
Arbitrating Conflict in the South China Sea: The Case of China and the Philippines

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Introduction: Arbitration as a Means to Settle Disputes under the UNCLOS

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides a number of binding and non-binding means towards peaceful settlement of disputes. In the case of the Philippines and China, neither state expressed any preferred third party dispute settlement mechanism in their ratification of the convention; hence, both are deemed to have selected arbitration as a means to settle disputes concerning the UNCLOS, unless limitations under Articles 297 and 298 apply. China has rejected arbitration initiated by the Philippines, including the jurisdiction of the tribunal on the matter and has firmly stated that it will not participate in its proceedings. Article 9 of Annex VII of the UNCLOS, however, provides that the “absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings”. Hence, China is still considered a party to the arbitration based on Article 296(1) of the UNCLOS and Article 11 of Annex VII, and shall be bound by any tribunal award.

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The history of the arbitral proceedings on jurisdiction and admissibility of the case filed by the Philippines against China on the South China Sea includes various procedural requirements and statements issued by both parties to the dispute. The sequence of key submissions, requests, and statements is as follows:

- January 22, 2013: The arbitral proceedings were initiated by the Philippines by issuing a notification and statement of claim pursuant to Articles 286 and 287, and Article I of Annex VII of the UNCLOS
- February 19, 2013: China presented a note verbale to the Philippines Department of Foreign Affairs rejecting the arbitration and returning the notification and statement of claim of the Philippines.
- March 30, 2013: The Philippines submitted a memorial addressing both the merits of its claim and the tribunal's jurisdiction;
- July 12, 2013: The tribunal provided the parties with draft rules of procedures and other documents relating to the constitution of the arbitral tribunal and the initial process;
- July 29, 2013: In a note verbale, China reiterated its position that “it does not accept the arbitration initiated by the Philippines” and returned the tribunal's letter and accompanying documents;
- July 31, 2013: The Philippines submitted its comments on the draft rules of procedure of the arbitral tribunal;
- November 14, 2013: The Chinese ambassador to the United Kingdom requested a meeting with the president of the tribunal but was reminded to refrain from *ex parte* communications with members of the tribunal;
- March 30, 2014: The Philippines submitted its memorial as required, as well as accompanying annexes;
- December 07, 2014: China's Ministry of Foreign Affairs published a “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”;

- December 16, 2014: After China did not submit a counter-memorial by the date provided by the tribunal, the latter requested further written arguments from the Philippines concerning certain issues of jurisdiction and merits;
- February 06, 2015: China's ambassador to the Netherlands wrote individually to the members of the tribunal reiterating its position on the arbitration;
- March 16, 2015: The Philippines filed a supplemental written submission, pursuant to the tribunal's request;
- July 07, 08 and 13, 2015: The tribunal convened a hearing on jurisdiction and admissibility at the Peace Palace, The Hague, Netherlands;
- October 29, 2015: The arbitral award on jurisdiction and admissibility was published by the arbitral tribunal

Given China's expansionist claims to nearly all of the South China Sea – being contested by Malaysia, the Philippines, Brunei, Taiwan and Vietnam – the brawny approach undertaken by China has been the primary driver for Manila to file a legal case unilaterally against Beijing.

This article provides an examination of the political, legal, and strategic aspects of the arbitration between the Philippines and China on the South China Sea, which is deemed as a landmark case that will be the onset of examining the web of complex legal issues that have plagued the disputed area for decades. It will assess the political and strategic implications of the arbitral proceedings and also summarise the arbitral award on jurisdiction and admissibility – and its potential impact on China's strategic approach to the South China Sea.

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The International Arbitration Tribunal and China's Conundrum

Given China's expansionist claims to nearly all of the South China Sea – being contested by Malaysia, the Philippines, Brunei, Taiwan and Vietnam—the brawny approach undertaken by China has been the primary driver for Manila to file a legal case unilaterally against Beijing, notwithstanding that China has declared that it would not accept, or participate in, international arbitration under any circumstance.

