



INTER-STATE MARITIME ARBITRATION

Case study: Existence of a Dispute in the South China Sea Arbitration
(*Philippines v. China*, PCA Case no. 2013-19)

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LAWYERS



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LIST OF DEFINED TERMS

<u>Term</u>	<u>Definition</u>
2009 Map	The map appended to Notes Verbales from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations (7 May 2009).
ASEAN	Association of Southeast Asian Nations.
Award on Jurisdiction	The Arbitral Tribunal's Award on Jurisdiction and Admissibility, as of 29 October 2015.
China	The People's Republic of China.
China's 2006 Declaration	The Declaration of the People's Republic of China under Article 298 of UNCLOS, as of 25 August 2006, referring that China "does not accept any of the procedures provided for in Section 2 of Part XV of the UNCLOS with respect to all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of UNCLOS."
China's Position Paper	The Position Paper of the Government of China on the Matter of Jurisdiction in the South China Sea Arbitration, published by China on 7 December 2014.
Convention	United Nations Convention on the Law of the Sea, 10 December 1982 (or " UNCLOS ").
Final Award	The Arbitral Tribunal's Final Award as of 12 July 2016 in <i>Philippines v. China</i> , PCA Case no.2013-19.

<u>Term</u>	<u>Definition</u>
Memorial	The Memorial of the Philippines, submitted on 30 March 2014, in <i>Philippines v. China</i> , PCA Case no.2013-19.
PCA	The Permanent Court of Arbitration.
PCA Press Release	The Press Release of the Permanent Court of Arbitration dated 12 July 2016.
Philippines	The Republic of the Philippines.
Tribunal	The Arbitral Tribunal in <i>South China Sea Arbitration Case (Philippines v. China)</i> , PCA Case no.2013-19), constituted under Annex VII of UNCLOS. The members of the Arbitral Tribunal: Thomas A. Mensah (Presiding Arbitrator); Jean-Pierre Cot; Stanislaw Pawlak; Alfred H.A. Soons; and Rüdiger Wolfrum.
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982.
Vietnam	Socialist Republic of Vietnam.

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Nord Sea Continental Shelf

Nord Sea Continental Shelf Cases (*Federal Republic of Germany v. The Netherlands*), ICJ reports, 1969.

Aegean Sea Continental Shelf

Aegean Sea Continental Shelf (*Greece v. Turkey*), Judgement, ICJ Reports 1978.

Southern Bluefin Tuna

Southern Bluefin tuna Case (*Australia and New Zealand v. Japan*), ITLOS cases nos. 3 and 4, Award on Jurisdiction and Admissibility, 4 August 2000.

Qatar and Bahrain

Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case (*The Qatar v. Bahrain*), Judgement on Merits, ICJ Reports 2001.

Cameroon and Nigeria

Land and Maritime Boundary Between Cameroon and Nigeria Case (*Cameroon v. Nigeria: Equatorial Guinea Intervening*) ICJ Judgement of 10 October 2002.

Straits of Johor

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (*Malaysia v. Singapore*), Provisional Measures, ITLOS Case no.12, Order of 8 October 2003.

Caribbean Sea

Territorial and Maritime Dispute between Nicaragua and Honduras (*Nicaragua v. Honduras*), Judgement, ICJ Reports 1978 2007.

Chagos

Chagos Marine Protected Area Arbitration Case (*Mauritius v. United Kingdom*), PCA Case No.2011-3, Award as of 18 March 2015.

Arctic Sunrise

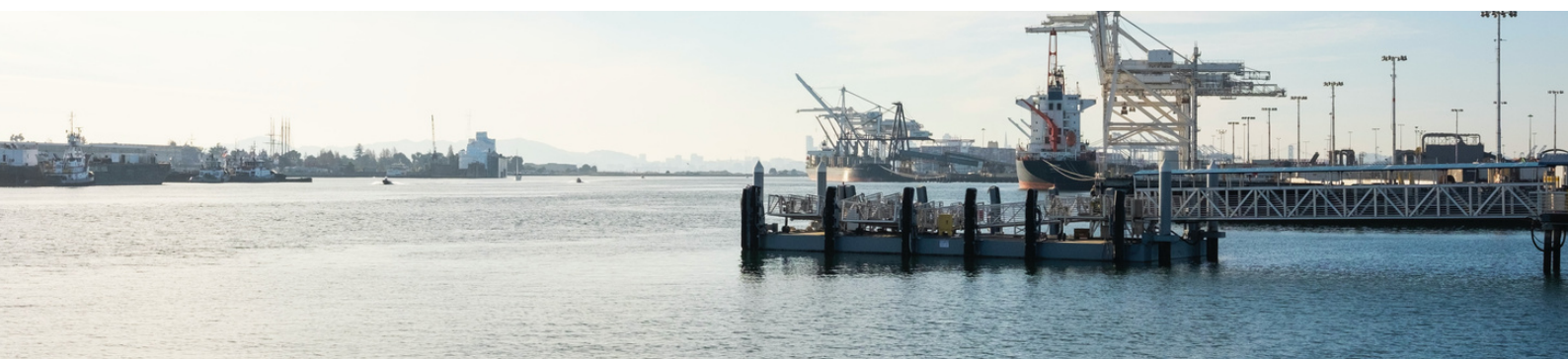
Arctic Sunrise Arbitration Case (*the Netherlands v. Russian Federation*), Award on the Merits, 14 August 2015.

