PERMANENT COURT OF ARBITRATION

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PRESS RELEASE

Arbitration between the Republic of the Philippines and the People's Republic of China

The Hague, 30 November 2015

The Tribunal Concludes Hearing on the Merits

On Monday, 30 November 2015, the Tribunal concluded the hearing on the merits and remaining issues of jurisdiction and admissibility in the arbitration initiated by the Republic of the Philippines against the People's Republic of China under Annex VII to the United Nations Convention on the Law of the Sea (the "Convention").

The hearing, which commenced on 24 November 2015, took place in the Peace Palace, the headquarters of the Permanent Court of Arbitration (the "PCA") in The Hague, the Netherlands.

The Philippines' delegation comprised over fifty attendees, including the Solicitor General as Agent for the Philippines, the Secretary of Foreign Affairs, members of the Supreme Court, members of the House of Representatives, Ambassadors, government lawyers, officials, legal counsel, advisors, technical experts, and assistants.

The Philippines' Agent, Solicitor General Florin T. Hilbay delivered introductory remarks. Thereafter, the Philippines' Counsel, Mr. Paul S. Reichler, Professor Philippe Sands QC, Mr. Lawrence H. Martin, Professor Bernard H. Oxman, Professor Alan Boyle, and Mr. Andrew Loewenstein presented the Philippines' legal arguments. Additionally, the Tribunal heard expert testimony from Professor Clive Schofield and Professor Kent Carpenter. The Philippines' closing statement was delivered by the Philippines' Secretary of Foreign Affairs, H.E. Albert Ferreros del Rosario.

The hearing was not open to the public. However, after the Tribunal received written requests from interested States Parties to the Convention, and after seeking the views of the Parties, small delegations representing the following governments attended the hearing as observers, with permission of the Tribunal: Australia, the Republic of Indonesia, Japan, Malaysia, Singapore, the Kingdom of Thailand, and the Socialist Republic of Viet Nam. Additionally, the United Kingdom was granted permission to observe the proceedings, although it ultimately chose not to do so. A request by the United States of America to send an observer was declined as the United States of America is not a party to the Convention.

Commencement of the Arbitration

The arbitration commenced on 22 January 2013 when the Philippines served China with a Notification and Statement of Claim "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea." On 19 February 2013, China presented the Philippines with a diplomatic note in which it described "the Position of China on the South China Sea issues," and rejected and returned the Philippines' Notification.

Non-Participation of China

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 public statements, 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"), and in letters to members of the Tribunal from the Chinese Ambassador to the Kingdom of the Netherlands. 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."

In keeping with this position, China did not submit a Counter-Memorial and did not participate in the hearing. China has, however, consistently stated its position that:

China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China's sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's domestic laws on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (UNCLOS).¹

China has also stated that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf" and that "in order to determine China's maritime entitlements based on the Nansha Islands under the Convention, all maritime features comprising the Nansha Islands must be taken into account" ²

Article 9 of Annex VII to the Convention provides that:

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 in law.

In line with its duty under Article 5 of Annex VII to the Convention to "assure each party a full opportunity to be heard and to present its case", the Tribunal has kept China updated on all developments in the arbitration and stated that it remains open to China to participate in these proceedings at any stage. Transcripts of the hearing have been made available to China, and China has been invited to comment on anything stated at the hearing.

Proceedings on Jurisdiction and Admissibility

Prior to the present hearing, the Tribunal conducted a separate phase of the proceedings dedicated to examining its jurisdiction and the admissibility of the Philippines' claims. Under the Convention, a tribunal constituted under Annex VII has jurisdiction to consider a dispute between States Parties to the Convention to the extent that the dispute involves the "interpretation or application" of the Convention. However, the Convention excludes certain types of disputes from the jurisdiction of a tribunal and includes certain preconditions that must be met before any tribunal may exercise jurisdiction.

China's Position Paper was "intended to demonstrate that [the Tribunal] does not have jurisdiction over this case" and refrained from expressing any position on the merits. For reasons set out in Procedural Order No. 4 of 21 April 2015, the Tribunal considered China's Position Paper and other communications by China to constitute, in effect, a plea that the Philippines' submissions fall outside the scope of the Tribunal's jurisdiction. Accordingly, the Tribunal decided to conduct a preliminary hearing on the scope of its jurisdiction and the admissibility of the Philippines' claims.

PCA 159034 2

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, available at www.fmprc.gov.cn/mfa eng/zxxx 662805/t1310474.shtml.

² China's Position Paper, para. 21, available at www.fmprc.gov.cn/mfa eng/zxxx 662805/t1217147.shtml.

After convening a hearing on jurisdiction and admissibility between 7 and 13 July 2015, the Tribunal rendered its <u>Award on Jurisdiction and Admissibility</u> on 29 October 2015, a summary of which is contained in the PCA's <u>Press Release</u> of the same date. In the operative part of its Award on Jurisdiction and Admissibility, the Tribunal:

- A. FINDS that the Tribunal was properly constituted in accordance with Annex VII to the Convention.
- B. FINDS that China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction.
- C. FINDS that the Philippines' act of initiating this arbitration did not constitute an abuse of process.
- D. FINDS that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.
- E. FINDS that the 2002 China–ASEAN Declaration on Conduct of the Parties in the South China Sea, the joint statements of the Parties referred to in paragraphs 231 to 232 of this Award, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, do not preclude, under Articles 281 or 282 of the Convention, recourse to the compulsory dispute settlement procedures available under Section 2 of Part XV of the Convention.
- F. FINDS that the Parties have exchanged views as required by Article 283 of the Convention.
- G. FINDS that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 3, 4, 6, 7, 10, 11, and 13, subject to the conditions noted in paragraphs 400, 401, 403, 404, 407, 408, and 410 of this Award.
- H. FINDS that a determination of whether the Tribunal has jurisdiction to consider the Philippines' Submissions No. 1, 2, 5, 8, 9, 12, and 14 would involve consideration of issues that do not possess an exclusively preliminary character, and accordingly RESERVES consideration of its jurisdiction to rule on Submissions No. 1, 2, 5, 8, 9, 12, and 14 to the merits phase.
- I. DIRECTS the Philippines to clarify the content and narrow the scope of its Submission 15 and RESERVES consideration of its jurisdiction over Submission No. 15 to the merits phase.
- J. RESERVES for further consideration and directions all issues not decided in this Award.

Proceedings on the Merits and Remaining Issues of Jurisdiction

Having sought the views of the Parties, the Tribunal had previously scheduled the dates for the merits hearing on a provisional basis and appointed a technical expert, Mr. Grant W. Boyes, in accordance with Article 24 of the Rules of Procedure. After issuing its Award on Jurisdiction and Admissibility and further seeking the views of the Parties, the Tribunal confirmed that the hearing would take place from 24-30 November 2015, as previously scheduled.

On 10 November 2015, the Tribunal sent a letter to the Parties with guidance as to issues to address in connection with the hearing. That list was not intended to be exhaustive of the issues that may be raised during the hearing and the Philippines remained free to structure its argument as it considered most appropriate.

Prior to the hearing, the Philippines was granted leave to file certain additional documentary and testimonial evidence. The Philippines was also granted leave to present the views of two independent expert witnesses, Professor Clive Schofield (a geographer) and Professor Kent Carpenter (a marine biologist).

At the outset of the hearing, the Philippines' Agent, Solicitor-General Hilbay, introduced the Philippines' claims and the manner in which it would present its case. As summarized by the Philippines in the course of the proceedings on jurisdiction and admissibility, the Philippines' case is generally as follows:

- First, that China is not entitled to exercise what it refers to as 'historic rights' over the waters, seabed and subsoil beyond the limits of its entitlements under the Convention;
- Second, that the so-called 'nine-dash line' has no basis whatsoever under international law insofar as it purports to define the limits of China's claim to 'historic rights';
- Third, that the various maritime features relied upon by China as a basis upon which to assert its claims in the South China Sea are not islands that generate entitlement to an exclusive economic zone or continental shelf. Rather, some are 'rocks', within the meaning of Article 121(3); others are low-tide elevations; and still others are permanently submerged. As a result, none are capable of generating entitlements beyond 12 miles, and some generate no entitlements at all. China's recent massive reclamations activities cannot lawfully change the original nature and character of these features:
- Fourth, that China has breached the Convention by interfering with the Philippines' exercise of its sovereign rights and jurisdiction; and
- Fifth, that China has irreversibly damaged the regional marine environment, in breach of [the Convention], by its destruction of coral reefs in the South China Sea, including areas within the Philippines' [exclusive economic zone], by its destructive and hazardous fishing practices, and by its harvesting of endangered species.

Solicitor-General Hilbay was followed by Counsel for the Philippines who first addressed the issue of China's claim to historic rights in the South China Sea. According to the Philippines, although China has not publicly clarified the precise nature of its claim to historic rights, China's position can be ascertained from its conduct and from public statements. According to the Philippines, China claims historic rights to the exclusive use of the living and non-living resources encompassed within the nine-dash line (as well as sovereignty over the islands therein, a matter not before the Tribunal), but does not claim title over the waters or consider them to form part of China's territorial sea. For the Philippines, this can be seen from China's acceptance of navigation and overflight within the nine-dash line, together with its objections to fishing and petroleum exploration by any other State within the same area. As such, the Philippines considers that China's claim does not fall within the exception in the Convention to compulsory settlement for disputes concerning "historic title" and that the Tribunal has jurisdiction to consider this matter.

In the Philippines' view, however, there is no basis for China's claim as (a) the Convention fully addresses the scope of entitlements to maritime resources and supersedes any historic rights that China might have had and (b) China has never had historic rights in the South China Sea. The Philippines argued that international law has never accepted sweeping claims to vast areas of sea and has, since the early seventeenth century, recognized State control only over a narrow band adjacent to the coast. According to the Philippines, the Convention is comprehensive and the entirety of the South China Sea is accounted for and governed by the regime therein. Where the Convention intended to preserve other rights, it did so expressly, but no such provision recognizes rights on the scope being claimed by China. In any event, however, the Philippines submits that China has no historic rights. The Philippines contends that before the early twentieth century China identified its territory as extending no further south than Hainan and that China's claim to sovereignty over the islands of the South China Sea emerged only in the 1930s. Moreover, according to the Philippines, China's claim to historic rights to the waters of the South China Sea is of even more recent origin and was first mentioned in May 2009. Other littoral States have never acquiesced to this claim and, in the Philippines' view, there is no basis for any historic right to have formed.

Counsel for the Philippines next addressed the status of maritime features in the South China Sea. According to the Philippines, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, and McKennan Reef (including Hughes Reef) are each "low-tide elevations", meaning that they are exposed at low-tide but submerged by the sea at high-tide. Under the Convention, low-tide elevations produce no independent

entitlement to maritime zones. The Philippines presented various hydrographic evidence, including satellite imagery and satellite-derived bathymetry with respect to each of the features. According to the Philippines, Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are each "rocks" for the purposes of the Convention. Under the Convention, "rocks" are islands "which cannot sustain human habitation or economic life of their own" and which are entitled to a 12 nautical mile territorial sea, but not to a 200 nautical mile exclusive economic zone or continental shelf. The Philippines noted that only tiny portions of these features are above water and argued that there is no basis to consider them capable of sustaining human habitation. Finally, the Philippines reviewed the larger features in the South China Sea, including Itu Aba, Thitu, and West York—each of which is claimed by (but not currently occupied by) the People's Republic of China—and argued that none are more than "rocks" under the Convention. The Philippines reviewed the conditions and environment on these features and argued that none has ever sustained a non-military human population. Accordingly, the Philippines argued that even if China is sovereign over all of the features it claims in the South China Sea, none is entitled to more than a 12 nautical mile territorial sea, and there is no basis for China to claim an exclusive economic zone overlapping that of the Philippines. Accordingly, the Philippines submitted that there is no issue of overlapping entitlements that would limit the Tribunal's jurisdiction.

