

Territorial Dispute in the South China Sea

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Abstract

This paper presents and discusses the facts and findings of the territorial dispute in the South China Sea involving the Republic of the Philippines and the People's Republic of China. Besides providing an overview of the procedures to establish an arbitration at the Permanent Court of Arbitration, the paper outlines geopolitical aspects of the dispute, concluding that although the award was clearly favorable to the Philippines, and diplomatic protests have been issued as to implement its results, the Philippines government has been cautious in dealing with China.

¹ Arbitral Award (*PCA CASE No. 2013-19*), Permanent Court of Arbitration, 12 July 2016 between the Republic of the Philippines and the People's Republic of China.

1. Initial Considerations

The Permanent Court of Arbitration was established in 1899, by virtue of the resolution adopted at the First Hague Peace Conference and confirmed at the Second Conference of 1907, held at the same Peace Palace. It is not exactly a court where the parties can appeal, since it does not have a structure with a body of judges and officials such as the International Court of Justice. The Secretariat of the Court keeps a permanent list of names that interested States can consult to choose the arbitrators. They are experts in International Law of the highest moral standing² and international prestige, and a maximum of four persons are appointed by the respective States³.

The territorial dispute in the South China Sea started out from allegations by the People's Republic of China (hereinafter referred to as China) that the archipelagos, islands, atolls and rocks in an area surrounded by invisible lines called the "Nine-dash line" belonged to its territory. The Republic of the Philippines (hereinafter referred to as Philippines) has been protesting against China since 2013, but its claims of sovereignty over these territories have been ignored, prompting the Philippines to seek an international legal remedy.

The present case – PCA CASE No. 213-19 –, is based on the arbitral award issued by an Arbitral Tribunal set up in 2013, at the Permanent Court of Arbitration, by request from the Philippines, based on Article 3 of Annex VII of the United Nations Convention on the Law of the Sea⁴ (hereinafter referred to as UNCLOS), which regulates arbitration and provides for the establishment of an arbitral tribunal. According to UNCLOS, when a dispute arises between States about the interpretation or application of the Convention, the parties must negotiate directly in order to find a peaceful solution. However, if there are difficulties in reaching such a solution, the parties must seek compulsory procedures leading to binding decisions. In accordance with article 287 of UNCLOS, the parties shall choose one or more of the following means of dispute settlement, in accordance with Annex VI: a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; b) the International Court of Justice; c) an arbitral tribunal established in accordance with Annex VII; d) a special arbitral tribunal established in accordance with Annex VIII, for one or more of the categories of disputes specified in the

2 Professor CELSO LAFER, together with Professor Nádia de Araújo, among other Brazilian International Law scholars, are part of this selected group.

3 NASCIMENTO E SILVA, Geraldo Eulálio e ACCIOLY, Hildebrando, *Manual de Direito Internacional Público*, p. 454 and followings.

4 The United Nations Convention on the Law of the Sea (UNCLOS) was enacted in Brazil with Decree No. 99.165, 12 March 1990. The Philippines ratified the Convention in 1984 and China in 1996.

referred Annex.

If the parties cannot agree on which of the compulsory procedures will be adopted, then Article 287, n. 5 *in verbis* applies: "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree". As China has refused the compulsory procedures leading to binding decisions provided for in Article 287 n. 1, the Philippines had to appeal to the compulsory procedure provided for in Article 287 n. 5.

At the Permanent Court of Arbitration, the State Parties must appoint the Arbitrators, but if there is no agreement between the parties, cases may arise where there will be no appointment of these Arbitrators. In such cases, UNCLOS provides for specific rules in its Annex VII that makes it possible for the Arbitral Tribunal to be constituted. The Philippines submitted the request for arbitration against China according to Article 3 of Annex VII, which establishes a five-member tribunal (paragraph "c"). And under paragraph "g", parties with common interest shall agree and jointly appoint one member of the Tribunal. If the parties have separate interests, or there is disagreement whether or not there is a common interest, each party must appoint one member of the Tribunal. The number of members of the Tribunal appointed separately by the parties shall always be one less than the number of members of the Tribunal appointed jointly by the parties. Also, according to paragraph "c", the other party to the dispute shall, within 30 days following the date of receipt of the notification referred to in Article 1 of the Annex, appoint a member, preferably to be chosen from the list of arbitrators, who may also be its national. If the designation is not made within this period, the party that initiated the proceedings may, within two weeks following the expiration of such period, request that the designation be made in accordance with paragraph "e".