I. INTRODUCTION

The *South China Sea Arbitration* was an inter-state arbitration case administrated by PCA, between the Philippines and China. The proceedings commenced following the application made by the Philippines, on 22 January 2013, pursuant Articles 286 and 287 of UNCLOS in accordance with Article 1 of Annex VI of UNCLOS [1]. The arbitration concerned the role of China's "historic rights" and source of maritime entitlements in the South China Sea, the status of maritime features and the maritime entitlements, as well as the lawfulness of certain actions performed by China in the South China Sea. China refused to participate in the arbitration and stated that "*it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines*" [2].

Over the next two years, the tribunal deliberated on the Philippines's 15 submissions, and issued the unanimous Award on Jurisdiction. It found that it had jurisdiction on some of the Philippines's submissions and suspended its decision on the others, linking them to the merits [3]. Nevertheless, in its Final Award, the Tribunal found that it had jurisdiction over the claims not decided in Award on Jurisdiction. Among the various aspects of jurisdiction and admissibility, the Tribunal found that in this case, the dispute between the Parties concerned the interpretation and the application of the UNCLOS's provisions, and the issues addressed in the claims fell under UNCLOS.

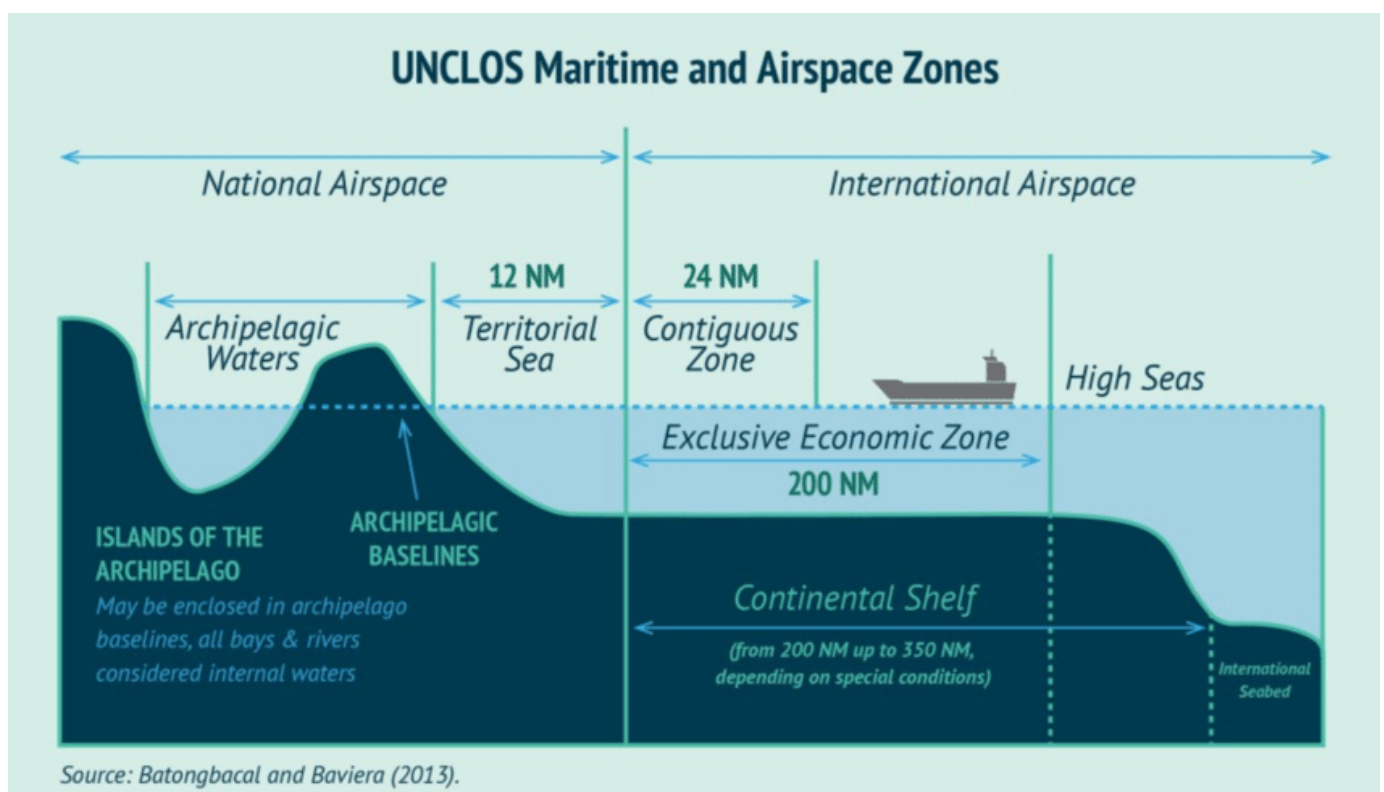
The following paper focuses on the Tribunal's findings in the Award on Jurisdiction, particularly on the existence and characterization of the dispute. The paper expresses the critical analysis of the characterisation of the dispute by the arbitral tribunal and its competence to examine the Philippines's claims. The paper is structured as follows: **(II)** The Dispute in the South China Sea Arbitration; **(III)** The characterization of the dispute by the arbitral tribunal; **(IV)** Critical analysis of the arbitral tribunal's decision on issues of jurisdiction and admissibility; and **(V)** Conclusions.



II. THE DISPUTE IN SOUTH CHINA SEA ARBITRATION

Origins of the dispute

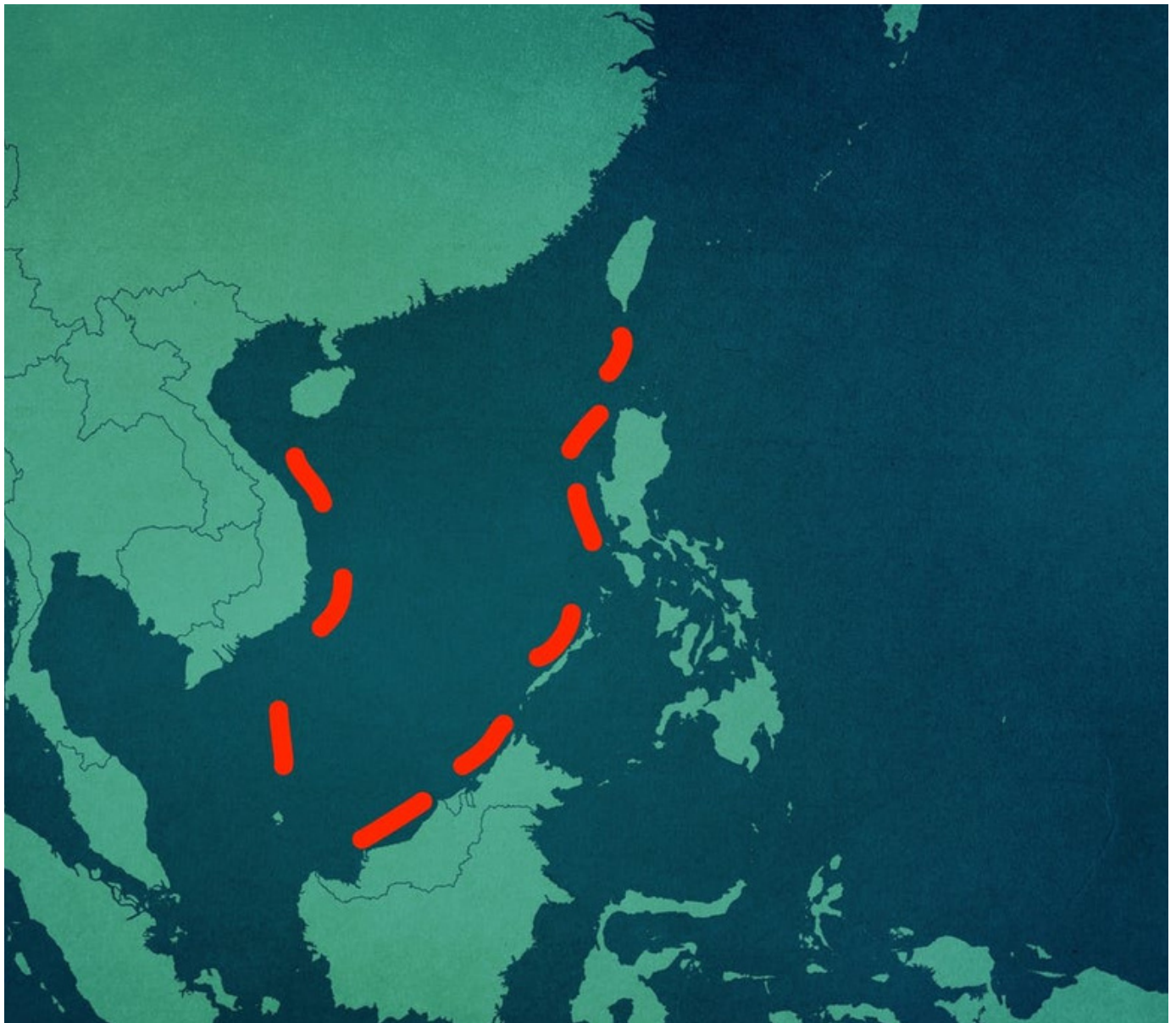
Although the source of the dispute has its origins back in time, it became alarming for the Philippines in 2009, when China submitted two notes verbale to the UN Secretary-General, by which it declared that *"China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof"* [4]. Supporting its declaration, China submitted a map [5] of the South China Sea, indicating a dashed line composed of nine segments, encompassing almost all islands in the South China Sea and its waters. Given that China had declared "historic rights" over all the features within nine-dash line, the Philippines considered that its rights were affected by that declaration, and brought the case in arbitration [6].



The Philippines' claims and China's position

The claims that the Philippines had brought before the Tribunal fell in four broad categories.

First, the Philippines sought a declaration from the Tribunal that China's rights and entitlements in South China Sea must not exceed the limits that the Convention allows, and must not rely on so called "historic rights". Therefore, the Philippines sought a declaration that China's claims to rights within the "nine-dash" line marked on the Chinese map were unlawful because they exceeded the entitlements that China would be permitted by the UNCLOS [7].



South China Sea, Nine-Dash line

Source: <https://www.businessinsider.com>

Second, the Philippines sought a decision on whether some maritime features in the South China Sea, claimed by the Parties, were appropriately characterized as islands, low-tide elevations or rocks under UNCLOS. The status determines the maritime zones they are capable of generating. Specifically, the Philippines, in the submission No.3-7, requested to declare that:

- a) Scarborough Shoal generated no entitlement to an exclusive economic zone or continental shelf;
- b) Mischief reef, Second Thomas Shoal, and Subi Reef were low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and were not features that were capable of appropriation;
- c) Mischief Reef and Second Thomas Shoal were part of the exclusive economic zone and continental shelf of the Philippines;



Source: <https://amti.csis.org/a-case-of-rocks-islands/>

d) Gaven Reef and McKennan Reef were low-tide elevations that did not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line might be used to determine the baseline from which the breadth of the territorial sea of Namyt and Sin Cowe, respectively, were measured; and

f) that Johnson Reef, Cuarteron Reef and Fiery Cross Reef generated entitlement to an exclusive economic zone or continental shelf.

According to the Philippines, if these features were “islands” for the purposes of the Convention, they could generate an exclusive economic zone or entitlement to a continental shelf extending as far as 200 nautical miles. If, however, the same features were “rocks” within the meaning of Article 121(3) of the Convention, they would only be capable of generating a territorial sea no greater than 12 nautical miles. If they were not islands, but merely low-tide elevations or submerged banks, then pursuant to the Convention they would be incapable of generating any such entitlements. The Philippines sought a declaration that all of those features claimed by China in the Spratly Islands, as well as Scarborough Shoal, fall within one of the categories, and none of these features generated an entitlement to an exclusive economic zone or to a continental shelf.

Third, the Philippines sought a declaration that China had violated the Convention by China’s unlawful actions in the South China Sea. The Philippines sought a declaration that China violated the Convention by: (a) interfering with the exercise of the Philippines’ rights with respect to fishing, navigation, and oil exploration; (b) inflicting harm on the maritime environment by construction of artificial islands, as well as failing to protect the maritime environment.

Finally, the Philippines had asked the Tribunal to find that China had aggravated the disputes in the region by commencement the large constructions of artificial islands and land reclamation at seven reefs in the Spratly Islands [8].

China rejected the Philippines’s recourse to arbitration. Despite its decision not to appear formally in the proceedings [9], China made its position clear. On 7 December 2014, China’s Foreign Ministry had published a Position Paper, by which it argued that the Tribunal lacked jurisdiction because: “(a) *The essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea, and therefore it falls outside of the scope of UNCLOS;*

(b) China and the Philippines have agreed, through bilateral instruments, to settle their disputes through negotiations; and (c) The disputes constituted an integral part of maritime delimitation between the two countries, falling under China's 2006 declaration" [10]. However, China's non-participation did not prevent the Tribunal to conduct the arbitral proceedings in China's absence [11].



