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The South China Sea Arbitration Award

*Office of the Staff Judge Advocate, U.S. Indo-Pacific Command**

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Initiation of Arbitration. On January 22, 2013, the Philippines (GRP) initiated arbitration proceedings against China (PRC) pursuant to Articles 286 and 287, and Article 1 of Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Both the GRP and PRC are Parties to UNCLOS and are therefore subject to the compulsory dispute settlement provisions of the Convention. Nonetheless, the PRC presented a Note Verbale to the GRP on February 19, 2013, rejecting the arbitration.

The GRP requested that the Tribunal determine the role of China's claimed historic rights and the source of maritime entitlements in the South China Sea (SCS), the status of the SCS maritime features and the maritime entitlements these features can generate, and the lawfulness of certain PRC actions that the GRP alleged violated UNCLOS. Consistent with the UNCLOS dispute settlement provisions, the Tribunal did not rule on any question of sovereignty over land territory and did not delimit any maritime boundary between the Parties.

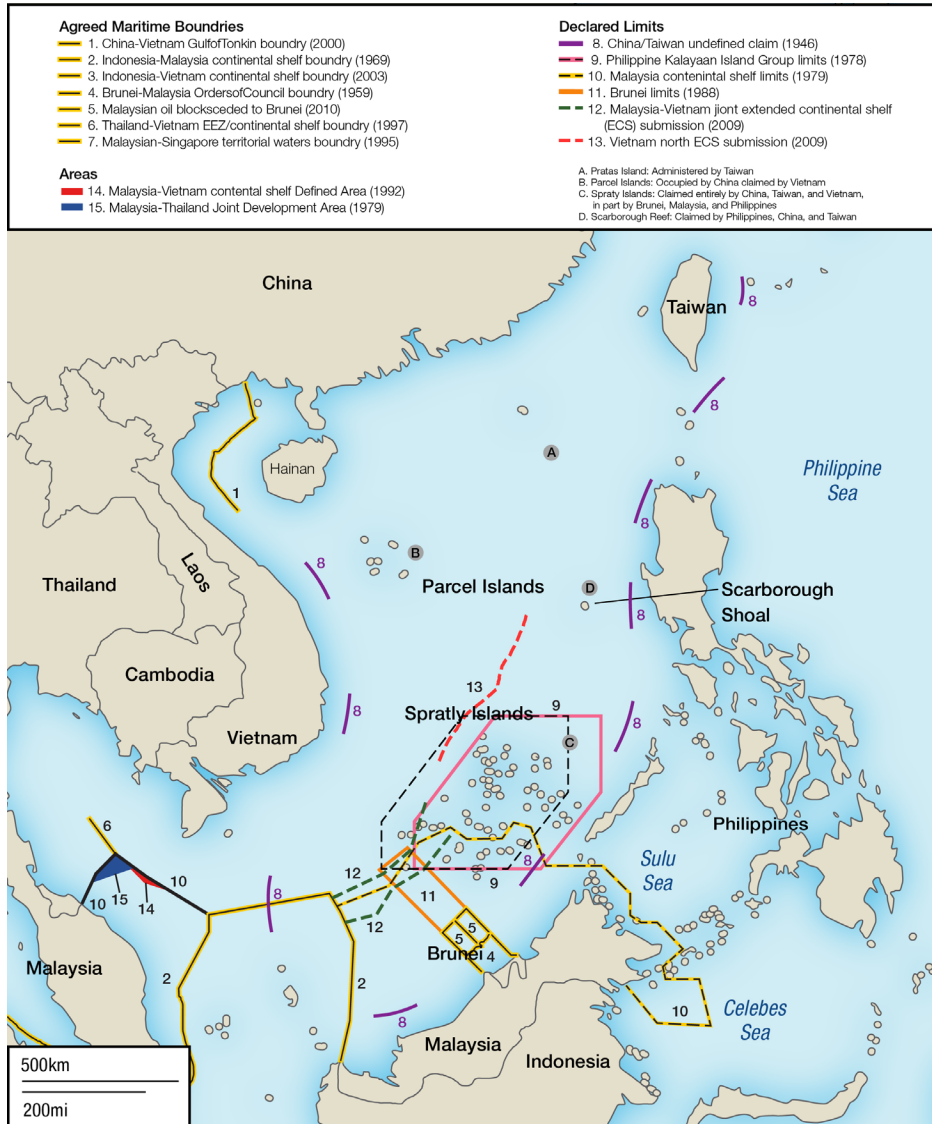
Award of Jurisdiction. The PRC refused to participate in the proceedings. Nonetheless, UNCLOS specifically provides that a party's absence or failure to defend itself does not constitute a bar to the proceedings. Thus, the PRC's non-participation did not prevent the arbitration from going forward.¹ Despite its decision not to appear formally in these proceedings, the PRC did issue a Position Paper on December 7, 2014, arguing that the Tribunal lacked jurisdiction to consider any of the GRP's claims.² Accordingly, the Tribunal convened a hearing in July 2015 and rendered an Award on Jurisdiction and Admissibility on October 29, 2015, deciding some issues of jurisdiction and deferring other for further consideration during the hearing on the merits.³

The Tribunal convened the hearing on the merits from 24 to 30 November 2015 to address the remaining jurisdiction issues, as well as the merits of the GRP's claims for which the Tribunal had jurisdiction. The Tribunal rejected the PRC argument that the dispute was actually about territorial sovereignty, holding that it would not need to decide sovereignty issues to address the GRP's Submissions. The Tribunal also rejected the PRC argument that the dispute was actually about maritime boundary delimitation and therefore excluded from dispute settlement by the PRC's declaration of August 25, 2006, made pursuant to Article 298 of UNCLOS.⁴ The Tribunal found that a dispute concerning whether a State has an entitlement to a

maritime zone is a distinct matter from the delimitation of maritime zones in an area in which they overlap.

Award on the Merits. The Tribunal issued a unanimous Award in favor of the GRP on July 12, 2016, which is final and binding on both parties.⁵

Historic Rights and the “Nine-Dash Line” (9DL). The Tribunal concluded that UNCLOS comprehensively allocates rights to maritime areas, and that any historic rights the PRC may have had to the resources in the SCS were extinguished by the exclusive economic zone (EEZ) provisions of the Convention. The Tribunal also found that there was no credible evidence that the PRC had historically exercised exclusive control over the waters or resources of the SCS (See the figure below for China’s maritime claims within the South China Sea). Accordingly, the Tribunal decided that there was no legal basis for the PRC to claim historic rights to resources within the sea areas falling within the 9DL.⁶



Status of SCS Features. In evaluating whether certain reefs claimed by the PRC were above water at high tide, the Tribunal recalled that features are classified based on their “natural” (not man-made) condition.⁷ Features that are above water at high tide are entitled to claim at least a 12-nm territorial sea, whereas features that are submerged at high tide (low-tide elevations (LTE)) do not.⁸ The Tribunal then noted that the reefs claimed by the PRC had been heavily modified by land reclamation and construction, and were therefore not “naturally” formed areas of land. Based on the evidence, the Tribunal determined that the following features were naturally formed high-tide features (HTF): (a) Scarborough Shoal, (b) Cuarteron Reef, (c) Fiery Cross Reef, (d) Johnson Reef, (e) McKennan Reef, and (f) Gaven Reef (North). The Tribunal also found that the following features were naturally formed LTEs: (a) Hughes Reef, (b) Gaven Reef (South), (c) Subi Reef, (d) Mischief Reef, and (e) Second Thomas Shoal. Finally, the Tribunal noted that, for purpose of delimiting the territorial sea of certain HTFs, Hughes Reef lies within 12 nm of the HTFs on McKennan Reef and Sin Cowe Island, Gaven Reef (South) lies within 12 nm of the HTFs at Gaven Reef (North) and Namyit Island, and that Subi Reef lies within 12 nm of the HTF of Sandy Cay on the reefs to the west of Thitu.⁹

With regard to maritime entitlements, the Tribunal noted that (1) the current presence of PRC officials on the SCS features is dependent on outside support and not reflective of the capacity of the features; (2) the historical use of the Spratlys was transient in nature and did not constitute inhabitation by a stable community; and (3) all of the historical economic activity had been extractive. Accordingly, the Tribunal concluded that none of the Spratly Islands is capable of generating extended maritime zones. Under UNCLOS, only “islands” can generate an EEZ and continental shelf; “rocks” that cannot sustain human habitation or economic life of their own can only claim a 12-nm territorial sea.¹⁰ The Tribunal also held that the Spratly Islands cannot generate maritime zones collectively as a unit. Having found that none of the features claimed by the PRC was capable of generating an EEZ, the Tribunal declared that Mischief Reef and Second Thomas Shoal, and the surrounding sea areas, were within 200-nm of the coast of Palawan Island and were located in an area that was not overlapped by any possible PRC entitlements.¹¹ Accordingly, the Tribunal held that these LTEs form part of the GRP EEZ and continental shelf.¹²