Incidentally, Manila holds the position that the Chinese territorial claims in the South China Sea are illegal as per the UNCLOS and has submitted evidence in the form of more than 40 maps and a nearly 4,000-page document to the international arbitration tribunal. This submission has been interpreted as a diplomatic attempt at buttressing its case against Chinese claims that span almost 90 per cent of the South China Sea's 3.5 million sq km (1.35 million sq miles) waters, with the sea providing 10 per cent of the global fisheries catch and carrying \$5 trillion in ship-borne trade annually.¹

On the other hand, China's Foreign Ministry has repetitively reiterated its position of neither accepting, nor participating in, the arbitral proceeding on the South China Sea issue at the Permanent Court of Arbitration at The Hague, claiming the lack of jurisdiction of the court in determining territorial sovereignty over disputed islands and in delimiting maritime entitlements.² China further argues that Manila's move breaches the agreement that has repeatedly been reaffirmed with China as well as the Philippines in the Declaration on the Conduct of Parties in the South China Sea (DOC). In a statement released through the official Xinhua agency, China stated that it would refuse to recognise the conclusion of

the arbitration, further stressing, "... on the issue of territorial sovereignty and maritime rights, China will never accept any imposed plan, nor any solution arrived at by unilaterally resorting to a third party for resolving disputes." It cited a policy of resolving disputes on territorial sovereignty and maritime rights only through direct consultation and negotiation with the nation directly involved. China chooses to describe itself "... being the victim of the South China Sea disputes" and further claims that it "remains highly restrained and keeps safeguarding regional peace and stability in mind."³ Often coalescing the issue of maritime entitlement with the larger concept of territorial sovereignty, China appears to be attempting to steer the debate on arbitration away from the focal point. The Chinese position is that the essence of the subject matter is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the UNCLOS under which Manila has initiated the arbitration.

China's external relations have also been affected as a result of the arbitration proceedings. In a direct reference, the Chinese Foreign Ministry lashed out an accusation against the US that despite not being a party to the South China Sea, it was influencing the arbitration case filed by the Philippines, referring to US Assistant Secretary of State Daniel Russel's statement, wherein he asserted that with both Beijing and Manila, being parties to the UNCLOS, legally, they must abide by the tribunal's decision.⁴ On July 17, 2015, *The New York Times* released a vital editorial comment, which stated that "a courtroom in The Hague has become an important new battleground in the multinational struggle over the resource-rich South China Sea" and that the Philippines "can qualify to have 200-nautical-mile exclusive economic zones." The Chinese Embassy in Washington swiftly termed the editorial as "unfair", stressing that Beijing's approach toward this issue hinged around holding direct bilateral negotiations. China's Press Counsellor and Spokesman Zhu Haiquan said that the editorial titled "The South China Sea, in

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Court”, about the arbitration case raised by the Philippines over rights to the South China Sea is “not fair”, and that “China’s approach toward solving the South China Sea issue is to have direct dialogue and negotiation between claimants, which is more effective and sustainable”.⁵

China’s Official “Position Paper” on the Matter of Jurisdiction in the South China Sea Arbitration

In a circuitous attempt to usurp the onus of the arbitration debate, the Chinese Foreign Ministry released an official “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” on December 07, 2014. According to the arbitration tribunal rules of procedure, China was required to present its counter-memorial to the case filed by the Philippines, latest by December 15, 2014. Given that the Chinese Foreign Ministry officially enunciated its position on March 31, 2014, of not accepting and/or participating in the arbitration, the act of releasing an official Position Paper on the eve of the December deadline was apparently effectual in two ways: (1) it expounded on why the tribunal does not have jurisdiction over this case; and (2) it reiterated China’s position of not participating in the case.⁶ According to the Chinese government, the document pronouncing China’s position on the issue is neither a counter-memorial on the arbitration, nor a response to the request of the arbitral tribunal. It primarily sets forth the legal positions on the matter of jurisdiction in this arbitration and “on the basis of international law ... debunks the Philippines’ groundless assertions and projects China’s image as a defender and promoter of the international

rule of law.”⁷ Further elaborating a legal basis for China’s position, the Director-General of the Department of Treaty and Law of the Foreign Ministry, Xu Hong, stated that the arbitral tribunal manifestly has no jurisdiction in this case, as per international law. Even if the subject matter of the Philippines’ claims could be considered in part as concerning the interpretation or application of the convention, it constitutes an integral part of the maritime delimitation between China and the Philippines. However, China has already excluded, through a

declaration made on August 25, 2006, certain types of disputes, including those relating to sea boundary delimitations, or those involving historic bays or titles based on Article 298 of the UNCLOS allowing states parties to be excluded from compulsory binding procedures.⁸