Source: <https://amti.csis.org/a-case-of-rocks-islands/>

Award on jurisdiction and admissibility

On 29 October 2015, the PCA published the award on Jurisdiction and Admissibility. The Tribunal found that it had jurisdiction to consider the following seven Philippines' submissions. (Each number is the Philippines' submissions number.) The Tribunal reserved consideration of its jurisdiction to rule on Nos. 1, 2, 5, 8, 9, 12, and 14.

- No.3 Philippines' position that Scarborough Shoal is a rock under Article 121(3).
- No.4 Philippines' position that Mischief Reef, Second Thomas Shoal, and Subi Reef were low tide elevations that do not generate entitlement to maritime zones.
- No.6 Whether Gaven Reef and McKennan Reef (including Hughes Reef) were low-tide elevations "*that do not generate any maritime entitlements of their own*".

- No.7 Whether Johnson Reef, Cuarteron Reef, and Fiery Cross Reef did or did not generate an entitlement to an exclusive economic zone or continental shelf.
- No.10 Premised on [the] fact that China had unlawfully prevented the Philippines's fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal.
- No.11 *"China's failure to protect and preserve the marine environment at these two shoals [Scarborough Shoal and Second Thomas Shoal]"*.
- No.13 Philippines' protest against China's *"purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS"*.

The Tribunal stated in the award that there were continuing disputes in all of the 15 submissions from the Philippines, but for submissions such as No.3, No.4, No.6 and No.7, no known claims from the Philippines prior to the initiation of the arbitration exist, and that China was not aware of (nor had previously opposed) such claims prior to the initiation of arbitration. For Submissions No.8 to No.14, the tribunal held the view that the lawfulness of China's maritime activities in the South China Sea was not related to sovereignty [12].

Final award

In the nutshell, in its Final Award dated 12 July 2016, the Tribunal found that:

1. there was no legal basis for China's "nine-dash line" claim to historic rights in the South China Sea which were in excess of the rights provided for by UNCLOS;
2. none of the land features claimed by China in the South China Sea were "islands" for the purposes of UNCLOS, under which islands generate an exclusive economic zone and continental shelf;
3. China had breached certain of its obligations under UNCLOS in respect of the Philippines' sovereign rights regarding fishing, oil exploration, navigation, and the construction of artificial islands and installations, as well as China's obligations under UNCLOS to protect and preserve the marine environment and ensure safety at sea; and
4. China had aggravated and extended the dispute including by engaging in large-scale land reclamation activities and construction of artificial islands, during the arbitration.

III. THE CHARACTERISATION OF THE DISPUTE BY THE ARBITRAL TRIBUNAL

The Tribunal determined whether there was a dispute between the Parties concerning the interpretation or application of the UNCLOS [13], which was the fundament for the dispute settlement mechanisms of the UNCLOS. Therefore, the Tribunal considered two objections which were raised by China.

First, the Tribunal decided whether the Parties' dispute was related to the sovereignty over the islands in the South China Sea and therefore was not a matter concerning the Convention. The Tribunal rejected the China's argument that the Parties' dispute was about territorial sovereignty. Also, it noted that there was a dispute between the Parties regarding the sovereignty over islands in the South China Sea, but held that the matters submitted to arbitration by the Philippines did not concern the sovereignty [14]. The Tribunal did not accept that the dispute *"follows from the existence of a dispute over sovereignty and that sovereignty is also an appropriate characterization of the claims the Philippines has submitted in these proceedings"* [15]. Moreover, the Tribunal noted that it did not need to implicitly decide the sovereignty issue, in order to address the Philippines' submissions [16], and it would not need to decide the sovereignty claims of either Party to islands in the South China Sea [17].

Second, the Tribunal examined whether the Parties' dispute was about the delimitation of the maritime boundary between them and therefore it was excluded from dispute settlement through China's declaration. China brought before the Tribunal the declaration regarding the exception for disputes concerning sea boundary delimitations, made in 2006.



In this respect, the Tribunal stated that a dispute concerning whether a State possesses an entitlement to a maritime zone was a distinct matter from the delimitation of maritime zones in an area in which they overlap [18]. The Tribunal noted that while fixing the extent of the parties' entitlements and the area in which they overlap would commonly be one of the matters to be addressed in the delimitation of the maritime boundary, the existence of such entitlements was a distinct issue [19]. Therefore, the Tribunal noted that the claims submitted by the Philippines did not concern sea boundary delimitation and were not subject to the exception to the dispute settlement provisions of the Article 298 of UNCLOS [20]. However, the Tribunal mentioned that it was fully conscious of the essence of the claims submitted to it, and to the extent that it would reach the merits of any of the Philippines's submissions, it intended to ensure that its decision neither advances nor detracts from either Party's claim to sovereignty in the South China Sea.

