments.
December 18	The Philippines files a supplementary response to Judge Wolfrum's questions on evidence of the alleged taking of giant clams and sea turtles by the Chinese.
December 21	The Chinese Ministry of Foreign Affairs Spokesperson comments on the published transcript of the Hearing of the Merits on the case, that the arbitration is a political provocation under the cloak of law by which the Philippines "[attempts] to negate China's sovereignty over the Nansha Islands and deny the validity of the Cairo Declaration and Potsdam Proclamation", among others.
2016	
January 1	China's deadline to file a comment in writing on anything said during the Hearing or subsequently filed by the Philippines, lapses.
January 11	The Tribunal conveys a request from the Japanese Embassy for copies of relevant new documents in relation to the Hearing on the Merits. The Philippines did not object to providing observer States with documents.
February 5	The Tribunal writes the Parties that it had decided it would benefit from further evidence and clarification, and from the views of independent experts. China was specifically asked whether it had conducted an environmental impact study in accordance with UNCLOS, and if it had, to provide the Tribunal copies. The Tribunal also decided to appoint experts to be sought for independent opinion, on the alleged detrimental effect of Chinese activity in the coral reef systems in the Spratlys, and on navigational safety issues.
February 26	The Tribunal proposes the appointment of Captain Gupreet Singh Singhota (UK) as an expert on navigational safety issues, and invites comments from the Parties.
February 29	The Tribunal proposes the appointment of Dr. Sebastian Ferse (Germany) as an expert on coral reef issues, and invites comments from the Parties. The Philippines would later approve the proposed appointments.
March 11	The Philippines submits comments accompanied by 30 new annexes, including two new expert reports, by Dr. Ryan T. Bailey on "Groundwater Resources Analysis of Itu Aba" and by Dr. Peter P. Motavalli on "Soil Resources and Potential Self-Sustaining Agricultural Production on Itu Aba." The Tribunal invites China to comment on the new submissions.

March 23	Chinese (Taiwan) Society of International Law submits an <i>amicus curiae</i> brief to the Tribunal, respecting Itu Aba (Taiping Island).
April 1	<p>The Tribunal sends the Parties three letters. In the first, the Tribunal informed the Parties that it finds it appropriate to refer to original records based on the direct observation of the features in question, and provided the Parties documents and survey materials it obtained from the United Kingdom Hydrographic Office's Archives, which it considered as having done the most extensive survey work in the South China Sea prior to 1945. The UKHO Archives also hold certain Japanese records captured during WWII.</p> <p>In the second letter, Dr. Ferse, the appointed expert on coral reefs, requested the Philippines to seek clarification from Prof. J.W. McManus, whose report the Philippines put on record.</p> <p>In the third letter, the Tribunal invited comments on four documents that had come to its attention, namely, a "Position Paper on ROC South China Sea Policy" (Taiwan); the Chinese Foreign Ministry Spokesperson's response to the latter; a document published by the Chinese (Taiwan) Society of International Law; and some remarks of then Taiwanese President Ma Ying-jeou at an international press conference, on the subject of Itu Aba.</p>
April 12	The Tribunal informs the Parties of its intention to appoint two additional coral reef experts, namely Professor Peter Mumby (UK and Australia) and Dr. Selina Ward (Australia). The Philippines approved of their appointments.
April 18	The Tribunal sends to the Parties the expert opinion of Captain Singhota on navigational safety issues.
April 25	The Philippines files comments expressing that although it finds that it is within its rights to request the Tribunal to disregard the additional materials on Itu Aba, it chooses not to do so, recognizing the exceptional difficulties resulting from China's non-appearance. It also sent the Tribunal two revised translations and 21 new annexes, including supplemental expert reports from Dr. Bailey and Dr. Motavalli. The Philippines submitted that Taiwan's newest materials must be treated with caution, and that no further attempts to influence the deliberations should be entertained, among others.
April 26, 28	The Philippines files responses to Dr. Ferse's request, including a letter and updated report from Prof. J.W. McManus, and a supplementary declaration from Prof. Carpenter; and to the UKHO materials, which it found to be confirming the Philippines' position that the relevant features are low-tide elevation, or rocks.
April 29	The Tribunal sends the Parties the independent expert opinion of Dr. Ferse, Professor Mumby, and Dr. Ward, on the coral reefs
May 12	The Chinese Ministry of Foreign Affairs Treaty and Law Department Director-General Xu Hong gives a Briefing on the policies and positions of the Chinese Government, from an international law perspective, pointing out "four bars" to the initiation of compulsory arbitration.
May 20	Representatives from the Chinese Embassy in The Hague presented a letter to the members of the Tribunal from the new Ambassador, expounding on its position that bilateral negotiation and consultation are the preferred modes of settling disputes.
May 26	The Tribunal informs the Parties that it finds appropriate to consult materials from the 1930s obtained from the <i>Bibliothèque Nationale de France</i> and the <i>Archives Nationales d'Outre-Mer</i> (National Overseas Archives) in order to gain a more complete picture as to the natural conditions of the South China Sea features at that time.
June 3	<p>The Philippines comments on the French materials and supplied supplementary materials and a further expert report from Dr. Motavalli.</p> <p>The new Chinese Ambassador sends a second letter to the Tribunal, with a statement of the Foreign Ministry Spokesperson on China's indisputable sovereignty over the Nansha Islands, including Itu Aba. Chinese activities on the island are said to be manifestly recorded in Geng Lu Bu (Manual of Sea Routes), and the working and living practice of the people therein, proves its status as an island.</p>