Article 3, paragraph "d" of Annex VII, provides that the other three members are to be appointed by agreement between the parties. If no arbitrators are appointed within 60 days after receipt of the notification referred to in Article 1 of the Annex, the appointments shall be made in accordance with paragraph "e", that is, the President of the International Tribunal for the Law of the Sea (ITLOS) shall make the necessary appointments. And because no action was taken by China to appoint an arbitrator, the President of ITLOS was summoned to nominate arbitrators in this case. The Philippines appointed German Rudger Wolfrum, ITLOS judge and as China did not appoint anyone, ignoring the terms of UNCLOS and since 30 days and 2 weeks have passed, according to Annex VII, Article 3, paragraph

"c" of Annex VII, the Philippines requested the appointment of the remaining arbitrators to the President of ITLOS, at that time, the Japanese Shunji Yanai, who had a term of office between 2011 and 2014. Therefore, within 30 days, Judge Yanai appointed Polish Stanislaw Pawlak first. Also, according to paragraph "d" of Article 3 mentioned above, the three remaining arbitrators were to be appointed by mutual agreement between the Philippines and China, but as the latter did not manifest after 60 days and 2 weeks, then, again, the ITLOS president appointed the remaining members of the tribunal: Judge Thomas A. Mensah, from Ghana, former ITLOS judge, who became the president of the Arbitral Tribunal, the Frenchman Jean-Pierre Cot, also an ITLOS judge, and Professor Alfred H. A. Soons, from the Netherlands.

The participation of the Japanese Judge Shunji Yanai in the appointment of the arbitrators was later criticized by China after the publication of the arbitral award⁵. The Arbitral Tribunal, constituted from the list of jurists registered on the list of the Permanent Court of Arbitration, is different from other UN commissions that take into consideration the geographical distribution of its members and also political issues. In the case of the arbitrators of the Arbitral Tribunal, it is natural to take into consideration not only their legal knowledge, but also their remarkable knowledge of the Law of the Sea, as well as their pure moral reputation. In the dispute herein presented, since all arbitrators were European, it might have been advisable to choose an Asian member in the list of arbitrators, but there seems to have been difficulties in the search, since most countries in the region have some kind of relationship or problem with China. At first, a prominent jurist from a country that had few relations of interest with China was on the list of candidates, but according to an article in the Japan Times, the jurist's wife was originally from the Philippines, and because of that, his name was disregarded. As for the possible criticism that many of the judges chosen were European, it is worth noting that Judge Pawlak from Poland has played a neutral role since the Cold War period and has knowledge of Asia from having participated in the UN observation team for the issue of the 38th parallel on the Korean Peninsula and also in the Vietnam peace negotiations.

In terms of prosecutors, the Philippines initially appointed Attorney General Florin Ternal Hilbay to represent its government, but on 30 June 2016, the new President of the Republic Rodrigo Duterte, appointed new Attorney General Jose Callangan

5 UENO, Eiji "Minami Shinakai Chusai Saibansho no saitei: sono chuuumokuten to kongo no kadai", p. 25. See also "Beijing turns on Japanese judge as Hague tribunal ruling over South China Sea nears", in Japan Times, 8 July 2016.

Calida to represent the country. Attorneys Paul S. Reichler, Lawrence H. Martin and Andrew B. Loewenstein, from the Washington and Boston-based law firm Foley Hoag LLP, were hired. In addition to this firm, the Philippines was advised by Professor Bernard H. Oxman of the University of Miami Law School; Professor Philippe Sands QC of Matrix Chambers, London; and Professor Alan Boyle of Essex Court Chambers, London.

China declared on 19 February 2013⁶, that it would not participate in the arbitration and on 7 December 2014 published a Position Paper⁷ to clarify its stance by no longer appointing a prosecutor or agent in the arbitration proceedings. China's Ambassador accredited to the Kingdom of the Netherlands sent letters to the tribunal members stating, in summary, that China adopted a policy and practice of settling territorial disputes and maritime rights through direct negotiations and consultations between the parties concerned, that it did not accept unilateral solutions imposed by third parties, and that the letters sent should not be interpreted as acquiescence to China's participation in the arbitral proceedings. Despite the Chinese position, the Arbitral Tribunal decided on 29 October 2015, that China's non-participation in the arbitration proceedings would not influence the tribunal's jurisdiction over the case⁸.

The hearing on the merits took place on 24, 25, 26 and 30 November 2015 at the Peace Palace, The Hague. In addition to the judges of the Arbitral Tribunal, the Philippines delegation attended the hearing, headed by then Foreign Affairs Secretary Albert F. del Rosario and consisting of numerous diplomats, as well as Attorney General Florin T. Hilbay.

