

# INTERNATIONAL ARBITRATION IN HIGHLY POLITICAL SITUATIONS: THE SOUTH CHINA SEA DISPUTE AND INTERNATIONAL LAW

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On January 22, 2013, the Philippines formally commenced arbitration proceedings against China over the South China Sea dispute.<sup>1</sup> China has refused to participate, but its rejection of the proceedings should not be interpreted as lack of interest. In fact, quite the opposite is true. Maritime boundary disputes are of key strategic importance to China, and China avidly watches the work of international tribunals, despite maintaining the position that its own boundary disputes should not be resolved through international adjudication.<sup>2</sup>

I can attest to China's interest in the international resolution of maritime disputes personally. Last year I participated in an hour-long interview on Radio China International about the ICJ's 2012 decision on *Nicaragua v. Colombia*.<sup>3</sup> This case addressed sovereignty over disputed islands in the San Andreas archipelago. For a law professor, it was like an early Christmas present to spend sixty minutes on public international radio discussing an ICJ decision. Moreover I have no doubt the interest in these decisions in China was based on their potential relevance by analogy to the ongoing disputes in the South China and East China seas.

Today, I want to tackle the following question: What is the role of arbitration in highly charged political disputes, particularly when one party refuses to participate? I will comment on three issues: (i) the likely findings on jurisdiction in the South China Sea dispute, (ii) the elements of successful arbitration in highly charged situations, and (iii) why

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1. Statement and Notification of Claim, attached as Annex A. The Department of Foreign Affairs of the Philippines made the Statement of Claim publicly available for download. *Other Documents*, REPUBLIC OF THE PHILIPPINES DEP'T OF FOREIGN AFF. (July 10, 2013, 3:52 PM), [http://www.dfa.gov.ph/index.php/component/docman/cat\\_view/8-other-documents?Itemid=546](http://www.dfa.gov.ph/index.php/component/docman/cat_view/8-other-documents?Itemid=546).

2. As a general matter, China has always been reticent to settle disputes through international mechanisms. For example, there has never been a contentious dispute involving China at the ICJ. Nonetheless, China has become an active participant in WTO proceedings and has concluded an extensive network of Bilateral Investment Treaties, suggesting that where business interests are involved, it is more amenable to international proceedings.

3. Territorial and Maritime Dispute (*Nicaragua v. Colombia*), 2012 I.C.J. 624 (Nov. 19).

international adjudication is appropriate in a politically sensitive case such as this one.

### I. JURISDICTION

The case *The Republic of the Philippines v. The People's Republic of China* has been filed at the Permanent Court of Arbitration, which is acting as registry. Five tribunal members have been appointed.<sup>4</sup> The Philippines selected one, and one was appointed on China's behalf. All tribunal members are extremely well regarded within the profession.

The Tribunal met in July 2013, issued a procedural order indicating submissions would be due in March 2014. The order also indicated that the admissibility and merits phases will be decided together. On March 1, 2014 the Philippines filed its memorial, while China, as anticipated, has chosen not to participate. At the time of writing, the only document publically available in the case is the Philippines Notification and Statement of Claim.<sup>5</sup>

The Philippines has asked the tribunal a number of questions, including whether:

- (i) China's claims based on its "nine dash line" are inconsistent with UNLOS and therefore invalid,
- (ii) Certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlements to maritime zones greater than 12M under Article 121 of UNCLOS, and
- (iii) China has violated the right of navigation of the Philippines, and therefore the rights of the Philippines in regard to the living and non-living resources within its exclusive economic zone and continental shelf.

The first task for the Tribunal is to determine whether or not it has jurisdiction over these claims. Specifically, are the questions put to the tribunal by the Philippines permissible, given China's reservation to UNCLOS for disputes over maritime sovereignty?<sup>6</sup>

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4. *The Republic of the Philippines v. The People's Republic of China*, PERMANENT COURT OF ARBITRATION, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1529](http://www.pca-cpa.org/showpage.asp?pag_id=1529) (last accessed Mar. 14, 2014).

5. Statement and Notification of Claim, *supra* note 1.

6. "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes

As a general matter, UNCLOS requires that parties submit their disputes to dispute resolution.<sup>7</sup> The system establishes a comprehensive dispute resolution mechanism, with various options, arbitration being the default method.<sup>8</sup> However, there is an important exception with regards to subject matter: states are not required to submit questions of maritime sovereignty if they enter the appropriate reservation.<sup>9</sup> This exception was created because states decided these types of disputes can be sensitive, and because there is no consensus between states regarding the substantive rules to be applied to sea boundary delimitations.<sup>10</sup> China has entered such a reservation, and the first thing the Tribunal will have to determine is whether the Philippines request is within its scope.

The Philippines has tried to frame the questions in its Notification and Statement of Claim to suggest that the arguments involve an interpretation of the convention rather than a determination of maritime sovereignty, which would be prohibited. But it is clear that some of the questions back onto questions of maritime sovereignty. In particular, the invitation to the Tribunal to rule on the 9-dash line and the request that the Tribunal rule on the Philippines rights beyond the EEZ clearly raise sovereignty issues.<sup>11</sup>

My impression is that the Philippines recognizes that some of the questions presented to the Tribunal may not be cognizable. Although officially, the Philippines is seeking clarification of its rights, in an off the record conversation with a government official, I was told that they see no harm in asking for the moon, because an answer to any of the questions will be helpful as the Philippines defines its rights. Even a narrow ruling could have benefits: it would offer a legal evaluation by a highly respected tribunal, and it may give some clarity to other states in the region.

The question that is least likely to run afoul of China's reservation, and thus most likely to proceed to arbitration is the second question on

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referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention." ITLOS, DECLARATIONS OF STATES PARTIES RELATING TO SETTLEMENT OF DISPUTES IN ACCORDANCE WITH ARTICLE 298 (OPTIONAL EXCEPTIONS TO THE APPLICABILITY OF PART XV, SECTION 2, OF THE CONVENTION) (2011), available at [http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/298\\_declarations\\_June\\_2011\\_english.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf).

7. United Nations Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1933 U.N.T.S. 397 [hereinafter UNCLOS].

8. Under UNCLOS annex VII, art. III, the tribunals are composed of five arbitrators and are free to determine their own procedure.

9. UNCLOS art. 298.

10. Anne Sheehan, *Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes*, 24 U. QUEENSLAND L.J. 165, 166 (2005).

11. For an overview of the 9-dash line, see Zhiguo Gao & Bing Bing Ja, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98 (2013).

whether the maritime features are islands, pursuant to Article 121 of UNCLOS.<sup>12</sup> Because this question involves an interpretation of UNCLOS, which would fall within the Tribunal's jurisdiction and does not need to address Maritime sovereignty, I believe there is a reasonable chance the Tribunal will determine it has jurisdiction over this aspect of the claim.<sup>13</sup>

## II. WHEN DOES ARBITRATION WORK IN POLITICALLY CHARGED SITUATIONS?

In my view, there are three conditions for successful arbitration on highly political issues such as cultural issues and boundary disputes:

- (i) Consent of the parties,
- (ii) The ability of politicians to sell the process of arbitration to their people,
- (iii) Arbitral tribunal's ability to tactically manage consent.<sup>14</sup>

Consent is important because the states involved need to make a commitment to submit themselves to a third party. Parties often get to arbitration after negotiations fail, and the leaders want a resolution. However, states must be willing to acknowledge that the arbitral tribunal can change legal entitlements.

The Philippines has arrived at a place where arbitration is viewed as one of the only viable options on the table. China, however, clearly has not reached this point. Moreover, if this case proceeds, it will be the first time

12. UNCLOS art. 121.

#### Regime of islands:

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.

#### *Id.*

13. Christopher Ward, Address at Australian National University, South China Sea: An Introduction to the Disputes and Prospects for International Law (Aug. 2013), available at [http://law.anu.edu.au/sites/all/files/events/christopher\\_ward\\_speech\\_august\\_2013.pdf](http://law.anu.edu.au/sites/all/files/events/christopher_ward_speech_august_2013.pdf).

14. I would like to acknowledge the excellent work of Bart L. Smit Duijzenhunst and Sophia L.R. Dawkins on this topic. I drew on their categorization of consent in land disputes to develop my approach. See Bart L. Smit Duijzenhunst & Sophia L.R. Dawkins, *Arbitrary Peace? Consent Management in International Arbitration* (Mar. 2014) (draft on file with author).

that at ITLOS chamber proceeds with one party in absentia. However, in other fields, it is not so unusual. In the investor/state context, for example, Moldova refused to participate in proceedings pursuant to a dispute under a Russian–Moldovan Bilateral Investment Treaty but later went on to enforce an award.<sup>15</sup>

Second, the politicians need to support the arbitration. Success depends on how states relay the arbitration process to the peoples of the country in question. When governments are on board, arbitration can become a way out of a politically sensitive situation. When they are not, however, arbitration can be a means to undermine other processes and potentially even peace agreements. It is too early to say how the Philippines will translate any decision by the Tribunal, but even if a ruling on the islands issue were to come back, for example, in China’s favor, the Philippines would have a political out.

Finally, arbitrators need to manage the consent of the parties. One of the advantages of arbitration is that there is flexibility in the system, and parties have more control than they would before national courts. However, parties can walk away during the process, and even when parties agree to participate, they might reject an award. A recent example is Colombia’s reaction to the ICJ’s *Nicaragua v. Colombia* Judgement of 2012.<sup>16</sup> Indeed, Colombia withdrew from the Bogota Pact which granted the ICJ jurisdiction soon after the judgment was handed down.<sup>17</sup> Moreover, Nicaragua has now lodged a new case at the ICJ to try to finalize the maritime boundary, before the ICJ’s jurisdiction ends. These events illustrate how even after parties consent, and a tribunal determines it has jurisdiction, and that tribunal renders an award that tries to reach an equitable solution for both parties, one side may reject it. Enforcement, therefore, can raise a secondary set of issues altogether.

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15. See, e.g., Jarrod Hepburn, *Moldova Loses Another Treaty Arbitration with Russian Investor, But Shows Signs of Cooperation with the Arbitration System*, INVESTMENT ARBITRATION REPORTER (May 11, 2012) [http://www.iareporter.com/articles/20110517\\_3](http://www.iareporter.com/articles/20110517_3).

16. Territorial and Maritime Dispute (*Nicaragua v. Colombia*), 2012 I.C.J. 624 (Nov. 19).

17. See American Treaty On Pacific Settlement, Apr. 30, 1948, O.A.S.T.S. No. 17, 30 U.N.T.S. 449 (imposing a general obligation on the signatories to settle their disputes through peaceful means, and conferring jurisdiction on the ICJ), available at <http://www.oas.org/juridico/english/signs/a-42.html#Colombia>.

### III. WHAT CAN ARBITRATION DO FOR THE SOUTH CHINA SEA DISPUTE?

Although Philippines is ready, willing and able to proceed, there is little debate that China has no interest in participating. Without the consent and participation of one of the parties, the arbitration process itself is unlikely to resolve the problem. That does not mean, however, that there is no value in the process. The Philippines has keenly demonstrated that it is complying with the spirit of UNCLOS by submitting the case for adjudication. Moreover, there are clear side benefits to the overall resort to international dispute resolution:

- the process might unlock the diplomatic impasse between China and the Philippines,
- it may clarify the legal status of some of the maritime features, and
- it may bring the issue into the international legal realm.

The analogy of East Timor/Australia is relevant here. The countries were in negotiations for years over ownership of resources off the continental shelf when Timor, finally, threatened to take Australia to the ICJ. Australia responded by withdrawing from the Court's jurisdiction. However, soon thereafter, they entered into a settlement. The moral of the story is that starting a case can be a good negotiating strategy.

### IV. CONCLUSION

Many countries are attempting to get "bigger" by defining their maritime entitlements like the extent of their continental shelf. It should not be surprising that this is creating friction where claims overlap, or where one country starts to bump up against the sovereignty of another. There are approximately 180 unresolved maritime disputes around the globe, and dispute resolution is becoming increasingly appealing when bilateral negotiations fail or stall. All indicators suggest that the need for dispute resolution in maritime matters will increase. These are precisely the kinds of cases where we need international law.

The PCA, the ICJ, and ITLOS are charged with a growing number of cases that have been resolved in a highly competent manner in a highly consistent way. We need an international court with international jurisprudence particularly in the type of situation where regional tensions run high. From this perspective, China's reticence is unfortunate.

ANNEX A  
REPUBLIC OF THE PHILIPPINES  
DEPARTMENT OF FOREIGN AFFAIRS  
MANILA

No. **13-0211**

The Department of Foreign Affairs of the Republic of the Philippines presents its compliments to the Embassy of the People's Republic of China and, with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea, the Government of the Philippines has the honor to submit the attached Notification under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the Statement of Claim on which the Notification is based, in order to initiate arbitral proceedings to clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea.

The Government of the Philippines has initiated these arbitral proceedings in furtherance of the friendly relations with China, mindful of its obligation under Article 279 of UNCLOS to seek a peaceful and durable resolution of the dispute in the West Philippine Sea by the means indicated in Article 33 (1) of the Charter of the United Nations.

The Department of Foreign Affairs of the Republic of the Philippines avails itself of this opportunity to renew to the Embassy of the People's Republic of China the assurances of its highest consideration.

Manila, 22 January 2013



The Embassy of the People's Republic of China

Manila

Attachments: Notification and Statement of Claims

**NOTIFICATION  
AND STATEMENT OF CLAIM**

**I. INTRODUCTION**

1. The Republic of the Philippines brings this arbitration against the People's Republic of China to challenge China's claims to areas of the South China Sea and the underlying seabed as far as 870 nautical miles from the nearest Chinese coast, to which China has no entitlement under the 1982 United Nations Convention on the Law of the Sea ("UNCLOS", or "the Convention"), and which, under the Convention, constitute the Philippines' exclusive economic zone and continental shelf.

2. Despite China's adherence to UNCLOS in June 1996, and the requirement of Article 300 that States Parties fulfill in good faith their obligations under the Convention, China has asserted a claim to "sovereignty" and "sovereign rights" over a vast maritime area lying within a so-called "nine dash line" that encompasses virtually the entire South China Sea. By claiming all of the waters and seabed within the "nine dash line", China has extended its self-proclaimed maritime jurisdiction to within 50 nautical miles ("M") off the coasts of the Philippine islands of Luzon and Palawan, and has interfered with the exercise by the Philippines of its rights under the Convention, including within its own exclusive economic zone and continental shelf, in violation of UNCLOS.

3. Further, within the maritime area encompassed by the "nine dash line", China has laid claim to, occupied and built structures on certain submerged banks, reefs and low tide



elevations that do not qualify as islands under the Convention, but are parts of the Philippines' continental shelf, or the international seabed; and China has interfered with the exercise by the Philippines of its rights in regard to these features, and in the waters surrounding them encompassed by China's designated security zones.

4. In addition, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are "rocks" under Article 121(3) of UNCLOS. China has claimed maritime zones surrounding these features greater than 12M, from which it has sought to exclude the Philippines, notwithstanding the encroachment of these zones on the Philippines' exclusive economic zone, or on international waters.

5. In June 2012, China finally created a new administrative unit, under the authority of the Province of Hainan, that included all of the maritime features and waters within the "nine dash line". In November 2012, the provincial government of Hainan Province promulgated a law calling for the inspection, expulsion or detention of vessels "illegally" entering the waters claimed by China within this area. The new law went into effect on 1 January 2013.

6. In response to these and other unlawful acts in contravention of UNCLOS, the Philippines seeks an Award that: (1) declares that the Parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid; (2) determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are

capable of generating entitlement to maritime zones greater than 12 M; and (3) enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.

7. The Philippines does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. The Philippines is conscious of China's Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.

8. All of the Philippines' claims in this arbitration have been the subject of good faith negotiations between the Parties. There have been numerous exchanges of views. The requirements of Article 279 have been satisfied. There is, therefore, no bar to the Arbitral Tribunal's exercise of jurisdiction over the claims asserted by the Philippines.

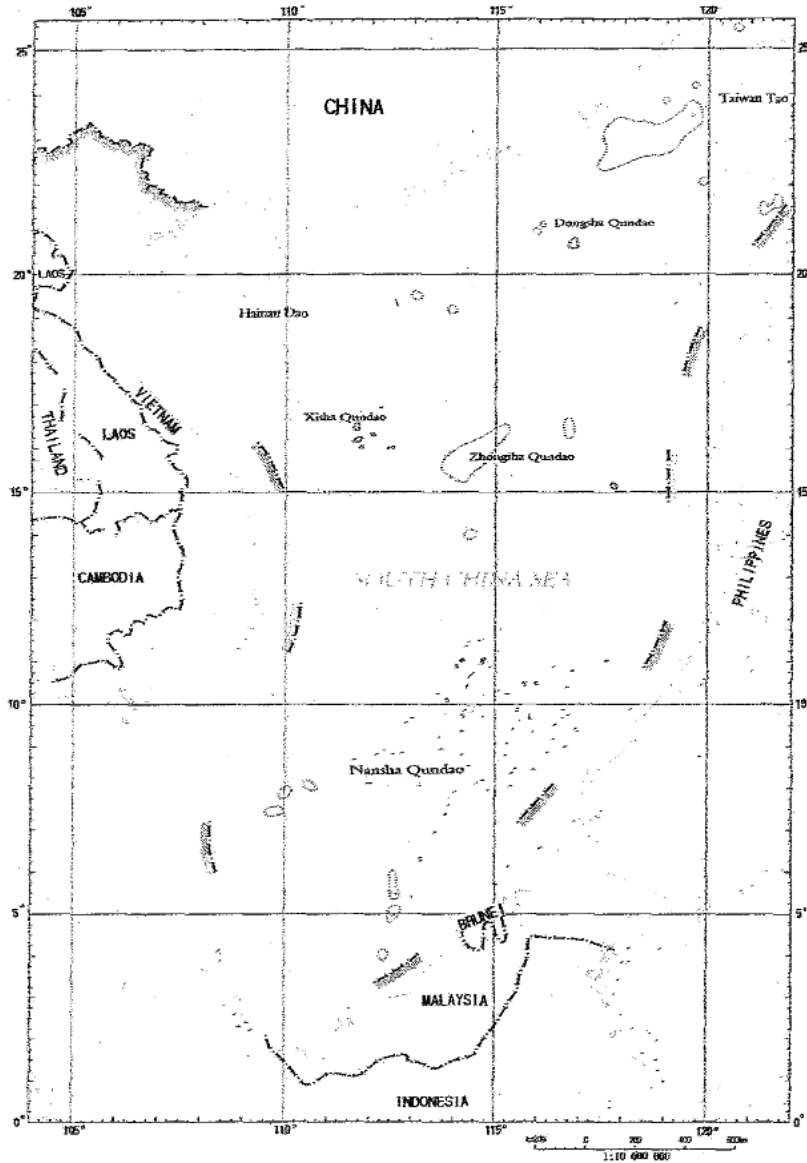
## II. FACTUAL BACKGROUND

### A. Maritime Areas

9. The South China Sea, part of which is known in the Philippines as the West Philippine Sea, is a semi-enclosed sea in Southeast Asia that covers approximately 2.74 million square kilometers. The Sea is surrounded by six States and Taiwan. To the north are the southern coast of mainland China, and China's Hainan Island. To the northeast lies Taiwan. To the east and southeast is the Philippines. The southern limits of the sea are bounded by Brunei, Malaysia and Indonesia. And to the west is Vietnam.

10. There are many small insular features in the South China Sea. They are largely concentrated in three geographically distinct groups: the Paracel Islands in the northwest; Scarborough Shoal in the east; and the Spratly Islands in the southeast. The Paracel Islands are not relevant to this arbitration. Scarborough Shoal, located approximately 120M west of the Philippines' coast and more than 350M from China, is a submerged coral reef with six small protrusions of rock above sea level at high tide. The Spratly Islands are a group of approximately 150 small features, many of which are submerged reefs, banks and low tide elevations. They lie between 50 and 350 M from the Philippine island of Palawan, and more than 550M from the Chinese island of Hainan. None of the Spratly features occupied by China is capable of sustaining human habitation or an economic life of its own.

11. Notwithstanding its adherence to UNCLOS, China claims almost the entirety of the South China Sea, and all of the maritime features, as its own. Specifically, China claims "sovereignty" or "sovereign rights" over some 1.94 million square kilometers, or 70% of the Sea's waters and underlying seabed within its so-called "nine dash line." China first officially depicted the "nine dash line" in a letter of 7 May 2009 to the United Nations Secretary General. It is reproduced below. According to China, it is sovereign over all of the waters, all of the seabed, and all of the maritime features within this "nine dash line".



12. In the east, the "nine dash line" depicted in China's letter is less than 50M off the Philippine island of Luzon. In the southeast it is within 30M from Palawan. In both

respects, it cuts through - and cuts off - the Philippines' 200 M exclusive economic zone and continental shelf, in violation of UNCLOS. Within the area encompassed by the "nine dash line", China has engaged in conduct that has unlawfully interfered with the Philippines' right of navigation, notwithstanding that some of the area is in the Philippines' own exclusive economic zone, and the rest is high seas; and China has interfered with the exercise by the Philippines of its rights to the living and non-living resources in 'its exclusive economic zone and continental shelf extending west from the island of Luzon, and northwest from the island of Palawan. China has also violated the Philippines' rights by exploiting the living resources in the Philippines' exclusive economic zone.

13. China's interference with and violations of the Philippines' rights under UNCLOS have been steadily escalating. In June 2012, China placed the entire maritime area within the "nine dash line" under the authority of the Province of Hainan, which, in November 2012, in the exercise of its administrative authority, promulgated a law that requires foreign vessels to obtain China's permission before entering the waters within the "nine dash line", and provides for inspection, expulsion and detention of vessels that do not obtain such permission. The law went into effect on 1 January 2013.

#### **B. Submerged Features**

14. Even before its first official espousal of the "nine dash line", China began to seize physical control of a number of submerged features and protruding rocks in the Spratly Islands, in the southeastern part of the Sea, and to construct artificial "islands" on top of them. Among the submerged features that China occupied and altered in this manner are: Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef. None of these features is an island under Article 121 of UNCLOS. They are all at best low tide elevations, far-removed

from China's territorial sea, exclusive economic zone and continental shelf. Because they are not above water at high tide, they are part of another State's continental shelf, or the international seabed. Yet, China has not only acted unlawfully by seizing control of these submerged features; it has declared maritime zones around them, from which it has illegally sought to exclude the Philippines, and other States.

15. Mischief Reef (Chinese name = Meiji Jiao; known in the Philippines as Panganiban Reef) is a submerged bank that is part of the Philippines' continental shelf, approximately 130 M from Palawan (and more than 600 M southeast of China's Hainan Island, the nearest Chinese land territory). Mischief Reef lies at approximately 9° 54'N-115° 32'E. Since 1995, China has constructed buildings and other facilities on stilts and concrete platforms at four different sites atop Mischief Reef, despite repeated protests from the Philippines.

16. McKennan Reef (Chinese name = Ximen Jiao; known in the Philippines as Chigua Reef) is a low tide elevation located at approximately 9° 53'5"N-114° 28'E. It is approximately 180 M west of the Philippine island of Palawan, and is also part of the Philippines' continental shelf. China has constructed buildings and other facilities on stilts and concrete platforms at this feature, as well, despite the Philippines' protests.

17. China has not only unlawfully seized parts of the Philippines' continental shelf, but has also wrongfully sought to prevent Philippine vessels from approaching Mischief Reef and McKennan Reef, even though the surrounding waters are within the Philippines' exclusive economic zone.

18. Gaven Reef (Chinese name = Nanxun Jiao) is a low tide elevation located at approximately 10° 13' N-114° 13'E. It lies approximately 205M northwest of Palawan.

19. Subi Reef (Chinese name= Zhubi Jiao; known in the Philippines as Zamora Reef) is a low tide elevation located at approximately 10° 55'N-114° 05'E. It lies approximately 230M west of Palawan.

### **C. Insular Features**

20. In 2012, China seized six small rocks that protrude above sea level within the Philippines' exclusive economic zone, unlawfully claimed an exaggerated maritime zone around these features, and wrongfully prevented the Philippines from navigating, or enjoying access to the living resources within this zone, even though it forms part of the Philippines' EEZ. These half dozen protrusions, which are known collectively as Scarborough Shoal (Bajo de Masinloc in the Philippines; Huang Yan Dao in China), are located approximately 120 M west of the Philippine island of Luzon. They are rocks both literally and under Article 121 of UNCLOS. None is more than 3 meters ("m") above sea level at high tide; and none measures more than a few meters in width. None of the rocks, which lie in close proximity to one another, generates entitlement to more than a 12 M territorial sea. Yet, China, which like the Philippines asserts sovereignty over Scarborough Shoal, claims a much larger maritime zone for itself, to the limit of the "nine dash line" approximately 70M to the east.

21. Until April 2012, Philippine fishing vessels routinely fished in this area, which is within the Philippines' 200 M exclusive economic zone. Since then, China has prevented the Philippines from fishing at Scarborough Shoal or in its vicinity, and undertaken other

activities inconsistent with the Convention. Only Chinese vessels are now allowed to fish in these waters, and have harvested, inter alia, endangered species such as sea turtles, sharks and giant clams which *are* protected by both international and Philippine law.

22. To the southwest of Scarborough Shoal, in the Spratly Islands, China has seized similar features. China presently occupies the following features which, though above water at high tide, *are* uninhabitable and incapable of supporting economic life in their natural state. They are therefore "rocks" within the meaning of Article 121(3) of UNCLOS:

- Johnson Reef (Chinese name = Chigua Jiao; known in the Philippines as Mabini Reef), located at approximately 9° 42' N-114°22' E and approximately 180M northwest of Palawan.
- Cuarteron Reef (Chinese name=Huayang Jiao; known in the Philippines as Calderon Reef), located at approximately 8° 51'N-112° 50'E and approximately 245M west of Palawan; and
- Fiery Cross Reef (Chinese name = Yongshu Jiao; known in the Philippines as Kagitingan Reef), located at approximately 9° 33'N-112° 54'E and approximately 255M west of Palawan;

23. All of these features are submerged reefs with no more than a few rocks protruding above sea level at high tide. Johnson Reef has a few rocky protrusions rising above water at high tide. Cuarteron Reef is a collection of coral rocks reaching no higher than 1.5 m. Fiery Cross Reef consists of a submerged bank with protruding rocks no more than 1 m above sea level at high tide.



24. Notwithstanding that all of these insular features are "rocks" under Article 121(3) of UNCLOS, China unlawfully claims entitlements to maritime zones greater than 12M in the waters and seabed surrounding them, and wrongfully excludes the Philippines and other States from these areas. Moreover, in the case of Scarborough Shoal and Johnson Reef, the maritime zones claimed by China unlawfully encroach upon the Philippines' 200 M exclusive economic zone and continental shelf extending from Luzon and Palawan, and prevent the Philippines from enjoying its rights under the Convention within 200 M.

**D. Exchanges of Views**

25. On numerous occasions, dating back at least to 1995, the Philippines and China have exchanged views regarding the settlement of their disputes concerning entitlements to maritime areas in the South China Sea, the exercise within those maritime areas of rights pertaining to navigation and the exploitation of living and non-living resources, and the status of maritime features in the Spratly Islands and at Scarborough Shoal.

26. The Parties have been exchanging views on these disputes in attempts to achieve negotiated solutions since the first "Philippines-China Bilateral Consultations on the South China Sea Issue" were held in August 1995. However, despite many bilateral meetings and exchanges of diplomatic correspondence over more than 17 years since those first consultations were held, no settlements have been reached on any of these disputed matters.

27. In regard to entitlements to maritime areas in the South China Sea, the Philippines has consistently expressed the view to China in bilateral meetings and diplomatic correspondence that it is entitled to an exclusive economic zone and continental shelf of 200 M from its archipelagic baselines, and to the exclusive enjoyment of the living and non-living resources in these zones, as well as to the right to navigate without interference by China within and beyond its 200 M limit. In response, China has repeatedly expressed the conflicting view that it is entitled to all the maritime space encompassed by its "nine dash line", to all the living and non-living resources within this limit, and to control navigation within this area. By its diplomatic note dated 21 November 2012, the Philippines declared, as it did on numerous prior occasions, that it cannot accept the validity of the "nine dash line" or China's claims based thereon. Over the past 17 years of such exchanges of views, all possibilities of a negotiated settlement have been explored and exhausted.

28. With respect to the status of maritime feature in the Spratly Islands and adjacent waters, and rights to navigate and exploit the living resources in these waters, the Parties have exchanged views since at least August 1995, and as recently as July 2012. The Philippines has repeatedly protested Chinese activities on and adjacent to Subi Reef and Mischief Reef, which form part of the Philippines' continental shelf, as well as China's claims and activities in regard to the other maritime features in the Spratly group occupied or claimed by China. China has consistently rejected the Philippines' protests and maintained its occupation of and activities on these features. Each Party has protested interference by the other with its claimed navigational rights, and with its claimed rights to the living resources, in the waters adjacent to these features. None of the protests, or

ensuing meetings or diplomatic correspondence in which views were exchanged, resulted in the settlement of these disputes.

29. With respect to the status of the maritime features at Scarborough Shoal and adjacent waters, and rights to navigate and exploit the living resources in these waters, the Parties have been exchanging views regarding the settlement of their dispute since at least May 1997. Most recently, during a series of meetings in Manila in April 2012, the Parties once again exchanged views on these matters without arriving at a negotiated solution. As a result of the failure of negotiations, the Philippines later that month sent China a diplomatic note in which it invited China to agree to bring the dispute before an appropriate adjudicatory body. China declined the invitation.

30. The diplomatic record leaves no doubt that the requirement in Article 283 that the "parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" has been satisfied.

### III. THE PHILIPPINES' CLAIMS

31. Based on the foregoing and the evidence to be submitted in the course of this arbitration, the Philippines asserts the following claims:

- China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;

- Accordingly, China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to UNCLOS and invalid;
- Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention;
- Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef are submerged features that are not above sea level at high tide, are not islands under the Convention, are not located on China's Continental Shelf; and China has unlawfully occupied and engaged in unlawful construction activities on these features;
- Mischief Reef and McKennan Reef are part of the Philippines' Continental Shelf under Part VI of the Convention.
- Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which qualify as "rocks" under Article 121(3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M; and China has unlawfully claimed maritime entitlements beyond 12 M from these features;

- China has unlawfully prevented Philippine vessels from exploiting the living resources in-the waters adjacent to Scarborough Shoal and Johnson Reef;
- The Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;
- China has unlawfully claimed rights to, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting the living and non-living resources within its Exclusive Economic Zone and Continental Shelf; and
- China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the Convention.

#### **IV. JURISDICTION OF THE TRIBUNAL**

32. The Philippines and China are both parties to UNCLOS, having ratified the Convention on 8 May 1984 and 7 June 1996, respectively. It follows that both Parties have given their advance consent to the regime of settlement of disputes concerning the interpretation and application of the Convention established in Part XV.