The primary arguments put forth in the Position Paper by Beijing are: (1) The subject matter of arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the UN Convention; (2) by unilaterally initiating the present arbitration, the Philippines has breached mutual obligations and violated international law, given that Beijing and Manila had agreed, through bilateral instruments and the DOC, to settle relevant disputes through negotiations; (3) assuming that the subject matter of the arbitration did concern the interpretation or application of the convention, it has been excluded by the 2006 declaration filed by China under Article 298 of the convention, due to its being an integral part of maritime delimitation between the two countries; and lastly, (4) China has never accepted any compulsory procedures of the convention with regard to the Philippines’

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claims for arbitration.⁹ By virtue of publicly releasing the Position Paper, China has communicated a toughened politico-diplomatic stance, the bottom line of which claims that China shall not accept any ruling, pronounced by the arbitration tribunal.

However, the Position Paper falls acutely short in two places. First, China believes that the arbitration case brought up by the Philippines in essence touches upon the question of sovereignty over features in the South China Sea, and, thus, the tribunal does

not have any jurisdiction. On the contrary, the Philippines believes that its case only asks for arbitration on the matter of whether or not China’s assertion of maritime rights is in accordance with the UNCLOS, a question where the tribunal does, indeed, have jurisdiction. Facing such a disagreement, a third party might conclude that the case falls under the scope of the tribunal’s duties, unless China can provide overwhelming evidence to the contrary. China’s stance on the core issue of arbitration is a subjective judgment, so its legal effectiveness is limited. Also, according to the practice of China’s own domestic law, the right to decide jurisdiction belongs to the courts, and not to either party of a lawsuit.¹⁰ The second shortcoming of China’s Position Paper in the South China Sea arbitration is that it fails to clarify the heavily debated “nine-dash line”. That the meaning of the “nine-dash line” needs to be clarified unambiguously is almost universally acknowledged by countries other than China. The Foreign Ministry and state-controlled media in China deliberately seem to be omitting clarification of the controversial “nine-dash line” claim, which primarily encompasses most of the South China Sea. This contentious line was first published officially on a map by

the Chinese government in 1948 and continued to appear on official maps of the People's Republic of China (PRC) post-1948 as well. Ever since, Beijing has acted in the most obstinate manner by refusing to clarify/define what exactly the line denotes/includes. The official explanation does not go beyond stating that the first official map on the nine-dash line claim was published in 1948. The Ministry of Foreign Affairs of China suggested in a meandering way that the line possibly indicates a claim to the islands and reefs lying within it. It is expected of Beijing to elucidate its position now that the matter has reached the international arbitration tribunal. The onus is on China to furnish a basis for the alignment of its nine-dash line that complies with international law. The line is instead an expedient tool wielded opportunistically — and, at times, illegally — to reprimand other claimants for presumed non-neighbourly activities in these contested waters.¹¹

On the day of the official release of the Position Paper on the matter of jurisdiction in the South China Sea arbitration, the Director-General of the Department of Treaty and Law of the Foreign Ministry, Xu Hong, gave an interview to the Xinhua News Agency wherein he was questioned as to why China had not clarified the meaning of the dotted line in the Position Paper. The response from Xu, as expected, was that in 1948, the Chinese government had published an official map that displayed the dotted line in the South China Sea and the Position Paper mentions this while setting the historical background to the relevant dispute in the South China Sea. Subsequently, Xu professed China's "indisputable sovereignty over the South China Sea Islands and the adjacent waters" that have "formed and evolved over a long course of history".¹²

The Philippines' Claim to the South China Sea

Unlike China, the Philippines does not claim all the islands of the South China Sea. Shortly after gaining independence in 1946, the Philippines had asserted its claim to the Spratly group of islands before the United Nations General Assembly. This was reiterated in the 1950s after the Japanese withdrew from

some of the islands they had occupied during World War II. In 1956, a Filipino navigator, Tomas Cloma, and his associates claimed ownership to Kalayaan Island (Freedom Island) by reason of discovery and occupation. This group of islands consists of 33 islands, cays, sandbars and coral reefs. Around the same time, the Philippines government sent a diplomatic note to Taipeh demanding the withdrawal of a Chinese garrison on the island of Itu Aba on the basis of the Philippines' legal title to the island.¹³

In 1974, Tomas Cloma and his associates ceded and transferred in favour of the Philippines all rights and interests over these islands.¹⁴ This was followed by the issuance of Presidential Decree No 1596 declaring 53 islands, cays, shoals and reefs, with a total area of about 65,000 square nautical miles (sq nm), as part of the Philippines territory by reason of effective occupation and control. The decree also declared that the area is part of the continental margin of the Philippines and does not belong to any other state. As a result of the presidential declaration, the Philippines established continuous political, economic and social communities in the islands. The Kalayaan group of islands is a political sub-division of the province of Palawan. Since 1976, oil exploration has also been conducted in several areas of the island group.

Events Leading up to the Arbitration

Despite the historical accounts and activities substantiating the Philippines' exercise of territorial sovereignty over the Kalayaan island group, the legal action of the Philippines against China only resulted in more recent events arising from the longstanding dispute between the two countries and other developments in the region. The fact that the Philippines brought the arbitration against China surprised many states and questions have been raised on the ability of the former to face the potential negative political and economic impact of such action. However, it appears to be a move welcomed by the South China Sea claimant states and other interested states monitoring the developments at the periphery.

The highlight of the territorial dispute between the Philippines and China can be traced back to the Mischief Reef incident in 1999. A series of diplomatic meetings followed which led to the 2002 Declaration on the Conduct of Parties in the South China Sea. The maritime boundary delimitation between China and Vietnam in the Gulf of Tonkin has also been considered as a major achievement not only in the political relations between the two states, but also in managing disputes in general. Joint marine scientific explorations have also been conducted for a number of years, and were believed to be promising functional cooperation in the South China Sea.¹⁵

In 2009, a joint submission was made by Vietnam and Malaysia and a sole submission by Vietnam on the limits of the continental shelf beyond 200 nm in the South China Sea. This led to protests by China and the official announcement and publication of the nine-dash line. These submissions were followed by increased confrontations at sea, including the interference of Chinese maritime surveillance ships with a Philippine seismic survey ship in the Reed Bank in 2011. The adoption of the Philippine Baselines Law which contains provisions on Scarborough Shoal, as well as technical work on the delimitation of the Philippines continental shelf beyond 200 nm have also contributed to the tensions in the South China Sea. In 2012, a ‘standoff’ occurred between Philippine and Chinese vessels in Scarborough Shoal which required immediate talks between Beijing and Manila to enable a withdrawal of such vessels in the area. However, shortly after the incident, Chinese vessels returned to Scarborough Shoal to take control of the area, to the disappointment of the Philippines. The official announcement of the “West Philippine Sea”, as well as the printing of a new official government map naming the South China Sea as such has also raised alarms for China.

Despite attempts to manage the disputes by adhering to the South China Sea Declaration and other means of diplomatic negotiations,

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the Philippines deemed China's proclamation of the nine-dash line as unlawful and contrary to international law. After exhausting all available political and diplomatic means, "the Philippines has no other recourse but to institute compulsory arbitration proceedings against China under Annex VII of the UNCLOS".¹⁶

Initiation of Arbitral Proceedings by the Philippines

The arbitration between Philippines and China on the South China Sea commenced on January 22, 2013, when the Philippines served China with a notification and statement of claim with respect to the dispute with China over maritime jurisdiction of the Philippines in the West Philippine Sea. This notification was issued under Article 287 and Annex VII of the 1982 UNCLOS. The Philippines' position is that recourse to judicial settlement of legal disputes should not be considered an unfriendly act between states.¹⁷

The Philippines has requested the arbitral tribunal to issue declarations and orders on a number of points (a few vital ones are listed below). The request is to 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-dashed 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;
- 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 nautical miles; and that China has unlawfully claimed maritime entitlements beyond 12 nautical miles 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 nautical miles Territorial Sea, a 200 nautical miles

Though it may not directly support the territorial claim in the Kalayaan Island group, an outcome in favour of the Philippines on either argument of such inter-related claims would strategically affirm the Philippines' general approach on the South China Sea issue.

