

## **‘Lawfare’ in the South China Sea: The Latest Round**

*Author: Raghavendra Mishra\**

*Date: 18 November 2015*

The South China Sea (SCS) continues to occupy the limelight because of the series of assertive actions, both by the claimants and those with strategic interests. The recent ‘freedom of navigation and overflight’ assertion by a US Navy Arleigh Burke Destroyer (*USS Lassen*) with P 8A *Poseidon* maritime patrol aircraft providing overwatch invited sharp retort from Beijing.<sup>1</sup> Consultations between senior naval leadership of both the sides were held following this incident, which is seen as a US response to the Chinese warships transiting the Aleutians Island territorial seas on 03 September 2015.<sup>2</sup> Some media reports also suggest such actions by the US are likely to be repeated.<sup>3</sup> The immediate fallout of this recent Sino-US row was the cancellation of joint declaration after the ASEAN Defense Ministers Meeting Plus (ADMM Plus) conclave at Kuala Lumpur, Malaysia on 04 November 2015.<sup>4</sup>

While this push-pull in the SCS plays out between two important global actors— one (China) as an ‘involved claimant’ and, the other (US) as ‘strategic player’, the arbitral tribunal at the Permanent Court of Justice (PCA) announced its ‘Award on Jurisdiction and Admissibility’ on 29 October 2015 in the ongoing China-Philippines case.<sup>5</sup>

The legal proceedings were initiated by the Philippines on 22 January 2013 under Annex VII of the 1982 United Nations Convention of the Law of the Sea (UNCLOS)<sup>6</sup>. The complete text of the Philippines memorial (case details) is yet to be made public, but the award indicates that it has raised 15 discrete issues related to the interpretation and application of the UNCLOS. While the decision of the Tribunal on these points is covered later in this article, the Philippines emphasized that its submissions relate neither to maritime delimitation nor to sovereignty (ownership). Its submission to the tribunal is about the interpretation of the UNCLOS, in particular, the ‘status’ of certain insular features and the infringements of its legitimate rights by China’s actions.

This article examines the salient observations made by the Tribunal in its award. It is also worth noting that many aspects examined by the Tribunal were *proprio motu* (at Tribunals discretion/initiative), so that the rights of the respondent (China) as also the ‘third parties’ are not prejudiced.

### **Admissibility and Jurisdiction**

The announcement of this award effectively marks the end of ‘first phase’ of arbitration process. This exercise was aimed at determining two critical issues, particularly so in light of China’s non-participation:

(a) The issues brought forth by the Philippines are ‘well founded in fact and law’ as admissible, i.e., ‘in consonance and worth consideration’ vis-à-vis with legal provisions of the UNCLOS it has cited;

(b) The Tribunal is empowered by the Treaty law (UNCLOS), case law (judicial observations in previous instances of similar nature) and, the established ‘Rules of Procedure’<sup>7</sup> for the case to decide that the issues raised by the Philippines are ‘within its jurisdictional mandate’.

The Tribunal observes that ‘a dispute exists’ between China and the Philippines and the two countries have ‘exchanged information’ on the issues that the Philippines has preferred for arbitration.<sup>8</sup> These observations indicate that two of the contingent criteria for initiating arbitration proceedings are fulfilled.

### **China’s Non-Participation**

As mentioned, China has refused to participate in the legal process since the beginning and the reasons for such a stance were explained through its Position Paper released on 07 December 2014.<sup>9</sup> The three main issues highlighted were:

(a) The essence of arbitration revolves around territorial sovereignty over several maritime features in the SCS, which lies beyond the scope of the Convention;

(b) The Philippines was in breach of its international legal obligations by unilateral initiation of legal proceedings as it had violated previously agreed to the principles of bilateral negotiations as also the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC)<sup>10</sup>;

(c) The 2006 Declaration by China<sup>11</sup> under UNCLOS Article 298, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.

It is also relevant that non-appearance or non-participation of a party is not an impediment to the progress of the case as long as the court/tribunal is satisfied on the aforementioned admissibility and jurisdictional capacity criteria. This provision is mentioned in Annex VII to the UNCLOS and, the Rules of Procedure formulated for the China-Philippines case.<sup>12</sup>

Despite China's refusal to join the arbitration, the Tribunal relied upon its December 2014 Position Paper, its correspondence with the Tribunal, other relevant diplomatic/political articulations and, the material made available by the Philippines to decide if this 'exclusionary stance' was legally valid. In this regard, the Tribunal observed that the reasons advocated in its Position Paper do not make China exempt from compulsory arbitration under the UNCLOS sections cited.