Several countries in the South China Sea region – Australia, Indonesia, Japan, Malaysia, Singapore, Thailand and Vietnam – sent observers to the hearing on the merits, either through their ambassadors accredited to the Kingdom of the Netherlands or through delegations specially sent to attend the hearing, some of

6 Verbal note from the Chinese Embassy in Manila to the Philippines Department Foreign Affairs.

7 *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 Government of the Philippines*, 7 December 2014.

8 PCA Case No. 2013-19, AWARD, Para. 51. *Letter of Chinese Ambassador to the Kingdom of Netherlands, dated 1 July 2015: recalling China's "consistent policy and practice of [resolving] the disputes related to territory and maritime rights and interests with States directly concerned through negotiation and consultation" and noting China's "legitimate right" under the convention not to "accept any imposed solution or any unilateral resorting to a third-party settlement". The Ambassador stated that his letters and the Chinese Government's statements "shall by no means be interpreted as China's participation in the arbitral proceeding" and that China "opposes any move to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures".*

them headed by foreign ministers. It is then possible to understand the importance and interest of those countries on the subject in question.

On 12 July 2016, the Tribunal published the arbitral award, recognizing 14 of the Philippines' 15 claims. The award concluded that China's attempt to force a change of the situation in the South China Sea was not in accordance with the terms of UNCLOS. However, it is worth noting that there is no compulsory way to execute the decision, nor does the decision provide a direct solution to the conflict between the Philippines and China in the region. It can be said, however, that the decision was important as a result of a detailed analysis of the issues brought to the Arbitral Tribunal and examined under international law. The considerations posed by China around these territorial issues concerning UNCLOS were considered by the Tribunal, although they were brought indirectly, due to its absence in the Tribunal's arbitration work.

2. Philippines' legislative arrangements regarding the geographic situation of the region

On 10 March 2009, then President Gloria Macapagal Arroyo enacted The Philippines Archipelagic Baselines Law through Republic Act 9522, determining in its Article 2 that Scarborough Shoal (Panatag Shoal or Bajo de Masinloc) and Spratly Islands (Kalayaan Islands Group) were not part of the basic lines of the Philippines' territorial sea, but that it possessed sovereignty over them by the application of the Island Regime stipulated in Article 121 of UNCLOS⁹. Furthermore, in June 2011, the Philippines renamed part of the South China Sea under its sovereignty as The West Philippines Sea and in September 2012, then President Aquino signed Executive Order 5446 (Act 5446) to make the denomination official. With this Act, the Philippines' changed the boundaries of its territory from a 600 by 1,200 nautical mile rectangle to a triangle, leaving out about 15,000 nautical square miles of territory¹⁰.

Professors Merlin Magallona and Harry Roque Jr, of the University of the Philippines, Congresswoman Akbayan Risa Hontiveros-Baraquel, along with student

⁹ Article 121 of UNCLOS:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

¹⁰ <https://www.gmanetwork.com/news/story/158808>, access on 4 November 2021.

representatives, challenged the constitutionality of the Act before the Supreme Court of the Philippines on 1 April 2009, stating that the Act reclassified into a mere "island regime" the Spratly Islands group and Scarborough Shoal, "weakening" the country's territorial claim and that the Act would alter the 1987 Philippines Constitution's definition of its territory consisting of more than 7,100 islands and archipelagos. The petitioners further mentioned that the Act would henceforth give foreign ships complete freedom to pass through its territorial waters and contiguous zones, including exclusive economic zones, and foreign aircraft to fly freely over Philippine airspace.

The Supreme Court, however, confirmed on 16 August 2011, the constitutionality of the Act¹¹.

3. China's and other states' claims

Based on the theory of the "Nine-dash Line", China took measures to complement its domestic legislation and in September 1958, promulgated the Declaration of Territorial Sea regarding most of the South China Sea area, considering it as its territory. And before ratifying the UNCLOS in June 1996, China had also enacted the Law on the Territorial Sea and the Contiguous Zone in February 1992, determining that its Territorial Sea would be of 12 nautical miles and that its territory would cover not only the mainland part of China, but also the insular part, including Taiwan and some contiguous islands, as well as the Penghu Islands, and almost all the archipelagos, atolls, and rocks located in the South China Sea. In addition, it enacted the Law on Exclusive Economic Zone and the Continental Shelf in June 1998.