June 8	The new Chinese Ambassador writes the members of the Tribunal laying out jurisdictional points previously made by China, highlighting negotiation as a preferred mode of settling disputes.
June 10	<p>The Philippines comments on the new Ambassador's second letter that there is no basis in the UNCLOS for China's claimed TS, EEZ and CS "based on the Nansha Islands as a whole". Furthermore, the Geng Lu Bu, a navigation guide for Hainan fishermen, merely confirms that China's fishermen only sojourned temporarily at Itu Aba.</p> <p>The new Chinese Ambassador writes a fourth letter to the members of the Tribunal, enclosing a statement by the Chinese Society of International Law, entitled "The Tribunal's Award in the 'South China Sea Arbitration' Initiated by the Philippines is Null and Void".</p> <p>During the same period that the Tribunal received the four most recent letters from the Chinese Ambassador, the Registry received copies or was made aware of various unsolicited statements and commentaries from Chinese associations and organisations pertaining to issues covered in the Award on Jurisdiction. These statements, however, were not provided to the Tribunal by the Chinese Government or any Party to the Convention.</p>
June 23	The Embassy of Malaysia in the Netherlands sent the Tribunal two Notes Verbales drawing attention to an issue with certain maps contained in the Award on Jurisdiction and requesting that the Tribunal show due regard to the rights of Malaysia, though it was not seeking to intervene.
June 28	The Philippines commented on Malaysia's communications, noting that it had presented the maps in such a way as to preserve its own claim but would leave the issue to the Tribunal's discretion; and that Malaysia's assertions, are "without merit", and "untimely".
June 29	The Tribunal advises that it would be issuing its Award on the merits on July 12.

The Case for the Philippines

The Philippines, in 15 specific submissions, sought rulings in respect of the following:

1. Declarations that the Philippines' and China's respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the UNCLOS; and that China's claims based on "historic rights" encompassed within its so-called "Nine-dash Line" are inconsistent with the UNCLOS and therefore invalid;
2. Determinations as to whether, under the UNCLOS, certain maritime features claimed by both states are properly characterized as islands, rocks, low tide elevations, or submerged banks. The Philippines claims in particular that Scarborough Shoal and eight of such features in the Spratlys are low-tide elevations or submerged banks that merely generate a territorial sea (TS), not an exclusive economic zone (EEZ) or continental shelf (CS);
3. Declarations that China has violated the UNCLOS by interfering with the Philippines' sovereign rights and freedoms, through construction and fishing activities that have harmed the marine environment.