Further, the award states that notwithstanding its 2006 declaration, all parties to the UNCLOS (an oblique reference to China) cannot be selective in choosing which part of the Convention they wish to accept or reject.<sup>13</sup> The award also clarifies that the 2002 DoC to which China and the Philippines are signatories, is a legally non-binding and politically aspirational document.<sup>14</sup> The Tribunal also opines that the provisions of 1976 Treaty of Amity and Cooperation (TAC) with China and the Philippines as parties, despite being a legally binding instrument does not prevent progressing with compulsory arbitration clauses prescribed under the UNCLOS.<sup>15</sup>

While finding the principal objections for its refusal to be part of arbitration as inadequate, the Tribunal also observed that China was free to join the proceedings at any time, thus leaving the door open for its future participation.<sup>16</sup>

### **'Third Party' Interests**

The Tribunal took note of the third party interests during its deliberations, especially Vietnam which appears to have endorsed the actions, arguments and the issues raised by the Philippines.<sup>17</sup> Based on the correspondence received from Vietnam and Malaysia, and the interest expressed by Japan, Indonesia and Thailand, the Tribunal permitted 'observer delegations' from these countries to attend the 07-13 July 2015 hearings. Further, the relevant documents were also provided to these

countries, as also Brunei. These somewhat unusual steps were taken in consultation with the Philippines.

Based on the Vietnamese response and the underlying intent of the issues raised by the Philippines, the Tribunal ruled that the ‘third party’ rights are neither affected nor the presence of such parties indispensable to the proceedings.<sup>18</sup> This means that the case would now remain a bilateral exercise. The Tribunal also ruled that the arbitration proceedings from now on would be generally closed to the public, except for the ‘interested parties’ on ‘specific written requests’.

### **Salient Observations of the Award**

The decision of the Tribunal on 15 specific ‘submissions’ by the Philippines can be summarised under two broad categories.<sup>19</sup>

- ***Submissions by the Philippines where the Tribunal jurisdiction is confirmed***

<b>Submission Serial No.</b>	<b>Brief Details of the Submission</b>
<b>3 &amp; 7</b>	Status of Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef as “islands” or “rocks”.
<b>4 &amp; 6</b>	Status of Mischief Reef, Second Thomas Shoal, Subi Reef, & Gaven Reef and McKennan Reef (including Hughes Reef) as “low-tide elevations”, <i>subject to possible effects of any overlapping entitlements vis-a-vis the first three features.</i>
<b>10</b>	China’s interference with the traditional fishing activities of Philippine nationals at Scarborough Shoal.
<b>11</b>	Protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal.
<b>13</b>	Operation of China’s law enforcement activities in the vicinity of Scarborough Shoal, the application of UNCLOS provisions related to innocent passage and the duties of coastal/flag states, <i>limited to those within the territorial sea limits of Scarborough Shoal.</i>

• ***Submissions by the Philippines which would be considered by the Tribunal in the ‘merits’ phase***

<b>Submission Serial No.</b>	<b>Brief Details of the Submission</b>
<b>1 &amp; 2</b>	Source of maritime entitlements in the South China Sea and the role of the Convention.
<b>5</b>	Sources of maritime entitlements in the South China Sea and whether situation of overlapping entitlements to an exclusive economic zone or to a continental shelf exists in the area of Mischief Reef and Second Thomas Shoal.
<b>8</b>	China’s actions that allegedly interfere with the Philippines’ petroleum exploration, seismic surveys, and fishing in Philippines claimed exclusive economic zone.
<b>9</b>	Chinese fishing activities in Philippines claimed exclusive economic zone.
<b>11</b>	China’s activities on Mischief Reef and their effects on the marine environment.
<b>14</b>	China’s activities in and around Second Thomas Shoal and China’s interaction with the Philippine military forces stationed on the Shoal.
<b>15</b>	China shall desist from further unlawful claims and activities, <i>with a directive to the Philippines for narrowing the content and the scope of this Submission.</i>

**Takeaways from the Award**

It can be seen from above, that the Tribunal for arbitration has accepted seven specific requests by the Philippines, with conditionality attached to two such issues. Eight issues are deferred for consideration in the next phase, where detailed supporting presentations and arguments before the Tribunal would be made by the parties.

