

TURMOIL AT THE SOUTH CHINA SEA THE PHILIPPINES VS. CHINA ARBITRATION AND OTHER RELEVANT MATTERS

SAUL HOFILEÑA JR.

DANIEL SORIANO HOFILEÑA

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3. Judge Stanislaw Pawlak.
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Daniel Soriano Hofileña

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PREFACE

Philippines v. China is considered the most important case involving international law in this century, and probably in the next.

We have presented in this slim volume the more important provisions of the United Nations Convention on the Law of the Sea (UNCLOS), and the case of *Magallona v. Ermita*, which we believe would be necessary to fully explain the ruling of the Arbitral Tribunal. We then presented the more important portions of the ruling of the Arbitral Tribunal created under Annex VII of the UNCLOS in a convenient question-and-answer format.

We have tried to make the rulings of the Arbitral Tribunal understandable and simple even to non-lawyers, and that was the most difficult part of writing this book. If in certain passages we have inadvertently omitted quotation marks, our apologies.

Saul Hofileña Jr.

Daniel Soriano Hofileña

ABOUT THE AUTHORS

Saul Hofileña Jr. graduated from the Ateneo College of Law in 1985. He has taught numerous law subjects at the San Beda University in Manila, Centro Escolar University in Makati and San Beda College of Law in Alabang. He also conducted pre-bar review classes in international law at the San Beda University in Manila. He was also the Dean of the College of Law of the Asian Development Foundation College. He now conducts MCLE classes for lawyers. He has written more than fifteen books on various subjects including a bestselling history book, *Under the Stacks*, for which he won the Patnubay Award for History awarded by the City of Manila. His books are on the shelves of numerous libraries worldwide. In the field of law, he is the author of a textbook in International Law and a bestselling pre-bar reviewer in International Law. In 2020, he co-authored with his son a book on international extradition. He now writes a weekly column on law with The Manila Times. He is a member of the Asian Law and Economics Association, the Economic Society of Singapore, and the American Society of International Law.

Daniel Soriano Hofileña, obtained his Master of Laws in International Dispute Settlement at the Centre for International Dispute Settlement of the Graduate Institute of International and Development Studies of Geneva and the University of Geneva Law School. He earned a Juris Doctor degree with a major in Intellectual Property from the Ateneo de Manila University (Second Honors). He also obtained a Masters in Applied Economics from De La Salle University-Manila and a diploma in banking from

the Ateneo de Manila University, and graduated Honorable Mention with a management degree at the De La Salle University-Manila.

He was a Senior Consultant at the Intellectual Property Office of the Philippines (IPOPHL). He is an accredited arbitrator and the Assistant Deputy Secretary General for Education and Training of the Philippine International Center for Conflict Resolution. He is likewise an accredited arbitrator and mediator of the Office for Alternative Dispute Resolution-Department of Justice of the Philippines. He is also a mediator of the Philippine Dispute Resolution Center, Inc.

He is a lecturer of International Law, Conflict of Laws, and Credit Transactions at the Centro Escolar University School of Law and Jurisprudence. He also teaches Alternative Dispute Resolution at EAC – Institute of Law and Justice. He was also a professor of economics in the MBA Program of De La Salle University-Manila. Since 2012, he has been teaching at the Commercial Law Department and the School of Economics of the De la Salle University-Manila, handling such diverse subjects as Business Law, Corporation Law, Statistics, Financial Econometrics, Microeconomics, and Macroeconomics.

He has lectured on intellectual property in numerous workshops conducted by the Intellectual Property Office of the Philippines and has been invited to lecture by the World Intellectual Property Organization. He taught strategic management of copyright for the Basic Diploma in Intellectual Property of De La Salle University. He has

likewise taught intellectual property law in the Philippine Trade and Training Center of the Department of Trade and Industry, the Local Government Academy of the Department of Interior and Local Government, the Civil Service Institute of the Civil Service Commission, the Technical Education and Skills Development Authority, and numerous colleges and universities.

He has also conducted seminars for alternative dispute resolution for the Integrated Bar of the Philippines, the Office of Alternative Dispute Resolution, the Young Philippine Institute of Arbitrators, the Philippine Dispute Resolution Center Inc., and the Philippine International Center for Conflict Resolution.

He is also a member of the Philippine Institute of Arbitrators, Singapore Institute of Arbitrators, Asian Law and Economics Association, the Economic Society of Singapore, and the American Society of International Law.

He is the Associate Editor of the Asia-Pacific Journal of IP Management and Innovation and published numerous articles in journals and presented papers in conferences in the Philippines, Singapore, Japan, Korea, Indonesia, and China on economics and intellectual property.

In 2020, he co-authored a book entitled *International Extradition*.

Daniel S. Hofileña is a founding partner of Kalaw Prasad & Hofileña law, a law firm specializing in corporate governance, risk management, and dispute resolution.

THE PHILIPPINES AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

1. What is the intention of the UNCLOS or the United Nations Convention on the Law of the Sea?

The intention of the UNCLOS or the United Nations Convention on the Law of the Sea is to serve as the “constitution for the oceans” for the nations of the world. According to its preamble, the UNCLOS was meant to be “a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”

2. When was the UNCLOS adopted?

The United Nations Convention on the Law of the Sea also known as UNCLOS was adopted on December 10, 1982 at Montego Bay in Jamaica.

3. What is a Convention?

It is a multilateral agreement or treaty between States.

4. Are the Philippines and China signatories to UNCLOS?

Yes. China signed the Convention on December 10, 1982 and the Philippines also signed it on the same date.

The Philippines ratified the Convention on May 8, 1984 and China on June 7, 1996.

5. When did the Convention enter into force?

On November 16, 1994.

6. What is the territorial sea?

The territorial sea is defined as that belt of water immediately surrounding a country's land mass or in the case of an archipelagic State, its archipelagic waters. The Philippines is sovereign in its territorial sea. The territorial sea does not exceed 12 nautical miles from the baselines established in accordance with the UNCLOS.

7. How far is a nautical mile?

1,852 meters.

8. What is an archipelago according to the UNCLOS?

An archipelago "is a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic

geographical economic and political entity, or which historically have been regarded as such.”

9. What is an archipelagic State?

Art. 46 of the UNCLOS defines an archipelagic State as a State constituted wholly by one or more archipelagos and may include other islands.

10. What do you mean by archipelagic waters?

Archipelagic waters are the waters enclosed by the archipelagic baselines of an archipelago. The archipelagic baselines are drawn by joining the outermost points of the outermost islands and drying reefs of the archipelago but should not depart to any appreciable extent from the general configuration of the archipelago. Archipelagic baselines are drawn in accordance with Article 47 of the UNCLOS.

11. What are internal waters?

Internal waters are all waters (bays, lakes, etc.) which are situated landwards from the established baselines. The State exercises sovereignty over its internal waters as it does over its territorial sea.

12. What are archipelagic sea lanes?

They are sea lanes established by an archipelagic State for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters.

13. Generally, what are the basic methods of measuring baselines?

The normal baseline method and the straight baseline method are the two basic methods of measuring baselines. The Philippines utilizes the archipelagic straight baseline method under Art. 47 of the UNCLOS.

14. What is the normal baseline method?

The normal baseline method for measuring the breadth of the territorial sea adheres to the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State.

Under the normal baseline method, the low-water mark, the land that is visible during low-tide or where the sea water meets the temporary shoreline created during low-tide, is the starting point for the measurement of the 12-nautical mile territorial sea.

15. What is the straight baseline method?

In the straight baseline method, the State draws straight lines from selected points along its shoreline. The straight baselines, however, must not depart to any appreciable extent from the general direction of the coast.

If an archipelagic State draws straight baselines, they are called archipelagic baselines. Under the UNCLOS, these baselines may join the outermost points of the

outermost islands and drying reefs provided that the main islands are included within the baselines.

16. In the Philippines, what baseline method is used?

The Philippines uses the archipelagic baseline method established under Article 47 of the UNCLOS wherein straight baselines are drawn around the archipelago. They can also be called archipelagic straight baselines.

17. What is Art. 47 of the UNCLOS?

It states in part that an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago...

**Archipelagic Straight Baselines of the Philippines
Drawn in Accordance with Article 47 of the UNCLOS**



(Source: Magallona vs. Ermita, G.R. No. 187167, 16 August 2011)

18. What is the purpose of the baselines?

The purpose of baselines is to determine the point of beginning for measuring the maritime zones. It also serves to enclose the State's internal or archipelagic waters.

19. What is a shoal?

A shoal is a sandbank or sandbar that makes the water shallow.

20. What is a cay?

It is a small, low island usually sandy, situated on a coral reef platform. Sometimes it is spelled as Key.

21. What is a reef?

A reef is a chain of rocks or corals or a ridge of sand at or near the surface of water.

22. What is an atoll?

An atoll is an island that is made of corals and shaped like a ring.

23. What is the Filipino name of Mischief Reef?

The Filipino name of Mischief Reef is Panganiban Reef.

24. What is the Filipino name of Reed Bank?

The Filipino name of Reed Bank is Recto Bank.

25. What is the Filipino name of Scarborough Shoal and its old name?

The Filipino name of Scarborough Shoal is Panatag Shoal. Its old name was Bajo de Masinloc.

26. What is the Filipino name of Second Thomas Shoal?

The Filipino name of Second Thomas Shoal is Ayungin Shoal.

27. What is the Filipino name of Spratly Island?

The Filipino name of Spratly Island is Lagos Island.

28. What are the Chinese and Filipino names for the Spratly Islands Group?

The Chinese name for the Spratly Islands Group is Nansha Qundao and its Filipino name is Kalayaan Island Group (Kalayaan Islands).

29. What is the Filipino name of Subi Reef?

The Filipino name of Subi Reef is Zamora Reef.

30. What is the Filipino name of Thitu Island?

The Filipino name of Thitu Island is Pag-asa Island.

31. What is the purpose of a State when it names islands and other features in its language?

It is a hallmark for countries claiming territory or features to use its official language and/or its native languages to name the islands or features being claimed by them.

THE MARITIME ZONES

32. What is the contiguous zone?

The contiguous zone is that which is adjoining or bordering the territorial sea of a country. A contiguous zone shall not go beyond 24 nautical miles from the baselines from where the breadth of the territorial sea is measured.

33. In the contiguous zone, may the State enforce its laws?

Yes, but in a limited way. The Convention grants the coastal State the right to enforce its laws within the contiguous zone over clearly specified offenses, *i.e.*, the violation of laws relating to customs, fiscal, immigration or sanitary laws.

34. What is the continental shelf?

Article 76 of UNCLOS gives a precise definition of the continental shelf:

“The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the

baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

35. What is the breadth of the Exclusive Economic Zone or EEZ?

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines.

36. What are the rights of a coastal State over its EEZ?

The coastal State has the sovereign right of exploring and exploiting, conserving and managing the natural resources, living or non-living, of the waters within the EEZ. It also has the right of economic exploitation and exploration, such as the production of energy from water, water current or wind. The coastal State also has the right to establish and use artificial islands, and structures, conduct marine scientific research and the correlative duty of protecting and preserving the environment.

37. What are the rights and duties of other States in the exclusive economic zone?

Among others, in the exclusive economic zone, all States, “whether coastal or land-locked, enjoy, subject to the relevant provisions of the Convention, the freedoms referred to in article 87 of the Convention, *i.e.*, of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea

related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the Convention.”

38. What is the High Seas?

The UNCLOS defines the High Seas through the process of elimination. If a sea is not included in the exclusive economic zone of a State nor is it the territorial sea, internal waters or the archipelagic waters of an archipelagic State, then that sea belongs to what is called the High Seas. In other words, the High Seas is beyond the jurisdiction of any State.