33. Article 279 of the Convention requires States Parties to seek a solution by peaceful means in accordance with the UN Charter. Article 283(1) further requires that when a dispute arises between States Parties, they should proceed expeditiously to an exchange of

views regarding a settlement by negotiation or other peaceful means. The Philippines has complied with the requirements of Article 279 and Article 283(1) fully and in good faith, and has exhausted possibilities of settlement by negotiation.

34. As the Philippines and China have failed to settle the dispute between them by peaceful means of their own choice, Article 281(1) allows recourse to the procedures provided for in Part XV, including compulsory procedures entailing binding decisions under Section 2 of Part XV. Article 286 allows these compulsory procedures to be initiated by any State Party in the court or tribunal having jurisdiction under Section 2.

35. The choice of compulsory procedures is governed by Article 287, the first paragraph of which allows a State Party, by means of a written declaration, to choose one or more of the means for settlement of disputes listed therein, including recourse to an arbitral tribunal under Annex VII of the Convention. States Parties to a dispute which have not made declarations pursuant to Article 287(1) are deemed by operation of Article 287(3) to have accepted arbitration in accordance with Annex VII.

36. Since neither the Philippines nor China has made a declaration pursuant to Article 287(1), and since no agreement to the contrary currently exists, it follows that, in accordance with Article 287(5), this dispute may be submitted to arbitration under Annex VII of the Convention.

37. The jurisdiction of an Annex VII tribunal extends to any dispute concerning the interpretation or application of the Convention, subject to the provisions of Section 3 of Part XV.

38. Section 3 of Part XV contains optional exceptions from jurisdiction in Article 298. Such exceptions have been invoked by China in a formal declaration dated 25 August 2006.

39. None of these exceptions is applicable to the Philippines' claims in this arbitration. The present dispute concerns (a) whether, in light of China's repeated assertions of alleged "sovereign rights and jurisdiction" within the so-called "nine dash line", the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by the provisions of UNCLOS, including but not limited to Articles 3-14 of Part II, Articles 55 and 57 of Part V, Article 76 of Part VI, Article 121 of Part VIII Article 300 of Part XVI; (b) whether China's Claims based on the "nine dash line" are inconsistent with those provisions; (c) whether, under Article 121 of UNCLOS, certain of the maritime features in the South China Sea are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlements to maritime zones greater than 12M; and (d) whether China has violated the right of navigation of the Philippines in the waters of the South China Sea, and the rights of the Philippines in regard to the living and non-living resources within its exclusive economic zone and continental shelf.

40. It follows that the Philippines' claims do not fall within China's Declaration of 25 August 2006, because they do not: concern the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations; involve historic bays or titles within the meaning of the relevant provisions of the Convention; concern military activities or law enforcement activities; or concern matters over which the Security Council is exercising functions assigned to it by the UN Charter.

**V. RELIEF SOUGHT**

41. In light of the above, and the evidence to be submitted in the course of this arbitration, the Philippines respectfully requests that the Arbitral Tribunal issue an Award that:

- Declares that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;
- Declares that China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to UNCLOS and invalid;
- Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS;
- Declares that Mischief Reef and McKennan Reef are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on them violate the sovereign rights of the Philippines;
- Requires that China end its occupation of and activities on Mischief Reef and McKennan Reef;



- Declares that Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;
- Requires China to terminate its occupation of and activities on Gaven Reef and Subi Reef;
- Declares that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 M; and that China has unlawfully claimed maritime entitlements beyond 12 M from these features;
- Requires that China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with the Convention at or in the vicinity of these features;
- Declares that the Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;

- Declares that China has unlawfully claimed, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting living and non-living resources within its Exclusive Economic Zone and Continental Shelf;
- Declares that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under the Convention 111 areas within and beyond 200 M of the Philippines' archipelagic baselines; and
- Requires that China desist from these unlawful activities.

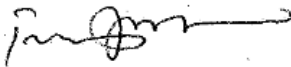
#### **VI. APPOINTMENT OF ARBITRATOR**

42. In accordance with the requirements of UNCLOS Annex VII, Article 3(b), the Philippines hereby appoints Judge Rudiger Wolfrum as a member of the Arbitral Tribunal.

## VII. RESERVATION OF RIGHTS

43. The Philippines reserves the right to supplement and/or amend its claims and the relief sought as necessary, and to make such other requests of the Arbitral Tribunal as may be required, to preserve its rights under UNCLOS, including a request for provisional measures.

Respectfully submitted,



Francis H. Jardeleza  
Solicitor General  
Republic of the Philippines  
Agent

22 January 2013