***Status of Disputed Maritime Features and the Consequential Effects***

A relatively uncomplicated task for the Tribunal would be in determining the ‘status’ for the specific maritime features mentioned by the Philippines and the permissible

‘maritime entitlements’ under UNCLOS. It is for emphasis that all the features mentioned by Philippines in its submissions have been the subject of China’s extensive island reclamation project.<sup>20</sup> Based on reliable reference sources<sup>21</sup>, it can predicted that the final award on this matter may read as:

<b>Feature</b>	<b>Likely Decision by the Tribunal</b>	<b>Permissible Maritime Entitlement</b>
Johnson Reef	‘Rock’	12 Nautical Mile (NM) territorial sea
Cuarteron Reef	‘Rock’	12 NM territorial sea
Fiery Cross Reef	‘Rock’	12 NM territorial sea
Scarborough Shoal	‘Rock’	12 NM territorial sea
Mischief Reef	Low Tide elevation (LTE)	NIL
Second Thomas Shoal	LTE	NIL
Subi Reef	LTE	NIL
Gaven Reef	LTE	NIL
Hughes Reef	LTE	NIL
McKenna Reef	LTE	NIL

An important point at this stage is that ‘determining the status/character’ would have ‘no effect on the ownership (territorial sovereignty)’ of these features, thereby retaining *status quo* as far as the control/administration is concerned, whether by China or the Philippines. The more significant fallout would be in terms of ‘passage rights’ for the international community and, ‘access to resources’ for China or the Philippines. If the Tribunal does characterise the aforementioned features as predicted, the Philippines by its geographical proximity, stands to gain substantially on the ‘resource front’ through the EEZ and, possibly Continental Shelf regimes.

Further, the extensive (and undoubtedly expensive) island reclamation by China vis-a-vis the features classified as LTE would be entitled to a mere ‘500 meter security zone’ since these are manmade and, therefore, ‘artificial installations’. This proposition arises out of two important provisions under UNCLOS:

- (a) Article 121 where island is defined a ‘naturally formed area of land’, and;

(b) Article 60 (Para 8) which states, “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf”.

The UNCLOS accords ‘innocent passage’ regime to all ships within the territorial seas of coastal states, including warships with certain stipulations. It is pertinent to mention the US does not recognise undue restrictions of ‘prior information and/or permission’ for innocent passage by the warships, mentioned in the September 1989 Joint Statement by the US and erstwhile USSR, popularly known as the Jackson Hole Agreement.<sup>22</sup> Such restrictions on the innocent passage of warships are stipulated in respective national legislations/submissions to the UN, like the proviso of ‘prior permission’ in China’s 1992 Territorial and Contiguous Zone Act.<sup>23</sup>

### ***Whither ‘For’ or ‘Against’ the Philippines/China***

At this stage, the award can be assessed as ‘largely positive’ for the Philippines on two counts: (a) the legal proceedings would continue and; (b) a definite decision would be pronounced on at least six issues where it has a differing interpretation vis-à-vis China on UNCLOS provisions.

This award is definitely not an encouraging outcome for China since its exclusionary rationale stands rejected. China is now a party to the case and, by extension, to the final judgment. This issue gains importance, as the awards/judgements during international arbitrations are final and binding on the parties.<sup>24</sup> This proposition would prevail even if China continues with its posture of non-participation. In case and ‘only if’, the final award is unfavourable China’s so-called ‘nine dashed line’ claim would come under even greater scrutiny for its validity and veracity.