39. What are the freedoms accorded to all States in the High Seas?

The following are the freedoms accorded to all States in the High Seas:

- 1) freedom of navigation;
- 2) freedom of overflight;
- 3) freedom to lay submarine cables and pipelines;
- 4) freedom to construct artificial islands and other installations permitted under international law;
- 5) freedom of fishing;
- 6) freedom of scientific research.

These freedoms shall be exercised by all States with due regard to the interests of other States in their exercise of the freedom of the High Seas, and also with due regard to the rights under the Convention with respect to activities in The Area. The High Seas is reserved for peaceful purposes and no State may subject any part of the High Seas to its sovereignty.

40. What is the continental shelf and the extended continental shelf?

According to Article 76 and 77 of the Convention, the continental shelf is that part of the seabed over which a coastal State exercises sovereign rights with regard to the exploration and exploitation of its natural resources. Natural resources pertain to oil and gas deposits as well as minerals that may be mined in the seabed.

The continental shelf extends to a distance of 200 nautical miles from the baselines. If the continental shelf extends to more than 200 nautical miles from the baselines because of its extended prolongation, the same is called the extended continental shelf and the coastal State is required to make a submission to the Commission on the Limits of the Continental Shelf (CLCS). Under the UNCLOS, the CLCS shall make recommendations to coastal States on the matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

41. What is “The Area”?

Ominously named “The Area”, it encompasses the deep seabed and subsoil beyond the national jurisdiction of any State.

“The Area” is a place in the sea which is not claimed as part of the maritime zone entitlement of any State, *i.e.*, it is not in the area covered by an EEZ or extended continental shelf or is not a territory of a coastal State.

42. What is the legal status of “The Area” according to UNCLOS?

According to Article 137, no State can claim or exercise sovereignty or sovereign rights over any part of “The Area” or any of its resources, nor can any State, natural or juridical person such as a corporation appropriate any part of “The Area”. The resources in “The Area” are owned by mankind.

However, the minerals recovered from “The Area” may only be alienated in accordance with the rules of the International Seabed Authority (ISA) which is based in Kingston, Jamaica.

Activities in “The Area” shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples

who have not attained full independence or other self-governing status recognized by the United Nations.

The ISA shall provide for the equitable sharing of financial and other economic benefits derived from activities in “The Area” through any appropriate mechanism on a non-discriminatory basis.

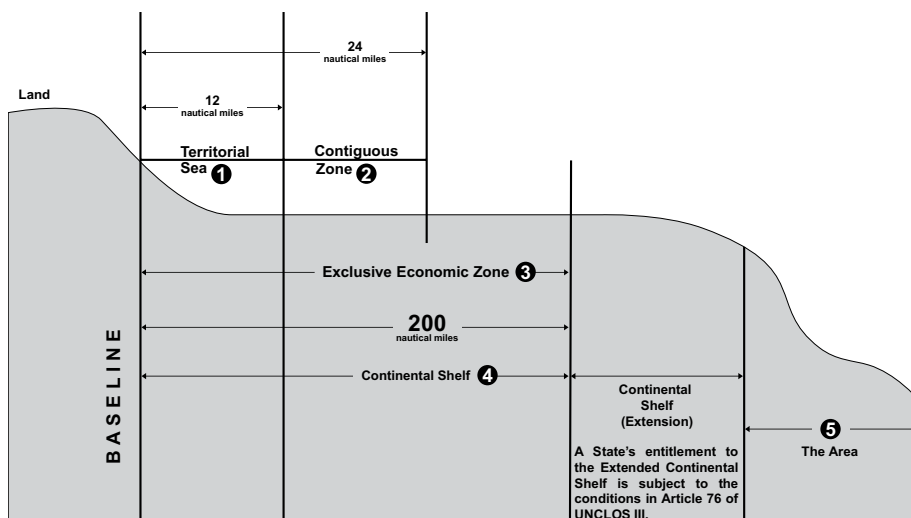
43. So, what makes the International Seabed Authority (ISA) and “The Area” of great interest?

The ISA has jurisdiction over nearly a hundred million square miles of seafloor and companies who want to mine the deep seabed of “The Area” must secure the permission of the ISA.

44. What are the resources in “The Area”?

At present, we know that there are rare earth minerals, cobalt, and copper in “The Area” and creatures yet unknown that inhabit the abyss and are bioluminescent as they produce light through chemical reaction. Oil, gas, and undiscovered minerals are also present in “The Area.”

Sea Boundaries Under the United Nations Convention on the Law of the Sea (UNCLOS) Using the Normal Baseline Method



- ❶ Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention. (Article 3. [UNCLOS])
- ❷ The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. (Article 33 (2). [UNCLOS]) The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedom of other States are governed by the relevant provisions of this Convention. (Article 55. [UNCLOS])
- ❸ The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (Article 57. [UNCLOS])
- ❹ The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. (Article 76. [UNCLOS])
- ❺ The Area encompasses the deep seabed and subsoil beyond the national jurisdiction of any State. The Area is administered by the International Seabed Authority, an autonomous organization of the United Nations headquartered in Kingston, Jamaica.

N.B. The normal baseline method is used by almost all the signatories to the UNCLOS. The Philippines, however, uses the archipelagic baseline or archipelagic straight baseline method under Article 47 of the UNCLOS where the baselines are established on specific points and not on the low-water mark. (See page 5 for explanation and illustration.)

According to Art. 33 (2) of the UNCLOS, the contiguous zone “may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured”. Portions of the contiguous zone, therefore, overlap with the territorial sea since measurement starts from the baselines.

Likewise, since the exclusive economic zone must be measured from the baselines, the EEZ therefore includes the territorial sea and the contiguous zone.

The overlaps are inevitable because it would be difficult to refer to the edge of the territorial sea to mark the beginning of the contiguous zone or the edge of the contiguous zone to reckon the beginning of the EEZ because one cannot draw lines on water.

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. The continental shelf may be extended subject to the conditions outlined in Article 76 of the UNCLOS.

MAGALLONA v. ERMITA
G.R. No. 187167, 16 August 2011
(A Decision of the Philippine Supreme Court)

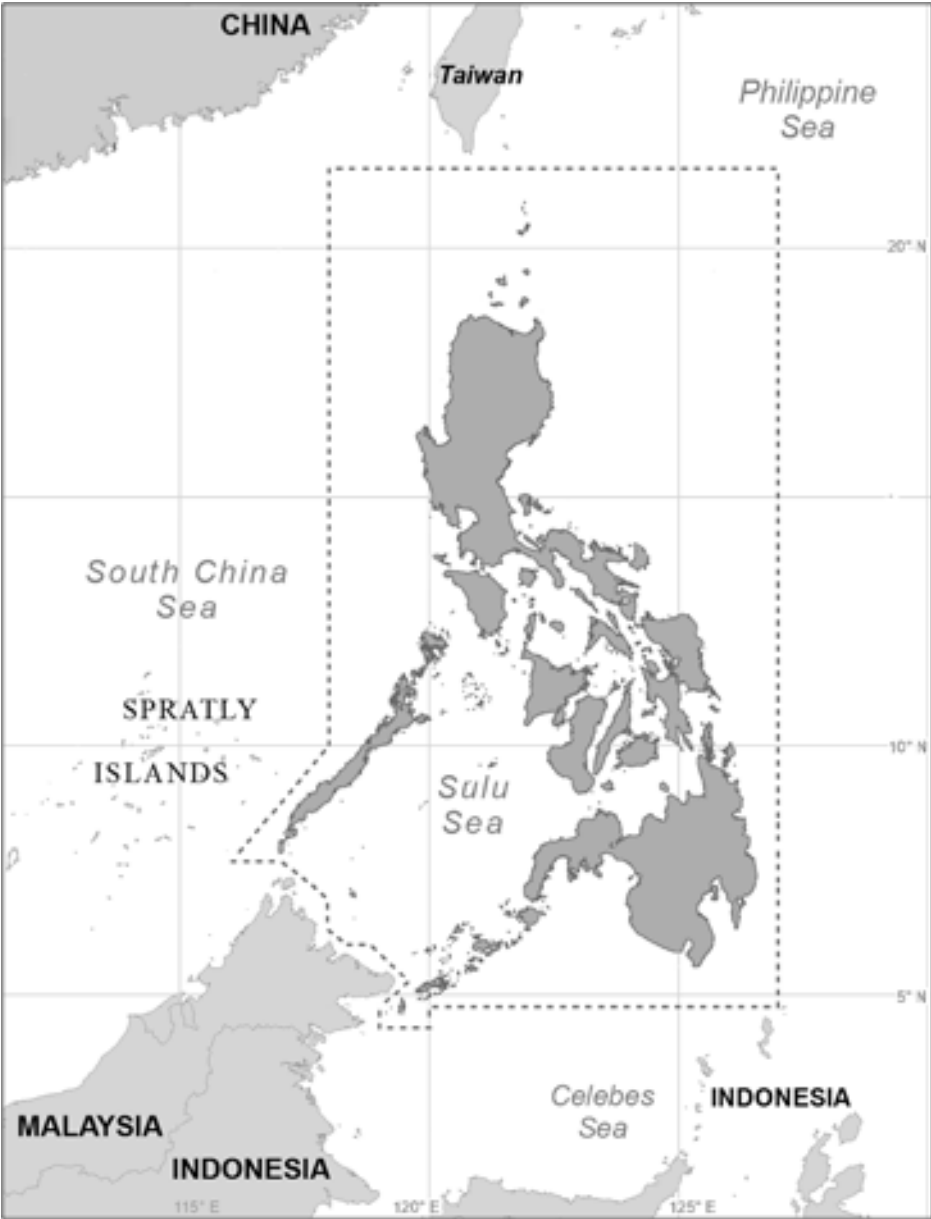
45. What is the case of *Magallona v. Ermita*?

This case is an original action for the issuance of a writ of certiorari and prohibition and assails the constitutionality of R.A. No. 9522 adjusting the country's archipelagic baselines and classifying the baselines regime of nearby territories.

The petitioner submits that R.A. 9522 “dismembers a large portion of national territory” as national territory is defined under the 1935, 1973, and 1987 Constitution.

The petitioner argues that from the Treaty of Paris' technical description, Philippine sovereignty over territorial waters extends hundreds of nautical miles around the Philippine archipelago, embracing the rectangular area delineated in the Treaty of Paris of 1898.

Boundaries of the Philippines under the Treaty of Paris.



46. What was the ruling of the *ponente* in the case?

The *ponencia* of then Justice Antonio Carpio ruled: “That R.A. 9522 was enacted to comply with UNCLOS III which mandates the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines...”

“Even under petitioner’s theory,” the *ponencia* continued, “that the Philippine territory embraces the islands and all the waters within the rectangular area delineated in the Treaty of Paris, the baselines of the Philippines would still have to be drawn in accordance with R.A. 9522 because that is the only way to conform with UNCLOS III.”

47. How did the *ponente* in *Magallona v. Ermita* negate the claim of the petitioners that under R.A. 9522, the Philippines will lose about 15,000 square nautical miles of territorial waters?