China's Position Paper

China contested the Tribunal's jurisdiction on the following grounds:

- That the essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the SCS, which is beyond the scope of the Convention, and does not concern the interpretation or application of the Convention;
- That the two countries have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the SCS, to settle their relevant disputes through negotiations. Thus, the Philippines' resort to arbitration is a breach of its obligations under international law;
- Even assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation,

which is covered by China's 2006 declaration excluding maritime delimitation from its acceptance of compulsory dispute settlement procedures under the UNCLOS

Award on Jurisdiction and Admissibility
29 October 2015

The Tribunal found that the submissions of the Philippines did not *per se* involve disputes concerning sovereignty or maritime boundary delimitation, which are among the issues that may be excluded by States from the subject-matter jurisdiction of compulsory dispute settlement procedures entailing binding decisions under the UNCLOS. However, this exclusion of the issue of sovereignty or maritime boundary delimitation is premised on the Philippines' position that the features claimed by China belong to the Philippines; are low-tide elevations or rocks only that do not generate either a TS, EEZ, or a CS, or EEZ or a CS only; and that as such, in the case that any/some/all of these features are found to belong to China, the maritime entitlements they will generate, if at all, will not overlap with the Philippines' own maritime entitlements.

The above reasoning will also determine whether China acted unlawfully with respect to the enjoyment of the Philippines of its rights, and the obligation to protect and preserve the marine environment, within the disputed areas. The Tribunal also acknowledged that other findings on the merits may preclude its jurisdiction, where fishing and fisheries related law enforcement, and military activities, may be in issue. With respect to the Scarborough Shoal, however, the Tribunal found that the exceptions under Article 297 and 298 cannot oust it of jurisdiction, given that the activities complained of involve traditional fishing rights and other events occurring in the territorial sea, a maritime area over which the said provisions have no application.

Finally, the Tribunal asked the Philippines to clarify the content and narrow the scope of its last submission, requesting a declaration that "China shall desist from further unlawful claims and activities."

The Tribunal's Decisions on the Merits of the Philippines' Claim
12 July 2016

1. The 'nine-dash line' and China's claim to historic rights in the maritime areas of the South China Sea

Whether China has historic rights to resources in the South China Sea beyond the limits of the maritime zones that it is entitled to pursuant to the Convention

- Based on the history of the Convention and its provisions concerning maritime zones, the Convention was intended to comprehensively allocate the rights of States to maritime areas
- The question of pre-existing rights to resources was considered during the negotiations on the creation of exclusive economic zone and a number of States wished to preserve historic fishing rights in the new zone: this position was rejected; the final text of the Convention gives other States only a limited right of access to fisheries in the exclusive economic zone and no rights to petroleum or mineral resources
- China's claim to historic rights to resources was incompatible with the detailed allocation of rights and maritime zones in the Convention: that China had historic rights to resources in South China Sea waters, such rights were extinguished when the Convention entered into force to the extent that they were incompatible with the Convention's system of maritime zones

Whether China actually had historic rights to resources in the South China Sea prior to the entry into force of the Convention

- Prior to the Convention, the waters of the South China Sea beyond the territorial sea were legally considered part of the high seas where vessels from any State can fish and navigate
- Historical navigation and fishing by China in the waters of the South China Sea were an exercise of high sea freedoms rather than a historic right; there is no evidence that China had historically exercised exclusive control over the waters of the South China Sea or prevented other States from exploiting their resources

- Between the Philippines and China, there was no legal basis for China to claim historic rights to resources, in excess of the rights provided by the Convention, within the sea areas falling within the 'nine-dash line'

2. The status of features in the South China Sea

Whether certain coral reefs claimed by China are or are not above water at high tide

- Articles 13 and 121: features that are above water at high tide generate an entitlement to at least a 12-nautical mile territorial sea; features that are submerged at high tide generate no entitlement to maritime zones
- Many of the reefs in the South China Sea have been heavily modified by recent land reclamation and construction; the Convention classifies features on the basis of their natural condition
- Evaluation of features based on the assistance of an expert hydrographer and archival materials and historical hydrographic surveys
 - Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are high-tide features, and
 - Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal were submerged at high tide in their natural condition
 - But Gaven Reef (North) and McKennan Reef are high-tide features

Whether any of the features claimed by China could generate an entitlement to maritime zones beyond 12 nautical miles