Finally, the Tribunal held that each of the Philippines's submission reflected a dispute concerning the Convention [21]. Therefore, the Tribunal held that: (1) a dispute concerning the interaction between the Convention and other rights (including any Chinese historic rights) is a dispute governed by the Convention [22]; and (2) China had not clearly stated its position in this case. In light of those arguments, the Tribunal merely rejected the China's argumentation but did not specify its appreciation of the characterization of the dispute.



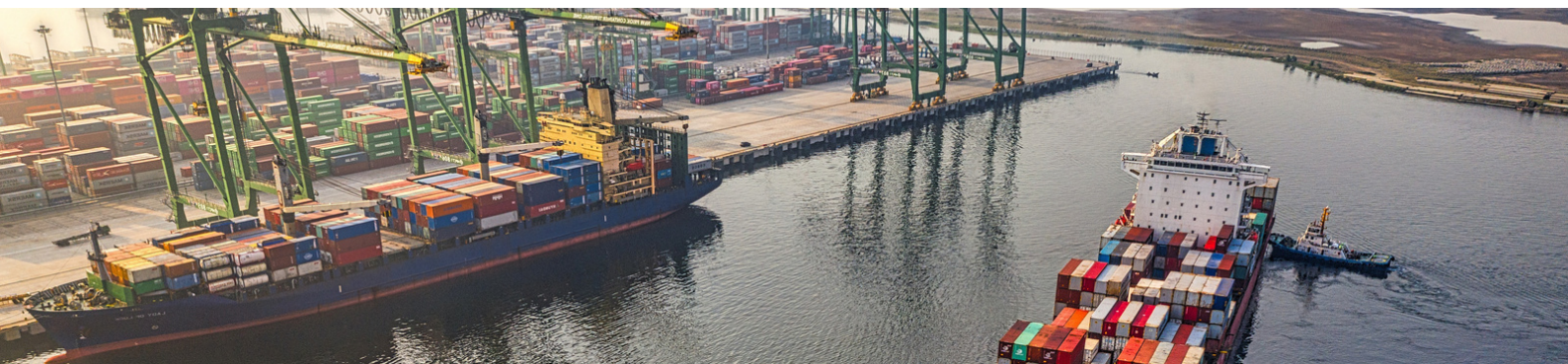
IV. CRITICAL ANALYSIS OF THE ARBITRAL TRIBUNAL'S DECISION ON ISSUES OF JURISDICTION AND ADMISSIBILITY

Fulfilment of “Exchange of views” obligation

The preconditions for the Tribunal's exercise of jurisdiction are set out in Article 283 UNCLOS. The rule provides that the parties to a dispute shall first proceed expeditiously to an exchange of views regarding the settlement of the dispute by negotiation or peaceful means. In South China Sea Arbitration, this condition has not been fulfilled under two aspects.

Firstly, the Tribunal concluded that the Philippines had fulfilled this obligation on the basis of two rounds of consultations between the Parties conducted in 1995 and 1998. At the same time, the Tribunal also admitted that the consultations pertained “*sovereignty over the Spratly Islands and Certain activities at Mischief Reef*” [23]. The Tribunal itself recognized that “*the Parties’ many discussions and consultations did not address all of the matters in dispute with the same level of specificity that is now reflected in the Philippines’ submission*”. Therefore, the subject matter of those negotiations did not refer explicitly to the interpretation or application of the Convention, but rather to the existence of sovereign rights over the maritime features in the South China Sea.

Secondly, the Tribunal lowered the criteria for the fulfilment of the obligation to Exchange the views [24]. Given the compulsory means of dispute settlement tools provided by the Convention, the exchange of views is necessary for the parties to be informed about the disputed matters.



In the Chagos Case, for instance, the Tribunal mentioned that Article 283 *“was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings”*. Therefore it *“requires that a dispute has arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed”* [25]. Therefore, the Exchange of views obligations is not a mere formalistic option, but rather a mandatory requirement for Parties to exhaust all the possibilities to settle the dispute amicably [26].

The “real” dispute in the case

The essential questions regarding the real subject matter of the dispute had arisen throughout the assessment of the admissibility of the Philippines's claims.

China did not contest that the provisions of UNCLOS apply to maritime entitlements of the States. There was neither a dispute between the Philippines and China nor could there be one over those provisions. The dispute, in essence, concerned the kind of rights China had over certain entitlements in the South China Sea. The Tribunal agreed with this and even mentioned that in its Award on Jurisdiction. Nevertheless, the Tribunal took the position stated in *Cameroon v. Nigeria* case, according to which the Tribunal had the power to deal with the dispute *“even if the exact scope of the dispute cannot be determined at present; a dispute nevertheless exists between the two Parties”* [27].

Therefore, the Tribunal admitted that the claims of sovereignty might cover China's rights, and therefore not admissible in this case. However, it added that the dispute related to the status of those rights within the framework of UNCLOS. Thus, it considered that the first two of the Philippines's submissions [28] reflected a dispute concerning the source of maritime entitlement in the South China Sea, and the interaction of China's claimed rights with the provisions of the UNCLOS [29].

When deciding the nature of the case, the Tribunal had to assess the essence of the Philippines's claims and their final purpose. In South China Sea Arbitration, besides other demands, the Philippines asked the Tribunal to declare that the rights claimed by China over the features within the nine-dash line were unlawful. In the other words, it seems that Tribunal faced the issue of finding whether China had or didn't have specific sovereign rights over those features. That is why, there was a direct link between the Philippines's claims and the issue of territorial sovereignty.

In order to address the Philippines's claims, the Tribunal might first ascertain the territorial sovereignty over certain maritime features in the South China Sea. According to the principle "The land dominates the sea" in international law [30], territorial sovereignty over the land is the basis of, and precondition for maritime entitlements. As pointed out by the ICJ in several cases, *"the maritime rights derive from the coastal State's sovereignty over the land"* [31] and *"it is the terrestrial territorial situation that must be taken as a starting point for the determination of the maritime rights of a coastal State"* [32].

The State's sovereignty over the land territory determines the maritime rights under the framework of the UNCLOS. The Convention recognizes in its Preamble that *"the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans"*. Therefore, the determination of a State's territorial sovereignty is the prerequisite for the qualification of its maritime rights according to the UNCLOS.

Specifically, the Philippines claimed in its submissions No. 1 and No. 2 that China's claims of maritime rights in the South China Sea were beyond those limits permitted by the Convention. The Tribunal held that those claims reflected a dispute regarding the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention and that it was not a dispute concerning sovereignty [33]. However, without the first determination of China's territorial sovereignty over the relevant maritime features in the South China Sea, the Tribunal would not have the power to determine what rights China enjoyed and the extent to which China might claim maritime rights.

Also, the Tribunal held that certain of the Philippines's submission concerned the China's lawfulness activities in South China Sea [34]. Therefore, in order to determine this issue, the Tribunal had first to decide which State had the rights over maritime entitlements and over the maritime zones where the activities took place. In South China Sea Arbitration, the Tribunal certainly had to take into consideration which State had started to exercise those rights before the entry of the Convention. Even if the dispute was a subject matter of the Convention, the limits of the maritime areas over which China could lay its claims were not governed by the terms of the Convention [35], but by the long, continuous and effective control exercised by China over those marine areas [36].

The continuous and effective control over a particular maritime features might be verified or assessed in terms of the inter-temporal law [37]. Also, it might be assessed on the basis of sovereign acts China had performed to consolidate its title prior the “critical date” on which the dispute between China and the Philippines crystallized. Instead of performing this assessment, the Tribunal merely stated that even if China had certain so-called “historic rights” over the islands in the South China Sea, such rights were extinguished by the entry into force of the Convention, to the extent they were incompatible with the Convention’s system of maritime zones. By this approach, the Tribunal gave the provisions of the Convention hierarchically a status higher than the general customary law concerning the acquisition of sovereignty over the territory, or over the insular features by States [38].

Finally, the Tribunal had to desist from an expansive interpretation of its competence to exercise jurisdiction. The Tribunal appeared to have dismissed the decision in Chagos Case, where the majority held against jurisdiction because a decision on Mauritius’ submissions would have required an implicit decision on sovereignty [39]. In the South China Sea Arbitration, the Tribunal failed to properly assess the real and actual dispute. It is quite obvious from the submissions made by the Philippines that the real object of its requests was to get a legalized direction from the Tribunal, requiring China to desist from so-called “unlawful claims and activities”.

V. CONCLUSIONS

This case is undisputable controversial, which has created significant different dynamics in the South China Sea. At the same time, the Tribunal's decision in opposition to China could lead to the termination of the Convention by China. If China excludes itself from Convention, it will represent a significant weakening of treaty norms in the international law of the sea. It seems that the arbitration did not help to resolve the disputes in the South China Sea, but rather to aggravate the situation in the region and in the ASEAN community.