There are many types of maritime landscape in the South China Sea region, with more than 300 islands, archipelagos, sandbars, reefs, and rocks, with their respective names in English, Chinese, Vietnamese, Tagalog, Spanish, Malay, and even Japanese as a result of the Japanese occupation during World War II. Some examples of these landscape are Macclesfield Bank (中沙群島), Paracels Islands (西沙群島), Spratly Islands (南沙群島, Kalayaan Islands Group), Scarborough Shoal (黃岩島), Panatag Shoal or Bajo de Masinloc, among others¹².

¹¹ <https://www.gmanetwork.com/news/story/156201>, access on 4 November 2021.

¹² Article 13 n. 1 of UNCLOS: A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. Idem n. 2: Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

It is possible to affirm that the conflicts regarding these islands and archipelagos became evident after Japan's defeat in World War II, during which period the Japanese had occupied the area of Paracels Islands and Spratly Islands. In the Treaty of Peace signed in San Francisco on 8 September 1951, Japan gave up rights over Taiwan, Penghu Islands¹³ and other archipelagos described in the previous paragraph and located in the South China Sea. With this, a sort of gap in the exercise of sovereignty over the archipelagos emerged, which became the subject of dispute by the countries closest to the area, such as the Republic of China (hereinafter referred to as Taiwan), China, Vietnam, the Philippines, Malaysia and Brunei.

Part of Paracels Islands is being disputed by China, Taiwan, and Vietnam; and as for Spratly Islands, there are claims of partial dominance between the Philippines, Malaysia, and Brunei, but China, Taiwan, and Vietnam claim total dominance over the area, consisting of some 120 oceanic landscape.

The major controversy is around Macclesfield Bank, in particular Scarborough Shoal, made up of rock formations with a lagoon in the middle, situated about 230 km West of Luzon, the largest of the Philippine Islands. The place is in a strategic position in view of the Bashi Channel, an important sea passage between the Northern part of the Philippines and Southeast China, including Taiwan. The lagoon has an opening to the sea, and because it is a suitable location for fishing, Chinese vessels entered the area in April 2012, protected by official Chinese vessels. The Philippines sent its Coast Guard ships, and there were moments of tension between the parties. With the approach of typhoons that are typical of the region in the Summer months, the Philippines' ships left the area, which was left at the mercy of the Chinese. The Chinese blocked the entrance to the lagoon with fishing cables and nets to prevent Filipino fishing boats from approaching and have remained there ever since.

Regarding the Spratly Islands, it should be noted that in March 1988, China fought the Naval Battle of Nansha against the then South Vietnamese Navy and won, occupying the 6 atolls named Cuarteron Reef (華陽礁), Fiery Cross Reef (永暑礁), Gaven Reef (南薰礁), Johnson Reef (赤瓜礁), Subi Reef (渚碧礁) and Hughes Reef (東門礁). China occupied Mischief Reef (美濟礁) in 1995, taking advantage of the

¹³ China claims historical rights not only over the Senkaku islands, located in the far South of Okinawa prefecture, but eventually over all Okinawa. The United States have reinforced declarations that the Senkaku islands are part of the Japanese territory, as mentioned in Article 5 of the Treaty of Mutual Cooperation and Security between Japan and the United States, concluded in 1960.

gap left in the region with the departure of American troops from the Philippines in 1992.

Even after the request for arbitration by the Philippines in mid-2014, China has quickly executed major landfill works on the 7 atolls in the Spratly Islands, turning them into an artificial island. UNCLOS does not prohibit landfill, nor the creation of artificial islands, a practice also adopted by Vietnam and the Philippines, in small proportions. However, the work executed by China has brought about a huge change in the strategic situation in the South China Sea, both because of its size and the speed of its execution, with its transformation into military bases, accompanied by the construction of an airport with a 3,000m long runway. It is estimated to be impossible to return the site to the *status quo ante*.

China claims sovereignty and territorial rights of a historical nature over the entire area of Paracels Islands and Spratly Islands. The basis of these claims is the so-called "Nine-Dash Line"¹⁴, which according to China has been inherited by various Chinese governments through history, confirmed by domestic law and protected by International Law, including UNCLOS.

As stressed in the Position Paper published by China: "China has indisputable sovereignty over the South China Sea islands (the Dongsha Islands, the Xisha Islands (西沙群島), Paracels Islands, the Zhongsha Islands and the Nansha (南沙群島, Spratly Islands) and the adjacent waters. Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them"¹⁵.

4. The Philippines' Submissions to the Tribunal and the Findings of the Tribunal

The Philippines' submissions 1 and 2 concerned the "Nine-dash line" based on China's claims, in addition to the "historical rights" that China claimed to have in the area of the South China Sea. The Tribunal considered Submissions 1 and 2, which represent two aspects of one dispute, about the sources of Law over the

¹⁴ *Nine-Dash Line* is a concept initially adopted as *Eleven-Dash Line*, and appears for the first time in a map of the Republic of China (still in the nationalist government of Kuomintang, before its establishment in Taiwan) in 1947. It was adopted by China after 1953, as *Nine-Dash Line*. It is said that the 11 lines were decreased to 9, in respect of the then Democratic Republic of Vietnam (North). From July 2004, an agreement between China and Vietnam about the Territorial Sea of Tonkin Gulf, Exclusive Economic Zone and Continental Shelf, is in force.

¹⁵ Chinese *Position Paper*, 7 December 2014.

South China Sea. Accordingly, as to submission 1, the Court concluded that in the case between the Philippines and China, UNCLOS defines the scope of both countries' rights in the area and cannot extend beyond the limits imposed by it. And as to submission 2, the Court held that the "Nine-Dash Line" claimed by China contravenes the terms of UNCLOS and did not recognize its legal effects as it exceeds the geographical limits and China's rights therein. Therefore, the Court concluded that UNCLOS suspended any historical and other sovereignty or jurisdictional rights that exceed its boundaries¹⁶.

Submissions 3 to 7 dealt with the legal status of maritime landforms in the South China Sea in light of Article 121 n. 3 of UNCLOS¹⁷. Correspondingly, as to claim 3, the Tribunal held that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and McKennan Reef are "rocks" under Article 121 n. 3¹⁸.

Regarding submissions 4 and 5 on Mischief Reef and Second Thomas Shoal, the Tribunal considered that they are "low-tide elevations" which become submerged at high tide and do not give rise to any rights of a maritime nature. The Court further concluded that none of the landforms of the Spratly Islands are capable of supporting human habitation or economic life under Article 121(3) of UNCLOS. They are "rocks" in the legal sense, located off the coast of the Philippines, and thus are part of the Exclusive Economic Zone and the Philippines' Continental Shelf¹⁹.

In submission 6, the Philippines claimed that Gaben Reef, McKennan Reef, and Hughes Reef are "low-tide elevations". The Court held that this was not the case and classified them as "rocks" that are uncovered even at high tide, entitled to 12 nautical miles of territorial sea. Thus, the Philippines' claims in submission 6 were not accepted by the Court.

In submission 7, the Philippines considered that Johnson Reef, Cuarteron Reef, and Fiery Cross Reef do not constitute Exclusive Economic Zone or Continental Shelf. The Tribunal granted the request, holding that they are "rocks" under Article 121(3) of UNCLOS²⁰.

16 PCA Case No. 2013-19 AWARD, Para. 276-278.

17 Article 121 n.3 of UNCLOS: Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

18 PCA Case No. 2013-19 AWARD, Para. 554-570, 643-645.

19 *Idem*, Para. 646-647.

20 *Idem*, Para. 644.

In submission 8, the Philippines requested the Tribunal to declare that illegal activities of Chinese officials and official vessels in the South China Sea interfere with the exercise of its sovereign rights regarding mineral and living resources in its Exclusive Economic Zone and Continental Shelf. Concerning the exploitation of mineral resources, China has objected or acted several times illegally to prevent oil exploration and seismic surveys by the Philippines within 200 nautical miles. Regarding living resources, China has several times impeded the activities of Filipino fishermen within 200 nautical miles by not allowing them to approach Mischief Reef and Second Thomas Shoal. The Tribunal concluded that China violated Article 58 (3)²¹ (Rights and duties of other States in the Exclusive Economic Zone) and Article 77²² (Right of the coastal State over the Continental Shelf) of UNCLOS.

In submission 9, the Philippines alleged that China did not prevent its nationals with their vessels from engaging in illegal fishing activities in the Philippines' Exclusive Economic Zone. The Tribunal found that China allowed, through the assistance of its marine survey vessels, illegal activities of Chinese flag fishing vessels in Mischief Reef and Second Thomas Shoal in May 2013, and thereby breached the terms of Article 58 (3) of UNCLOS²³.

In submission 10, the Philippines alleged that China obstructed traditional fishing activities of Filipino nationals in Scarborough Shoal. The Tribunal found that since May 2012, China has unlawfully prevented Filipino fishermen from engaging in traditional fishing at that location using its official vessels. The Tribunal made clear that this decision is independent of the sovereignty issue at Scarborough Shoal²⁴.

21 *Idem*, Para. 709-715.

Article 58 n.3 of UNCLOS: "In exercising their rights and performing their duties under this Convention in the Exclusive Economic Zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

22 *Idem*, Para. 702-708.

Article 77 of UNCLOS: "1. The coastal State exercises over the Continental Shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the Continental Shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation. 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

23 *Idem*, Para. 717-757. As for Article 58 n. 3 of UNCLOS, see note 21.

24 *Idem*, Para. 758-814.

In submissions 11 and 12-B, the Philippines alleged that China failed to protect and preserve the maritime environment, provided for in UNCLOS, in Scarborough Shoal and Second Thomas Shoal. The Tribunal concluded, based on the considerations presented, that China failed to prevent its fishing vessels from engaging in harmful activities such as predatory fishing and coral harvesting in Scarborough Shoal and Second Thomas Shoal, as well as in Spratly Islands, thereby violating Articles 192 (Obligation to protect and preserve the marine environment) and 194 (5) of UNCLOS²⁵.

In submission 12, the Philippines alleged that China's occupation and construction of artificial islands in Mischief Reef violated the UNCLOS provisions on artificial islands, facilities and structures, preservation and protection of maritime environment, and its illegal occupation. The Tribunal considered that China, through the construction of artificial islands and facilities on Mischief Reef, without the authorization of the Philippines, violated Articles 60 (Artificial Islands, Facilities and Structures in the Exclusive Economic Zone) and 80 (Artificial Islands, Facilities and Structures on the Continental Shelf) of UNCLOS regarding sovereign rights in the Exclusive Economic Zone and Continental Shelf. The Court held that Mischief Reef is a "low-tide elevation" and cannot be subject to possession or appropriation²⁶.

In submission 13, the Philippines alleged that China failed to comply with its obligations under UNCLOS by dangerously conducting its official vessels in the vicinity of Scarborough Shoal, causing serious risks of collision with Philippines' vessels in the area. The Tribunal concluded that by virtue of the conduct of China's official vessels in the vicinity of Scarborough Shoal, there were serious risks of collision and danger to Philippines' vessels and their crews, and that China was therefore in breach of the rules of Article 94 (Flag State Duties) of UNCLOS²⁷.

In submission 14, the Philippines alleged that since January 2013, when the arbitration work by the Tribunal began, China has unlawfully continued the situation and extended the dispute through the following acts:

25 *Idem*, Para. 815-993. In pages 333, 334, 335, 341 and 343 of the Arbitral Award, there are aerial photographs taken by the Philippines Navy that evidence the landfill and illegal construction carried out by China in those places. Article 194 (5): "The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

26 *Idem*, Para. 994-1043. In page 405 of the Arbitral Award there are aerial photographs of *Mischief Reef* taken by the Philippines Navy before the construction and in page 402, of the structure built by China in the same place.

27 *Idem*, Para. 1044-1106.

- a) Interfering with the "navigation rights" of the Philippines in the waters of Second Thomas Shoal and adjacent zone;
- b) Obstructing the replacement of personnel and the provision of supplies to a contingent of Philippines Marines quartered on a vessel stranded in Second Thomas Shoal;
- c) Exposure to danger to the health and welfare of the Philippines Marines who remained at Second Thomas Shoal;
- d) Dredging, artificial island construction and other related activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.

In light of the Philippines' submissions, the Tribunal concluded as follows:

- a) China aggravated the dispute between the parties by constructing a large artificial island in the "low-tide elevation" at Mischief Reef, located in the Exclusive Economic Zone of the Philippines.
- b) China has aggravated the dispute between the parties over the protection and preservation of Mischief Reef maritime environment causing permanent and irreparable damage to the coral habitat there.
- c) China has escalated the dispute between the Parties over the protection and preservation of the maritime environment by commencing construction of large-scale artificial islands at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.
- d) China aggravated the dispute between the parties regarding the state of seascape in the Spratly Islands by reducing the ability to generate living beings in the sea areas upon destruction of natural conditions in Mischief Reef, Cuarteron Reef, Fiery Cross Reef (North), Johnson Reef, Hughes Reef and Subi Reef²⁸.

In submission 15, the Philippines asked the Court to declare as follows:

"China shall respect the rights and freedom of the Philippines by complying with the rules and duties stipulated in UNCLOS, including those related to the protection

²⁸ *Idem*, Para. 1110-1181.

and preservation of the maritime environment in the South China Sea.”

As for this last request, the Tribunal held that the parties are obliged to comply with the provisions of UNCLOS, including the provisions on dispute settlement and respect for the rights and freedom of other States. In view of the fact that neither party has contested these issues, the Tribunal neither saw the need nor considered it appropriate to make any declaration²⁹.