The South China Sea issue that was once only a concern for the Executive Department has now become a national matter. The Legislative and Judiciary Departments of the Philippines have issued support to the legal action of the country against China.

Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines.¹⁸

The Philippines is seeking relief from the tribunal over a number of declarations and orders, but the key argument is the application of the UNCLOS with respect to islands and rocks, as well as in exercising rights and obligations of both parties in the maritime areas of the South China Sea. In particular, the main declaration sought is the invalidity of

China's claims based on the map of the nine-dash line. Though it may not directly support the territorial claim in the Kalayaan Island group, an outcome in favour of the Philippines on either argument of such inter-related claims would strategically affirm the Philippines' general approach on the South China.

The Philippines also raises the issues relating to the unlawful activities by China, which are deemed to prevent the Philippines from lawfully exercising its rights in its maritime zones under the convention. The Philippines is clear in that it is not asking for a ruling on the territorial issues it has with China, nor does it request the tribunal to delimit any maritime boundaries. One of the strongest points of the Philippines' arguments is the recognition that while there are different elements to the disputes, some elements may not be precluded from falling within the jurisdiction of the tribunal. By focussing on the application of the UNCLOS and isolating issues of territorial sovereignty and maritime boundary delimitation, the Philippines was able to strongly argue against China's position and support the tribunal's jurisdiction to rule

on the issues it has raised. Consequently, the arbitration will induce more pressure on China to clarify the legal basis of its position, or minimise its activities in the South China Sea. The Philippines has submitted its statement and amendments, as well as supporting documents and data, including maps, navigational charts, and satellite photos. It has not only attended the hearings on jurisdiction but also presented oral arguments and responded in a timely manner to procedural orders,

The Philippines, in its amendment statement of claim, also provided that the 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea does not bar the exercise of the jurisdiction of the tribunal.

written questions, review of transcript of proceedings, and other requirements of the tribunal. It has also ensured payment of the costs of arbitration, including China's share for the deposit. Taking into account the political determination and the rigorous work entailed in pursuing legal proceedings against China, it is apparent that the country could not have chosen a better time to undertake a bold move to challenge a political and economic giant in the South China Sea.

The South China Sea issue that was once only a concern for the Executive Department has now become a national matter. The Legislative and Judiciary Departments of the Philippines have issued support to the legal action of the country against China. For example a House Resolution was filed in the Fifteenth Philippine Congress strongly supporting the filing of the arbitration case against China.¹⁹ A number of statements and public speeches have also been conducted by a Senior Justice of the Supreme Court of the Philippines, Justice Antonio Carpio, to advocate the protection of the marine wealth of the Philippines.²⁰ As a result of the growing government interest in China's activities in the South China Sea, the concern has increased public awareness, as similarly manifested in various social media.

In summary, the tribunal has ruled in favour of the Philippines that the unilateral initiation of arbitration proceedings by the Philippines does not constitute an abuse of rights, contrary to Article 300 of the UNCLOS, as posed by China.

Apart from the merits of the case, the Philippines has strongly supported the jurisdiction and proceedings of the tribunal. The Philippines, in its amendment statement of claim, also provided that the 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea does not bar the exercise of the jurisdiction of the tribunal. It also supports the principle of transparency by indicating that it has no objections for interested parties such as Vietnam, Thailand, Malaysia, Indonesia and Japan to access copies of

relevant documents and send small delegations to attend the hearings on jurisdiction.

Implications of the Philippines' Legal Action Against China

There are political and socio-economic implications for the Philippines in taking on China for dispute settlement. Apart from political tension, there have been threats to sever established economic ties between the two countries, such as calls for the boycott of Chinese goods, imposition of stricter regulations on Philippines' exports, suspension of travel tours, mass protests in the respective consulates, and intensified fishing activities to assert territorial claims. There have also been other reported issues, which were allegedly related to issues such as cyber attacks in educational institutions.