- Article 121 of the Convention: islands generate an entitlement to an exclusive economic zone of 200 nautical miles and to a continental shelf, but rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf – closely linked to the expansion of coastal State jurisdiction and intended to prevent insignificant features from generating large entitlements to maritime zones that would infringe on entitlements of inhabited territory or on high seas and the area of the seabed reserved for the common heritage of mankind
- Entitlements of a feature depend on the a) objective capacity of a feature, b) its natural conditions to sustain either c) a stable community of people or d) economic activity that is neither dependent on outside resources nor purely extractive in nature
- Even if many of the features are currently controlled by one or other of the littoral States, which have constructed installations and maintained personnel there and have been modified to improve their habitability (by land reclamation and construction of infrastructure), the current presence of official personnel on many of the features does not establish their capacity, in their natural condition, to sustain a stable community of people and considered that historical evidence of habitation or economic life was more relevant to the objective capacity of the features
- Temporary use of features (as in by small groups of Chinese fishermen and from other states in the Spratly Islands and Japanese fishing and guano mining enterprises) did not amount to inhabitation by a stable community and that all historical economic activity had been extractive in nature
- All high-tide features in the Spratly Islands are legally "rocks" that do not generate an exclusive economic zone or continental shelf
- The Convention does not provide for a group of islands (such as the Spratly Islands) to generate maritime zones collectively as a unit

3. Chinese activities in the South China Sea

Lawfulness of various Chinese actions in the South China Sea under the Convention

- Because Mischief Reef, Second Thomas Shoal and Reed Bank are submerged at high tide and are not overlapped by any possible entitlement of China, they form part of the exclusive economic zone and continental shelf of the Philippines; the Convention is clear in allocating sovereign rights to the Philippines with respect to sea areas in its exclusive economic zone
- China had violated the Philippines' sovereign rights with respect to its exclusive economic zone and continental shelf: China had a) interfered with Philippine petroleum exploration at Reed Bank, b) purported to prohibit fishing by Philippine vessels within the Philippines' exclusive economic zone, c) protected and failed to prevent Chinese fishermen from fishing within the Philippines' exclusive economic zone at Mischief Reef

and Second Thomas Shoal, and d) constructed installations and artificial islands as Mischief Reef without the authorization of the Philippines

Traditional fishing at Scarborough Shoal

- Fishermen from both China and the Philippines and from other countries had long fished at the Scarborough Shoal and had traditional fishing rights in the area
- Scarborough Shoal is above water at high tide so it generates an entitlement to a territorial sea, its surrounding waters do not form part of the exclusive economic zone, and traditional fishing rights were not extinguished by the Convention
- China had violated its duty to respect the traditional fishing rights of Philippine fishermen by halting access to the Shoal after May 2012

Effect of China's actions on the marine environment

- China's large scale land reclamation and construction of artificial islands at seven features in the Spratly Islands has caused severe harm to the coral reef environment
- China violated its obligations under Articles 192 and 194 of the Convention to preserve and protect the marine environment with respect to fragile ecosystems and the habitat of depleted, threatened, or endangered species
- Chinese fishermen were engaged in the harvesting of endangered sea turtles, corals and giant clams on a substantial scale in the South China Sea using methods that inflicted severe damage on the coral reef environment; Chinese authorities were aware of these and failed to fulfill their due diligence obligation under the Convention to stop them

Lawfulness of conduct of Chinese law enforcement vessels at Scarborough Shoal in April and May 2012

(Chinese vessels sought to physically obstruct Philippine vessels from approaching or gaining entrance to the Shoal)

- Assisted by an independent expert on navigational safety and expert evidence on navigational safety provided by the Philippines
- Chinese law enforcement vessels had repeatedly approached the Philippine vessels at high speed and to cross ahead of them at close distances, creating serious risk of collision and danger to Philippine ships and personnel
- China breached its obligations under the Convention on the International Regulations for Preventing Collisions at Sea (1972), and Article 94 of the Convention concerning maritime safety

4. Aggravation of the dispute between the parties

Whether China's recent large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands since the commencement of the arbitration had aggravated the dispute between the Parties

- Parties engaged in a dispute settlement procedure have a duty to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process
- China has a) build a large artificial island on Mischief Reef which is within the exclusive economic zone of the Philippines, b) caused permanent harm to the coral reef ecosystem, and c) permanently destroyed evidence of the natural condition of the features in question
- China violated its obligations to refrain from aggravating or extending the Parties' disputes during the pendency of the settlement process

5. Future conduct of the parties

Philippines request for declaration that China shall respect the rights and freedoms of the Philippines and comply with its duties under the Convention

- Both the Philippines and China have accepted the Convention and general obligations of good faith define and regulate their conduct
- The root of the disputes at issue in this arbitration lies not in any intention of any Party to infringe on the legal rights of the other but in the fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea
