

# CHINA'S CLAIMS DASHED IN SOUTH CHINA SEA ARBITRATION

By Tim Stephens



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On 12 July 2016, an arbitral tribunal (the Tribunal) established under the 1982 *United Nations Convention on the Law of the Sea* ('**UNCLOS**') issued its unanimous award in the *South China Sea Arbitration* between the Philippines and China. The Tribunal agreed with most of the Philippines' arguments, including that China's claim to historic rights within a 'nine-dash line' encompassing most of the South China Sea is contrary to *UNCLOS* and exceeds China's maritime entitlements. The decision clarifies several provisions of *UNCLOS*, most notably article 121 concerning islands, which provides that mere rocks incapable of sustaining human habitation or economic life may only generate a 12 nautical mile territorial sea and not a 200 nautical mile exclusive economic zone ('**EEZ**') or continental shelf.

The *South China Sea Arbitration* carries major significance for the parties to the arbitration and to the other littoral states in the South China Sea.

## History

The *South China Sea Arbitration* was commenced by the Philippines against China in 2013. The Tribunal had previously issued an award on jurisdiction and admissibility on 29 October 2015 deciding most issues of jurisdiction, while deferring several for determination at the merits phase. The Permanent Court of Arbitration in The Hague served as the registry for the proceedings.

Both the Philippines and China are parties to *UNCLOS*, and are bound by the provisions of the Convention including those which establish a system of compulsory third-party dispute settlement (except in relation to certain defined exemptions).

China neither accepted nor participated in the arbitral proceedings, but did release a detailed 'position paper' in

## Snapshot

- An *UNCLOS* arbitral tribunal has issued its unanimous award in *The South China Sea Arbitration between the Philippines and China*.
- The Tribunal agreed with most of the Philippines' arguments, including that China's claim to historic rights within a 'nine-dash line' encompassing most of the South China Sea is contrary to *UNCLOS* and exceeds China's maritime entitlements.
- The South China Sea Arbitration is one of the most complex and significant decisions rendered by an international court or tribunal in the international law of the sea.

December 2014 setting out its view of the factual and legal issues in dispute.

In China's absence, the Tribunal took steps to satisfy itself fully that it possessed jurisdiction over the dispute, and to assess whether the Philippines' claims were well founded in fact and law (including by appointing independent experts to provide reports to the Tribunal on technical points).

## The Philippines' claims

The South China Sea is a contested and complex sea semi-enclosed by Brunei, Indonesia, China, the Philippines, Taiwan and Vietnam, and which is scattered with an array of islands and other features including reefs, shoals, cays and rocks, many of which are claimed by multiple states. China claims a number of these features and also asserts historic rights within a U-shaped, nine-dash line that embraces much of the South China Sea.

The Philippines sought a ruling on four matters:

**First**, what effect *UNCLOS* has on China's claims to historic rights within the nine-dash line;

**Second**, whether certain maritime features claimed by China and the Philippines should be characterised under *UNCLOS* as islands, rocks, low-tide elevations or submerged banks;

**Third**, the legality of China's activities in the South China Sea, including the construction of artificial islands, which, it was said, interfered with the Philippines' sovereign rights and which harmed the marine environment; and

**Fourth**, whether China's activities after the arbitration was commenced, including large-scale land reclamation and artificial island construction, unlawfully aggravated the dispute between the parties.

## Jurisdiction

China objected to the proceedings and took no part in them, claiming that the Tribunal lacked jurisdiction. China argued that the subject-matter of the arbitration related to territorial sovereignty, a topic beyond the scope of *UNCLOS*, and furthermore that China could rely on optional exclusions from the jurisdiction of *UNCLOS* tribunals in relation to maritime boundary delimitation and historic rights (*UNCLOS*, article 298). Most of these issues were addressed in the Tribunal's 2015 award on jurisdiction and admissibility, with the remainder determined in the merits award.

In summary, the Tribunal concluded that it enjoyed jurisdiction as the dispute concerned the interpretation or application of *UNCLOS* and was not a dispute relating to territorial sovereignty or maritime boundary delimitation. While the Tribunal accepted it could not rule on sovereignty disputes, it could rule on the law of the sea implications of



sovereignty. And so it could determine whether an outcrop of land in the South China Sea is an island, rock, low-tide elevation, or submerged feature, from which then flow legal consequences for maritime entitlements.

The Tribunal found that China could not avail itself of the exception from jurisdiction with respect to disputes concerning 'historic title'. This was because it was found on the evidence that China's claims in the South China Sea were at most to historic rights to the resources within the nine-dash line, and not to historic title or ownership of these waters (at [229]).

### Nine-dash line

Having characterised China's claims within the nine-dash line to be an assertion of historic rights to resources beyond the maritime zones China is entitled to under *UNCLOS*, the Tribunal assessed whether such claims were consistent with *UNCLOS*.

The Tribunal reviewed the history of *UNCLOS* and concluded that the Convention intended to allocate comprehensively the rights of states to maritime zones, that China's assertions were incompatible with the Convention, and to the extent that China possessed any historic rights, that these had been superseded when *UNCLOS* entered into force (at [262]). In any event, the Tribunal found that the evidence did not support China's contention that historically it had exercised exclusive control over the South China Sea and its resources (at [278]). The effect of these conclusions is that China's nine-dash line has no valid basis at international law.

### Features in the South China Sea

A central dispute in the *South China Sea Arbitration* was the geographical status of certain reefs and other features claimed by China. Whether features are either fully submerged, low-tide elevations only exposed at high tide, or high-tide features that are permanently above water, is relevant for determining whether they may be appropriated under international law and generate maritime entitlements. Moreover, only high-tide land features that are true islands within the meaning of article 121 of *UNCLOS* may generate an exclusive economic zone and continental shelf.

The Tribunal considered whether coral reefs claimed by China were above water at high tide, in which case they generate at least a 12 nautical mile

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territorial sea. It was noted that China has substantially modified many reefs through major land reclamation and construction activities but that under *UNCLOS* it is the natural condition of the feature that is determinative. The evidence (including from an expert hydrographer appointed by the Tribunal) showed that Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef and Gaven Reef (North) were high-tide features (at [382]), while Subi Reef, Hughes Reef, Mischief Reef and Second Thomas Shoal were low-tide elevations that generate no maritime zones (at [383]).

The Tribunal then assessed whether any of the high-tide features claimed by China were islands with the capacity to generate a 200 nautical mile exclusive economic zone and continental shelf. The Tribunal elaborated criteria for features to meet the definition of an island under article 121, by reference to: the objective capacity of a feature in its natural condition, to sustain either a stable community of people or economic activity that is neither dependent on outside resources nor purely extractive in nature (at [475]-[553]). This detailed interpretation of article 121 is highly significant as there has not previously been close judicial consideration of this provision of *UNCLOS*.

The Tribunal observed that while features may have been transformed through land reclamation, and have military personnel stationed upon them, this did not establish the capacity of the features to sustain, in their natural condition, a stable community.

The Tribunal concluded that all high-tide features in the Spratly Islands were 'rocks' for the purpose of article 121 and therefore generate no more than a 12 nautical mile territorial sea (at [625]). This included Itu Aba (also known as

Taiping Island), the largest feature in the Spratly Islands and which is administered by Taiwan.

### China's activities

The Tribunal determined that a number of features, including Mischief Reef, are submerged at high tide and therefore because of their location they are part of the Philippines' exclusive economic zone and continental shelf where the Philippines possesses exclusive jurisdiction with respect to the establishment and use of artificial islands, installations and structures (*UNCLOS*, arts 56, 60 and 80).

China's activities with respect to Mischief Reef and other features in the Philippines' EEZ and continental shelf involved the unlawful construction of artificial islands (at [1038]) which interfered with the Philippines' petroleum exploration (at [716]), unlawfully affected fishing by Philippines vessels and permitted fishing by Chinese vessels which violated the Philippines' sovereign rights within its exclusive economic zone and continental shelf (at [753]-[757]).

The Tribunal also found that China violated the Philippines' traditional fishing rights within 12 nautical miles of Scarborough Shoal, a high-tide feature (at [814]).

The impact of China's activities on the marine environment in the South China Sea was considered by the Tribunal in light of the evidence of three independent experts. The Tribunal noted that the South China Sea 'includes highly productive fisheries and extensive coral reef ecosystems, which are among the most biodiverse in the world' (at [823]). The Tribunal found that China's land reclamation and artificial island construction resulted in severe harm to the marine environment, clearly in violation of China's obligations under articles 192 and 194 *UNCLOS* to protect and preserve the marine environment, and to prevent, reduce and control pollution (at [993]).

It was also found that China had allowed its nationals to catch endangered species including turtles, giant clams, and coral, utilising highly destructive methods including 'propeller chopping' (at [992]). The Chinese government was aware of (and actively facilitated) these activities.

China was also found to have violated article 94 of *UNCLOS* relating to maritime safety as Chinese law enforcement vessels had repeatedly and dangerously approached Philippines' vessels seeking entry to Scarborough Shoal (at [1109]).

### Aggravation of the dispute

The Tribunal observed that parties to an international dispute are under an obligation to refrain from aggravating or extending the dispute pending its determination (at [1166]-[1173]).

The evidence indicated that during the proceedings, China had intensified construction of artificial islands on several features in the Spratly Islands and effectively created a *fait accompli* at Mischief Reef through the construction of a large artificial island within the Philippines' exclusive economic zone and continental shelf (at [1177]). China also aggravated the dispute with respect to the protection and preservation of the marine environment by causing very significant and irreparable harm to coral reef ecosystems (at [1178]), and it also 'undermined the integrity of the proceedings' by permanently erasing

evidence of the natural condition of the features in dispute (at [1179]).

This constituted a clear breach of China's obligations under *UNCLOS*, including article 300 which requires parties to fulfil in good faith the obligations under the Convention and exercise their rights in a manner which does not constitute 'an abuse of right' (at [1181]).

### Conclusion

At 500 pages in length, and covering an extensive body of fact and law, the *South China Sea Arbitration* is one of the most complex and significant decisions rendered by an international court or tribunal in the international law of the sea. The Tribunal's detailed evidentiary evaluation, its extensive interpretation of key and contested provisions of *UNCLOS* (including article 121), and the relevance of the decision to the diplomatic relations of the parties and other states in the South China Sea all mark out the award for its enduring importance.

It now remains to be seen what practical impact the award will have for the parties and for other states laying claim to the South China Sea. **LSJ**

**[T]he Tribunal found that the evidence did not support China's contention that historically it had exercised exclusive control over the South China Sea and its resources (at [278]). The effect of these conclusions is that China's nine-dash line has no valid basis at international law.**

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