Counsel for the Philippines then turned to China's conduct in the South China Sea, which the Philippines considers to violate the Convention. According to the Philippines, China has prevented the Philippines from conducting surveys for petroleum reserves and has prevented fishing by Philippine vessels in areas where only the Philippines is entitled to sovereign rights over marine resources. The Philippines considers that China has also failed in its duty to prevent its nationals from exploiting resources over which the Philippines has sovereign rights and has failed to respect traditional fishing rights at Scarborough Shoal. The Philippines also argued that China had failed to preserve and protect the marine environment, given its toleration in areas under its control of the harvesting of endangered species and of destructive fishing methods using explosives and cyanide, and given the destructive effects of China's construction of installations on Mischief Reef. Finally, the Philippines argued that China had operated its law enforcement vessels in a dangerous manner, contrary to the Convention, and had acted to exacerbate the Parties' dispute even while these proceedings have been ongoing, first by attempting to prevent the resupply of a small contingent of Philippine marines stationed on Second Thomas Shoal and, second, by engaging over the past year in a massive program of construction, building artificial islands at nearly all of the maritime features presently under its control. The Philippines also elaborated on its arguments from the hearing on jurisdiction and admissibility that China's actions should not be seen as falling within the Convention's exclusion from jurisdiction for disputes relating to military activities.

In the course of the hearing, the Tribunal also heard testimony from the Philippines' expert witnesses on the status of features in the South China Sea and on the environmental effects of China's island building and of the fishing carried out by Chinese vessels. Throughout the hearing, members of the Tribunal posed questions to the Philippines' counsel in respect of many aspects of their claims. Additionally, on 27 November 2015, the Tribunal provided the Philippines and its expert witnesses with a list of questions in writing that the Philippines addressed on the final day of the hearing on 30 November 2015.

The Philippines' Secretary of Foreign Affairs, H.E. Albert Ferreros del Rosario closed the presentation of the Philippines' case, recalling the central place of the peaceful resolution of disputes in the international legal order and the importance of the present dispute, emphasizing the Philippines' confidence in the Tribunal's judgment, and noting with respect to China that "We view China as a valued friend, and it is precisely to preserve that friendship that we initiated this arbitration." The Philippines' Agent, Solicitor-General Hilbay then read the Philippines' final submissions as follows:

A. The Tribunal has jurisdiction over the claims set out in Section B of these Submissions, which are fully admissible, to the extent not already determined to be within the Tribunal's jurisdiction and admissible in the Award on Jurisdiction and Admissibility of 29 October 2015.

- B. (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 ("UNCLOS" or the "Convention");
 - (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 nonliving 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; and
- (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.

Next Steps for the Tribunal

The Parties will have until 9 December 2015 to review and submit corrections to the transcripts of the hearing, which will subsequently be published on the PCA's website. By 18 December 2015, the Philippines may submit further written responses to the questions posed by the Tribunal during the hearing, as well as related materials.

In line with the Tribunal's duty under Article 5 of Annex VII to the Convention to "assure each party a full opportunity to be heard and to present its case," the Tribunal has decided to provide China with the opportunity to comment in writing, by 1 January 2016, on anything said during the hearing or submitted in writing subsequently by the Philippines.

The Tribunal now enters its deliberations and intends to issue its Award in 2016.

*

Background to the Case: The Tribunal in this matter is composed of Judge Thomas A. Mensah of Ghana, Judge Jean-Pierre Cot of France, Judge Stanislaw Pawlak of Poland, Professor Alfred Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany. Judge Thomas A. Mensah serves as President of the Tribunal. The Permanent Court of Arbitration acts as the Registry in the proceedings.

These arbitral proceedings were initiated on 22 January 2013 by the Republic of the Philippines.

On 30 March 2014, the Philippines submitted a Memorial addressing both the merits of its claims and the Tribunal's jurisdiction.

On 16 December 2014, after China did not submit a Counter-Memorial by the date indicated by the Tribunal, the Tribunal requested further written argument from the Philippines concerning certain issues of jurisdiction and the merits.

On 16 March 2015, the Philippines filed a Supplemental Written Submission, pursuant to the Tribunal's request.

On 7, 8, and 13 July 2015, the Tribunal convened a Hearing on Jurisdiction and Admissibility at the Peace Palace in The Hague, the Netherlands.

On 29 October 2015, the Tribunal issued its Award on Jurisdiction and Admissibility.

Further information about the case, including the Award on Jurisdiction and Admissibility, the Rules of Procedure, earlier Press Releases, and transcripts and photographs of the Hearing, may be found at http://www.pcacases.com/web/view/7 or requested via e-mail.

Background to the PCA: The Permanent Court of Arbitration is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. Headquartered at the Peace Palace in The Hague, the Netherlands, the Permanent Court of Arbitration facilitates arbitration, conciliation, fact-finding and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties.

Contact: Permanent Court of Arbitration; <u>bureau@pca-cpa.org</u>

Annex: Selection of photographs available for download

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PRESS RELEASE

THE REPUBLIC OF THE PHILIPPINES V. THE PEOPLE'S REPUBLIC OF CHINA HEARING ON THE MERITS AND REMAINING ISSUES OF JURISDICTION & ADMISSIBILITY PEACE PALACE, THE HAGUE, 24-30 NOVEMBER 2015

PHOTOGRAPHS ACCOMPANYING POST-HEARING PRESS RELEASE

- 1. The Tribunal (L to R: Professor Alfred H.A. Soons, Judge Rüdiger Wolfrum, Judge Thomas A. Mensah (President), Judge Stanislaw Pawlak, Judge Jean-Pierre Cot)
- 2. The Tribunal in Session (L to R: Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, Judge Thomas A. Mensah (President), Judge Jean-Pierre Cot; Judge Rüdiger Wolfrum)
- 3. H.E. Mr. Albert F. Del Rosario, Secretary of Foreign Affairs of the Philippines, seated with Solicitor General Mr. Florin T. Hilbay (Agent), and Professor Philippe Sands QC (Counsel)
- 4. Opening Statement by Agent for the Philippines, Solicitor General Mr. Florin T. Hilbay
- 5. Counsel Team for the Philippines, including Professor Alan Boyle, Mr. Andrew Loewenstein and Professor Bernard H. Oxman
- 6. Members of Observer Delegations
- 7. Hearing in Session, with Counsel for the Philippines, Mr. Paul S. Reichler and Mr. Lawrence H. Martin at the lectern.
- 8. Counsel for the Philippines, Mr. Lawrence H. Martin, with Justice Francis Jardeleza, Special Adviser and Associate Justice of the Supreme Court of the Philippines.
- 9. Members of Observer Delegations.
- 10. Hearing in Session
- 11. The Tribunal with Expert and PCA Staff Members (L to R: Judith Levine (Registrar and PCA Senior Legal Counsel); Grant W. Boyes (Tribunal Expert), Professor Alfred H.A. Soons, Judge Rüdiger Wolfrum, Judge Thomas A. Mensah (President), Garth Schofield (PCA Senior Legal Counsel), Judge Stanislaw Pawlak, Judge Jean-Pierre Cot)
- 12. Hearing in Session
- 13. Expert Witnesses, Professor Kent Carpenter and Professor Clive Schofield
- 14. Delegation of the Republic of the Philippines

Photographs follow on next page. High resolution images available upon on request via e-mail to bureau@pca-cpa.org. Photographs by Frank van der Burg Fotografie.

SELECT PHOTOGRAPHS



