Lawfulness of PRC Actions. Having determined that certain features and sea areas were within the GRP EEZ, the Tribunal found that the PRC had violated the GRP's sovereign rights in its EEZ and continental shelf by (a) interfering with Philippine fishing in its EEZ and petroleum exploration at Reed Bank; (b) constructing artificial islands at Mischief Reef without GRP permission; and (c) failing to prevent PRC fishermen from fishing in the GRP EEZ at Mischief Reef and Second Thomas Shoal. The Tribunal also held that Philippine and PRC fishermen both had traditional fishing rights at Scarborough Shoal, and that the PRC had interfered with these rights in restricting access to Filipino fishermen. The Tribunal further held that PRC law enforcement vessels had unlawfully created a serious risk of collision in violation of the International Collision Regulations (COLREGS)¹³ when they physically obstructed Philippine vessels.¹⁴ Specifically, the Tribunal found that the PRC had violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS and, as a consequence, was in breach of its obligations under Article 94 of UNCLOS.¹⁵

Harm to the Marine Environment. The Tribunal found that the PRC's large-scale land reclamation and construction of artificial islands at seven features in the Spratlys caused severe harm to the coral reef environment and violated the PRC's obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species.¹⁶ The Tribunal also found that PRC authorities were aware that PRC fishermen were illegally harvesting endangered sea turtles, coral, and giant clams on a substantial scale in the SCS using fishing methods (*e.g.*, dynamite and cyanide) that inflict severe damage on the coral reef environment, and had intentionally failed to fulfill their obligations under international law to stop such activities.¹⁷

Aggravation of the Dispute. The Tribunal found that the PRC's actions since the commencement of the arbitration—large-scale land reclamation and construction of artificial islands—was incompatible with a State's obligations during dispute resolution proceedings, insofar as China has inflicted irreparable harm to the marine environment, built a large artificial island in the GRP EEZ on Mischief Reef, and destroyed evidence of the natural condition of SCS features that formed part of the Parties' dispute.¹⁸ In particular, the Tribunal found that, as a LTE, Mischief Reef is not capable of appropriation by the PRC, and that the PRC had breached Articles 60 and 80 of the Convention with respect to the GRP's sovereign rights in its EEZ and

continental shelf through its constructions of installations and artificial islands at Mischief Reef without the permission of the GRP.¹⁹

Future Conduct of the Parties. Finally, the GRP asked the Tribunal to declare that the PRC shall (1) respect GRP rights and freedoms under UNCLOS; (2) comply with its duties under UNCLOS, including those relevant to the protection and preservation of the marine environment in the SCS; and (3) exercise its rights and freedoms in the SCS with due regard to those of the GRP under UNCLOS.²⁰ The Tribunal concluded that the PRC already had an international legal obligation to do what the GRP was requesting in the declaration. The Tribunal also noted that the Award was binding and that both Parties had an obligation to comply with the Tribunal's decisions. Accordingly, the Tribunal was not persuaded that it was necessary or appropriate for it to make any further declaration.²¹ Contrary to the Tribunal's decisions, however, the PRC Foreign Ministry issued a statement following the hearing stating that the Award was "null and void" and had "no legal binding force" on the PRC.²²

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1. United Nations Convention on the Law of the Sea, annex VII, art. 9, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
 2. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), <http://ae.china-embassy.org/eng/dshd/t1380341.htm>.
 3. The South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm Ct. Arb. 2015).
 4. "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention [compulsory dispute settlement] with respect to all the categories of disputes referred to in paragraph 1 (a) [maritime delimitation] (b) [military and law enforcement activities] and (c) [functions of the UN Security Council] of Article 298 of the Convention." The People's Republic of China, Declaration under Article 298 of 25 August 2006, 2384 U.N.T.S. 327, <https://treaties.un.org/doc/Publication/UNTS/Volume%202384/v2384.pdf>.
 5. UNCLOS, *supra* note 1, art. 296, Annex VII, art. 11.
 6. The South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, ¶¶ 169–278 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration].
 7. UNCLOS, *supra* note 1, arts. 13, 121.
 8. *Id.*
 9. South China Sea Arbitration, *supra* note 6, ¶¶ 382–84.
 10. UNCLOS, *supra* note 1, art. 121.
 11. South China Sea Arbitration, *supra* note 6, ¶ 647.
 12. *Id.* ¶¶ 279–648.
 13. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16.
 14. South China Sea Arbitration, *supra* note 6, ¶¶ 649–814, 1044–1109.
 15. *Id.* ¶ 1109.
 16. UNCLOS, *supra* note 1, arts. 123, 192, 194, 197, 206.
 17. *Id.* arts. 192, 194; South China Sea Arbitration, *supra* note 6, ¶¶ 815–993.
 18. South China Sea Arbitration, *supra* note 6, ¶¶ 994–1043, 1110–81.
 19. *Id.* ¶ 1043.
 20. *Id.* ¶¶ 1191–93.
 21. *Id.* ¶¶ 1195–1201.
 22. Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, CHINA.ORG (July 12, 2016), http://www.china.org.cn/world/2016-07/12/content_38864668.htm.