

# ARBITRAL TRIBUNAL IS DECISION IN THE SOUTH CHINA SEA

On 12 July 2016, an international arbitral tribunal in The Hague (the "Tribunal") unanimously ruled in favour of the Philippines and against China in the South China Sea Arbitration. The Philippines instituted the landmark case in 2013 under Annex VII to the United Nations Convention on the Law of the Sea (the "Convention"). The Permanent Court of Arbitration ("PCA") acted as the Registry in the proceedings. The Award is available [here](#)

In its sweeping decision, the five-member Tribunal rejected China's claim to historic rights over almost all of the South China Sea as without any foundation in international law. It also ruled against China on: (1) the status of certain maritime features in the South China Sea and the maritime entitlements they are capable of generating; (2) the lawfulness of Chinese actions in the South China Sea, including the construction of artificial islands and interference with Philippine fishing and oil exploration; (3) the effect of China's actions on the marine environment; (4) whether China's actions since the arbitration began had aggravated the dispute.

According to the Tribunal, it goes without saying that China is obligated to comply with the Award. China is required to do so by the express terms of Annex VII to the Convention and in accordance with the presumption in

public international law of State compliance with treaty commitments.

The Tribunal did not have jurisdiction to rule on questions of sovereignty over land territory or to delimit boundaries between the parties. The scope of the ruling on questions regarding the Law of the Sea nonetheless was of monumental significance for both legal and geopolitical reasons. It provided long-sought clarity about the parties' legal rights and obligations under the Convention, which has widespread membership. It also intervened in one of the most tense and complex dramas playing out on the international stage today. With over 50% of the world's commercial shipping passing through the South China Sea each year, the outcome of the case will be of significance not only for the parties but also for all of the States bordering the South China Sea like Indonesia, Malaysia and Vietnam, and for the United States and other States that insist on freedom of navigation rights in the area.

Having refused to participate in the proceedings, China has insisted that it will ignore the final and binding decision. Its statement to that effect immediately following the ruling is available [here](#).

## Case background

The South China Sea Arbitration began on 22 January 2013, when the Philippines served China with a Notification and a Statement of Claim under the Convention. China refused to accept or participate in the proceedings. However, in December 2014 it published a Position Paper in which it asserted that the Tribunal lacked jurisdiction which the Tribunal

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deemed to constitute China's position on the matter.

Despite China's non-participation, the Tribunal continued the proceedings, as permitted by Annex VII of the Convention. The Tribunal, which was chosen by the Philippines and the President of the International Tribunal for the Law of the Sea ("ITLOS"), was presided over by Mr. Thomas Mensah of Ghana, a former President of the International Tribunal for the Law of the Sea in Hamburg, Germany. It also included three of the sitting judges on that court, Mr. Jean-Pierre Cot of France, Mr. Rüdiger Wolfrum of Germany and Mr. Stanislaw Pawlak of Poland, and the former director of the Netherlands Institute for the Law of the Sea, Professor Alfred H.A. Soons.

In October 2015, the Tribunal issued an Award on Jurisdiction and Admissibility, in which it concluded that it had jurisdiction over some of the Philippines' submissions and deferred a decision on others until it decided the merits. That Award is available here.

The hearing on the remaining jurisdictional issues and the merits was held in November 2015. It was attended by some 103 people, including representatives of the governments of Australia, Indonesia, Japan, Malaysia, Singapore, Thailand and Vietnam, which were given observer status due to their interest as littoral States in the South China Sea and/or their membership in the Convention. The United States was denied observer status on account of not being a party to the Convention.

Two interested States, Vietnam and Malaysia, each submitted statements to the Tribunal re-

asserting their own claims and interests in the South China Sea and urging the Tribunal to respect them. Those statements are not available to the public.

## **Main findings of the Tribunal**

In its most far-reaching decision, the Tribunal in yesterday's ruling rejected China's claims to more than 90% of the South China Sea on the basis of historic rights. China publically claims rights to all of the maritime areas encompassed by what it calls its "nine-dashed line". The Tribunal determined that the Convention comprehensibly allocates the maritime rights of States. Any pre-existing "historic rights" to resources were extinguished upon the entry into force of the Convention.

The Tribunal also found that, in any event, there was no evidence that China historically had exercised exclusive control in the South China Sea. Thus there was neither a legal nor a historical basis for China's claims to large swathes of the South China Sea, including areas to which the Philippines and some of the observer littoral States instead were entitled.

The Tribunal also ruled against China on a range of other important matters under the Convention and reminded China of its obligation to comply with international law.

*The status of maritime features and the entitlement generated by these features*

First, the Tribunal determined that none of the features claimed by China in the South China Sea was capable of generating an Exclusive Economic Zone ("EEZ"), which meant that they

Sea was capable of generating an Exclusive Economic Zone ("EEZ"), which meant that they fell within the EEZ of the Philippines instead.

In reaching this conclusion, the Tribunal first considered whether some of the reefs claimed by China were above water at high tide. Under Articles 13 and 121 of the Convention, features above water at high tide generate an entitlement to at least a 12-nautical mile territorial sea, while features that are submerged at high tide do not generate such entitlement. The Tribunal noted that many of the features that China claims generate entitlement have been subject to human modification, while the Convention classifies features only based on their natural condition. Consequentially, the Tribunal assessed the status of the features on the basis of archival materials and historical hydrographic surveys. The Tribunal concluded that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fierly Cross Reef, Gaven Reef (North) and McKennan Reef are features not submerged at high tide, therefore generate an entitlement to at least a 12-nautical mile territorial sea.

The Tribunal then went on to analyse whether these features found to be above water at high tide could be classified as islands. Under Article 121 of the Convention, islands generate an entitlement to an EEZ and to a Continental Shelf, while rocks that cannot sustain human habitation or economic life of their own do not generate such entitlement. The Tribunal found that the above-mentioned features, despite China's constructions on a number of them, cannot sustain human habitation or economic life. Consequentially, the Tribunal concluded that these features were rocks and not islands.

The Tribunal also considered whether any of the Spratly Islands that China claims or the Spratly Islands as a whole could generate extended maritime zones. The Tribunal found that the Spratly Islands had been used only by small groups of transient fishermen and mining enterprises and therefore could not be said to sustain human habitation or economic life. They therefore do not generate entitlement to

an EEZ. The Tribunal also held that, under the Convention, the Spratly Islands do not generate maritime zones collectively as a unit.

#### *The lawfulness of Chinese actions in the South China Sea*

Second, having found that certain areas are within the EEZ of the Philippines, the Tribunal found that China had violated the Philippines' sovereign rights within those areas in a number of ways. Specifically, it found that China had: (1) interfered with Philippine fishing and petroleum exploration at Reed Bank; (2) constructed artificial islands at Mischief Reef without the permission of the Philippines; and (3) failed to prevent Chinese fishermen from fishing within the Philippines' EEZ at Mischief Reef and Second Thomas Shoal. The Tribunal also concluded that China had interfered with the Philippines' traditional fishing rights at Scarborough Shoal and created a serious risk of collision when they obstructed Philippine vessels.

#### *The effect of China's actions on the marine environment*

Third, the Tribunal made a first-time ruling on the Convention's provisions on environmental protection, finding that China had breached these too. Articles 192 and 194 of the Convention oblige States to protect and preserve the marine environment and take steps to avoid polluting it. The Tribunal found that China had breached these articles by severely harming the marine environment with its large-scale land reclamation and construction of artificial islands. By not preventing Chinese fishermen from harvesting endangered species in the area, China also had failed to fulfil its due diligence obligations under the Convention.

#### *China's aggravation of the dispute*

Fourth, the Tribunal determined that China had violated its obligation under international law not to aggravate the dispute during the pendency of the proceedings against it. The

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Tribunal noted that, since the start of the proceedings, China had built a large artificial island in the Philippines' EEZ, caused irreparable damage to the coral reef ecosystem, and permanently destroyed evidence of the natural condition of features that formed part of the parties' dispute. All of these actions had aggravated the dispute.

## *Future conduct of the parties*

Finally, in a pyrrhic victory for China, the Tribunal ruled that it was not necessary to grant the Philippines' requests for judgments declaring that China should bring its conduct into compliance with the Convention. These requests fell within the basic rule of international law that States should comply with their treaty obligations. It goes without saying that both China and the Philippines were required to comply with the Convention and the Award in accordance with that basic rule. The Convention itself is clear that awards under Annex VII "shall be complied with by the parties to the dispute." The Tribunal indicated that it expected as much from these parties.

## Commentary

Yesterday's ruling in the South China Sea Arbitration brings to an end a case that has generated international attention due to its significant legal and geopolitical implications. The Tribunal has decided an issue of fundamental importance under the Convention for the States involved – the legality of China's nine-dashed line claim. It has also put all States Parties on notice that they can be held accountable under the Convention for failure to protect and preserve the environment in the world's oceans and seas.

The full extent of those implications remains to be seen, particularly now that all eyes are on China to see whether it will comply with the rule of law in its international conduct. As noted above, China has said that the ruling has "no binding force". It added that the Tribunal's conduct and award was "unjust and unlawful".

- Volterra Fietta