

## **CHAPTER IV**

### **FINDING AND ANALYSIS**

#### **A. The History of South China Sea Dispute between the People's Republic of China and the Philippines.**

##### **1. The General Review of South China Sea Dispute**

The South China Sea is a huge sea of 1.4 million square miles, bordered by nations that contain approximately 2 billion people. About a third of the world's shipping goes through its waters, which also provide vast amounts of food and whose seabed is rich in oil and gas. Scattered through the sea are small land features often tiny, often underwater during high tide. These fall into two main groupings, the Paracel Islands in the northern part of the sea, and the Spratly Islands in the southern part. China, Taiwan, the Philippines, Vietnam, Brunei, and Malaysia all claim sovereignty over some of these land features and waters.

China, through its "nine-dash line" map and many statements, has claimed at the very least sovereignty over all the islands and rocks in the South China Sea and rights over the adjacent waters. The other five stakeholders have conflicting claims over land features that in turn produce numerous additional overlapping and conflicting claims over adjacent waters and how they are used. Neither the vastness of the sea nor the smallness of the disputed land specks has prevented an escalation in intensity in recent years. Concerns about security and resources have

driven much of the tension, and rival nationalisms in stakeholder countries breathe fire on the waters.<sup>35</sup>

The South China Sea is semi-enclosed, as defined in Article 122 of the UN Convention on the International Law of the Sea (UNCLOS). It includes the 15 islands of the Paracel archipelago, islands and numerous reefs and rocks of the Spratly archipelago, the Macclesfield bank and the three islands of the Prates group. The southern reaches extend to the Sunda Shelf, which is shallow, less than 200 meters, but the Palawan Trough at its south-eastern flank is deeper, dropping below 2000 meters. The dispute concerns the sovereignty of the islands and surrounding sea territory, involving China and five ASEAN countries, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia. China and Vietnam have extensive claims over the area, which are largely undefined, while the Philippines, Malaysia, Brunei and Indonesia claim contiguous sea zones.<sup>36</sup>

From the above description and fifteen points of lawsuit filed by the Philippines to the International Arbitration Tribunal, it can be concluded that the disputed territory between China and the Philippines is Scarborough Shoal and some marine features in the Spratly Island region such as Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef (including Hughes Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef.) The Philippines is suing

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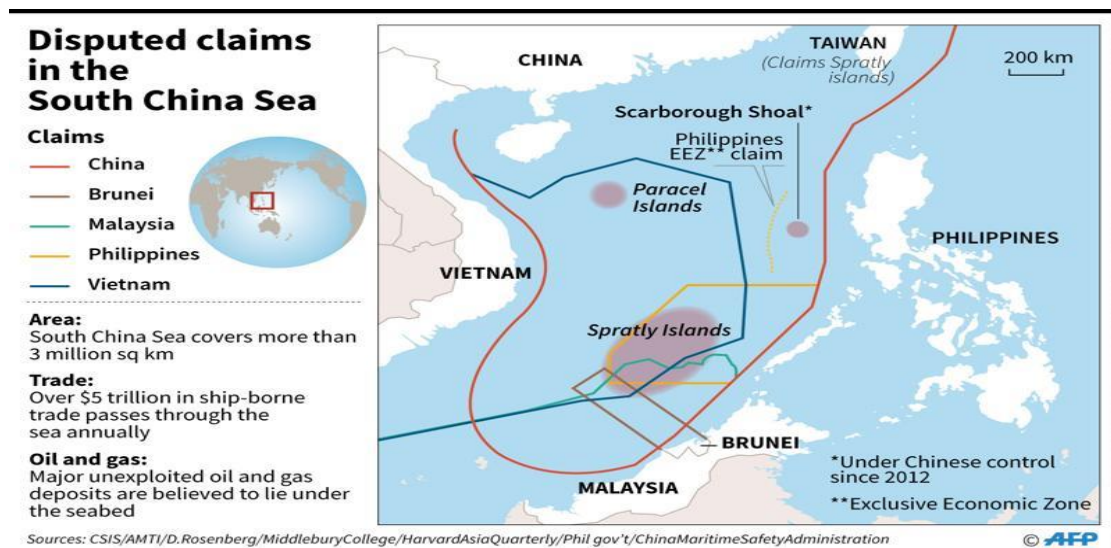
<sup>35</sup> Paul Gewirtz, "Limits of Law in the south China Sea", *Journal East Asia Policy Studies*, Vol, 6 No, 8, 2016.

<sup>36</sup> Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Dispute the South China Sea", *The American Journal of International Law*, Vol. 107:142, 2013.

Chinese activities carried out on these marine features that have violated the sovereignty and disrupted the fishing rights of traditional Filipino fishermen, as well as exacerbated the escalation of disputes by continuing to carry out activities that become the object of the dispute during the process of dispute resolution carried out. The area that became the object of dispute can be seen in the following map (Figure 4.1).

**Figure 4.1**

**The Dispute in the South China Sea between China and Philippines**



Sources: EIA Middlebury College, National Geographic, CIA Fact book

**Figure 4.2 The Dispute in the South China Sea between China and**

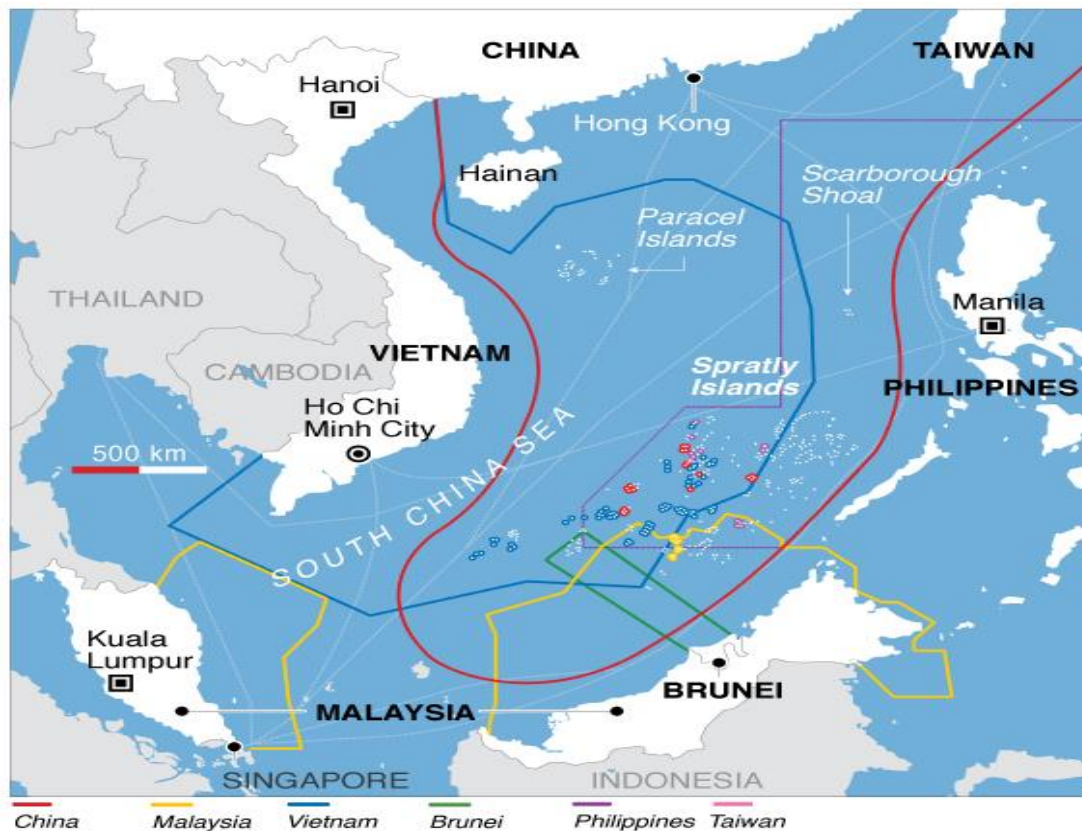


**Philippines**

Sources: <https://sloeserwij.wordpress.com/>

**Figure 4. 3**

**The Dispute in the South China Sea between China and Philippines**



Sources: <http://thechinatimes.com/online/2012/08/4903.html/>

The dispute involves complicated issues relating to UNCLOS which does not offer clear guidelines in situations where claims to sea territory, islands, and Exclusive Economic Zones (EEZs) overlap; both PETRONAS and Petro Vietnam are obliged to tap new reserves, which could raise tensions with China. In 2011, China's oil imports accounted for about 54 per cent of its total demand and its

interest in the oil and natural gas resources of the South China Sea has grown considerably. Some Chinese estimates claim that the area holds some 80 per cent of Saudi Arabia's oil reserves, although this figure is likely to be inflated. The US Energy Information Administration (EIA) says that 'there is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources.' It claims that the area around the Spratly Islands has virtually no proven oil reserves, and estimates that about '60 to 70 per cent of the region's hydrocarbon resources are natural gas.'<sup>37</sup>

UNCLOS is one of the world's great international treaties, and its preamble begins with the heroic statement expressing "the desire to settle all issues relating to the law of the sea as an important contribution to the maintenance of peace, justice and progress for all peoples of the world." Unlike many other heroic efforts, this one is not a grand gesture, but rather a tedious verbalization of human thoughts about endless minutia that, unaddressed, can cumulatively cause much human misery. UNCLOS provides not only rules but also remedial mechanisms for countries that believe that other parties to UNCLOS have violated its provisions. Both the Philippines and China, along with 164 other countries, are parties to UNCLOS although the United States is one of the few that is not.

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<sup>37</sup> Leszek Buszynski, *The Development of the South China Sea maritime Dispute*, taken from, <http://nsc.anu.edu.au/documents/occasional-5-brief-1.pdf>, accessed on 23, November 2016 at 3.23 p.m.

In 2013 the Philippines invoked remedial provisions specified in UNCLOS and brought 15 claims against China before an UNCLOS arbitration tribunal at the Permanent Court of Arbitration in The Hague. China immediately announced its “resolute opposition” to the Philippines action, called upon the Philippines to “return to the right track of resolving the disputes through bilateral negotiations,” and said that “China does not and will never change its position of non-acceptance of and non-participation in the arbitration.”<sup>38</sup>

The sovereignty claims over features referring to rocks and islands rather than underwater reefs and UNCLOS-based rights over waters surrounding those features are relatively uncontroversial. China’s neighbors dispute the extent of those claims, but they are at least grounded in commonly understood international law. The problem for the region, for China and for the world is the third part of Wu’s formulation. China’s legal scholars are working hard, but they have yet to come up with a convincing justification for China to enjoy “historic rights” to waters up to 1,500 km away from undisputed Chinese territory. Christopher Chung, a PhD student at the University of Toronto, is the first person to forensically examine the archives of the official People’s Republic of China (PRC) committee that drew the line. He has discovered that, on September 25, 1946, representatives of the Ministry of Foreign Affairs, Ministry of the Interior,

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<sup>38</sup> Rancho Mirage, The Conclusion of the Association of Southeast Asian Nation Summit, 2016, taken from, <https://www.c-span.org/video/?404677-1/president-obama-news-conference-usasean-leaders-summit>, accessed on Wednesday, November 23, 2016 at 7.44 p.m.

