

The South China Sea Arbitration

A Chinese Perspective

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to Answer?

jurisdiction by China's

arbitral tribunals is subject to UNCLOS but also to a Tribunal. UNCLOS provides that a Tribunal (prior to the dispute) make a determination of jurisdiction under section 2 of the Convention, or those provisions concerning military activities (para 1(b)), and 'disputes in which the United Nations is exercising its jurisdiction' (para 1(b)). When, on 25 August 2006, the Secretary-General of the

Secretary-General does not accept any of the provisions of the Convention with respect to paragraph 1 (a) (b) and (c) of

in pursuance of Article 298 of the Convention, the institution of arbitration is not a declaration as one of the grounds of jurisdiction.²⁵³

China's Declaration under Article 298 of the Convention, excluding subjects or making a determination, is excluded from arbitration. It is difficult to reconcile with its Declaration of 2013, Philippines Foreign Secretary's statement about a 'territorial dispute' and the initiation of arbitral proceedings. The Philippines' jurisdiction over its maritime

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Chunying's Remarks on the Proceedings of the Arbitral Tribunal in Relation to the South China Sea' (26 April 2013), Secretary-General of the Treaty and Law Commission, public and effective, which deserves recognition by Philippines Meets International

Question - Who, What, Where, When?' *Comparative Law Blog*, www.cjicl.org.uk. See also *ibid*, para 40.

entitlements in the West Philippine Sea'.²⁵⁵ The establishment of maritime entitlements in areas of conflicting and overlapping claims, however, necessarily entails delimitation of maritime areas. The question of sea boundary delimitations runs like a red thread through the Philippines' Notification and Statement of Claim. In fact, the Philippines gives the impression that the sea boundaries in the South China Sea have all been delimited and are final and binding on the parties. Thus, the Philippines requests the Tribunal to declare that 'Mischief Reef and McKennan Reef ... form part of the Continental Shelf of the Philippines',²⁵⁶ that 'Gaven Reef and Subi Reef ... are not located on China's Continental Shelf',²⁵⁷ and 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'.²⁵⁸ All these claims require the Tribunal to determine the extent of the EEZ and continental shelf of the parties (as well as other States). Considering the competing claims in the South China Sea of China, the Philippines, Vietnam, Malaysia and Brunei, this will not be possible without engaging in sea boundary delimitations — a subject-matter excluded from the Tribunal's jurisdiction. In addition, sea boundaries cannot be delimited before the question of territorial sovereignty over the islands or island groups in the South China Sea is resolved.

The Philippines also stated that its claims do not fall under the 'military activities or law enforcement' exemption in Article 298(1)(b) UNCLOS.²⁵⁹ The Convention does not provide a definition of 'military activities' but there is widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely.²⁶⁰ Military activities are not limited to actions taken by warships and military aircraft

²⁵⁵ 'Statement of Foreign Affairs Secretary Albert F del Rosario for the Joint Press Briefing with Federal Foreign Minister Dr Guido Westerwelle of Germany' (7 February 2013) www.dfa.gov.ph. See also the statement of Foreign Secretary del Rosario: 'For China, an arbitral award, will finally clarify for the Chinese people its lawful maritime entitlements under UNCLOS in the South China Sea. This will enable China to provide responsible leadership towards fostering stability in the region. For the Philippines, it will clearly define what is ours, specifically its maritime entitlements under UNCLOS with regards to our fishing rights, rights to resources and rights to enforce our laws within our Exclusive Economic Zone'. Secretary del Rosario expressly spoke about 'the delimitation of sea areas' with regard to China's unilateral 'Nine-Dash Line' claim and that 'the validity of the delimitation with regard to other States [ie the Philippines] depends upon international law' ('Managing the South China Sea and Other Regional Security Issues, Hon. Secretary Albert F. del Rosario, Secretary of Foreign Affairs, On the Occasion of Experts' Roundtable on Regional Approaches to Maritime Security in the West Philippine Sea/South China Sea' (Brussels, Belgium, 9 July 2013) www.dfa.gov.ph).

²⁵⁶ Relief Sought, bullet point 4; see also Claims, bullet point 5.

²⁵⁷ Relief Sought, bullet point 6; see also Claims, bullet point 4.

²⁵⁸ Relief Sought, bullet point 11; see also Claims, bullet point 9.

²⁵⁹ Notification and Statement of Claim, para 40.

²⁶⁰ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, CUP, 2005) 291–92 and 286; John King Gamble Jr, 'The Law of the Sea Conference: Dispute Settlement in Perspective' (1976) 9 *Vanderbilt Journal of International Law* 323, 331.

or governmental vessels and aircraft engaged in non-commercial service. Whether an activity is a military activity or not ultimately depends on the purpose and intent of the activity. The occupation of insular land territory by a State's armed forces and the establishment of artificial islands, installations or structures for military purposes thus qualify as military activities.²⁶¹

The Philippines requests the Tribunal to declare that 'China's occupation of and construction activities' on Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef are unlawful and to require China to 'end its occupation of and activities on' these reefs.²⁶² However, it is the Philippines itself that has accused China of erecting 'military structures and facilities', including anti-aircraft artillery, helicopter pads, docking facilities for warships, sophisticated radar and communications equipment and housing for troops, on several reefs in the Spratly Islands, including the ones named above.²⁶³ As military activities, these construction activities as well as the operation and use of these structures by the PLA are excluded from the jurisdiction of the Tribunal by way of China's August 2006 declaration. The same is true for the occupation of at least some of these reefs which were previously held by Vietnam and were captured by the PLA after Chinese and Vietnamese naval forces clashed in the Spratly Islands on 14 March 1988.²⁶⁴

The Philippines further petitions the Tribunal to require China to 'refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef'.²⁶⁵ In other words, China is to refrain from preventing 'the Philippines from fishing at Scarborough Shoal or in its vicinity'.²⁶⁶ Through its August 2006 declaration, China has excluded from the Tribunal's jurisdiction all disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction removed

²⁶¹ cf '67th Plenary meeting' (23 April 1976) and '68th Plenary meeting' (26 April 1976), Official Records of the Third United Nations Conference on the Law of the Sea, vol V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session) 56 [2] (Ecuador), 59 [44] (Iraq), 65 [24] (Iran). See also Klein, *Dispute Settlement* (2005) 290, and, generally, Tullio Treves, 'Military Installations, Structures, and Devices on the Seabed' (1980) 74 *American Journal of International Law* 808.

²⁶² Relief Sought, bullet points 4, 5, 6 and 7; see also Claims, bullet point 4.

²⁶³ See eg 'Mischief Reef a Major Chinese Fortress, Says Philippine Navy' *The Straits Times* (Singapore) (25 January 1999) 19; 'Philippine Official Says China Installs Powerful Radar Near Disputed Islet' *BBC Monitoring Asia Pacific - Political* (13 July 2012); 'Philippines Military Aware of Chinese Activities in Disputed Sea - Official' *BBC Monitoring Asia Pacific - Political* (18 July 2012); 'Philippines, China Not on "Brink of Armed Conflict" - Official' *BBC Monitoring Asia Pacific - Political* (26 July 2012); 'Philippines Navy Pictures Show China Boosting Presence on Disputed Reef - Report' *BBC Monitoring Asia Pacific - Political* (2 August 2012). For the view that Mischief Reef is occupied by the PLA, see also James Kraska and Raul Pedrozo, *International Maritime Security Law* (Leiden, Martinus Nijhoff, 2013) 326.

²⁶⁴ 'Chinese Forces Occupy Two More Islands, Says Vietnam; China' *Sydney Morning Herald* (8 April 1988) 10.

²⁶⁵ Relief Sought, bullet point 9; see also Claims, bullet point 7.

²⁶⁶ Notification and Statement of Claim, para 21.