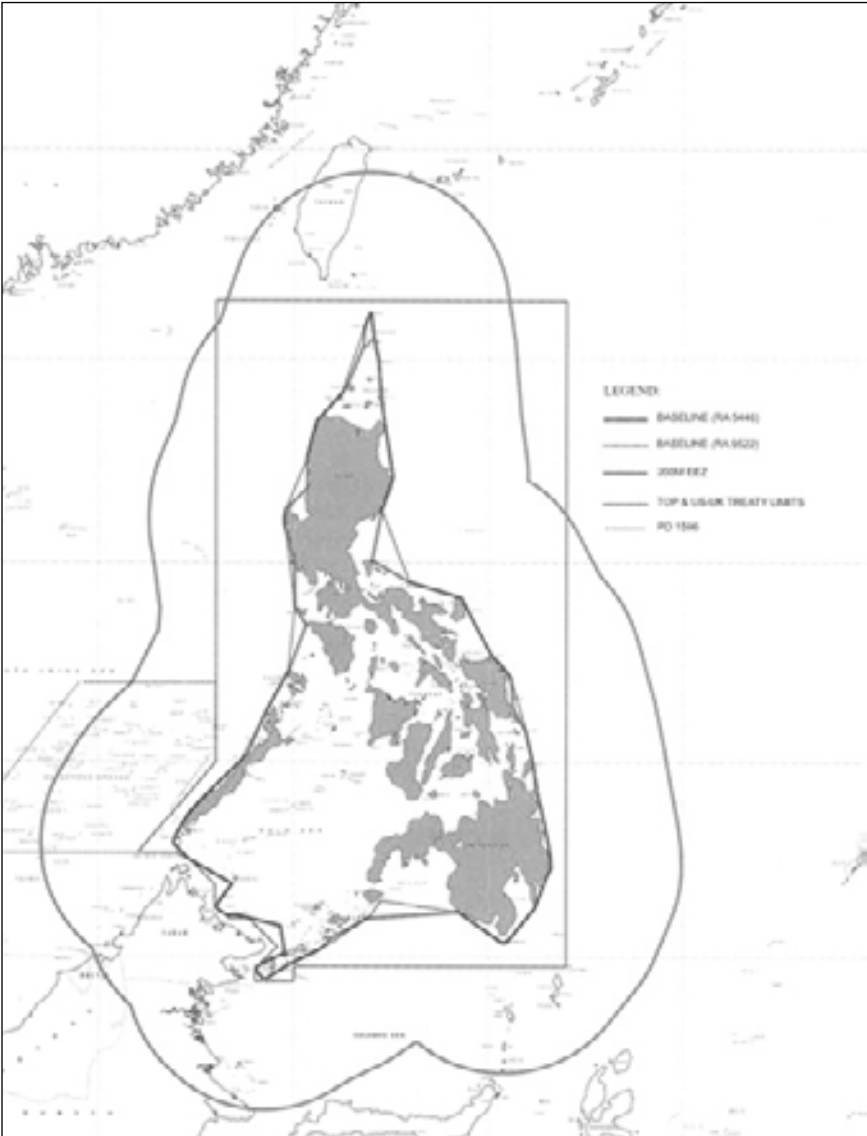
According to the *ponencia*: Petitioner’s assertion of loss of ‘about 15,000 square nautical miles of territorial waters’ under R.A. 9522 is unfounded both in fact and law. On the contrary, R.A. 9522, by optimizing the location of basepoints, *increased* the Philippines’ total maritime space (covering its internal waters, territorial sea and exclusive

economic zone) by 145,216 square nautical miles, as shown in the table below:

	Extent of maritime area using R.A. 3046, as amended, taking into account the Treaty of Paris delimitation (in square nautical miles)	Extent of maritime area using R.A. 9522, taking into account UNCLOS III (in square nautical miles)
Internal or archipelagic waters	166,858	171,435
Territorial Sea	274,136	32,106
Exclusive Economic Zone		382,669
TOTAL	440,994	586,210

48. How did the *ponente* in *Magallona v. Ermita* explain the reach of the exclusive economic zone of the Philippines under RA 9522?

To quote the words of the *ponente* in *Magallona v. Ermita*: “Thus, as the map below shows, the reach of the exclusive economic zone drawn under R.A. 9522 even extends way beyond the waters covered by the rectangular demarcation under the Treaty of Paris. Of course, where there are overlapping exclusive economic zones of opposite or adjacent States, there will have to be a delineation of maritime boundaries in accordance with UNCLOS III.”



(Source: Magallona vs. Ermita, 655 SCRA 476)

49. What happened to the irregular parallelogram which outlined the territory of the Philippines under the Treaty of Paris?

The *ponente* in *Magallona v. Ermita* quoted the proponent of the baseline law, Miriam Defensor Santiago:

“This is called contested islands outside our configuration. We see that our archipelago is defined by the orange line which [we] call] archipelagic baseline. Ngayon tingnan ninyo ang maliit na circle doon sa itaas, that is Scarborough Shoal, itong malaking circle sa ibaba, that is Kalayaan Group or the Spratlys. Malayo na sila sa ating archipelago kaya *kung ilihis pa natin ang dating archipelagic baselines para lamang masama itong dalawang circles, hindi na sila magkalapit at baka hindi na tatanggapin ng United Nations because of the rule that it should follow the natural configuration of the archipelago.*”

50. In *Magallona v. Ermita*, how did the *ponente* resolve the issue involving the constitutionality of the archipelagic baselines established by R.A. 9522?

According to the *ponencia*:

“Baselines laws are nothing but statutory mechanisms for UNCLOS III States parties to delineate with precision the extent

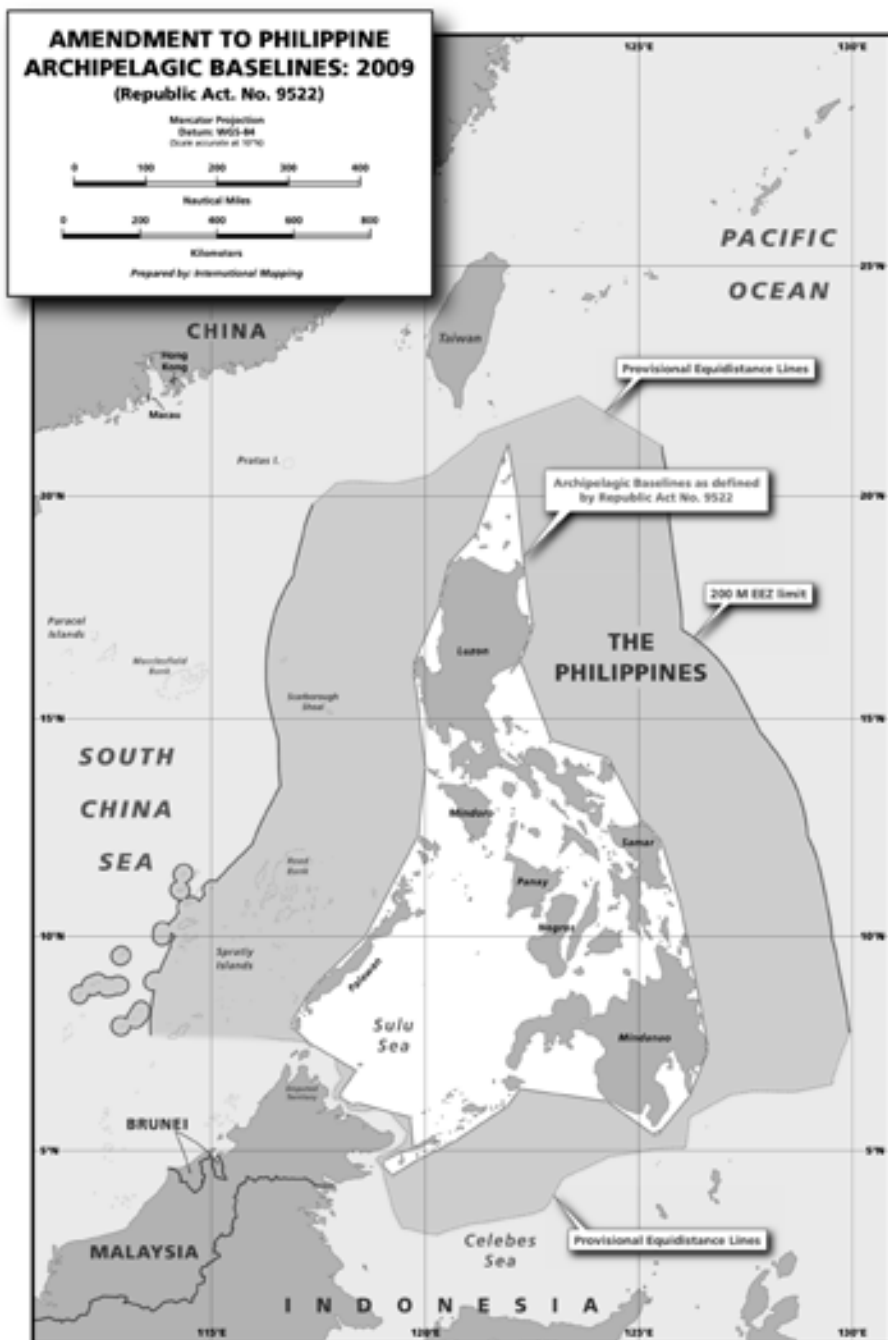
of their maritime zones and continental shelves. In turn, this gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights, namely, the exercise of sovereignty over territorial waters (Article 2), the jurisdiction to enforce customs, fiscal, immigration, and sanitation laws in the contiguous zone (Article 33), and the right to exploit the living and non-living resources in the exclusive economic zone (Article 56) and continental shelf (Article 77).”

xxx

xxx

xxx

“Absent an UNCLOS III compliant baseline law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. This is a recipe for a two-fronted disaster: *first*, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and *second*, it weakens the country’s case in any international dispute over Philippine maritime space. These are consequences Congress wisely avoided.”



Amendment to Philippine Archipelagic Baselines: 2009, Republic Act No. 9522
(Source: Memorial of the Philippines, RP vs. China)

THE REPUBLIC OF THE PHILIPPINES
- versus -
THE PEOPLE'S REPUBLIC OF CHINA
PCA Case No. 2013-19

51. Who decided the case between the Republic of the Philippines and China?

The Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) was formed to decide the dispute between the Philippines and China concerning areas in the South China Sea. The Permanent Court of Arbitration (PCA) was appointed as the Registry.

52. What and where is the South China Sea (SCS)?

The Arbitral Tribunal describes the South China Sea as a semi-enclosed sea in the western Pacific Ocean, spanning an area of almost 3.5 million square kilometers. The South China Sea lies to the south of China; to the west of the Philippines; to the east of Vietnam; and to the north of Malaysia, Brunei, Singapore, and Indonesia.



The South China Sea (Source: Memorial of the Philippines, RP vs. China)

53. Where are the Spratly Islands?

According to the Arbitral Tribunal, the southern portion of the South China Sea is also the location of the Spratly Islands, a constellation of small islands and coral reefs, existing just above or below water, that comprise the peaks of undersea mountains rising from the deep ocean floor. It is located in the western part of Palawan.

54. Where did the Spratly Islands get its name?

The Spratly Islands were named after Richard Spratly in 1843. He was the master of the British whaler ship, *Cyrus South Seaman*, in the 19th century.

55. What was the case of the Philippines and China all about?

According to the Arbitral Tribunal, the dispute between the Philippines and China fell into four categories:

1. The Philippines asked the Tribunal for a declaration that China's claim to rights to the nine-dash line has no legal ground.
2. That the features being claimed by China in the area known as the Spratly Islands and the Scarborough Shoal do not generate an entitlement or are not entitled to an Exclusive Economic Zone (EEZ) or a continental shelf.