How China reacts to the final award remains an open issue, but the recent hard-line statements from Beijing suggest that there is little possibility of any recalibration. This is obvious by the statement from the Foreign Ministry of China on the award which is termed as “null and void with no binding effect”, “the Arbitral Tribunal manifestly has no jurisdiction”, “China's non-acceptance of and non-participation in the arbitration .....is clear and explicit, and will not change”. This

statement goes on aver that “...the Philippines and the Arbitral Tribunal have abused relevant procedures and obstinately forced ahead with the arbitration....severely violated the legitimate rights that China enjoys....completely deviated from the purposes and objectives.... and eroded the integrity and authority of the UNCLOS”.<sup>25</sup>

However, a more definitive assessment on the overall effects of the case would have to await the next phase of the arbitration as the submissions deferred by the Tribunal carry greater ‘substantive significance’ which are just not limited to maritime entitlements but also regarding the alleged misconduct of party (China). Therefore, making a concrete assessment as to ‘who won’ can only be made after the announcement of final award as the decisions on the pended issues could go either way.

### **Conclusion**

Unilateral activism may be is a reality of international politics; however, being labelled a ‘rogue’, especially in defiance of international arbitration, is an entirely different proposition. All nations, howsoever powerful, care about their international repute. Empirical evidence suggests that nations, despite non-participation and/or initial rejection of international arbitration have largely accepted adverse rulings. The 1986 judgement by the International Court of Justice (ICJ) where the US was observed to have defaulted on certain counts in the case involving Nicaragua and, a similar observation about Russia in the *Arctic Sunrise Case* are prime examples of powerful nations being held accountable under the ambit of international law.<sup>26</sup>

This award could influence the contested South China Sea dynamics in two possible ways. Firstly, it could fuel competitiveness and propensity for assertive behaviour among the claimants and the interested parties, thereby increasing the chances of unintended/accidental escalation. Secondly, the award could be seen in a positive light where recourse to international law provides a possible way ahead on this seemingly intractable dispute. An attendant effect could be on the much-anticipated binding Code of Conduct (CoC) on parties to the SCS dispute. This award could end up in further delays in formalising of such a code as China may feel aggrieved to stop engaging on this issue or embolden other claimants to engage in further such legal processes.

In sum, it is worth reiterating the sagaciousness in Indonesia's July 2010 response to nine-dashed line submission where it recalls the 2009 remarks by China's representative about the necessity of 'a consistent interpretation' on insular features.<sup>27</sup> This statement also emphasises that excessive claims to sovereignty and expansive interpretation of the UNCLOS for seeking greater maritime entitlements could upset the existing open and equitable system. Whether the 'involved and interested parties' are paying heed remains the proverbial big question.

\*\*\*\*\*

*Captain Raghavendra Mishra is a Research Fellow at the National Maritime Foundation (NMF), New Delhi. The views expressed are his own and do not reflect the official policy or position of the NMF, the Indian Navy or the Government of India. He can be reached at [mish17330@gmail.com](mailto:mish17330@gmail.com)*

## **Notes and References**

<sup>1</sup> See, Council on Foreign Relations, 'A U.S. Naval Signal in the South China Sea', <http://www.cfr.org/china/us-naval-signal-south-china-sea/p37185> and; Tom Phillips, 'Beijing summons US ambassador over warship in South China Sea', *The Guardian*, 27 October 2015, <http://www.theguardian.com/world/2015/oct/27/us-warship-lassen-defies-beijing-sail-disputed-south-china-sea-islands>

<sup>2</sup> See, Jeremy Page, 'Chinese Navy Ships Came within 12 Nautical Miles of U.S. Coast', *The Wall Street Journal*, 04 September 2015, <http://www.wsj.com/articles/chinese-navy-ships-off-alaska-passed-through-u-s-territorial-waters-1441350488> and; Christopher P. Cavas, 'Navy Chiefs Talk, New Details On Destroyer's Passage', *Defense News*, 31 October 2015, <http://www.defensenews.com/story/defense/2015/10/31/navy-china-richardson-wu-destroyer-lassen-south-china-sea-innocent-passage/74881704/>

<sup>3</sup> 'US to return to South China Sea after warship visit', *BBC News*, <http://www.bbc.com/news/world-asia-34707166>

<sup>4</sup> Yeganeh Torbati and Trinna Leong, 'ASEAN defense chiefs fail to agree on South China Sea statement', *Reuters*, 4 November 2015, <http://www.reuters.com/article/2015/11/04/us-asean-malaysia-statement-idUSKCN0ST07G20151104#w1r9xRDSVpDkW6Lc.09>

