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## THE SOUTH CHINA SEA ARBITRATION

The South China Sea, has emerged as a region of immense global interest and contention, especially in the contemporary times, owing to its vast economic and geostrategic significance. A 1/3<sup>rd</sup> of the world's maritime shipping passes through the sea carrying over USD \$3 trillion in trade each year making it the 2<sup>nd</sup> most used sea line in the world<sup>1</sup>. The water body also has 1/3<sup>rd</sup> of entire world's marine biodiversity and contains lucrative fisheries for providing food security to the South East Asian Nations.<sup>2</sup> An estimated 160 trillion cubic feet of natural gas and 12 billion barrels of oil lie beneath the South China sea which are yet untapped by the nations.<sup>3</sup> Several countries bordering the sea including Vietnam, Malaysia, Brunei, China, Philippines, Indonesia, have raised conflicting claims of sovereignty over the waters and use resources of the South China Sea. One such dispute was decided by the arbitral tribunal in July, 2016, in a case brought People's Republic of Philippines against People's Republic of China.

### *The Dispute*

In January, 2013 Philippines initiated a case against China concerning the status of certain marine features in the South China Sea, which involved the interpretation and application of the provisions of the UNCLOS, and the latter's alleged unlawful activities in the Sea. On 21<sup>st</sup> June, an arbitral tribunal of 5 arbitrators of Permanent Court of Arbitration was established to settle the dispute in pursuance with the compulsory settlement procedure set out in Annex 7 of Part XV of the UNCLOS.

The Major Issues to be decided, in a nutshell were-

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<sup>1</sup> Wikipedia, *South China Sea*, WIKIPEDIA (Aug 17, 2020). [https://en.wikipedia.org/wiki/South\\_China\\_Sea](https://en.wikipedia.org/wiki/South_China_Sea).

<sup>2</sup> Drishti, *South China Sea*, DRISHTI (Sept 16, 2019). <https://www.drishtias.com/to-the-points/Paper2/south-china-sea>

<sup>3</sup> Leaflet Contributors, *South China Sea Energy Exploration and Development*, ASIA MARITIME TRANSPARENCY INITIATIVE <https://amti.csis.org/south-china-sea-energy-exploration-and-development/>

1. Whether China had ‘Historic Rights’ within its so called 9 dash line?
2. Whether certain maritime features as claimed by both the nations characterize as Island, rocks, low tide elevations or submerged banks under the convention?
3. Whether certain activities of China in the South China Sea had violated the provisions of UNCLOS by interfering with sovereign rights of the Philippines?
4. Whether certain actions undertaken by China in the Sea, since the commencement of the arbitration, had further aggravated the dispute between the parties?

In February 2013, China announced that it would not participate in the said proceedings nor accept any of its award claiming that the tribunal had no jurisdiction to determine the said dispute.<sup>4</sup> The same stance was further elaborated in the “White Paper” published by the State in 2014. Back in 2006, China made a written declaration, that the state would not accept any compulsory settlement procedures under the convention on issues of territorial sovereignty and maritime delimitation over the South China Sea by invoking Article 298 of UNCLOS which gives the states the right to opt out of Compulsory Settlement procedures laid out in section 2 of Part XV.

China also relied on the “Declaration on the Conduct of the Parties in the South China Sea” (DOC) adopted in 2002 by the ‘Association of South Asian Nations’(ASEAN) and China to settle the relevant dispute concerning the South China Sea through negotiations and conciliation, to assert its claim that the tribunal lacked jurisdiction. The DOC stipulated that the parties would undertake to resolve their territorial and jurisdictional claims through by peaceful means without resorting to use of threat or force in accordance with the recognized principles of International Law.<sup>5</sup>

Throughout the proceeding China abstained from appearing in any hearing before the Permanent Court of Arbitration. It rejected and returned correspondences from the tribunal and neither officially provided clarifications or comments on any specific questions of substance or procedure, nor advanced any cost for the proceedings, reiterating its original stance that the arbitration initiated was flawed and hence void. But this did not impede the tribunal from conducting its proceeding according to Art. 9, which stipulates that when one of the parties to the proceeding does not appear before the court or defends its claims, the tribunal shall continue

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<sup>4</sup> Wikipedia, *Philippines v China*, WIKIPEDIA (Aug 17, 2020) [https://en.wikipedia.org/wiki/Philippines\\_v\\_China#cite\\_note-csil-4](https://en.wikipedia.org/wiki/Philippines_v_China#cite_note-csil-4)

<sup>5</sup> Rowman & Littlefield, *Examining the South China Sea Dispute*, 5 CSIS, 61-62, (2015)

the proceedings. Absence of the parties to defend its case or appear before the court shall not bar the proceedings.

In October, 2015, the tribunal conducted a separate hearing on the issue of Jurisdiction and Admissibility of the case according to Art. 288 of the convention, which stipulates the determination of claims arising out of questions jurisdiction of the tribunal or Court. After close interpretation of China's Statement of 2006 under Article 298 of UNCLOS, the tribunal concluded that the scope of the present matter was to determine maritime entitlements and the nature of the actions of China in the sea and not Maritime delimitations and therefore China's Statement did not deprive the bench to decide on the merits of the case. The tribunal also observed that entitlement to "maritime zones" is distinct from delimitation of those zones in areas where they overlap. The tribunal found that the DOC adopted by the parties was a bilateral political instrument with no legal binding effect. And even if the treaties were binding, it would not obstruct the parties to choose an alternative dispute resolution mechanism. Additionally, the tribunal also clarified that it would honour China's Declaration of 2006 and would not delve into the issued of maritime delimitations and sovereignty.

The nine-dash line, originally an eleven-dash line, first shown on the Map released by the Chinese Government in 1947, which was later submitted to the UN in 2009, to justify its "Historic Rights" over the South China Sea. The U-shaped dotted line covers more than 90% of the South China Sea and extends much beyond the permitted EEZ of 200 nautical miles from the baseline.<sup>6</sup> China's Government has never officially explained the meaning of the line nor provided any concrete legal evidence in favour of its claims. The line remains undefined as it does not have any specific geographic coordinates and provides no clarifications on how it was connected if it were a continuous line.

The essential jurisdictional question concerning the 9-dash line and the historic rights therein was whether such a claim was encapsulated in the wording of section 298(a)(1)(i) of the UNCLOS : "*disputes...historic titles and bays*" and thus the tribunal would be out of jurisdiction in accordance with China's Declaration of 2006. The tribunal concluded that China's Claim was not one involving "Titles" but rather "Rights" over the living and non-living resources in the marine area. It stated that the meaning of "Historic title" in Article 298 was

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<sup>6</sup> Wikipedia, *Nine Dash Line*, WIKIPEDIA, (Aug, 17, 2020) [https://en.wikipedia.org/wiki/Nine-dash\\_line#:~:text=The%20nine%2Ddash%20line%20was,in%20the%20South%20China%20Sea.](https://en.wikipedia.org/wiki/Nine-dash_line#:~:text=The%20nine%2Ddash%20line%20was,in%20the%20South%20China%20Sea.)

“claims to sovereignty over maritime areas derived from historical circumstances”<sup>7</sup> It also clarified that the wording “title” did not cover the questions of “rights” within its ambit and since China’s Claim was limited to its Rights in the area with no explicit claims of territorial sovereignty, the tribunal had jurisdiction to decide the claim. The tribunal ruled in favour of Philippines, stating that China’s claim of “Historic Rights” over the area covered by the nine-dash line which virtually covers the entire South China Sea, was ambiguous and without any factual or legal evidence and hence incompatible with the provisions of UNCLOS.<sup>8</sup> Although, Chinese fishermen and navigators, as well as those of foreign states, have made use of the resources and waters historically, there is no evidence that China historically exercised exclusive control over the waters or considered them as a part of its internal waters or territorial sea.

The tribunal accepted that in order to determine the extent of Philippines EEZ it was pertinent to examine all the relevant high tide features in the Spratly islands. Unlike previous arbitral tribunals that have accepted certain features as rocks and islands without explicitly applying Article 121 of the UNCLOS, this tribunal interpreted the provision in detail. The tribunal concluded that if a maritime feature cannot sustain human habitation and economic life on the basis of its natural capacity, it does not meet the requirements of an island within the definition of UNCLOS. It placed significant emphasis on the natural conditions of a feature, without any external interventions to support human life to determine it as an island. Immediately, prior to the declaration of the award, China had heavily modified and enhanced the features of these islands. Applying, this conception, the tribunal found that though the relevant high tide features in the Spratlys and Scarborough Shoal were capable of inhabiting small groups of people, there was no substantial evidence of a stable human community ever occupying the place. The Tribunal also clarified that human intervention does not change the status of the feature Hence, the tribunal classified all those features including the Scarborough Shoal as rocks within article 121(3) which could not generate maritime entitlement to an EEZ or continental shelf.

The tribunal found that the Mischief reef was a low tide feature that essentially forms a part of Philippines EEZ and by constructing artificial islands and installations in the area, without the authorisation of Philippines, China had breached Article 60 and 80 of the UNCLOS. China has

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<sup>7</sup> Ted L. Mc Dorman, *The South China Sea Arbitration*, AMERICAN SOCIETY OF INTERNATIONAL LAW (Nov 18, 2016) <https://www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration>

<sup>8</sup> Permanent Court of Arbitration, *The South China Sea Arbitration*, PERMANENT COURT OF ARBITRATION (Jul 12, 2016) <https://pca-cpa.org/en/news/pca-press-release-the-south-china-sea-arbitration-the-republic-of-the-philippines-v-the-peoples-republic-of-china/>

also prevented Philippines from exploiting the natural resources within its own country's continental shelf. The tribunal found China guilty of obstructing the operations of a Philippine survey ship around the area of the Reed bank, thus infringing Philippine's sovereign rights over the living and non-living resources of the continental shelf in the area of the Reed bank. In May, 2012, A Philippine navy surveillance aircraft detected 8 Chinese fishing vessels near the Scarborough Shoal.<sup>9</sup> Further, China not only prevented Philippine fishermen from fishing within their own territorial waters but also took no steps to prevent Chinese fishers from fishing illegally within the Philippines EEZ.<sup>10</sup>

In 2013, China began large land reclamation projects for constructing artificial islands in the areas of the Spratlys and the Paracel islands. Satellite images of the East of the mischief reef show that these islands are equipped with runways, aircraft hangers, bunkers and even radar sites.<sup>11</sup> The Tribunal found that these activities of China were incompatible with the obligations of a state during a dispute resolution process, as such activities have caused severe harm and damage to the marine ecosystem and even destroyed evidence of the natural conditions of the features in the South China Sea that form a part of this dispute.

The tribunal overwhelmingly ruled in favour of Philippines on virtually every issue. It examined in detail the scope of Part XV of the UNCLOS with regard to article 281. The ruling in the dispute is going to go a long way in emphasising the importance of settling highly contested and politically charged disputes between parties of unequal strength through arbitration in international law. However, it also highlights the limitations of an arbitral tribunal based on its jurisdiction. Several scholars have criticised the composition of the tribunal and its detangling of the issue of sovereignty with maritime entitlements without much justification. After the award was declared in favour of the Philippines, China openly condemned the award and called it "null and void". Though the award is legally binding on both the parties, there is no enforcement mechanism present in the convention to implement the award, giving one of the parties a sweet escape route from obliging to the award.

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<sup>9</sup> Tufts, *The South China Sea Tribunal*, THE FLETCHER SCHOOL <https://sites.tufts.edu/lawofthesea/chapter-ten/>

<sup>10</sup> Abeer Mustafa, *Case Brief on the South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China by the Permanent Court of Arbitration*, RESEARCH SOCIETY OF INTERNATIONAL LAW (Aug 12, 2017) <https://rsilpak.org/2017/case-brief-on-the-south-china-sea-arbitration/>

<sup>11</sup> Wikipedia, *Territorial disputes in the South China Sea*, WIKIPEDIA (Aug 17, 2020) [https://en.wikipedia.org/wiki/Territorial\\_disputes\\_in\\_the\\_South\\_China\\_Sea](https://en.wikipedia.org/wiki/Territorial_disputes_in_the_South_China_Sea)