3. The Philippines seeks declarations that China has violated the Law of the Sea Convention by:
 - (a) interfering with the exercise of the Philippines' rights under the Convention, including with respect to fishing, oil exploration, navigation, and the construction of artificial islands and installations;
 - (b) failing to protect and preserve the marine environment by tolerating and actively supporting Chinese fishermen in the harvesting of endangered species and the use of harmful fishing methods; and
 - (c) inflicting severe harm on the marine environment by constructing artificial islands and engaging in extensive land reclamation at seven reefs in the Spratly Islands.
4. The Philippines has also asked the Tribunal to find that China has aggravated and extended the disputes between the Parties during the course of the arbitration by restricting access to a detachment of Philippine marines stationed at Second Thomas Shoal.

COMMENCEMENT OF THE ARBITRATION

56. How was the arbitration commenced?

In January 2013, the Philippines communicated a Notification and Statement of Claim. Thus, arbitral proceedings were initiated by the Philippines against China under Annex VII of the Law of the Sea Convention.

Both the Philippines and China are parties to the UNCLOS.

57. After the arbitration was commenced by the Philippines, what did China do?

China refused to accept the jurisdiction of the Arbitral Tribunal and did not participate in the proceedings from beginning to end while the Philippines pursued the case up to its termination. China, however, articulated its positions in numerous public statements, a Position Paper, and Notes Verbales to the Philippines and the PCA.

58. What were the grounds given by China to justify its refusal to participate in the international suit filed by the Philippines?

In its Position Paper which China circulated but did not submit to the Arbitral Tribunal, China argued that the “Tribunal lacks jurisdiction because (a) the essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features of the

South China Sea; (b) China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiation; and (c) the disputes submitted by the Philippines would constitute an integral part of maritime delimitation between the two countries.”

59. Prior to *Philippines v. China*, were there instances wherein a State refused to appear or participate in proceedings?

Yes. There were instances wherein the International Court of Justice (ICJ) rendered a decision in the absence of the participation of a party in the proceedings. In the same vein, the International Tribunal of the Law of the Sea (ITLOS) and Arbitral Tribunals created under Annex VII, United Nations Convention on the Law of the Sea (UNCLOS) have continued proceedings despite the non-appearance of a party.

60. What is Article 287 of the United Nations Law of the Sea?

Article 287 of the UNCLOS established the procedures that should be followed in the event of a dispute between parties to the Convention.

61. What are the modes for the settlement of disputes under Art. 287 of the UNCLOS?

It states that when signing, ratifying, or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

- (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 constituted in accordance with Annex VII;**
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

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XXX

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62. What is the default mechanism for the settlement of disputes under the UNCLOS?

Arbitration under Annex VII is the default mechanism for the settlement of disputes. According to Article 287 (3) of the Convention “a State party, which is a party to a dispute not covered by a declaration in force shall be *deemed to have accepted arbitration in accordance*

with Annex VII.” In the same manner, Article 287 (5) states that “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.*”

63. Who decided the case of Philippines v. China?

The Arbitral Tribunal that was formed to decide the dispute under Annex VII of the Convention. It was a non-permanent *ad hoc* body that became *functus officio* after rendering the arbitral award.

64. Was it not the Permanent Court of Arbitration or PCA that decided the case?

It was not the Permanent Court of Arbitration (PCA) that decided the case. The PCA only acted as the Registrar and facilitated the arbitration, among others. The PCA is not a court with judges with fixed tenures.

65. If the PCA is not a court with judges with fixed tenures, what is it then?

The Permanent Court of Arbitration (PCA) is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of

States, State entities, intergovernmental organizations, and private parties.

It is a facility that litigants may use. It has a chamber that can be used for arbitral hearings and a legal archive. It has a support and administrative staff. It can also act as a Registrar in an action, as in the case of *Philippines v. China*. All communications of the *ad hoc* Arbitral Tribunal were sent out by the PCA.

66. Why was the case docketed as a PCA case?

Although the docket prefix and number “PCA Case No. 2013-19” has misled a lot of people (even lawyers) into thinking that the case was decided by the Permanent Court of Arbitration (PCA), its complete title clearly shows that it was the *ad hoc* arbitral tribunal created under Annex VII of the UNCLOS that sat in judgment to resolve the issues in the case. Here is the complete title:

“PCA Case No. 2013-19 IN THE MATTER
OF THE SOUTH CHINA SEA ARBITRATION
- before - AN ARBITRAL TRIBUNAL
CONSTITUTED UNDER ANNEX VII TO
THE 1982 UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA - between - THE
REPUBLIC OF THE PHILIPPINES - and - THE
PEOPLE’S REPUBLIC OF CHINA”

67. How should a party start the arbitration process under Annex VII of the Convention?

Article 1 of Annex VII of the Convention allows “any party to a dispute to submit it to arbitral procedure provided that there is written notification addressed to the other party or parties to the dispute. The notification must be accompanied by a statement of the claim and the basis for the claim.”

68. What is the procedure for constituting the Tribunal in the case of Philippines v. China?

In Philippines v. China, the Philippines appointed an arbitrator. Since China did not participate, the President of the International Tribunal of the Law of the Sea (ITLOS) as the appointing authority, appointed four arbitrators—one of whom represented China. The procedure followed Article 3, Annex VII of the Convention.

The PCA was appointed by the Tribunal as the Registrar.

69. What are the limitations on the jurisdiction of the Arbitral Tribunal in the Philippines v. China case as set-forth in the 2006 Declaration of China?

The Tribunal cannot rule on the issue of maritime delimitation or sovereignty, issues involving historic bays or titles, or questions concerning military and law enforcement activities. This is because, in 2006, China submitted a declaration excluding them from

the compulsory settlement of disputes under UNCLOS concerning these matters.

70. Can the Arbitral Tribunal rule on questions involving sovereignty?

The Tribunal cannot rule on questions involving sovereignty. In *Ukraine v. The Russian Federation* (PCA Case No. 2017-06), which was decided under UNCLOS by an Arbitral Tribunal also constituted under Annex VII, the Tribunal unanimously ruled that it cannot decide Ukraine's claims on the merits because the Tribunal has to decide "directly or implicitly" on a sovereignty issue involving Crimea.

71. What is sovereignty?

It is a fundamental concept underlying the system of public international law which implies the State's lawful and essentially exclusive control of its territory, with the authority to govern it and enact and enforce its laws with respect to all persons, property, and events within its territory. As noted by the arbitrator in the *Island of Palmas* Arbitration, a 1928 case involving a dispute between the United States of America (USA) and the Netherlands concerning the acquisition of sovereignty over an island, sovereignty is tantamount to independence, that is, the right to exercise in a territory the functions of a State to the exclusion of any other State, and with no other authority over the State than that of international law.

72. What if there is a question of sovereignty and questions relating to the application and interpretation of the Convention?

If the Tribunal must determine the principal question of sovereignty, then the Tribunal cannot have jurisdiction as in the case of *Ukraine v. The Russian Federation*. In that case, the Tribunal refused jurisdiction because the principal question was the sovereignty of Crimea, which the Russian Federation had occupied.

Thus, the Tribunal, in its Award on Jurisdiction and Admissibility in *Philippines v. China* required itself to determine whether the dispute concerns the interpretation or application of the Convention, to which it has jurisdiction.

73. In fine, the Arbitral Tribunal in the case of Philippines v. China ruled on what kind of issues?

The Arbitral Tribunal ruled on issues involving the application and interpretation of the Convention.

74. How did the Arbitral Tribunal created under Annex VII of the UNCLOS acquire jurisdiction over the parties in the case of Philippines v. China?

It is a basic tenet in international law that in controversies, an international court or tribunal can only acquire jurisdiction over a case if the parties agree that the court or tribunal should hear the case and resolve the issues presented for its adjudication. However, the Convention

allows compulsory procedure even if one party refuses to participate.

Article 286 of the Convention states that “any dispute concerning the interpretation or application of this Convention shall, where no settlement has been resolved by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.” This article outlines recourse to compulsory arbitration.

75. But did China give its consent to the tribunal to sit in judgment over the case?

Yes. China gave its consent to be bound by the decision of the Tribunal created under Annex VII of the UNCLOS when it signed and ratified the Convention because the provisions on compulsory arbitration were contained in the body of the Convention itself.

76. What if a party refuses to appear as what China did in the case filed by the Philippines?

An arbitration can validly proceed under Article 9 of Annex VII of the Convention which states as follows:

“If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not

constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well-founded in fact and law.”

77. What did the Tribunal do after China refused to participate?

The Arbitral Tribunal continued with the arbitration and bifurcated the procedure. First, it ruled on its own jurisdiction and the admissibility of the claims, then on the merits. It used the Position Paper of China and diplomatic notes and letters to the members of the Tribunal sent by the Chinese Ambassador to the Kingdom of Netherlands, and the many public and official statements made by China to determine China’s position on the dispute.

78. May the tribunal rule on its own jurisdiction?

Yes. According to Section 2 of the Convention which is entitled “Compulsory Procedures Entailing Binding Decisions” and which title stresses the fact that there is compulsory jurisdiction that can be acquired on a non-participating party, the question of jurisdiction may be resolved in the following manner: *“In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by a decision of that court or tribunal.”* (Article 288 [4])

79. What did the Arbitral Tribunal do to safeguard the rights of China?

In order to safeguard the rights of China, the Arbitral Tribunal through the PCA, *inter alia*, delivered to China, through its ambassador in The Hague, all communications and materials pertaining to the arbitration and asked China to comment on the procedural steps taken during the proceedings and provided China with the transcripts of the case and invited China to submit written responses to the pleadings filed by the Philippines and informed China that it can participate at any stage of the proceedings. The Tribunal consistently reminded China that it can participate in the proceedings at any stage.

80. What other matters did the Arbitral Tribunal do besides establish jurisdiction?

Because there is no system of default judgment under the Convention, the Arbitral Tribunal did not just accept the arguments of the Philippines but satisfied itself that not only does it have jurisdiction over the dispute, but the Philippine claim is well-founded in fact and law.

81. Was it correct for the Tribunal to use the Position Paper of China dated December 7, 2014 and other communications made through letters and diplomatic notes or statements made publicly known during the dispute to determine China's claims despite the fact that they were not formally submitted for the consideration of the Arbitral Tribunal?

Yes. According to the Arbitral Tribunal, it is in line with the practice of international courts and tribunals in interstate disputes: (a) to take note of public statements or informal communications made by non-appearing parties; (b) to treat such statements and communications as equivalent or as constituting preliminary objections.

82. How did the Arbitral Tribunal rule on the contention of China in its Position Paper that the Arbitral Tribunal does not have jurisdiction because the case involves a sovereignty issue?

Ruling on China's objection that the Arbitral Tribunal has no jurisdiction because the issue was one of sovereignty, the Arbitral Tribunal rejected the argument set out in China's Position Paper that the dispute is actually about territorial sovereignty and therefore not a matter concerning the Convention.

The Arbitral Tribunal accepted that there is a dispute between the parties concerning sovereignty over islands in the South China Sea but held that the matters submitted to arbitration by the Philippines do not concern sovereignty. The Arbitral Tribunal considered that it would not need to

implicitly decide on sovereignty to address the Philippines' Submissions and that doing so would not advance the sovereignty claims of either Party to islands in the South China Sea.

83. How did the Arbitral Tribunal rule on the argument set-forth in China's Position Paper that the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea and the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity prevented the Philippines from initiating the arbitration?

The Tribunal held that the 2002 China-ASEAN Declaration is a political agreement and not legally binding, does not require parties to pursue any agreed means of settlement indefinitely, and does not exclude other means of dispute settlement, and therefore does not restrict the Arbitral Tribunal's jurisdiction.

The Arbitral Tribunal also considered the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, and a series of joint statements issued by the Philippines and China referring to resolution of disputes through negotiations and concluded that none of these instruments constitute an agreement that would prevent the Philippines from bringing its claims to arbitration under the UNCLOS.

84. Why was it necessary for the Tribunal to rule on the issue of the non-applicability of the provisions of the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea and the Treaty of Amity and Cooperation in Southeast Asia and the Convention on Biological Diversity?

Such ruling was necessary because of Article 282 of the UNCLOS which states that: “If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”

85. Article 283 of UNCLOS states that there is an obligation to exchange views to settle the dispute through negotiations or other peaceful means before a case is filed. How did the Arbitral Tribunal rule on this matter?

The Arbitral Tribunal held that the Parties had exchanged views regarding the settlement of their disputes, as required by the Convention, before the Philippines initiated the arbitration. The Tribunal concluded that the requirement was met in the record of diplomatic communications between the Philippines and China, in which the Philippines expressed a clear preference for multilateral negotiations involving the other States

surrounding the South China Sea, while China insisted that only bilateral talks could be considered.

86. How did the Arbitral Tribunal rule on the contention of China in its Position Paper that the case also involves maritime delimitation which is beyond its jurisdiction?

The Arbitral Tribunal rejected the argument set out in China's Position Paper that the Parties' dispute is actually about maritime boundary delimitation and therefore excluded from dispute settlement by the Convention because of a declaration that China made on August 25, 2006.

The Arbitral Tribunal noted that a dispute concerning the status of maritime features and the source of maritime entitlements is a distinct matter from the delimitation of maritime zones in an area in which they overlap. The Arbitral Tribunal noted that entitlements, together with a wide variety of other issues, are commonly considered in a boundary delimitation, but can also arise in other contexts. The Arbitral Tribunal held that it does not follow that a dispute over each of these issues is necessarily a dispute over boundary delimitation.

87. What do you mean by entitlements?

In the context of the Convention, entitlements refer to what a State is entitled to under the terms of the Convention. In the case of *Philippines v. China*, it referred to maritime zone entitlements.

88. How did the Arbitral Tribunal rule on the contention of China in its Position Paper that the case also involves historic rights of China to the South China Sea which allegedly is beyond the jurisdiction of the Arbitral Tribunal?

The Tribunal held that the Philippines' submissions reflected a dispute concerning the Convention. In doing so, the Tribunal emphasized (a) that a dispute concerning the interaction between the Convention and other rights (including any Chinese "historic rights") is a dispute concerning the Convention and (b) that where China has not clearly stated its position, the existence of a dispute may be inferred from the conduct of a State or from its silence and is a matter to be determined objectively. From these, the Tribunal held that it has jurisdiction because the exception to jurisdiction is limited to disputes involving historic titles and China's claim is based on a constellation of historic rights short of a title.

A historic title refers to historic sovereignty to land or maritime areas, while historic rights primarily refer to limited rights such as fishing rights and rights of access.

89. In fine, how did the Arbitral Tribunal rule on its own jurisdiction?

After consideration, the Tribunal ruled that despite its non-participation in the proceedings, China "is a party to the arbitration and is bound under international law by any award rendered by the Tribunal."

90. After the Arbitral Tribunal ruled on the question of jurisdiction, what did it do?

After the Tribunal resolved its jurisdiction, it proceeded to decide the case on the merits.

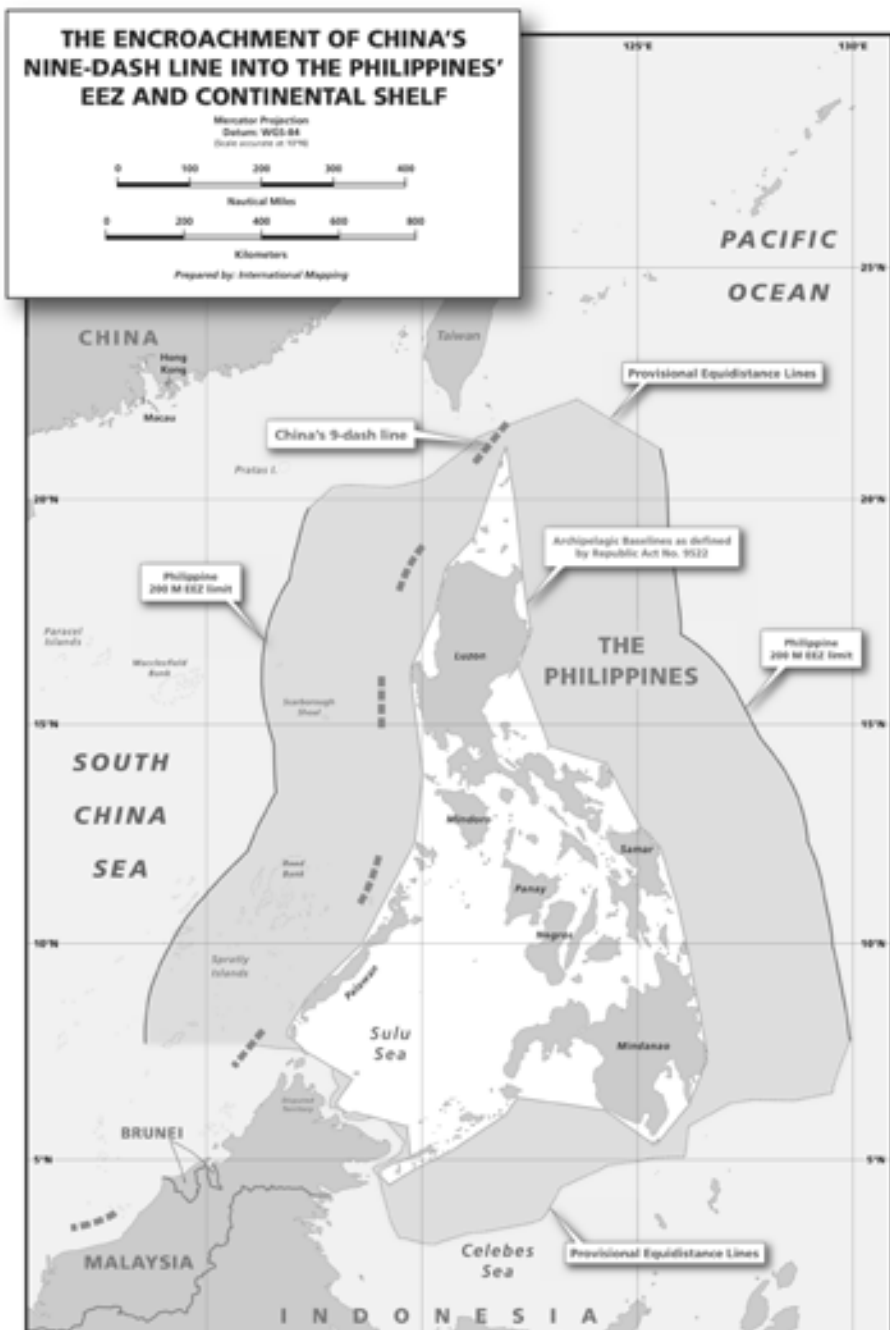
THE NINE-DASH LINE

91. What is the nine-dash line?

It is a series of dashes, nine in all, that presents and outlines in a vague way, China's claim to the South China Sea (SCS). The nine-dash line encroached on the EEZ and continental shelf of the Philippines.



The Nine-Dash Line. Map attached to China's Notes Verbales Nos. CML/17/2009 and CML/18/2009 dated May 7, 2009 (Source: Memorial of the Philippines, RP vs. China)



The Encroachment of China's Nine-Dash Line into the Philippines' EEZ and Continental Shelf
(Source: Memorial of the Philippines, RP vs. China)

92. What is the history of the nine-dash line?

According to the Arbitral Tribunal, what has become known as the “nine-dash line” first appeared on an official Chinese map in 1948. In that year, the Ministry of the Interior of the then Republican Government of China published a “Map Showing the Location of the Various Islands in the South Sea.” A similar line had also appeared in privately produced cartography as early as 1933. In its original form, the map featured 11 dashes. The two dashes in the Gulf of Tonkin near Vietnam were removed in 1953, rendering it a “nine-dash line”, and the line has appeared consistently in that nine-dash line form in official Chinese cartography since that date. The length and precise placement of individual dashes, however, do not appear to be entirely consistent among different official depictions.

93. According to the Arbitral Tribunal, what is the nine-dash line in actuality?

The Arbitral Tribunal said that the area of the sea enclosed by the nine-dash line shows the surface area of the South China Sea which represents China’s claim to the resources contained therein. It cannot represent China’s claim to territorial ownership of the South China Sea since the sea is simply too large to justify China’s claim and the subject of China’s claim is for the most part, the High Seas.

94. How did the Arbitral Tribunal rule on the historic claim of China to the South China Sea?

The Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’.

According to the Tribunal, evidence that a State had made use of any island in the South China Sea does not establish historic rights to the waters beyond the territorial sea and in the same manner of speaking, historic usage of the waters of the South China Sea cannot lead to historic rights to the islands located there.

Moreover, historic rights are exceptional rights and the exercise of freedoms permitted under international law cannot give rise to a historic right because it represents the use of what international law already freely permits. Thus, if a State uses the high seas, one cannot claim it by virtue of historic rights.

Historical navigation and fishing, beyond the territorial sea, cannot be the basis of the emergence of a historic right. Such activities are merely the exercise of freedoms already permitted by international law.

95. How did the Arbitral Tribunal rule on the historicity of China’s claim?

The Tribunal clarified that for much of history, China’s navigation and trade in the South China Sea, as well as fishing beyond the territorial sea, represented the

exercise of high seas freedoms. China engaged in activities that were permitted to all States by international law, as did the Philippines and other littoral States surrounding the South China Sea. Before the Second World War, the use of the seabed beyond the limits of the territorial sea was a freedom open to any State that wanted it. However, the technological ability to do so effectively has emerged only in more recent years.

96. Is evidence of extensive Chinese navigation and fishing in the South China Sea sufficient to establish historic rights to its waters or the seabed?

No. According to the Arbitral Tribunal:

“Evidence that merely points to even very intensive Chinese navigation and fishing in the South China Sea would be insufficient. Instead, in order to establish historic rights in the waters of the South China Sea, it would be necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right.

In practice, to establish the exclusive historic right to living and non-living resources within the ‘nine-dash line’, which China now appears to claim, it would be necessary to show that China had historically sought to prohibit or restrict the exploitation

of such resources by the nationals of other States and that those States had acquiesced in such restrictions. In the Tribunal's view, such a claim cannot be supported. The Tribunal is unable to identify any evidence that would suggest that China historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea. With respect to the non-living resources of the seabed, the Tribunal does not even see how this would be theoretically possible. Seabed mining was a glimmer of an idea when the Seabed Committee began the negotiations that led to the Convention. Offshore oil extraction was in its infancy and only recently became possible in deep water areas. Indeed, the China National Offshore Oil Corporation itself was only founded in 1982. The same year that China signed the Convention. With respect to the seabed, the Tribunal does not see any historical activity that could have been restricted or controlled, and correspondingly there is no basis for China's claim of historic rights to the South China Sea."

97. How did the lawyers for the Philippines approach the question of China's "historic rights" to the South China Sea without delving into the question of maritime delimitation or sovereignty?

The lawyers for the Philippines approached the case this way: China claimed the South China Sea on the basis

of historic rights because according to the Chinese, they have been navigating and using the seas for a long time and therefore it belongs to them. That same argument was used by Spain centuries ago when their kings referred to the Pacific Ocean as the Lago Español or the Spanish Lake.

Very astutely, the lawyers for the Philippines surmised that even if they hypothetically admit China's "historic rights" to the South China Sea, by signing the Convention, China had effectively waived such "historic rights" as far as the Philippines is concerned.

Thus, according to the lawyers for the Philippines, the Philippines is entitled to its 200 nautical miles Exclusive Economic Zone and China infringed on the Philippine entitlement to its EEZ.

98. Is China's claim of historic rights to the South China Sea an issue of maritime delimitation or sovereignty that would deprive the Tribunal of jurisdiction?

In explaining its ruling, the Tribunal said that the issue is about the interpretation and application of the Convention. The Arbitral Tribunal concluded that to the extent China had "historic rights" to resources in the waters of the South China Sea, such rights were extinguished to the extent that they were incompatible to the exclusive economic zones provided for in the Convention.

99. Simply stated, what did the Arbitral Tribunal say?

Since it signed the Convention, China is considered to have waived its rights, in so far as the EEZ of the Philippines is concerned. Whatever rights China may claim, these are deemed extinguished if they infringe on the entitlements granted by the Convention, specifically on the Philippines' Exclusive Economic Zone.

Accession to the Convention reflects a commitment to bring incompatible claims into alignment with its provisions, and its continued operation necessarily calls for compromise by those States with prior claims in excess of the Convention's limits.

China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concluded that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.

100. In its ruling on the nine-dash line, did the Arbitral Tribunal rule on a question of maritime delimitation, a matter which cannot be the subject of the arbitral ruling?

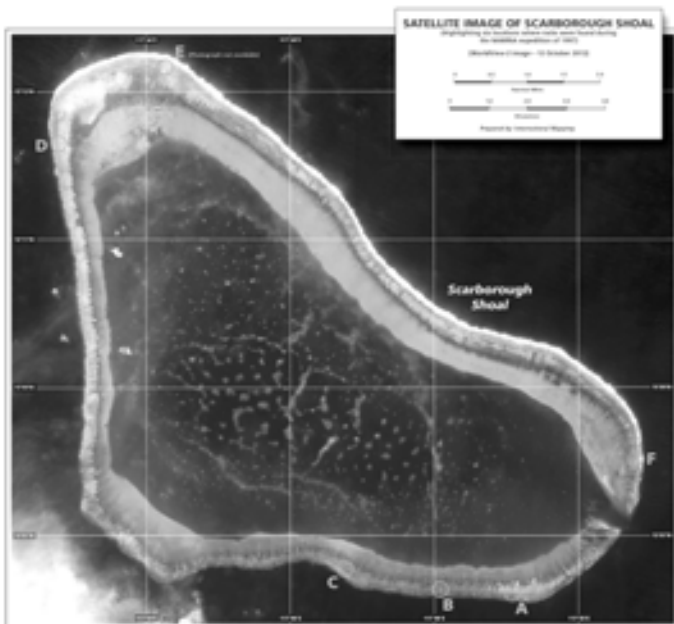
The Arbitral Tribunal clarified that it only ruled on matters which concerned the application and interpretation of the Convention. Since it signed the Convention, China has waived any claim to any portion of the maritime zones which belongs to the Philippines under the terms of the Convention. Moreover, when China signed the Convention, it agreed to the limits imposed by the Convention on its own EEZ and continental shelf.

ON THE ISSUE OF SCARBOROUGH SHOAL

101. How did the Arbitral Tribunal rule on the issue of Scarborough Shoal?

China and the Philippines both claim sovereignty over the Scarborough Shoal and both countries consider it as their fishermen's traditional fishing ground.

Because of jurisdictional limitations, the Tribunal did not rule on who has sovereignty over Scarborough Shoal, but instead ruled that China violated the artisanal fishing rights of the Philippines over Scarborough Shoal when it prevented Filipino fishermen from entering and fishing in the shoal.



Satellite Image of Scarborough Shoal (Source: Memorial of the Philippines, RP vs. China)

102. Why did the Arbitral Tribunal refuse to rule on the question of territorial ownership of Scarborough Shoal?

Scarborough Shoal is a high-tide elevation and therefore, it generates a territorial sea of 12 nautical miles. Had the Tribunal ruled on the issue of who owns the Scarborough Shoal—China or the Philippines—that would have been a ruling on the sovereignty issue with a ruling on maritime delimitation thrown in for good measure. The Tribunal of course, cannot rule on the twin issues of sovereignty and maritime delimitation. Instead, the Arbitral Tribunal ruled on issues involving the application and interpretation of the Convention.

103. What do you mean by artisanal fishing rights?

The Arbitral Tribunal cited the case of *Eritea v. Yemen* in explaining artisanal rights:

“The term ‘artisanal’ is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. ‘Artisanal fishing’ is used in contrast to ‘industrial fishing’. It does not exclude improvements in powering small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing . . .”

104. So, what is artisanal fishing actually?

In fine, artisanal fishing is actually small-scale fishing done with small boats, outrigger canoes or small crafts with small engines, in contrast to industrialized fishing, big boats or trawlers. Fishing gear adopted by artisanal fishermen are simple and efficient, usually hand lines and nets.

105. What is the basis for the protection of artisanal fishing rights in international law?

The basis for the protection of artisanal fishing is, according to the tribunal, “having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears.”

The Tribunal also cited the Abyei Arbitration which made the observation that: “Traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation.”

106. In summary, what was the conclusion of the Arbitral Tribunal with regard to the Scarborough Shoal?

The Arbitral Tribunal said that Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including Taiwan), and Vietnam. With respect to Scarborough

Shoal, the Tribunal accepts that the claims of both the Philippines and China to have traditionally fished at the shoal are accurate and advanced in good faith.

The Arbitral Tribunal further said that: “Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the other rules of international law applicable in the territorial sea.”

According to the Tribunal, Filipino and Chinese fishermen have the right to fish in Scarborough Shoal using small boats and traditional methods. There was no ruling on the issue of who owns the shoal. The ruling was limited to the right of Chinese and Filipino fishermen to fish in the shoal and that China’s actions preventing Filipino fishermen from fishing in the Scarborough Shoal are against international law and the Convention.

The Tribunal said that the complete prevention by China of fishing by Filipinos at Scarborough Shoal is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen.

ROCKS, ISLANDS, AND VARIOUS FEATURES

107. What is Article 121 of the UNCLOS?

It pertains to the regime of islands and declares as follows:

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.

108. What is the relevance of high-tide features and low-tide features?

Features that are above water at high-tide generate an entitlement of at least 12 nautical miles of territorial sea, whereas features that are submerged at high-tide are not entitled to a territorial sea or to any maritime zone.

109. Is a high-tide elevation an island?

Yes. Because according to Article 121 of the Convention, an island is a naturally formed area of land, surrounded by water, which is above water at high-tide.

110. Is a low-tide elevation an island?

No. Because such feature disappears during high-tide.

111. What if a feature cannot sustain human habitation or economic life of its own?

They are ignominiously referred to as “rocks” under Article 121(3) of the Convention and shall have no exclusive economic zone or continental shelf.

112. Why was it important for the Tribunal to rule on whether a feature can sustain human habitation or economic life of its own?

It was necessary because there are certain features which must be categorized because if an island cannot sustain human habitation or economic life of its own, it shall only be entitled to a territorial sea of 12 nautical miles, not an EEZ. A ruling on entitlement is necessary to determine if overlaps exist that may deprive the Tribunal of jurisdiction to decide on a specific feature because the decision will be based on maritime delimitation.

Such determination was necessary for the Tribunal to determine whether there would be an overlapping of entitlements. If there is an overlap of entitlements, that would mean that the matter will be one of maritime delimitation and the Tribunal will not have jurisdiction to rule on that particular claim because maritime delimitations, as per China's declaration, are excluded from the Arbitral Tribunal's jurisdiction.

113. How is the status of a feature that is entitled to an EEZ determined?

The status of each feature is determined on the basis of its natural capacity to sustain human habitation or an economic life of its own, without external additions or modifications intended to increase its ability to do so. It means that the feature shall be judged in its original state. No man-made feature introduced shall be taken into consideration to determine whether it is entitled to an exclusive economic zone or not.

114. What do you mean by the requirement that the island can sustain human habitation?

Generally speaking, at its barest minimum, sustained human habitation would require that the feature should be able to support, maintain, and provide food, drinking water, and shelter to people to enable them to reside there permanently or habitually over an extended period of time.

115. If a feature is inhabited by people, does it mean that it has human habitation within the context of the Law of the Sea Convention?

It would depend on the number of people occupying the feature, or who have occupied the same. According to the decision of the Arbitral Tribunal: “The mere presence of a small number of persons on a feature does not constitute permanent or habitual residence there and does not equate to habitation. Rather, the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner.”

116. What do you mean by the phrase “economic life of its own”?

Generally speaking, the feature or island must sustain life and livelihood for the human population who calls it home.

117. According to the Tribunal, if an island can sustain human habitation or economic life of its own, what is it entitled to?

The feature can generate an entitlement to an exclusive economic zone of 200 nautical miles and is entitled to a continental shelf.

118. How about features that are above water at high-tide but cannot sustain human habitation or economic life of its own?

That high-tide elevation feature known as HTE is entitled to a 12 nautical mile territorial sea. It is of no moment if the elevation is only a foot above water during high-tide; as long as a small portion of the feature is above water during high-tide it shall be entitled to a 12 nautical mile territorial sea.

119. As a practical matter, must human habitation or economic life co-exist?

Although Article 121(3) is disjunctive, nonetheless, according to the Tribunal, as a practical matter, a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception would be the case of populations sustaining themselves through a network of related maritime features. That is, a population that makes use of multiple features to survive.

120. How about features that are visible during low-tide but submerged during high-tide?

Known as low-tide elevations or LTEs, they generate no entitlement to maritime zones. If the LTE is within a State's EEZ, then such State may claim it as part of its EEZ.

121. How did the Tribunal arrive at an interpretation of Article 121(3) of the Law of the Sea?

According to the Arbitral Tribunal, when the Convention refers to a rock, it has a distinct meaning separate from its geological meaning. Rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. This is according to Article 121(3) of the Law of the Sea Convention. They will only be entitled to a territorial sea of 12 nautical miles, provided they are high-tide elevations.

Artificial islands shall be judged on the basis of their natural conditions before reclamation or before the islands were modified through man-made means. Low-tide elevations cannot be appropriated.

122. Why are all islands not entitled to an EEZ of 200 nautical miles?

Because it would be unjust; islands barren and uninhabited owned by a powerful State could lay claim to vast areas of water. This would also be true even if such an island is being claimed by a small State. In the words of Ambassador Tommy Koh of Singapore, who was quoted in the Tribunal's ruling:

“The rationale for the proposal that coastal States should have the right to establish an economic zone was essentially based upon the interests of the people and the desire to marshal the resources of ocean

space for their development . . . However, it would be unjust, and the common heritage of mankind would be further diminished, if every island, irrespective of its characteristics, was automatically entitled to claim a uniform economic zone. Such an approach would give inequitable benefits to coastal States with small or uninhabited islands scattered over a wide expanse of the ocean. The economic zone of a barren rock would be larger than the land territory of many States and larger than the economic zones of many coastal States.”

RULING ON LOW-TIDE AND HIGH-TIDE FEATURES

123. What were the features that were declared by the Tribunal as high-tide features and low-tide features?

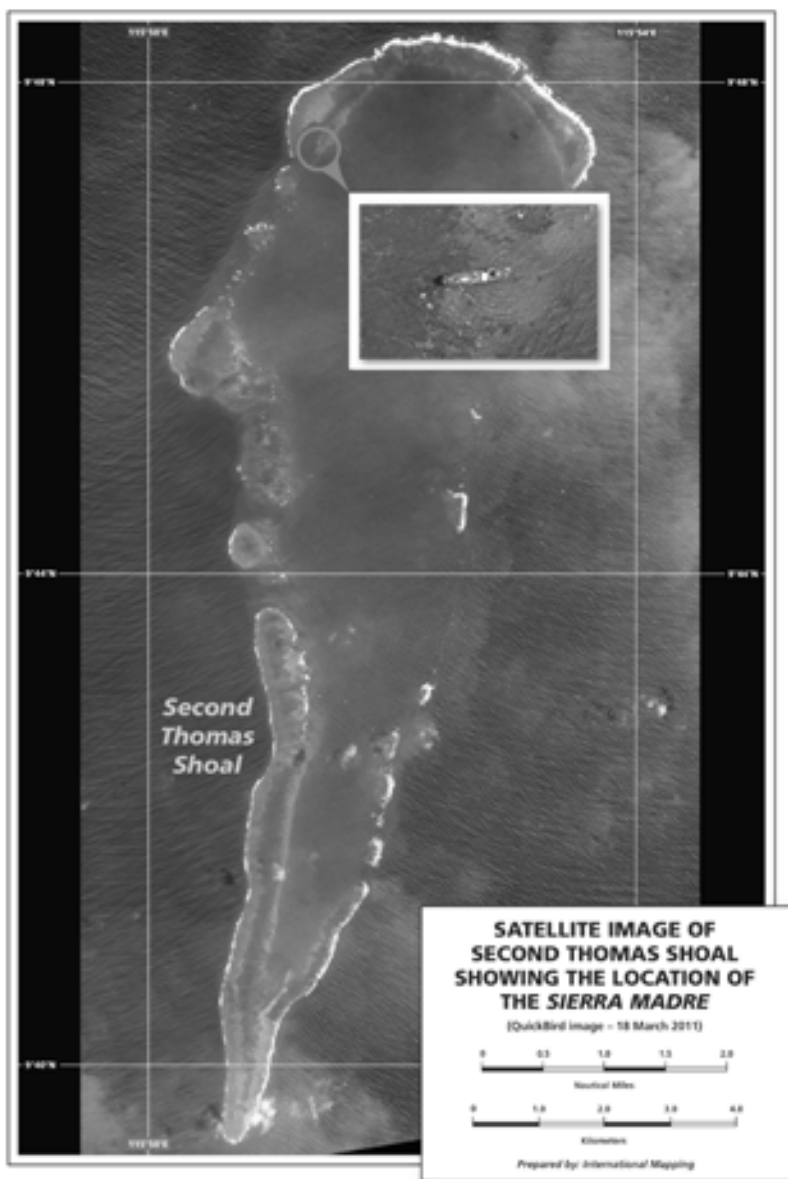
The Arbitral Tribunal reached the following conclusions regarding the status of features in the South China Sea. The following features include, or in their natural condition did include, rocks or sand cays that remain above water at high-tide and are, accordingly, high-tide features:

- (a) Scarborough Shoal,
- (b) Cuarteron Reef,
- (c) Fiery Cross Reef,
- (d) Johnson Reef,
- (e) McKennan Reef, and
- (f) Gaven Reef (North).

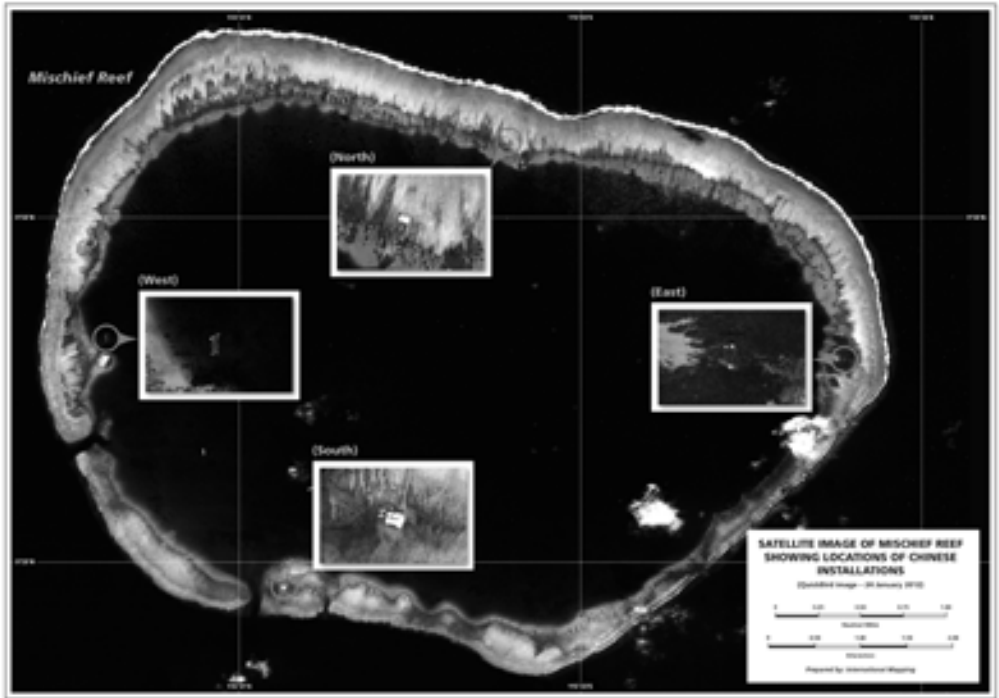
124. What features were declared as low-tide elevations?

The following features are, or in their natural condition were, exposed at low-tide and submerged at high-tide and are, accordingly low-tide elevations:

- (a) Hughes Reef,
- (b) Gaven Reef (South),
- (c) Subi Reef,
- (d) Mischief Reef, and
- (e) Second Thomas Shoal.



Satellite Image of Second Thomas Shoal showing the location of the Philippine vessel Sierra Madre which was scuttled by the Philippines to establish presence in the shoal. (Source: Memorial of the Philippines, RP vs. China)



Satellite Image of Mischief Reef showing Locations of Chinese Installations
(Source: Memorial of the Philippines, RP vs. China)

125. Why was it necessary for the Arbitral Tribunal to rule on high-tide and low-tide elevation features?

Among others, if it is a high-tide feature, it is entitled to a territorial sea of 12 nautical miles. If it is a low-tide elevation feature, it belongs to the EEZ of the State claiming the Exclusive Economic Zone.

126. What was the significance of the ruling that none of the high-tide features in the Spratly Islands in their natural condition is capable of sustaining human habitation or economic life of their own?

The significance of the categorization made is that it meant that the Tribunal could rule on the question of whether Mischief Reef and Second Thomas Shoal are part of the EEZ of the Philippines because there would be no overlaps to entitlements between the islands being claimed by China and Mischief Reef and Second Thomas Shoal.

SECOND THOMAS SHOAL

Also known as:

Chinese: Ren'ai Jiao (仁爱礁)

Philippine: Ayungin Shoal

Coordinate Location: 09°43'07"N - 115°52'00"E

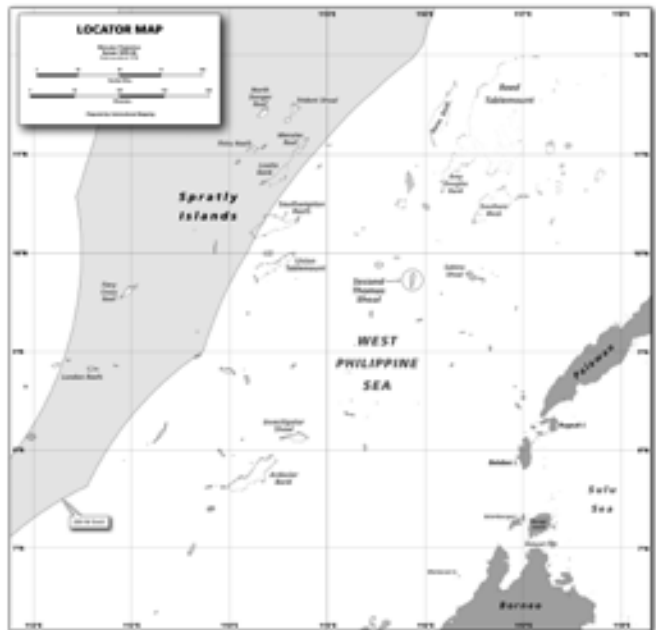
Nearest High Tide Feature: Alicia Amato Reef, 27.3 M

Distance to Palawan: 104.1 M

Distance to Hainan: 413.9 M

Claimed by: China, Philippines, Vietnam

Occupied by: Philippines



Second Thomas Shoal (Source: Supplemental Written Submission of the Philippines, RP vs. China)

127. Why was it important to rule on the status of Subi Reef, Gaven Reef (South), and Hughes Reef?

It was important to rule on the status of these features in order to determine whether the issue of maritime delimitation exists in areas being claimed by the Philippines.

Also, since Subi Reef, Gaven Reef (South), and Hughes Reef do not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf and are features that are not capable of appropriation, by inference, China's occupation of those features was illegal under the Convention.

ON MISCHIEF REEF AND OTHER FEATURES ON THE SPRATLY ISLANDS

128. Where is the Mischief Reef?

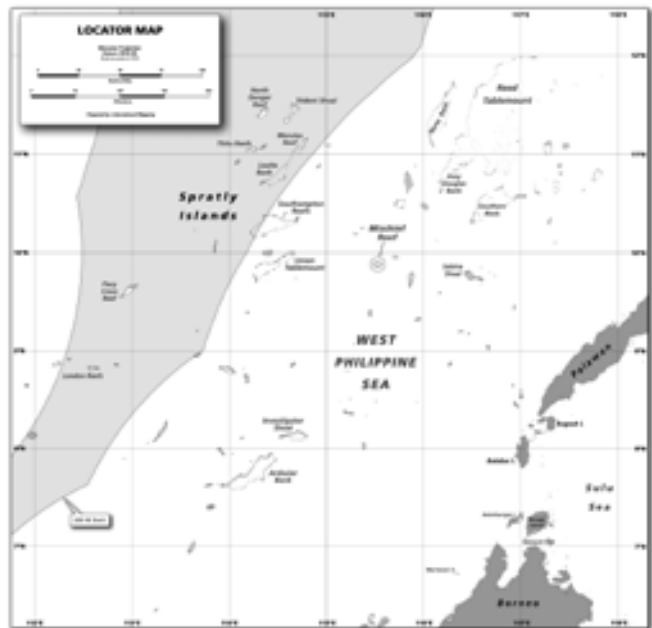
Mischief Reef is a reef being claimed by the Philippines and China and is near Palawan, located within 200 nautical miles from the established baseline of the Philippines, but has been reclaimed and transformed by China, which now occupies the same.

MISCHIEF REEF

Also known as:

Chinese: Meiji Yao (礁) (Meiji Reef)
Philippine: Pangasinan

Coordinate Location: 09°35'00"N - 115°32'00"E
Nearest High Tide Feature: Alicia Amis Reef, 27.8 M
Distance to Palawan: 123.6 M
Distance to Hainan: 796.3 M
Claimed by: China, Philippines, Vietnam
Occupied by: China



Mischief Reef (Source: Supplemental Written Submission of the Philippines, RP vs. China)

129. What is the status of Mischief Reef?

The Arbitral Tribunal has ruled that Mischief Reef is a low-tide elevation and not a rock or fully entitled island and, as such, generates no entitlement to maritime zones of its own.

130. If Mischief Reef is a low-tide elevation, what is the consequence?

According to the Arbitral Tribunal, there exists no legal basis for any entitlement by China to maritime zones in the area of Mischief Reef and no situation of overlapping entitlements. Mischief Reef was originally a low-tide elevation located within the exclusive economic zone of the Philippines before it was occupied and subjected to reclamation by China.

131. Are the Chinese activities in Mischief Reef military activities?

In its Award on Jurisdiction, the Tribunal reserved for the merits stage the question of whether Chinese activities in Mischief Reef constitute “military activities” which was excluded by the declaration of China.

In its award on the merits, the Arbitral Tribunal ruled that the occupation and activities of China in the reef are not military in nature.

132. How did the Arbitral Tribunal arrive at the conclusion that the activities of China in Mischief Reef are non-military in nature?

The bases for the Tribunal's ruling are the pronouncements made by China's representatives. Using the public pronouncements of China that the installations and island construction are made "to fulfill a non-military but rather a civilian function" and the public statement of President Xi Jinping that "relevant construction activities that China are undertaking in the island of South-Nansha Islands do not target or impact any country, and China does not intend to pursue militarization." The statements were accepted by the Arbitral Tribunal because it came from the highest level of government of China.

133. In fine, what was the ruling of the Arbitral Tribunal with regard to Mischief Reef?

In its ruling, the Tribunal said that Mischief Reef lies within the exclusive economic zone and continental shelf of the Philippines since prior to China's construction and reclamation, it was a low-tide elevation completely submerged during high-tide. Being a low-tide elevation, it is not entitled to any maritime zone nor may it be appropriated by China.

The Tribunal also found that China has, through its construction of installations and artificial islands at Mischief Reef without the authorization of the Philippines, violated the Philippines' sovereign rights in its exclusive economic zone and continental shelf.

134. What was the ruling of the Arbitral Tribunal with regard to the continental shelf in the area of Reed Bank?

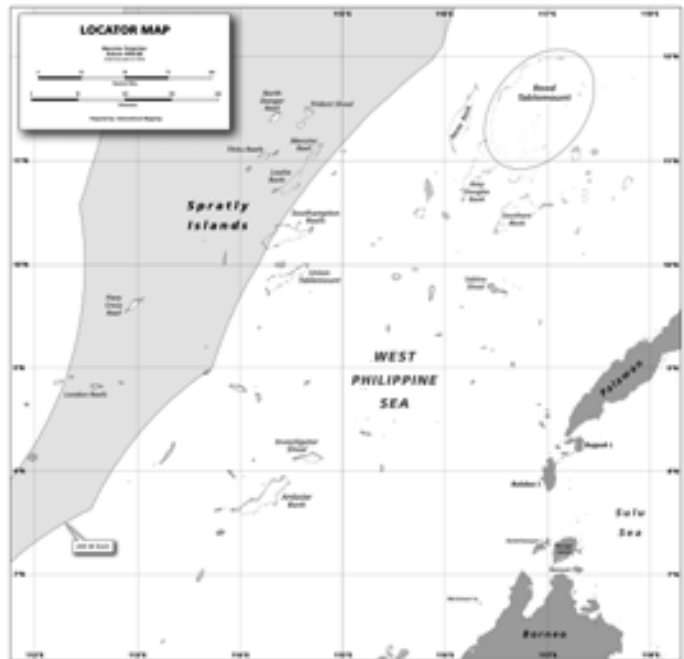
That China with regard to the operation of its marine surveillance vessels, has breached the Convention “with respect to the Philippines’ sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank” (Paragraph 716 of the South China Sea Arbitration Award of July 12, 2016).

REED BANK

Also known as:

Chinese: Liyue Tan (Lüyu Tan)
Philippine: Roca

Coordinate Location: 11°20'00"N - 116°30'00"E
Nearest High Tide Feature: Flat Island, 21.8 NM
Distance to Palawan: 82.9 NM
Distance to Hainan: 147.9 NM
Claimed by: China, Philippines
Occupied by: Unoccupied



Reed Bank (Source: Supplemental Written Submission of the Philippines, RP vs. China)

THE MARINE ENVIRONMENT

135. In connection with the marine environment, what did the Philippines say?

The Philippines alleged that China has breached, among others, its obligations to preserve and protect the marine environment, to cooperate with other States to prevent, reduce and control pollution in the marine environment, and to assess the potential effect of activities within the area being contested by China and the Philippines.

136. How did the Arbitral Tribunal rule on the Philippine submission?

The Arbitral Tribunal found that 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 and that China has violated its obligation 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.

137. How did the Arbitral Tribunal rule on the large-scale fishing being done by China within the contested areas?

The Arbitral Tribunal found that Chinese fishermen have engaged in the harvesting of endangered sea turtles,

coral and giant clams on a substantial scale in the South China Sea, using methods that inflict severe damage on the coral reef environment. The Tribunal found that Chinese authorities were aware of these activities and failed to fulfill their due diligence obligations under the Convention to stop them.

THE 2012 MORATORIUM OF CHINA ON FISHING IN THE SOUTH CHINA SEA AND THE PHILIPPINE CLAIM ON THE OPERATIONS OF CHINESE VESSELS

138. What was the ruling of the Arbitral Tribunal on the 2012 moratorium of China imposing a ban on fishing in the South China Sea?

The Arbitral Tribunal found that China has breached the Convention with respect to the Philippines' sovereign rights over the living resources in the EEZ by promulgating the 2012 moratorium on fishing in the South China Sea. This is because the moratorium included the areas falling within the EEZ of the Philippines.

139. What was the extent of China's 2012 fishing ban?

The extent of the fishing ban covers areas being claimed by China within the nine-dash line and was imposed by China allegedly to replenish fish stocks. The fishing ban was declared unilaterally by China and included areas within the Philippine exclusive economic zone as defined by the United Nations Convention on the Law of the Sea (UNCLOS) and beyond the maritime entitlements of China as accorded by the Convention.

140. What was the submission of the Philippines concerning the operation of China's law enforcement vessels in the vicinity of Scarborough Shoal?

According to the Philippines, China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.

141. What was the factual background of the Philippine submission?

The complaint of the Philippines arose from the near-collisions between Philippine vessels and China's vessels. The Chinese vessels were much bigger and more powerful. The actions of China's vessels were obviously deliberate and showed a conscious disregard of maritime safety regulations.

142. What was the ruling of the Arbitral Tribunal?

The Arbitral Tribunal then concluded that China has, by virtue of the conduct of Chinese law enforcement vessels attributable to it, in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel and was in breach of the Convention, specifically Article 94 of the UNCLOS.

143. What was the basis of the ruling?

According to Article 94 (3)(4)(c) of the UNCLOS, it is the duty of the flag State to take such measures for ships flying its flag to ensure, among others, that the master, officers and, to the extent appropriate, that the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea and the prevention of collisions. Thus, the Arbitral Tribunal determined that Article 94 of the Convention incorporates the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) to which China and the Philippines are parties.

In the Tribunal's view, Article 94 incorporates the COLREGS into the Convention, and they are consequently binding on China. It follows that a violation of the COLREGS, as "generally accepted international regulations" concerning measures necessary to ensure maritime safety, constitutes a violation of the Convention itself. With this in mind, the Tribunal resorted to independent expert opinion and factual records and found that indeed China breached Article 94 of the Convention.

144. Overall, did the Arbitral Tribunal rule on questions of sovereignty or maritime delimitation?

No, it did not. It only ruled on the application and interpretation of the United Nations Convention on the Law of the Sea (UNCLOS).

145. What was the root cause of the disputes, according to the Tribunal?

According to the Arbitral Tribunal: “The root of the disputes presented by the Philippines in this arbitration lies not in any intention on the part of China or the Philippines to infringe on the legal rights of the other, but rather—as has been apparent throughout these proceedings—in fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea. In such circumstances, the purpose of dispute resolution proceedings is to clarify the Parties’ respective rights and obligations and thereby to facilitate their future relations in accordance with the general obligations of good faith that both governments unequivocally recognise.”

SUMMARY OF RULINGS OF THE ARBITRAL TRIBUNAL

146. Did the Arbitral Tribunal rule on sovereignty issues or on matters covered by the 2006 Declaration of China?

No. The Tribunal only ruled on issues involving the application and interpretation of the provisions of the United Nations Convention on the Law of the Sea.

147. Since brevity is the soul of wit, in a series of one-liners, what are the pertinent rulings of the Arbitral Tribunal?

Here they are:

A. That the Tribunal was properly constituted in accordance with Annex VII of the Convention.

B. That China's non-appearance in the proceedings did not deprive the Arbitral Tribunal of jurisdiction.

C. That the Philippines' act of initiating the arbitration did not constitute an abuse of process.

D. That there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.

E. That the 2002 China–ASEAN Declaration on Conduct of the Parties in the South China Sea, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, do not preclude recourse to the compulsory dispute settlement procedures of the Convention.

F. That the Parties have exchanged views as required by the Convention.

G. That the vague South China Sea claim of China is not a claim to territory but rather to resources.

H. That Mischief Reef and Second Thomas Shoal are low-tide elevations and cannot be claimed by China because being low-tide elevations, they are not capable of appropriation.

I. That Mischief Reef and Second Thomas Shoal are within the EEZ and continental shelf of the Philippines and China does not have any right under the terms of the Convention to claim Mischief Reef and Second Thomas Shoal and override the Philippines' claim to them as part of its Exclusive Economic Zone.

J. That China has breached the Convention and the Philippines' sovereign rights in its exclusive economic zone and continental shelf when it reclaimed and built structures at Mischief Reef.

K. That China has breached its obligation under the Convention with respect to the Philippines' sovereign rights over the non-living resources and the continental shelf in the area known as Reed Bank.

L. That Scarborough Shoal has always been a traditional fishing ground for fishermen, and China has unlawfully prevented fishermen from the Philippines from enjoying its traditional fishing rights at the shoal, in violation of the Convention.

M. That China had violated the Philippines' sovereign rights in its exclusive economic zone by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in the zone.

N. That China has failed to protect and preserve the environment in the South China Sea.

O. That the effect on the marine environment of China's recent large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands have caused severe harm to the coral reef environment and China violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species.

P. That China's reclamation and construction of artificial islands have caused damage to the marine environment in the South China Sea.

Q. That the reclamations at Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hugh Reef, Subi Reef and Mischief Reef do not constitute military activities and therefore, the Arbitral Tribunal may rule on issues concerning the features.

R. That China has caused—through its land reclamation and construction of artificial islands, installations, and structures—severe, irreparable damage to the coral reef ecosystem at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.

S. That China has permanently destroyed—through its land reclamation and construction of artificial islands, installations, and structures—evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.

T. That China has breached its obligations pursuant to the Convention, as well as to general international law, to abstain from any measure capable of exercising a prejudicial effect with regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing.

U. That the extent of China's "historic rights" claim to resources in the waters of the South China Sea were extinguished because they were incompatible with the exclusive economic zones provided for in the Convention.

V. That China's nine-dash line claim is contrary to the Convention to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention.

W. That China's vague claim to territory as outlined in its unilaterally drawn nine-dash line is contrary to the United Nations Convention on the Law of the Sea to which it is a party.

148. What were the most important aspects of the decision of the Arbitral Tribunal regarding the claim of the Philippines against China?

The Arbitral Tribunal invalidated China's nine-dash line maritime claim as far as the Philippines is concerned. It also concluded that the claim of China encroached on the 200 nautical miles Exclusive Economic Zone (EEZ) of the Philippines and that the island-building actions of China in areas that belong to the EEZ of the Philippines are illegal.



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