REFERENCES

- [1] Award on Jurisdiction, para. 26
- [2] China's Position Paper, p. 85
- [3] PCA Press Release, p. 3
- [4] China's Notes Verbales no. CML/17/2009 as of 7 May 2009
- [5] The "nine-dash" line originated in a 1947 map prepared by the KMT Chinese government before the success of the Communist revolution in 1949, but it has remained part of China's claims since then. This "nine-dash" or "U-Shaped" line was meant to illustrate the limits of sovereignty in the South China Sea
- [6] Gewirtz (2016), p. 10
- [7] Final Award, para. 7
- [8] This issue was addressed in the Final Award
- [9] In deciding not to appear, China had followed a small number of states that have similarly declined to participate in cases before the International Court of Justice (ICJ), as well as the more recent nonparticipation by the Russian Federation in UNCLOS procedures in the Arctic Sunrise Case brought by the Netherlands
- [10] In 2006, China submitted a declaration excluding all disputes that might involve questions of sovereignty and issues of delimitation of maritime boundaries from the procedure of compulsory settlement of disputes specified under Section 2 of Part XV, which is subject to the limitations and exceptions specified under Section 3 of Part XV of the Convention
- [11] Article 9 of Annex VII UNCLOS provides: "absence of party or failure of a party to defend its case shall not constitute a bar to the proceedings". The Tribunal noted that China is still a Party to the arbitration and shall be bound by any award the Tribunal issues
- [12] Award on Jurisdiction, pp. 54-57
- [13] Award on Jurisdiction, paras. 148-178
- [14] Award on Jurisdiction, paras. 152-154. In the Tribunal's view, it is expected that in the relationship between Parties would rise disputes concerning several distinct matters, that's why this dispute is not about the sovereign rights over the islands.
- [15] Award on Jurisdiction, para. 152
- [16] Award on Jurisdiction, para. 153

[17] Final Award, para.5, the Tribunal stated: “Tribunal has not been asked to, and does not purport to make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over Spratly Islands or Scarborough Shoal. None of the Tribunal’s decisions in this Award are dependent on finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty.”

[18] Award on Jurisdiction, paras. 155 - 157

[19] Award on Jurisdiction para. 156, the Tribunal held that: *“A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where – for instance – a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention”*

[20] Award on Jurisdiction, para. 157

[21] Award on Jurisdiction, paras. 164 -178

[22] Award on Jurisdiction, para. 168

[23] Award on Jurisdiction, para. 336

[24] For instance, on the basis of the Philippines’ note verbale to China dated 26 April 2012 and China’s reply three days later, the Tribunal concluded that the Philippines had fulfilled the obligation with respect to claims regarding the Scarborough Shoal (See Award on Jurisdiction, paras.340-342)

[25] Chagos Case, para. 382

[26] As Judge P. Chandrasekhara Rao observed in Straits of Johor Case that: “the requirement of this article regarding exchange of views is not an empty formality” (See Separate Opinion of Judge Chandrasekhara Rao, para.11). Also, in the Southern Bluefin Tuna Case, the Tribunal regarded the “prolonged, intense and serious” negotiations as fulfilling the obligation of exchange of views

[27] Award on Jurisdiction, para. 171

[28] The first two submissions asked the Tribunal to declare that: 1) China’s maritime entitlements may not extend beyond those permitted by UNCLOS; and 2) China’s “nine-dash line” claim is contrary to UNCLOS

[29] Award on Jurisdiction, para. 164.

[30] North Sea Continental Shelf Case, para.96; Aegean Sea Continental Shelf Case, para. 86

[31] Qatar and Bahrain Case, para.185.

[32] Qatar and Bahrain Case, para. 185; Caribbean Sea Case, para. 113

[33] Award on Jurisdiction, paras.164, 398 and 399

[34] Award on Jurisdiction, paras.173, 405-411

[35] Pemmaraju (2016), p. 299

[36] The Island of Palmas Case para. 839. For an analysis of other relevant case law see the Separate Opinion of Sreenivasa Rao, Judge ad hoc in the Straits of Johor Case, paras. 5-10

[37] According to Sir Gerald Fitzmaurice, cited by Sir Ian Brownlie; "It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today". See Brownlie (2003), p. 124-125. This principle was applied by Judge Huber in the Island of Palmas Case. On the acquisition of legal title to territory, see Tanaka (2008); Distefano (2006) p.1041-1075; Post (2000), p.147- 173

[38] Pemmaraju (2016), p.294: "While it is agreed that UNCLOS has set out a regime on law of the sea which is generally considered as binding on all the parties to it, it is not considered to have status similar to that of the Charter of the UN nor does it have an article comparable to Article 103 of the UN Charter specifying priority for member States of obligations incurred thereunder over obligations contracted or potentially to be engaged under other treaties. Its provisions, which are the sum of a package deal, do not certainly have the status of jus cogens to stump all other rights and obligations acquired by States under either customary law or other conventions. Above all, it is not even clear, considering that it is a package deal, to what extent UNCLOS can be said to reflect customary law itself".

[39] Chagos Case, para. 547



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