<sup>5</sup> Permanent Court of Arbitration (hereafter PCA), *Award on Jurisdiction and Admissibility*, 29 October 2015, <http://www.pcacases.com/web/sendAttach/1506>

<sup>6</sup> United Nations Convention on the Law of the Sea (hereafter UNCLOS), Montego Bay, Jamaica, 10 December 1982, U.N.T.S. 397, [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

<sup>7</sup> PCA, *Rules of Procedure*, 'The Republic of the Philippines V. The People's Republic of China', [http://www.pca-cpa.org/PH-CN%20-%20Rules%20of%20Procedure%20\(ENG\)a7ec.pdf?fil\\_id=2504](http://www.pca-cpa.org/PH-CN%20-%20Rules%20of%20Procedure%20(ENG)a7ec.pdf?fil_id=2504)

<sup>8</sup> PCA, *Award*, Note 5, Paras 148 – 178 and 342-352.

<sup>9</sup> Ministry of Foreign Affairs of the People's Republic of China, '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', 7 December 2014, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

<sup>10</sup> ASEAN Website, 'Declaration on the Conduct of Parties in the South China Sea', <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>

<sup>11</sup>Declaration made after ratification (25 August 2006) – "Declaration under article 298: The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention", [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China\\_after\\_ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China_after_ratification)

<sup>12</sup> UNCLOS, Note 6, Annex VII, Article 9, and; PCA, *Rules*, Note 7, Article 25.

<sup>13</sup> PCA, *Award*, Note 5, Para 107.

<sup>14</sup> Ibid, Paras 217-218, 248.

<sup>15</sup> Ibid, Paras 265-269.

<sup>16</sup> Ibid, Paras 18, 117.

<sup>17</sup> Ibid, Para 184.

<sup>18</sup> Ibid, Para 188.

<sup>19</sup> Ibid, Paras 397-412.

<sup>20</sup> For updated details on island reclamation by the SCS claimants including China, see 'Island Tracker' database on the *Asia Maritime Transparency Initiative* (AMTI), Center for Strategic and International Studies, <http://amti.csis.org/island-tracker/>

<sup>21</sup> David Hancox, Victor Prescott, 'A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands', *Maritime Briefing*, Volume 1 Number 6, 1995, International Boundaries Research Unit, Department of Geography, University of Durham, <https://www.dur.ac.uk/ibru/publications/download/?id=229>, and; Gregory B. Poling (July 2013), Appendix to '*The South China Sea in Focus : Clarifying the Limits of Maritime Dispute*', Center for Strategic and International Studies, pp. 27-28 [http://csis.org/files/publication/130717\\_Poling\\_SouthChinaSea\\_Web.pdf](http://csis.org/files/publication/130717_Poling_SouthChinaSea_Web.pdf), (both accessed 20 October 2015). While both these sources are based on dated information, these provide valuable indicators for interpretative purposes

<sup>22</sup> Joint Statement by the United States of America and the Union of Soviet Socialist Republics on 'Uniform Interpretation of Norms of International Law Governing Innocent Passage', 23 September 1989. The statement *inter alia* states, "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required". See, United Nations Office for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletins*, Vol. 14, pp. 1-13.

<sup>23</sup> Peoples Republic of China, *Law on the Territorial Sea and the Contiguous Zone of 25 February 1992*, [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf). A recent study brings out that 43 state parties to UNCLOS have promulgated various restrictions like 'prior information', 'prior permission' and 'compulsory pilotage' on the innocent passage by the warships. See, J Ashley Roach and Robert W Smith, *Excessive Maritime Claims*, (Lieden: Martinus Nijhoff, 2012), Third Edition, pp. 250-251.

<sup>24</sup> UNCLOS, Note 6, Annex VII Article 11; also, PCA, *Rules*, Note 7, Article 26.

<sup>25</sup> Ministry of Foreign Affairs of the People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines, 30 October 2015, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml)

<sup>26</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5> and; International Tribunal for the Law of the Sea, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, <https://www.itlos.org/cases/list-of-cases/case-no-22/#c1471>

---

<sup>27</sup> Permanent Mission to the United Nations, Republic of Indonesia letter 480/POL-703/VII/10, 08 July 2011,  
[https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/idn\\_2010re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf)