

PCA Case N° 2013-19

IN THE MATTER OF THE SOUTH CHINA SEA 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

Arbitral Tribunal:

**Judge Thomas A. Mensah (Presiding Arbitrator)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred H.A. Soons
Judge Rüdiger Wolfrum**

Registry:

Permanent Court of Arbitration

12 July 2016

had the mandate to protect the common heritage of mankind.”⁴⁹⁶ Referring to Article 121(3), the Chinese representative “urged member States to be guided by the letter and spirit of the Convention to avoid any encroachment on the common heritage of mankind.”⁴⁹⁷

457. China reiterated its position on Oki-no-Tori-shima in a 3 August 2011 Note Verbale to the UN Secretary General, after Korea had also registered protest. China stated that it “consistently maintains that, the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own” and therefore under Article 121(3), the rock of Oki-no-Tori “shall have no exclusive economic zone or continental shelf.”⁴⁹⁸ China went on to state that:

the application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interests of the international community, and is an important legal issue of general nature. To claim continental shelf from the rock of Oki-no-Tori will seriously encroach upon the Area as the common heritage of mankind.⁴⁹⁹

458. Through the statements recounted above, China has demonstrated a robust stance on the importance of Article 121(3). It has repeatedly alluded to the risks to “the common heritage of mankind” and “overall interests of the international community” if Article 121(3) is not properly applied to small features that on their “natural conditions” obviously cannot sustain human habitation or economic life of their own. China has not, however, assessed those factors in any specific analysis of most of the individual features in the South China Sea, as discussed below.

(b) China’s Position on the Status of Scarborough Shoal

459. China claims sovereignty over Scarborough Shoal, which in China is known as “Huangyan Dao” and treated as part of the Zhongsha Islands.⁵⁰⁰

⁴⁹⁶ Delegation of the People’s Republic of China, *Statement at the 15th Session of the International Seabed Authority* (June 2009), summarised in International Seabed Authority, Press Release, UN Doc. SB/15/14, p. 3 (4 June 2009), available at <www.isa.org.jm/sites/default/files/files/documents/sb-15-14.pdf>.

⁴⁹⁷ Delegation of the People’s Republic of China, *Statement at the 15th Session of the International Seabed Authority* (June 2009), summarised in International Seabed Authority, Press Release, UN Doc. SB/15/14, p. 3 (4 June 2009), available at <www.isa.org.jm/sites/default/files/files/documents/sb-15-14.pdf>.

⁴⁹⁸ See Note Verbale from the People’s Republic of China to the Secretary-General of the United Nations, No. CML/59/2011 (3 August 2011) (Annex 203).

⁴⁹⁹ Note Verbale from the People’s Republic of China to the Secretary-General of the United Nations, No. CML/59/2011 (3 August 2011) (Annex 203). China also expressed concern that, were the CLCS to make recommendations on an extended continental shelf claim from Oki-no-Tori before its legal status was been made clear, there would be “adverse impact on the maintenance of an equal and reasonable order for oceans.”

⁵⁰⁰ China’s Position Paper, para.6

460. In China's 1958 *Declaration of the Government of the People's Republic of China on China's Territorial Sea*, China declared a twelve mile nautical sea from "all territories . . . including . . . the Zhongsha Islands."⁵⁰¹ China's 1992 *Law on the Territorial Sea and the Contiguous Zone* also included the Zhongsha Islands in China's territorial land which generated a 12-nautical-mile territorial sea.⁵⁰²
461. In conjunction with its ratification of the Convention, on 7 June 1996, China declared an exclusive economic zone of 200 nautical miles and a continental shelf in accordance with the provisions of the Convention and reaffirmed its sovereignty over the islands listed in Article 2 of its 1992 *Law on the Territorial Sea and the Contiguous Zone*.⁵⁰³ According to China's 1998 Exclusive Economic Zone and Continental Shelf Act, China's exclusive economic zone and continental shelf are to be measured 200 nautical miles from "the baselines from which the breadth of the territorial sea is measured."⁵⁰⁴ China has not, however, published "the baselines from which the breadth of the territorial sea" for Scarborough Shoal is measured. While China has stated that it is entitled to an exclusive economic zone and continental shelf from the Spratly Islands, under the relevant provisions of the Convention and the above-referenced legislation, it has made no such claim specifically with respect to Scarborough Shoal.⁵⁰⁵
462. Various statements of Chinese Foreign Ministry officials, however, indicate that China considers Scarborough Shoal to be at least a high-tide feature within the definition of "island" under Article 121(1) of the Convention. For example, on 22 May 1997, a press briefing entitled "Chinese Foreign Ministry Statement regarding Huangyandao" stated:

⁵⁰¹ People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea*, para. 1 (4 September 1958), reproduced in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed., 2001).

⁵⁰² People's Republic of China, *Law on the Territorial Sea and the Contiguous Zone*, Article 2 (25 February 1992) available at <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm>.

⁵⁰³ United Nations, *Multilateral Treaties Deposited with the Secretary-General*, Vol. III, Part 1, Chapters XXII-XXIX, and Part 2, UN Doc. ST/LEG/SER.E/26, p. 450 (1 April 2009).

⁵⁰⁴ People's Republic of China, *Law on the Exclusive Economic Zone and the Continental Shelf*, art. 2 (26 June 1998) available at <www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383573.htm>. On 15 May 1996, China issued a *Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea*, setting out coordinates for the baselines from which its territorial sea would be measured, but this did not include baselines from Scarborough Shoal's territorial sea. See United Nations, Office of Legal Affairs, Division of Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin No. 32*, pp. 37-40 (1996). China has also subsequently promulgated the coordinates for the baselines from its claim to a territorial sea from Diaoyu Dao and its Affiliated Islands. See United Nations, Office of Legal Affairs, Division of Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin No. 80*, pp. 30-31 (2013).

⁵⁰⁵ Cf. Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011) (Annex 201).

Huangyan Dao has always been Chinese territory and its legal position has been long determined. According to Article 121 of the UNCLOS, Huangyandao is surrounded by water on all sides and is a natural dry land area that is higher than the water level during high tide; it is not a shoal or submerged reef that does not rise above the water all year round.

...

The Philippines has never challenged the position that Huangyandao is China's territory. Recently, the Philippine side suddenly claims that it has maritime jurisdiction over Huangyandao because the island is in the 200 nm EEZ of the Philippines. This position violates the principles of international law and the UNCLOS.... The issue of Huangyandao is an issue of territorial sovereignty; the development and exploitation of the EEZ is a question of maritime jurisdiction, the nature of the two issues are different.... According to international law, under a situation where is an overlapping of EEZ's among concerned countries, the act of a country to unilaterally proclaim its 200 EEZ is null and void. The scope of the EEZ's of the Philippines and China should be resolved through negotiations based on the principles and regulations of international laws.⁵⁰⁶

463. The above statement expresses China's view that Scarborough Shoal is an island, without engaging in an analysis of whether it might be a rock for purposes of Article 121(3) of the Convention. China does, however, allude to a situation of two "overlapping EEZ[s]" rather than a situation of an exclusive economic zone overlapping only with a territorial sea. As Scarborough Shoal lies more than 200 nautical miles from any other high-tide feature claimed by China, the reference to "overlapping EEZ[s]" suggests that China may consider Scarborough Shoal to be entitled to an exclusive economic zone.
464. In July 1998, according to a record of the "10th Philippines-China Foreign Ministry Consultations" held in Manila on 30 July 1998, the Chinese Foreign Minister expressed the view that "the Huangyan Dao is not a sand bank but rather an island,"⁵⁰⁷ in apparent correction of a view expressed earlier by the Philippine Undersecretary of Foreign Affairs that Scarborough Shoal was a shoal, "not an island susceptible of sovereign territorial claim."⁵⁰⁸ Again, this statement only reveals China's position with respect to the classification of the feature as a high-tide feature for purposes of Article 121(1) as distinct from a low-tide elevation or submerged shoal. It does not address whether the feature falls into the "rocks" exception of Article 121(3).
465. China has, however, taken certain actions that suggest to the Tribunal that China considers Scarborough Shoal to be a fully entitled island. As discussed above in connection with China's claim to historic rights (see paragraphs 209 to 211), in 2012 China banned some fishing in the

⁵⁰⁶ Ministry of Foreign Affairs, People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997) (Annex 106).

⁵⁰⁷ Department of Foreign Affairs, Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations*, p. 23 (30 July 1998) (Annex 184).

⁵⁰⁸ Memorandum from the Undersecretary for Policy, Department of Foreign Affairs, Republic of the Philippines, to the President of the Republic of the Philippines, p. 4 (27 May 1997) (Annex 25).

South China Sea north of 12° north latitude. China has also objected to the Philippines' grant of petroleum concessions in the West Calamian Block (SC-58) adjacent to the coast of Palawan, much of which lies beyond 200 nautical miles from any high-tide feature claimed by China, except for Scarborough Shoal. China did not elaborate the basis for these actions, which may have been based either on a theory of historic rights or on a claim to an exclusive economic zone from Scarborough Shoal.

(c) China's Position on the Status of Itu Aba

466. According to China, Itu Aba is a fully entitled island, entitled to an exclusive economic zone and continental shelf. On 3 June 2016, China's Foreign Ministry Spokesperson stated as follows:

Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. The above activities are all manifestly recorded in Geng Lu Bu (Manual of Sea Routes) which was passed down from generation to generation among Chinese fishermen, as well as in many western navigation logs before the 1930s.

The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an "island" which is completely capable of sustaining human habitation or economic life of its own. The Philippines' attempt to characterize Taiping Dao as a "rock" exposed that its purpose of initiating the arbitration is to deny China's sovereignty over the Nansha Islands and relevant maritime rights and interests.⁵⁰⁹

467. This express position was previously also suggested by China's comments on the Taiwan Authority's statements "stressing that Taiping Dao [Itu Aba] meets the definition of island according to UNCLOS and is therefore eligible for possessing exclusive economic zone, continental shelf and other maritime rights and interests." When asked to comment, China's Foreign Ministry Spokesperson responded with the following remarks:

The Nansha Islands including Taiping Dao have been China's territory since ancient times. Chinese people have long been living and working there continuously. China takes the Nansha Islands as a whole when claiming maritime rights and interests, and Chinese people across the Strait all have the responsibility to safeguard the property handed down from our ancestors. China is firmly against attempts of the Philippines to unilaterally deny China's territorial sovereignty and maritime rights and interests in the South China Sea through arbitration.⁵¹⁰

⁵⁰⁹ Letter from the Ambassador of the People's Republic of China to the Netherlands to the individual members of the Tribunal (3 June 2016), *enclosing* Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao* (3 June 2016) available at <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1369189.shtml>.

⁵¹⁰ See Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference* (24 March 2016), <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1350552.shtml>; Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference* (23 March 2016) available at <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/>.

468. In this statement, China did not contradict the characterisation by the Taiwan Authority of Itu Aba as a fully entitled island, but rather asserted that its people have lived and worked on Itu Aba continuously, which mirrors the elements of “human habitation” and “economic life” in Article 121(3) of the Convention.

(d) China’s Position on the Status of Other Features in the Spratly Islands

469. While China has not made statements on the Article 121 status of other specific features in the Spratly Islands, it has made general statements that the Spratly Island group as a whole generate full maritime entitlements. In its Position Paper, China argued that the Philippines’ selection of particular features was “an attempt at denying China’s sovereignty over the Nansha Islands as a whole.”⁵¹¹
470. In a Note Verbale to the Secretary-General of the United Nations on 14 April 2011, China reiterated its sovereignty claims to “the islands in the South China Sea and the adjacent waters” and stated that it “enjoys sovereign rights and jurisdiction over relevant waters as well as the seabed and subsoil thereof.”⁵¹² China added that:

under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China (1998), China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.⁵¹³

471. China repeated this statement verbatim in its Position Paper.⁵¹⁴ However, given that the Position Paper “does not express any position on the substantive issues related to the subject-matter of the arbitration,”⁵¹⁵ no further insights on China’s position on the application of Article 121 to specific features in the Spratly Islands can be gleaned from it.
472. As far as the Tribunal is aware, China has not made specific statements about the status of Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), or McKennan Reef for purposes of Article 121(3) of the Convention. There are no press briefings about those features

t1350212.shtml>; Ministry of Foreign Affairs, People’s Republic of China, *Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference* (28 January 2016), available at <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1336013.shtml>.

⁵¹¹ China’s Position Paper, para. 19.

⁵¹² Note Verbale from the People’s Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011) (Annex 201).

⁵¹³ Note Verbale from the People’s Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011) (Annex 201).

⁵¹⁴ China’s Position Paper, para. 21.

⁵¹⁵ China’s Position Paper, para. 2.

comparable to the 1997 statement about Scarborough Shoal⁵¹⁶ or China's recent statement concerning Itu Aba.⁵¹⁷ Nor has China made any comparable statements regarding the other, more significant high-tide features in the Spratlys, with the exception of Itu Aba.

5. The Tribunal's Considerations

473. The Tribunal must interpret and apply Article 121 of the Convention in order to make decisions with respect to the Philippines' Submissions No. 3, 5, and 7, as well as to determine its jurisdiction with respect to the Philippines' Submissions No. 8 and 9.
474. Article 121 has not previously been the subject of significant consideration by courts or arbitral tribunals⁵¹⁸ and has been accorded a wide range of different interpretations in scholarly literature.⁵¹⁹ As has been apparent in the course of these proceedings, the scope of application of its paragraph (3) is not clearly established. Accordingly, the Tribunal will consider the interpretation of this provision before turning to its application to the maritime features in the South China Sea.

(a) Interpretation of Article 121 of the Convention

475. The critical element of Article 121 for the Tribunal is its paragraph (3), which provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

⁵¹⁶ Ministry of Foreign Affairs, People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997) (Annex 106).

⁵¹⁷ Letter from the Ambassador of the People's Republic of China to the Netherlands to the individual members of the Tribunal (3 June 2016), *enclosing* Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao* (3 June 2016), available at <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1369189.shtml>.

⁵¹⁸ See, e.g., *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, ICJ Reports 2012, p. 624.

⁵¹⁹ See, e.g., D.W. Bowett, *The Legal Regime of Islands in International Law* (1979); E.D. Brown, "Rockall and the Limits of National Jurisdiction of the UK: Part 1," *Marine Policy* Vol. 2, p. 181 at pp. 206-207 (1978); J.M. Van Dyke & R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources," *Ocean Development and International Law*, Vol. 12, Nos. 3-4, p. 265 (1983); R. Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the Law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own," *French Yearbook of International Law*, Vol. 40, p. 899 (1994); D. Anderson, "Islands and Rocks in the Modern Law of the Sea," in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI, pp. 307-21 (M. Nordquist, gen. ed., 2002); J.L. Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space," in J. Frowein, et al., eds., *Negotiating for Peace*, p. 579 (2003).