5. The characteristics of the Award issued by the Arbitral Tribunal

It seems to be of the utmost importance the unfavorable decision of the Tribunal on China's claims about the "Nine-Dash Line" which encompasses most of the area of the South China Sea, as well as about China's sovereign rights, jurisdiction and also "historical rights". The Award was clear to establish that the claims of "historic rights" over the maritime resources of the area are null and void, exceeding the limits set by UNCLOS. And that there is no historical evidence that China has been exercising exclusive jurisdiction in the South China Sea and also over the maritime resources of the region. Therefore, claims of "historical rights" upheld by the "Nine-Dash Lines" regarding the disputed area lack any legal foundation.

The Award criticized China's actions in sending fishing and official vessels, as well as battleships to create a *de facto* situation in terms of dominance by denying Philippines fishing vessels and fishermen access to that region. China claimed that landfills and construction of artificial islands in the Spratly Islands were part of its undisputed sovereign rights, but the Award completely rejected its rationale.

Another element to note is that the Award strictly interpreted the Islands Regime under Article 121 of UNCLOS³⁰ to consider that there are "rocks" in the Spratly Islands, but not "islands". Therefore, of the seven "artificial islands" built by China in that area, Johnson Reef, Cuarteron Reef, Fairy Cross Reef, Gaben Reef and Houghes Reef were originally "rocks" with 12 nautical miles of Territorial Sea. Subi Reef and Mischief Reef, on the other hand, are originally considered "low-tide elevations" and cannot be subject of maritime rights nor can they be object of "possession."

Despite the Award's condemnation, it is likely that the landfills and artificial island construction carried out by China cannot be eliminated and the sites may not be returned to the *status quo ante*. The notable part, however, is that the Philippines' claims were accepted, or else, that its sovereign rights and right of navigation have

²⁹ Idem, Para. 1182-1201.

³⁰ About Article 121 of UNCLOS, see notes 9 and 17.

been impaired as a result of China's actions. Additionally, the Tribunal condemned China for the destruction of the area's maritime environment.

5.1. China's reaction to the Arbitration Award³¹

When the Philippines filed for arbitration on 22 January 2013, China stated on 19 February that the arbitration was unilaterally initiated by the Philippines and that it neither accepted nor would participate in the arbitration.

China issued a Position Paper on 7 December 2014³², stating that the initiation of arbitration violated the agreement between China and the Philippines on bilateral negotiation for settlement of disputes of territorial and maritime nature, and also the terms of UNCLOS, and that the Tribunal had no jurisdiction over the case.

The Tribunal recognized the jurisdiction and admissibility of this case on 29 October 2016, and China then declared the Award to be invalid and non-binding.

China emphasized the Philippines' bad faith in initiating the arbitration, considering it a violation of its sovereignty and the principles of international law as follows:

- (a) firstly, territorial issues are not subject to UNCLOS and maritime delimitation disputes were excluded from mandatory dispute settlement based on Article 298 of UNCLOS³³ by China's 2006 declaration;
- (b) secondly, on the basis of Article 298 above, China excluded the mandatory UNCLOS settlement procedures concerning maritime delimitation, historical bays or titles, military and law enforcement activities;
- (c) thirdly, the Philippines' unilateral initiation of arbitration violates the bilateral agreement between China and the Philippines; and
- (d) fourthly, the Philippines' unilateral initiation of arbitration violates the commitment made by ASEAN Member States in the 2002 Declaration on the Agreement of the Parties in the South China Sea. The unilateral

31 Statement of the Chinese Ministry of Foreign Affairs, on 13 July 2016, in view of the Arbitral Award concerning the dispute between the Philippines and China over the South China Sea.

32 See note 7 above.

33 Article 298 of UNCLOS defines the exceptions of optional nature to the application of section 2, that determines the compulsory proceedings that lead to compulsory decisions: "1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2, with respect to one or more of the following categories of disputes (···)".

request for arbitration, denoted a violation of UNCLOS and the principles of *Pacta Sunt Servanda* by the Philippines.

According to China, the Arbitral Tribunal disregarded the fact that the essence of the subject-matter of the arbitration initiated by the Philippines are issues of territorial sovereignty and maritime delimitation and misinterpreted the common choice of dispute settlement previously agreed between China and the Philippines. The practice of the Arbitral Tribunal is contrary to the general practice of international arbitration and completely deviates from the object and purpose of UNCLOS, undermines the integrity and authority of UNCLOS, seriously violates China's legitimate rights as a Sovereign State and are unjust and illegal. Additionally China's territorial sovereignty and maritime rights and interests in the South China Sea shall not be affected by the Award; that China opposes and shall never accept any claim or action based on this Award and that it does not accept any means of third-party dispute settlement or any remedy imposed on China.

5.2. Position of the Philippines and other countries regarding the Arbitration Award

More than 40 countries, mainly from Europe, were in favor of the Award, including countries from the region such as India, Japan, Malaysia, Myanmar, Singapore, Korea (South), and Vietnam. Although from the region, countries such as Brunei, Cambodia, Indonesia, Laos, and Thailand were neutral. China itself, Taiwan, Pakistan, Russia, among others, opposed the Award.

It is interesting, however, to observe the behavior of the President of the Philippines, Rodrigo Duterte, who sometimes seems to have no desire for confrontation with China. Soon after the publication of the Award, on 15 July 2016, he decided to send former President Fidel Ramos to China³⁴ to discuss the Award whose conclusion was frankly favorable to the Philippines.

According to media reports, President Duterte probably wanted to avoid embarrassment with China at the ASEAN (Association of Southeast Asian Nations) summit held from 13 to 16 November 2017 in Manila, which the Philippines chaired. Previously, he had already canceled military maneuvers that were to take place in the region in April of the same year. In the final statement published after the summit meeting, there was no negative reference to China, which had been in the statements since 2014. The document only mentioned that there would be efforts to

³⁴ <http://www.sankei.com/world/news/160715/wor1607150071-n1.html>, access on 4 November 2021.

improve relations between ASEAN and China³⁵.

The same President Duterte gave a speech in support of the Arbitration Award at the UN General Assembly on 22 September 2020, stating that "Now, the Award is part of International Law, beyond the commitment and scope of approval of governments (...). We strongly reject attempts to weaken it"³⁶,

In March 2021, however, there was an incursion of hundreds of Chinese ships, including Maritime Police vessels, in the vicinity of the Spratly Islands, provoking reactions from cabinet members, such as Defense Secretary Delfin Lorenzana, who defended in his speech the national interest in the defense of sovereignty. Several members of the Legislature, representatives of academia and NGOs joined the protest, representing Philippines public opinion.

Foreign Affairs Secretary Teodoro Locsin sent several diplomatic protests to the Chinese Embassy in Manila for Chinese vessels to leave Philippines territorial waters, such as: the Declaration against the prolonged and unauthorized presence of Chinese fishing vessels in the vicinity and in Julian Felipe Reef³⁷, of 23 March 2021; the Department of Foreign Affairs Statement deploring the Chinese Embassy's response to the Defense Secretary's Statement; the convocations of the Chinese Ambassador by the Department of Foreign Affairs to express the utmost sense of displeasure about the Julian Felipe Reef matter.

Very interesting, however, is the stance of President Duterte, who according to the press, on 18 May 2021, "imposed a cabinet gag order on the South China Sea matter"³⁸, forbidding his ministers to publicly discuss the territorial dispute with China.

In any case, on 22 June 2021, the Secretary for Foreign Affairs issued a statement celebrating the fifth anniversary of the publication of the Arbitral Award on the South China Sea³⁹, citing President Duterte's September 2020 speech at the UN

35 <http://www.asahi.com/articles/ASKCJ446CJUHBI002.html>, access on 4 November 2021.

36 STRANGIO, Sebastian. "In UN Speech, Duterte Stiffens Philippines' Stance on the South China", in *The Diplomat*, 24 September 2020.

37 Statement on the unauthorized and lingering presence of Chinese fishing vessels in and around Julian Felipe Reef; Statement - The Department of Foreign Affairs deplores Chinese Embassy response to the Secretary of Defense's Statement; Department of Foreign Affairs summons Chinese Ambassador, expresses utmost displeasure over Julian Reef issue.

38 Idem, *The Diplomat*, 19 May 2021, access on 4 November 2021.

39 Statement of Foreign Affairs Secretary Teodoro L. Locsin, Jr., On the 5th Anniversary of the Issuance of the Award on the South China Sea Arbitration, 22 June 2021.

that the Award is part of International Law and that the Philippines welcomes an increasing number of States who have come to support the Award, a triumph of reason over temerity, law over disorder, friendship over ambition, and sovereignty of law.

The statement ends declaring that the Award is a legacy that a developing country leaves to humanity with the immense expectation of peace and cooperation in the South China Sea, the supremacy of Law over war power, which the Philippines has long desired.

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