Ministry of National Defense, and PRC Navy General Headquarters (NHQ) convened in the Ministry of the Interior to resolve several issues pertaining to the South China Sea islands.<sup>39</sup>

In its meeting that day, the committee defined which islands China would claim, according to a “Location Sketch Map of the South China Sea Islands” previously drawn up by cartographers in the Ministry of Interior. This map is the very first Chinese government document to show the U-shaped line and its meaning was clear to PRC that committee: it defined “the scope of what is to be received for the purpose of receiving each of the islands of the South China Sea”. The committee’s interest was only in the islands. They made no mention of waters, historic or otherwise. Nothing changed in China’s claim after the victory of the Communist revolution in 1949 either. When Zhou Enlai, premier of the People’s Republic of China, denounced the draft Treaty of San Francisco in 1951, he talked only of islands, not waters. The PRC’s 1958 “Declaration on the Territorial Sea” went further. While claiming a 12 nautical mile territorial sea, it explicitly noted that the islands were separated from the Chinese mainland by “the high seas.” There was no mention of “historic rights.”<sup>40</sup>

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<sup>39</sup> Eva Pejsova, Sense and Sensibility Addressing the South China Sea Dispute, *EU Institute for security Studies Journal*, Issue No, 28 May 2016.

<sup>40</sup> Chris P.C. Chung, 1946–1974, Drawing the U-Shaped Line: China’s Claim in the South China Sea, *China, Modern China*, p. 35.



## 2. **The People's Republic of China Claim on the South China Sea**

In its assertion to the UN Secretary General, China claimed that everything, including both land and sea, encompassed within the Nine-Dash Line is area over which it exercises sovereignty. This encompasses 70–75 percent of the SCS. The Nine-Dash Line is derived from ancient Xia and Han dynasty records and a map produced in 1947, known as the Eleven-Dash Line, that indicated the geographical scope of its authority over the SCS. Two dashes were removed from the Eleven-Dash Line, establishing the current Nine-Dash Line, in 1953. In 1956, China issued a statement in response to a suggestion by the Philippines that some of the SCS islands “should” belong to the Philippines because of their proximity.<sup>41</sup>

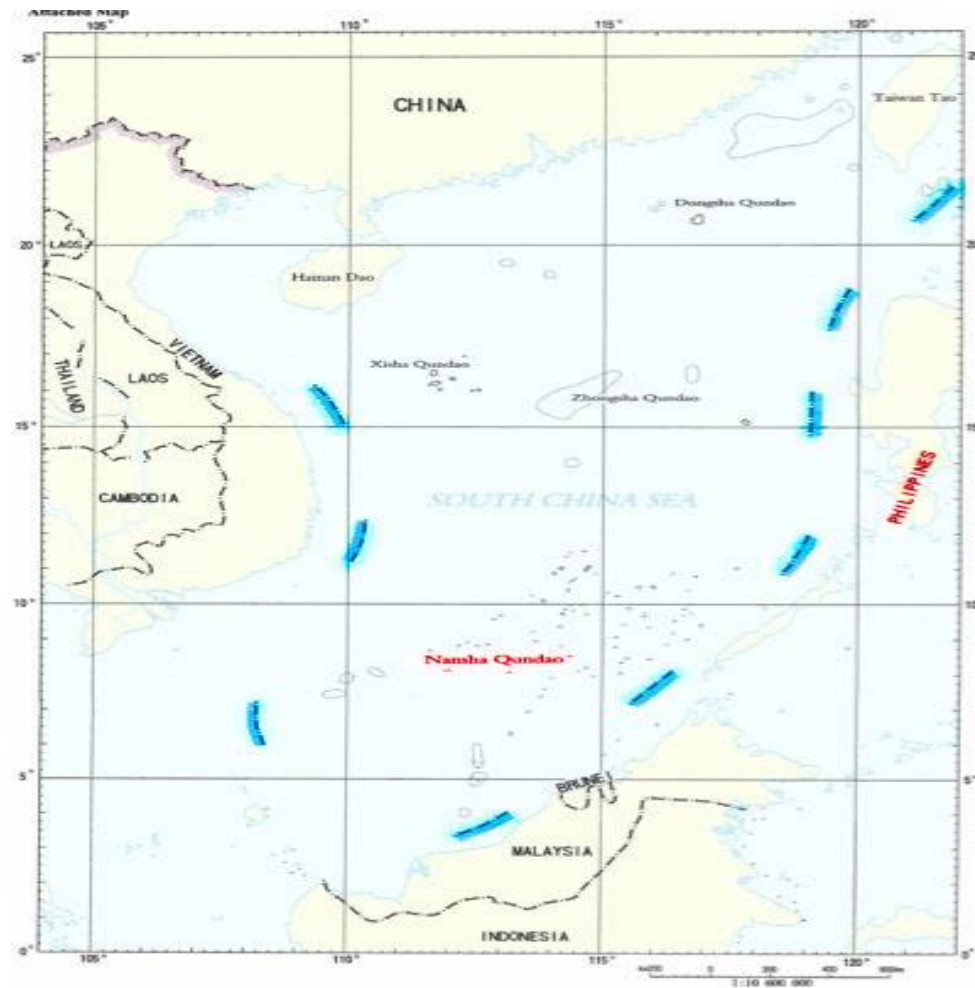
This statement reiterated that the SCS islands, including the Spratlys Islands, were inherently Chinese territory, as they had fallen during World War II to the Japanese, and were recovered by the Chinese government upon Japan's surrender. In 1992, China promulgated its Law on the Territorial Sea and the Contiguous Zone. Article 2 of this law includes the four island groups in the SCS, including Scarborough Shoal and the Spratlys, within the land territory of China. When China ratified UNCLOS in 1996, China stated that it “reaffirmed its sovereignty over all its archipelagos and islands as listed in Article 2” of the 1992 law.

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<sup>41</sup> Emma Kingdon, A Case for Arbitration: The Philippines Solution for the South China Sea Dispute, *Boston College International and Comparative Law Review Journal*, Vol. 38, Issue No I, 04 Jan 2015.

Figure 4. 4

China submitted a map to the United Nations claiming sovereignty over virtually the entire South China Sea



Sources: <https://energeopolitics.com/2012/11/>

Figure 4.5

Nine Dash line



Sources: <http://undertheangsanatree.blogspot.co.id/2016/01/the-nine-dash-line.html>

In 2009, China submitted the map to the United Nations to retaliate and object to Vietnam's claim to expand the continental shelf and its sovereignty in the Spratly Islands and Paracel Islands. Together with the map is also included a statement which contains that China has an inviolable sovereignty over the islands and waters located in the South China Sea, enjoying the right of sovereignty and jurisdiction over the waters as well as the richness that is in and on the seabed. Vietnam, Philippines and Indonesia filed objections. The states stated that for whatever reason such Chinese claims contradict UNCLOS, which China ratified in 1996.<sup>42</sup>

The concept of “historic rights” only entered the official Chinese lexicon in the late 1990, while there were many factors at work in 1990s China; one that has been overlooked is the contribution of a buccaneering oilman from Denver, Colorado. In early 1991, Randall C. Thompson’s one-man oil company, Crestone, sealed a deal in the Philippines that opened his eyes to the potential riches of the South China Sea. Engineers advised him that “the next big play” would be around the Spratly Islands. In April 1991, Thompson traveled to the South China Sea Institute of Oceanography in Guangzhou. There he examined the results of Chinese seismic surveys the institute had carried out around the Spratly since 1987.

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<sup>42</sup> Jianming Shen, China’s Sovereignty over the South China Sea Island: A Historical, *Chinese Journal of International Law*, Vol. 1, Issue No 1, 01 March 2002.

They showed me some structures, I got excited about it and then I did some more research, he told me. Thompson kept trying to persuade the Chinese to take Crestone seriously until, in February 1992, after much deliberation at the highest levels in Beijing, he finally got to pitch his proposal to the board of the China National Offshore Oil Company (CNOOC).<sup>43</sup> Thompson took along a legal advisor to precisely define the patch of seabed he wanted the rights to: Daniel J. Dzurek, the former chief of the Boundary Division of the U.S. Department of State. It was Thompson and Dzurek who persuaded the Chinese that they could make a legal case to exploit oil fields hundreds of miles away from China.<sup>44</sup>

According to Thompson, “I used him, Dzurek, to help get validity to our concept this is Chinese waters and he strongly espoused many positions that this is Chinese waters, not Vietnamese waters based upon sovereignty of claim and historic stuff.” Dzurek, however, plays down his role. In an email he told me that he, “never gave China any ‘boundary advice’,” but “merely helped negotiate an offshore lease.” However, in a key academic paper published after the Crestone episode, he noted that the Chinese term for the “U-shaped line” might best be translated as “traditional sea boundary line.

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<sup>43</sup> Zou Keyuan, 2001, *Historic Rights in International Law and in China’s Practice*, Ocean Development and International Law, Singapore, Taylor and Francis, p. 168.

<sup>44</sup> Bill Hayton, *China’s Historic Right in the South China Sea: Made in America*, 21 June 2016, taken from, <http://thediplomat.com/2016/06/chinas-historic-rights-in-the-south-china-sea-made-in-america/>, accessed on Thursday, November 24, 2016 at 3.34 p.m.

He seems to have accepted and developed the idea that China had “historic rights” in the area beyond those spelled out in UNCLOS. At the same time, lawyers in Taiwan, not mainland China, were also trying to develop the concept of historic rights. In 1993, the PRC government issued its South China Sea Policy Guidelines, which stated, “the South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests.” The phrase appeared in Taiwan’s draft Territorial Sea Law, but disappeared on the bill’s second reading in the Legislative Yuan.<sup>45</sup>

The argument about whether or not to claim “historic rights” within the U-shaped line continues to divide Taiwanese maritime lawyers. The concept has taken on new life in the Chinese mainland, particularly with officials such as Wu with an interest in maximizing the country’s maritime claims. This is no mere academic argument; the “historic rights” claim is the only possible basis for China’s auctioning of oil exploration blocks along the Vietnamese coast in June 2012: they are well beyond any potential Exclusive Economic Zone that could be drawn from land features claimed by China.<sup>46</sup>

Above all it provides the basis of China’s claim to have the right to regulate navigation within the U-shaped line and obstruct “freedom of navigation”

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<sup>45</sup> Daniel J. Dzurek, “The Spratly Islands Dispute: Who’s On First”, *Journal Maritime Briefing*, Vol.2 No. I. ISBN 1-897643-23-3 1996 University of Durham, UK, 1996.

<sup>46</sup> Tran Truong Thuy, 2011, *The south China Toward a region of peach, Security and Cooperation*, Vietnam, The gioi Publisher, p. 31.

by other countries' ships. This is the fundamental cause of the dispute between China and the United States in the region and the one most likely to lead their armed forces to come to blows. The irony is that China seems prepared to risk conflict to defend a claim to "historic rights" that was first set out by an American boundary expert, and which is at best no more than 20 years old. Some have called for China to clarify its claims in the South China Sea. Imagine if Beijing clarified the claim in what the rest of the world would regard as "the wrong way" stating that the U-shaped line is a boundary and all the waters within it are historically China's.<sup>47</sup>

China would have nailed its colors to the mast and be forced to publicly defend its position, regardless of its legal and historical ridiculousness. China has recently begun what it says is a five-year process to draw up a new maritime law. Chinese officials and academics privately admit that there is still much confusion about what China should claim in the South China Sea and why. Some internal lobbies such as Hainan Province with its large fishing industry want to press a maximalist claim. But that claim will bring China into collision with its neighbors and the United States.

Now is the time for China's friends to explain that such a claim not only has no basis in international law, but also no basis in China's own history. It is nonsense. While that process of discussion continues, it is much better that China

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<sup>47</sup> Zou Keyuan, 2013, *Law of the Sea in East Asia: Issues and Prospects*, London, Routledge, p.149.

leave its claims vague and then quietly brings them into line with commonly understood international law over time. Forcing China into a corner, in a legally adversarial manner, might sound attractive but there is a risk that it could force the outcome least desired by the rest of the world.<sup>48</sup>

The most important and interesting area where China could claim historic rights is in the South China Sea. The South China Sea continues to be one of the world's flash points, particularly concerning the situation around the Spratly Islands, which have been claimed, in whole or in part, by China (including Taiwan), Vietnam, Brunei, Malaysia, and the Philippines.<sup>49</sup> It is obvious that China's position and behavior are critical for the resolution of the territorial as well as maritime boundary delimitation disputes in the South China Sea. It seems that the prevailing basis for China's historic claims to the South China Sea is the U-shaped line officially drawn on the Chinese map in 1947 by the then-Chinese Nationalist Government. The U-shaped line refers to the line with nine segments off the Chinese coast on the South China Sea, as displayed in the Chinese map.

According to China, the line has been called a "traditional maritime boundary line." China has claimed all the islands, atolls, and even submerged banks within this line. But it is not clear whether China has claimed the waters so

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<sup>48</sup> *ibid.* p.47

<sup>49</sup> Mohan Malik, Historical Fiction: China's South China Sea Claims, taken from, <http://www.worldaffairsjournal.org/article/historical-fiction-china%E2%80%99s-south-china-sea-claims>, accessed on Sunday, November 26, 2016 at 10.33. a.m.



enclosed. China's ambiguous position has given rise to the controversy of whether the waters within the line are intended to be historic waters.<sup>50</sup>

### 3. The Philippine Claim's in South China Sea

The modern history of the Philippines can be traced to 1898, when, following the Spanish American War, the Spanish government ceded to the United States the lands and waters of what is now the Philippines. Cession of these lands and waters was accomplished via the Treaty of Paris, in which a large box was drawn around the 7,107 islands that form the Philippine archipelago.<sup>51</sup> Then, in 1932, the Philippine Senate passed Act No. 4003, classifying all of the waters inside the Treaty Box as Philippine territorial waters for purposes of regulating fishing, law enforcement, defense, and resource development.

In 1933, the United States ceded all the lands it had received under the Treaty of Paris to the people of the Philippines; however, the United States retained residual authority as a protector of the Philippines until such time as the Philippine legislature established self-rule. In 1946, the United States formally recognized Philippine independence, and all of those territories inside the Treaty Box were ceded to the modern day Republic of the Philippines without protest by

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<sup>50</sup> Zou Keyuan, Implementing Marine Environmental Protection Law in China: Progress, Problems and Prospects, *Journal Marine Policy*, Vol. 23, 1999.

<sup>51</sup> The total land area of the Philippines is approximately 300,00 sq. km.

any other nations.<sup>52</sup> Neither Scarborough Shoal nor the features now claimed by the Philippines as part of its Kalayaan Island Group (KIG) claim were inside of the original Treaty Box.

The sovereignty in the 1930 did not address the status of the waters which were enclosed inside the Treaty Box or the legitimacy of Philippine Act No. 4003 which classified the enclosed waters as internal waters. In 1955, the Philippines notified the Secretary General of the United Nation that it regarded all waters inside of the Treaty Box to be territorial waters. In subsequent legislation, the Government of the Philippines established, in Act No. 3046 of June 17, 1961, a series of 80 straight baselines, more closely the Philippine archipelago and effectively repeals the old Treaty Box claim. The position of the Philippine government in that legislation was that all waters inside the baselines were considered internal waters and all waters between the baselines and “Treaty Limits” were territorial seas.<sup>53</sup>

In 2009, the Philippine government enacted new legislation to amend its prior archipelagic baseline claims. That legislation (Republic Act No. 9522) established archipelagic baselines similar to those shown in figure 1; however, some of the baselines were adjusted to conform to the technical requirements of

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<sup>52</sup> See the Proclamation Mr. President Harry S. Truman, July 4 1946, taken from, <http://www.presidency.ucsb.edu/ws/?pid=58813>, accessed on December, Thursday 8, 2016 at 5.35 p.m.

<sup>53</sup> H. Yorac, “The Philippine Claims to the Spratly Island Group”, *Philippine Law Journal*, Vol. 42, No. 43 1983.

Article 47 of the UNCLOS, which states that baselines cannot generally exceed 100 nautical miles in length. Preliminary analysis by the author and experts at the Department of State confirms that the new baselines conform to UNCLOS. None of the baselines appear to depart in an appreciable amount from the direction of the islands, and the baseline segments meet the technical standards in terms of length.<sup>54</sup>

The Philippines has still not formally clarified its position on passage through its archipelagic waters or formally repudiated the “internal waters” position which it took when it ratified the Law of the Sea Convention in 1982. However, the Philippines indicated in a verbal note that the regime of innocent passage applies in Philippine “internal” waters and, on October 26, 1988, multiple sources confirmed that the Philippines had issued a clarifying statement to the Government of Australia (via the UN Secretary General) that it would respect archipelagic passage rights contained in UNCLOS: The Philippine Government intends to harmonize its domestic legislation with the provisions of the Convention.

The necessary steps are being taken, and the Philippine government wishes to reassure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of said Convention. The Supreme

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<sup>54</sup> U.S. Department of State, Archipelagic and Other Maritime Claims and Boundaries: Philippines, June 2014, taken from, <http://www.state.gov/e/oes/ocns/opa/c16065.htm>, accessed on December Thursday 8 2016 at 6.44.p.m.

Court of the Philippines also stated that the right of innocent passage is a matter of customary law and would apply in both Philippine territorial seas and archipelagic waters. The court also recognized that archipelagic sea lanes passage was a necessary concession which archipelagic states made in exchange for being able to enclose their outermost islands, but fell short of describing how it would specifically apply in the case of the South China Sea (SCS).

The claim of the Philippines to sovereignty of the Spratly was originally based on a private claim asserted by Captain Thomas Cloma, who declared in 1956 that he had discovered a group of islands in the South China Sea which he called Kalayaan (Freedom) Islands. Since 1971, the Philippines have occupied six islands in the Spratly. In 1978 the Philippine government laid formal claim to the islands it controlled through the issuance of Presidential Decree No. 1599, which established the Philippines' Exclusive Economic Zone (EEZ) to a distance of 200 miles from the country's baseline.<sup>55</sup> On 10 March 2009 the Philippines strengthened the legal basis of its claim through the passage of the 2009 Baseline Law, which defines the country's archipelagic baseline according to the United Nations Convention on the Law of the Sea (UNCLOS) provisions pertaining to archipelagos.

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<sup>55</sup> Lowell Bautista, "International Legal Implication of the Philippine Treaty Limit on Navigational Right in Philippine Waters", *Australian Journal of Maritim and Ocean Affairs*, Vol. 1, Issue No. 1, 2009.

In January 2013 the Philippines sought to boost its legal claims over the Spratly and other land features in the South China Sea when it filed a statement of claim against China in the Arbitral Tribunal of the UNCLOS. In its Notification and Statement of Claim to the Arbitral Tribunal, the Philippines laid its claims to the Spratly Islands, Scarborough Shoal, Mischief Reef, and other land features within its 200-mile EEZ on the basis of the UNCLOS, and specifically to its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an EEZ under Part V, and to a Continental Shelf under Part VI.<sup>56</sup> Unfortunately, since 2009 China has challenged the Philippines legal claim to these numerous islands, reefs and banks by relying on growing naval prowess backed by coercive diplomacy. To date, the challenge has led to a tense two-month standoff between Philippine and Chinese civilian vessels in the Scarborough Shoal.

Likewise, to maintaining the peace and stability in the South China Sea, It further warned the Philippines not to complicate and escalate the situation. China immediately gained the upper hand as it forced the Philippines to back away from confronting the Chinese civilian presence. With its growing armada of armed civilian maritime vessels at its disposal, China was able to place the onus of escalating the dispute on the Philippines, forcing its representatives to reconsider before using force to resolve a matter of maritime jurisdiction. China sent an

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<sup>56</sup> Department of Foreign Affairs, Notification and Statement of Claim to the United Nations Convention of Law of the Sea (UNCLOS) Arbitral Tribunal, (Manila, 22 January 2013), taken from, <https://www.dfa.gov.ph/newsroom/unclos>, accessed on Thursday, December 8, 2016 at 9.14.pm.

additional patrol ship; consequently, three Chinese ships confronted a lone Filipino coastguard vessel in the shoal.

In response to a diplomatic protest filed by the Philippines, the Chinese embassy contended that the three Chinese surveillance vessels in Scarborough Shoal were in the area fulfilling the duties of safeguarding Chinese maritime rights and interests adding that the shoal ‘is an integral part of the Chinese territory and the waters around the traditional fishing area for Chinese fishermen. The incident demonstrates the extent of China’s development of naval brinkmanship as a means of handling territorial disputes in the South China Sea.<sup>57</sup>

The Philippine islands are at the center of current maritime disputes in the South China Sea (SCS). The Philippines has had maritime disputes with a number of countries, including the United States. Now, legal and policy attention is focused on sovereignty disputes between the Philippines and principally China in four areas: Scarborough Shoal,<sup>58</sup> Second Thomas Shoal (the site of a beached former U.S. Navy LST),<sup>59</sup> Reed Bank (or Reed Tablemount), and a variety of

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<sup>57</sup> James Hookway, “Philippine, China Ships Square Off”, *The Wall Street Journal Asia*, Vol. 2, No. 2, 2012.

<sup>58</sup> Scarborough Shoal is an area of intense sensitivity because it is rich fishing area. Philippine fishermen have traditionally used it; however, now they are prevented from doing so because China has positioned rotating coast guard vessels around the Shoal to prevent entry. Also, physical barriers (fouling cables) may have been erected to prevent entry, but the facts are in dispute.

<sup>59</sup> According to Philippine officials, the LST was beached as blocking maneuver to prevent China from further occupying features near the Philippine coastline. Philippine legal and policy analysts advised that the LST was chosen because it is part of the Philippine armed forces. The assumption is that China will not directly attack a component of the Philippine armed forces because of the mutual defense provision in Article II of the 1951 Mutual Defense Treaty which commits the United States to defend the Philippines in the event of an attack on elements of the Philippine armed forces.

features in the Spratly island chain, in which the contestants also include Vietnam and the Republic of China (Taiwan).

The Republic of the Philippines has two basic external South China Sea (SCS) claims: claims to the features known as Scarborough Shoal; and claims to the other features contained within the geometric area, which the Philippines asserts are part of the Kalayaan Island Group (KIG). Although these two areas are depicted in figure 2, the discussion which immediately follows concerns only the Scarborough Shoal, which is claimed by the Philippines and the Republic of China (ROC).

Scarborough Shoal is the largest atoll in the South China Sea. The features form a triangle-shaped chain of reefs and rocks. This particular area has been a source of contention between the Philippines and China since 1997 because it is rich with fish, guano, sea turtles, sea cucumbers, and other types of living marine resources. There was a serious stand-off in April 2012 when a Filipino warship confronted eight Chinese fishing vessels that were harvesting marine resources in the Shoal. China quickly dispatched two large maritime surveillance ships to block the Philippine ship from taking action. In the ensuing weeks, China sent a large number of vessels to establish a permanent presence around the shoal and may

have installed some barriers which prevented access to the Shoal's lagoon. Eventually the Philippine vessels withdrew.<sup>60</sup>

China's assertion of its nine-dashed-line claim to the South China Sea in its 2009 filing with the UN Commission on the Limits of the Continental Shelf (CLCS) and its most recent actions to exclude Philippine fishermen from the waters around Scarborough Shoal emboldened the Philippine government to seek assistance from an international arbitration tribunal. It remains unclear whether the Chinese government will ever make an appearance before the Tribunal, or what the precedential effect of an adverse "judgment" would be, but this arbitration is an important development in the overall question of how these disputes will be decided and what the applicable rule set will be. Indeed, in the face of increasing tensions between Vietnam and China concerning China's oil and gas activities in the vicinity of the Paracel Islands, numerous press reports say that Vietnam is considering joining the Philippine arbitration or initiating action on its own.<sup>61</sup>

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<sup>60</sup> Zou. Keyuan, "Scarborough Reef: A New Flashpoint in Sino-Philippine Relations", *Journal Boundary & Security Bulletin*. Vol. 7, Issue No. 7. 1999.

<sup>61</sup> Francisco & Mogato, Reuters (Manila Bureau), Vietnam PM says Considering Legal Action Against China over Disputed Waters, 22 May 2014, taken from, <http://www.reuters.com/article/us-vietnam-china-idUSBREA4K1AK20140522>, accessed on Wednesday, December 26, 2016 at 10.33. p.m.



## **B. The Submission of The Philippines and the Respond of People's Republic of China**

Recently, the issue of the South China Sea has become connected to the conflict between China and the Philippines. The Philippines government alleges that China ships have entered the territory of the Philippines at least nine times. The Philippines changed the name of the South China Sea into the West Sea of the Philippines. At the same time, both countries are also seen strengthening their respective fleets and conducting military exercises around the South China Sea. Even the Philippines do the exercises with the United States. Disputes between China and the Philippines over conflicting ownership claims against the Spratly Islands increased in 2011. The disputed small islands in the sea are also referred to by various opposing names, with claims of conflicting sovereignty over them that have occurred for hundred years.<sup>62</sup>

China's provocative activities in the South China Sea, especially in the Scarborough Shoal region, prompted the Philippines to file a lawsuit against the International Arbitration Tribunal to examine and resolve the issue. The Philippines filed claims and lawsuits by fifteen points. The points are as follows:<sup>63</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> Op. Cit. Permanent Court of Arbitration, p.5.

1. China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea;
2. China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "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 expressly permitted by UNCLOS;
3. Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
4. Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
5. Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
6. Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

7. Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;
8. China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;
9. China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
10. China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
11. China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;
12. China's occupation of and construction activities on Mischief Reef:
  - a. Violate the provisions of the Convention concerning artificial islands, installations and structures;
  - b. violate China's duties to protect and preserve the marine environment under the Convention; and
  - c. constitute unlawful acts of attempted appropriation in violation of the Convention;

13. 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;
14. Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
  - a. Interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
  - b. preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
  - c. endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
  - d. conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;
15. China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.

Based on the above description it can be concluded that the causes of the China and The Philippines disputes over the ownership of the South China Sea are overlapping claims against some of the marine features existing in the region. China claims to be entitled to most areas of the South China Sea based on the historical rights set forth in the nine-dash line. The claims are tangent to the Spratly Islands and Scarborough Shoal areas included in the Philippines ZEE.

Furthermore, responding to the fifteen points of the Philippine lawsuit concerning on China activities in the South China Sea filed to the International Arbitration Tribunal and petitioned for granted entirely, China responded by asserting those positions:

- a. The essence of the subject matter of arbitration is the territorial sovereignty of some maritime features in the South China Sea, which are outside the scope of the Convention and does not concern the interpretation or application of the Convention;
- b. China and the Philippines agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea to resolve relevant disputes through negotiations. Unilaterally initiating this arbitration, the Philippines has violated its obligations under international law;
- c. Even assuming that the subject matter of arbitration concerned with the interpretation or application of the Convention, that the subject-

matter will be an integral part of the maritime boundary between the two countries. Thus, it falls within the scope of the declaration submitted by China in 2006 in accordance with the convention. As for which is not included in the scope of the declaration is a dispute concerning on maritime boundaries of compulsory arbitration and other dispute settlement procedures.<sup>64</sup>

## **C. The Role of Arbitral Tribunal Under Annex VII of the United Nation Convention on the Law of the Sea to the South China Sea.**

### **1. The Role of Arbitral Tribunal**

In July 2013, the Tribunal in the South China Sea Arbitration appointed the PCA to serve as Registry for the proceedings. The Tribunal's Rules of Procedure provide that the PCA shall "maintain an archive of the arbitral proceedings and provide appropriate registry services as directed by the Arbitral Tribunal." Such services include assisting with the identification and appointment of experts, publishing information about the arbitration and issuing press releases, organizing the hearings at the Peace Palace in The Hague, and the financial management of the case, which involves holding a deposit for expenses in the arbitration, such as to pay arbitrator fees, experts, technical support, court reporters

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<sup>64</sup> The South China Sea Arbitration Decision (The Republic of The Philippine V. People's Republic of China), 2016, Permanent Court of Arbitration, Hague. p. 6.

etc. The Registry also serves as the channel of communications amongst the Parties and the Tribunal and observer States.<sup>70</sup>

The South China Sea Arbitration between the Philippines and China concerned an application by the Philippines for rulings in respect of four matters concerning the relationship between the Philippines and China in the South China Sea. First, the Philippines sought a ruling on the source of the Parties' rights and obligations in the South China Sea and the effect of the United Nations Convention on the Law of the Sea ("Convention") on China's claims to historic rights within its so-called 'nine-dash line'. Second, the Philippines sought a ruling on whether certain maritime features claimed by both China and the Philippines are properly characterized as islands, rocks, low-tide elevations or submerged banks under the Convention.

The status of these features under the Convention determines the maritime zones they are capable of generating. Third, the Philippines sought rulings on whether certain Chinese actions in the South China Sea have violated the Convention, by interfering with the exercise of the Philippines' sovereign rights and freedoms under the Convention or through construction and fishing activities that have harmed the marine environment. Finally, the Philippines sought a ruling that certain actions taken by China, in particular its large-scale land reclamation

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<sup>70</sup> Fedelma C, Smith, The Permanent Court of Arbitration (PCA), Taken from, <http://www.nvvn.nl/artikel/the-permanent-court-of-arbitration-pca/pdf/>, Accessed on April 21, 2017 at 16.44. p.m.

and construction of artificial islands in the Spratly Islands since this arbitration was commenced, have unlawfully aggravated and extended the Parties' dispute.<sup>71</sup>

The Chinese Government has adhered to the position of neither accepting nor participating in these arbitral proceedings. It has reiterated this position in diplomatic notes, in the "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" dated 7 December 2014 ("China's Position Paper"), in letters to members of the Tribunal from the Chinese Ambassador to the Kingdom of the Netherlands, and in many public statements. The Chinese Government has also made clear that these statements and documents "shall by no means be interpreted as China's participation in the arbitral proceeding in any form."

Two provisions of the Convention address the situation of a party that objects to the jurisdiction of a tribunal and declines to participate in the proceedings:

a. Article 288 of the Convention provides that, "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

b. Article 9 of Annex VII to the Convention provides that,

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<sup>71</sup> The South China Sea Arbitration Decision (The Republic of The Philippine V. People's Republic of China), 2016, Permanent Court of Arbitration, Hague. p.4.



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.<sup>72</sup>

Throughout these proceedings, the Tribunal has taken a number of steps to fulfill its duty to satisfy itself as to whether it has jurisdiction and whether the Philippines' claims are "well founded in fact and law." With respect to jurisdiction, the Tribunal decided to treat China's informal communications as equivalent to an objection to jurisdiction, convened a Hearing on Jurisdiction and Admissibility on 7 to 13 July 2015, questioned the Philippines both before and during the hearing on matters of jurisdiction, including potential issues not raised in China's informal communications, and issued an Award on Jurisdiction and Admissibility on 29 October 2015 (the "Award on Jurisdiction"), deciding some issues of jurisdiction and deferring others for further consideration in conjunction with the merits of the Philippines' claims.

The respect to the merits, the Tribunal sought to test the accuracy of the Philippines' claims by requesting further written submissions from the Philippines, by convening a hearing on the merits from 24 to 30 November 2015, by

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<sup>72</sup> United Nation Convention on the Law of the Sea 1982, Article 228 and Article 9.

questioning the Philippines both before and during the hearing with respect to its claims, by appointing independent experts to report to the Tribunal on technical matters, and by obtaining historical records and hydrographic survey data for the South China Sea from the archives of the United Kingdom Hydrographic Office, the National Library of France, and the French National Overseas Archives and providing it to the Parties for comment, along with other relevant materials in the public domain.<sup>73</sup>

Furthermore, the most important role from the Tribunal is to give Award by using Advisory Opinion. It means the opinion of the court of advisory. Advisory opinion does not have a binding nature for the applicant, but is usually treated as "compulsory ruling", a mandatory decision that has a strong persuasive power. Based on the explanation above it can be concluded that the Arbitral Tribunal has jurisdiction to examine the dispute between China and the Philippines according to Article 9 of Annex VII to the Convention.

#### **D. The Decision of Arbitral Tribunal**

In 2016 the International Arbitration Board issued a ruling, that involved the Philippines and China related to the utilization of the South China Sea. This ruling is based on a lawsuit filed unilaterally by the Philippine government in 2013,<sup>77</sup> Finally after examining the lawsuit of the Philippines related to his 15

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<sup>73</sup> Permanent Court of Arbitration, 2015, *Award on Jurisdiction and Admissibility*.

<sup>77</sup> *Ibid*,

(fifteen) Submissions, the Arbitral Tribunal decided to accept 4 (four) claims of the Philippines, the claims are:

1. No Legal basis of China's "nine dash line" claim;
2. No legal status of artificial features of China in the South China Sea region;
3. No validity of China's exploitation and exploration activities in other countries' sea areas;
4. China's actions that endanger the marine environment.

Overall, the PCA decided by giving Advisory Opinion that the unilateral actions taken by China in the area of the South China Sea, especially the exclusive economic zone of the Philippines violated the regulation stated in UNCLOS 1982. On the other hand, PCA also determined every China's activities in the features area of South China Sea do not give sovereignty right for China that matter is done by PCA by interpreting the sea features based on UNCLOS. China is also considered in environmental damage when China commits the exploration and exploitation in the dispute area.

The PCA's decision brought a new chapter in the development of the Law of the Sea widely. The most immediate impact is on the dispute resolution procedures, where there is an opportunity for UNCLOS participants to enforce dispute resolution procedures in the absence of the Common Consent. Based on Article 287 (1), (2) and (3), it is expressly stated that there is an obligation for the participating country to specifically designate certain procedures in dispute

settlement, but if there is no official statement then according to Article 287 (3) one Party may impose arbitration jurisdiction as a dispute settlement procedure. This gap is read by the Philippine authorities, when they met a deadlock diplomacy process on the case of southern China Sea experienced by the Chinese side.<sup>78</sup>

Pertaining to the discussion above, the Tribunal considered the Philippines request for a declaration that, going forward, China shall respect the rights and freedoms of the Philippines and comply with its duties under the Convention. In this respect, the Tribunal noted that both the Philippines and China have repeatedly accepted that the Convention and general obligations of good faith define and regulate their conduct. The Tribunal considered that the root of the disputes at issue 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 in fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea.

The Tribunal recalled that it is a fundamental principle of international law that bad faith is not presumed and noted that Article 11 of Annex VII provides that the “award shall be complied with by the parties to the dispute.” The Tribunal therefore considered that no further declaration was necessary. Finally, it can be concluded that according to Arbitral Tribunal, a state cannot claim

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<sup>78</sup> Article 121 UNCLOS 1982. “That only natural features of the island alone can have the right to have marine zones as defined by UNCLOS”.

maritime zone outside of what have been determined by UNCLOS. It means, the claims of china pertaining to the South China Sea region by using the right history (nine-dash line) is revoked.