However, aside from the vigorous objection of China to the Philippines' notification and statement and the rejection of the jurisdiction of the arbitral tribunal over the issue, Chinese activities in the South China Sea continue. For example, in 2014, Chinese and Filipino fishermen were arrested for

engaging in the illegal trade of a significant number of marine turtles in Half Moon Shoal. Photographs were released showing reclamation on the Johnson South Reef and other reefs.²¹ When China deployed an oil rig off the coast of Vietnam, the Philippines called for a moratorium on any activity that could further create tension in the area.²² Evidence of these incidents has also been submitted progressively to the tribunal during the proceedings. While it may be argued that there are no legal implications of such activities on the arbitration process, it is undeniable that the impact would be more political and security in nature, particularly with respect to a potential encounter between the naval fleets in the disputed area. Whether or not the Philippines agrees with the conduct of such activities by a country which it considers an ally and supporter to the arbitration proceedings is a question that may complicate the country's overall position on the freedom of navigation programme of the US. China has instantaneously expressed its disapproval on the matter and has asked India to play a "constructive and positive role" in safeguarding peace and stability in the region.²³

The tribunal has ruled that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over the maritime boundary delimitation itself.

The Arbitration as on October 29, 2015

In the award issued on October 29, 2015, the tribunal only addressed matters of jurisdiction and admissibility, but did not address the merits of the Philippines' claim. However, according to the tribunal, it is required to determine, first, whether there is a dispute between the parties concerning the matters raised by the Philippines and, second, whether such a dispute concerns the interpretation or application of the UNCLOS.

- In summary, the tribunal has ruled in favour of the Philippines that the unilateral initiation of arbitration proceedings by the Philippines

In order to avoid any implications on the merits of the Philippines' claim to the South China Sea, the tribunal deemed it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China, whether or not such feature is presently occupied by China.

does not constitute an abuse of rights, contrary to Article 300 of the UNCLOS, as posed by China (para 126);

- That it does not accept that it follows from the existence of the dispute over sovereignty, that sovereignty is also the characterisation of the submission of the Philippines (para 152);

- The tribunal has ruled that a dispute over an issue that may be considered in the course of a maritime boundary delimitation, constitutes a dispute over the maritime boundary delimitation itself (para 155);

- A dispute exists not about the existence of specific historic rights, but about historic rights within the framework of the UNCLOS (para 168);

- A dispute exists concerning the status of maritime features and the source of maritime entitlements in the South China Sea (para 169). These features are: the Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross Reef (para 169);
- A dispute exists as to the incidents alleged by the Philippines with respect to potential violations of obligations under the UNCLOS and other relevant international agreements (paras 174-177); and
- The Declaration on Conduct of Parties in the South China Sea, Treaty of Amity, as well as bilateral statements made by the Philippines and China, whether individually or collectively, do not bar the tribunal's jurisdiction (paras 229-353).²⁴

Hence, the tribunal is satisfied that disputes between the parties concerning the interpretation and application of the UNCLOS exist with respect to matters raised by the Philippines in all of its submissions. This may be considered a win for the Philippines, however, a closer look at the decision made on jurisdiction and its relationship with the merits of the case will provide us an insight as to the potential limitations on the rulings of the merits of the case.

The arbitral award was clear that while the tribunal has clear jurisdiction over disputes concerning alleged violation of “specified international rules and standards for the protection and preservation of the marine environment in the exclusive economic zone”, it reserves decision on its jurisdiction with respect to certain submissions of the Philippines for consideration with conjunction with the merits of the Philippines’ claims (paras 397-412). The main considerations in this regard are with respect to the potential effects of any overlapping maritime entitlement and the historic rights over the nine-dash line under the UNCLOS. The tribunal also did not accept certain issues for determination such as military and other activities of China around the disputed areas. In order to avoid any implications on the merits of the Philippines’ claim to the South China Sea, the tribunal deemed it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China, whether or not such feature is presently occupied by China.

As the jurisdiction of the tribunal has already been decided, the likely outcome on the merits of the arbitration case can also be predicted. It can be argued that although some of the key issues, such as those relating to the nine-dash line may ultimately have no clarification from the tribunal as a result of China’s lack of clear supporting evidence and position on the matter, there are other issues that will have some finality in terms of their legal underpinning and interpretation. One such issue is the ruling on the status of certain features in the South China Sea. Based on geologic structure, it will be highly likely that Fiery Cross Reef, Cuarteron Reef

and Johnson Reef, that cannot sustain human habitation or economic life of their own, may be classified as islands based on Article 121 of the UNCLOS. Hence, these features cannot generate their own maritime zones. This potential outcome will likely undermine China's current activities in these areas.

Concluding Observations: Refocussing on China's Approach to the South China Sea

During the Scarborough Shoal standoff in 2012, Chinese poachers were allowed to leave by the Philippines Navy with their illegal catch; however, Chinese maritime surveillance ships never left the area and remain there till date. The Chinese military managed to seize control of the shoal from the Philippines without having to resort to war. Ever since, having found success in redefining the status quo, the Chinese leadership has become heavily inclined towards upstaging the rule-based international order and altering the status quo. The Chinese military, backed by its political leadership under Xi Jinping, is keen to replicate the trend of attempting to create a fresh status quo in all its existing territorial disputes, both on land and at sea, and simultaneously wants to test the tenacity and credibility of the existing security alliances in the Asia-Pacific region, namely the US' equation with Japan and the Philippines.²⁵ That said, Beijing, however, does appear equally wary of the decision taken by the Philippines to move the case to the International Arbitration Tribunal, despite the fact that any final ruling by the court on the dispute may face challenges in terms of enforcement at the domestic level. This is primarily because the arbitration ruling shall provide credence and become instrumental in moulding international opinion on the dispute. It is evidently clear that Beijing is strictly averse to the South China Sea dispute being internationalised, with the internal discourse in China seemingly acknowledging that even a slight tacit acceptance of international intervention shall prove detrimental to China's territorial claims which it contests with other countries in the region.²⁶ The decision

to release the Position Paper is a “preemptive” move aimed to provide a cushion against the international fallout from an unfavourable decision at the tribunal. Du Jifeng, of the Chinese Academy of Social Sciences, was in agreement with this line of thought, stating that Beijing expected that a verdict arising from international arbitration would bring upon it more “international moral pressure ... and [China] may find itself more isolated internationally as the convention is still endorsed by a majority of countries, even though Beijing does not accept the arbitration.”²⁷

Beijing has clearly made a departure from its earlier “dual-track approach” given out in August 2014 by Foreign Minister Wang Yi, wherein he hinted at agreeing to handle the South China Sea dispute under a multilateral framework. It was being suggested that the Association of Southeast Asian Nations (ASEAN), as a regional grouping, could well have played a constructive role, although China strictly opposed interference from countries outside the region, especially mediation that favours one side over the other. Manila has been insisting that only by engaging other ASEAN members can any negotiation to settle the West Philippine Sea dispute be accepted. This gets reflected in the statement, “... the principle of ASEAN centrality should be recognised in accordance with the Declaration on Conduct of Parties in the South China Sea...” according to Presidential Communications Operations Office Secretary Herminio Coloma Jr.²⁸ Chinese state-controlled media has often gone to the extent of warning that a potential “counter-strike” against the Philippines would be “hard to avoid”, accusing it of using the ASEAN platform as an “accomplice” in the violation of its sovereignty claims in the South China Sea. On the contrary, it is China’s controversial patrols in the South China Sea that have forced the Philippines’ Hamilton-class ships to guarantee patrolling of Manila’s exclusive economic zone. And that Beijing has managed to construct an artificial island in the South China Sea over the course of 2014 in the Fiery Cross Reef (part of the Spratly Islands) that was virtually untouched by man-made structures

until March 2014 has further fuelled tensions in the South China Sea. The facilities created by China can be put to use for out-and-out military operations amid a flotilla of Chinese vessels tasked with land-dredging activities, creating ports and battlements in the region — amounting to it becoming, perhaps, the biggest “reclamation project” — a reported 800 hectares of submerged reef converted into dry land.²⁹ China has proved that great power diplomacy has not always been soft-sided and is a deft mix of hard tactics rolled up in yielding policy pronouncements. Stemming from this construct, China’s approach and take on the South China Sea is gradually, yet firmly, becoming far more inflexible. The world closely watches to see whether or not the arbitration between the Philippines and China will change the political and military strategy of China in the South China Sea.

Notes

1. Monika Chansoria, “China-Philippines Face-off Heightens Regional Tension,” *The Manila Times*, April 20, 2014.
2. For more details, see “Chinese Embassy Rebuts NY Times Editorial on China-Philippines Dispute,” *Xinhua Press Release*, July 29, 2015.
3. As cited in Lu Hui, “China Won’t Accept Hague Sovereignty Arbitration: Foreign Ministry,” *Xinhua Press Release*, July 14, 2015.
4. For more details, see “China: Philippines’ Unilateral Arbitration Unacceptable,” Report by *China Network Television* (CNTV), Beijing, July 25, 2015.
5. For more details, see n. 2.
6. For more details, see Xue Li, “How China Views the South China Sea Arbitration Case,” *The Diplomat*, July 14, 2015.
7. Remarks by Xu Hong, director-general of the Department of Treaty and Law of the Ministry of Foreign Affairs, on 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*, December 07, 2014.
8. *Ibid.*
9. For a detailed debate on the Chinese stated position on the issue, see, Xinhua News Agency Commentary titled, “Why Manila’s Arbitration Request over South China Sea Does not Hold Water,” July 17, 2015.
10. Xue Li, n. 6.
11. Chansoria, n. 1.
12. Xu Hong, n. 7.

13. Mary Ann Palma-Robles, "The Philippines as an Archipelagic and Maritime Nation: Interests, Challenges, and Perspectives," *RSIS Working Paper*, Issue No. 182 (Singapore: S. Rajaratnam School of International Studies, 2009).
14. *Ibid.*
15. Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885, April 04, 2011.
16. Philippine House of Representatives, House Resolution 3004, Resolution Strongly Supporting the Filing of An Arbitration Case Against China Under Article 287 and Annex VII of the United Nations Convention of the Law of the Sea by His Excellency President Benigno S. Aquino III, January 23, 2003.
17. United Nations General Assembly, A/RES/37/10, 6th Plenary Meeting, November 15, 1982, Peaceful Settlement of Disputes between States, Para 5 (3).
18. For more details, see Republic of the Philippines, Department of Foreign Affairs, No. 13-0211, Notification and Statement of Claim, January 22, 2013; The Philippines' Supplemental Written Submission to the Arbitral Tribunal, March 16, 2015.
19. n. 17.
20. Philippines Supreme Court Justice Antonio Carpio has delivered various speeches and conducted briefing before legislators, politicians, academics, the general public, and foreign institutions on the importance of promoting national interests in the West Philippine Sea.
21. Associated Press, "Philippines Charges Chinese Caught in Disputed Sea," *The Daily Mail*, May 13, 2014.
22. Ankit Panda, "China's HD-981 Oil Rig Returns, Near Disputed South China Sea Waters," *The Diplomat*, June 27, 2015.
23. Press Trust of India, "India Can Play Constructive, Positive Role in South China Sea, China Says," *NDTV*, November 06, 2015.
24. The Philippines Court of Arbitration, PCA Case No. 2013-19 in the Matter of an Arbitration before An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility.
25. Monika Chansoria, "China Takes on the Philippines," *The Sunday Guardian*, August 24, 2013.
26. For details, see Chansoria, n. 1.
27. As cited in Li Jing, "China Releases Paper Denouncing Philippine 'Pressure' over Sea Dispute Arbitration," *South China Morning Post*, December 07, 2014.
28. Delon Porcalla, "Philippines Rejects Bilateral Talks with China Anew," *The Philippine Star*, July 08, 2015.
29. For more details, see Monika Chansoria, "China's Artificial Island is a Matter of Concern," *The Sunday Guardian*, June 20, 2015.