

**3rd MIMA South China Sea Conference:
Promoting Sustainable Use of SCS in an Era of
Dynamic Geostrategic Change**

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**Session Four. South China Disputes:
International Legal Developments**

UNCLOS Annex VII Arbitration

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Outline of Presentation

- Part 1 – UNCLOS Part XV
- Part 2 – Annex VII Arbitration
- Part 3 – The Philippines v. China Case

Part 1

BACKGROUND

UNCLOS Part XV

Rationale for DSM in Part XV

- States negotiating UNCLOS recognized that a dispute settlement mechanism (DSM) must be part of “package deal”
- necessary to have an effective method of peacefully resolving future disputes on interpretation or application of the provisions of the Convention
- necessary to ensure that the agreed text of Convention had stability, certainty and predictability
- necessary to protect the agreed package of compromises against destruction through unilateral interpretations

Guiding Principle of DSM in Part XV

- General principle is that the “will of the parties” shall prevail
- Parties to a dispute may by agreement select any method they wish for settling their dispute
- When a dispute arises, the parties shall proceed expeditiously to an exchange of views regarding its **settlement by negotiation** or other peaceful means.
- Even if one of the DS procedures provided for in UNCLOS has started, the parties can agree “at any time” to adopt a special method for resolving their dispute

Invocation of Compulsory Procedures Entailing Binding Decisions in Section 2

Article 286. Application of procedures under this section

Subject to section 3 [Limitations and Exceptions]

any dispute concerning the interpretation or application of this Convention shall,

where no settlement has been reached by recourse to section 1,

be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Choice of Procedure - Article 287

- A State shall be free to choose one or more of the following means:
 1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;
 2. INTERNATIONAL COURT OF JUSTICE (ICJ);
 3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;
 4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII

If the parties have not accepted the same procedure, it may be submitted only to ARBITRATION in accordance with Annex VII, unless the parties otherwise agree.

Article 298. Optional Exceptions to Applicability of Section 2

States parties have option to formally declare that they do not accept Section 2 for following categories of disputes:

- the interpretation or application of **articles 15, 74 and 83 relating to sea boundary delimitations**, or those involving **historic bays or titles**
- disputes concerning **military activities and disputes concerning law enforcement activities** relating to rights and jurisdiction of coastal States over fishing and marine scientific research in the EEZ
- Disputes in respect of which the UN Security Council is exercising the functions assigned it by the UN Charter

Applicable Law [Article 293]

- Article 293 provides that a court or tribunal having jurisdiction under this section shall apply
 - this Convention and
 - other rules of international law not incompatible with this Convention.

Part 2

Annex VII Arbitration

Appointment of Arbitrators

Unless the parties agree otherwise:

- Total of 5 Arbitrators
- Party instituting proceedings appoints one arbitrator when it institutes proceedings
- Other Party then has 30 days to appoint one member
- Remaining three arbitrators appointed by agreement of the parties, but if they are unable to agree, they shall be appointed by the President of ITLOS
- If other Party fails to cooperate, the Party instituting the proceedings may request the ITLOS President to appoint the remaining 4 arbitrators from the UN list of arbitrators

Arbitral Procedure

- General provisions on procedure are set out in Part XV of UNCLOS and in Annex VII on Arbitration
- These rules are supplement by Rules of Procedure adopted by the tribunal specifically for that case
- Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case
- Once the Arbitral Tribunal has been established, parties can request Provisional Measures from the Tribunal

Default of Appearance

Annex VII, Article 9

- If one party fails to appear to defend the case, other party may request tribunal to continue and make an award
- Absence of a party or failure to defend case is not a bar to the proceedings
- Before making an Award, the arbitral tribunal must satisfy itself that :
 - (1) it has jurisdiction; and
 - (2) the claim is well founded in fact and in law

Duties of Parties to a Dispute

Annex VII, Article 6.

- The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:
 - (a) provide it with all relevant documents, facilities and information; and
 - (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

Finality of the Award

- The Award is final and without appeal
- It shall be complied with by the parties to the dispute
- There is no mechanism by which the Tribunal can enforce the Award
- Any controversy between the Parties regarding the interpretation or implementation of the Award may be submitted by either Party for decision to the arbitral tribunal

Part 3

Philippines v China Case

Institution of Proceedings

- On 23 Jan 2013 Philippines brought action under Part XV of UNCLOS to take China to arbitration under Annex VII
- Argued that there are disputes on the interpretation or application of the provisions of UNCLOS **not excluded by China's declaration under Article 298**, such as:
 - Interference with Philippines' exercise of its sovereign rights in its EEZ (Art 56)
 - Illegal occupation of Low-Tide Elevations
 - Claiming more than 12 nm maritime zones from islands which cannot sustain human habitation or economic life of their own [121(3)]

Relief Sought by Philippines

1. Declare that China's rights to **maritime areas** are those established by UNCLOS
2. Declare that China's maritime claims based on its **9-dash line** are contrary to UNCLOS and invalid
3. Declare China's occupation of **four submerged features** is unlawful
4. Declare that **Scarborough Shoal** and **three other reefs** it occupies are "**rocks**" within 121(3) entitled only to a 12 m territorial sea

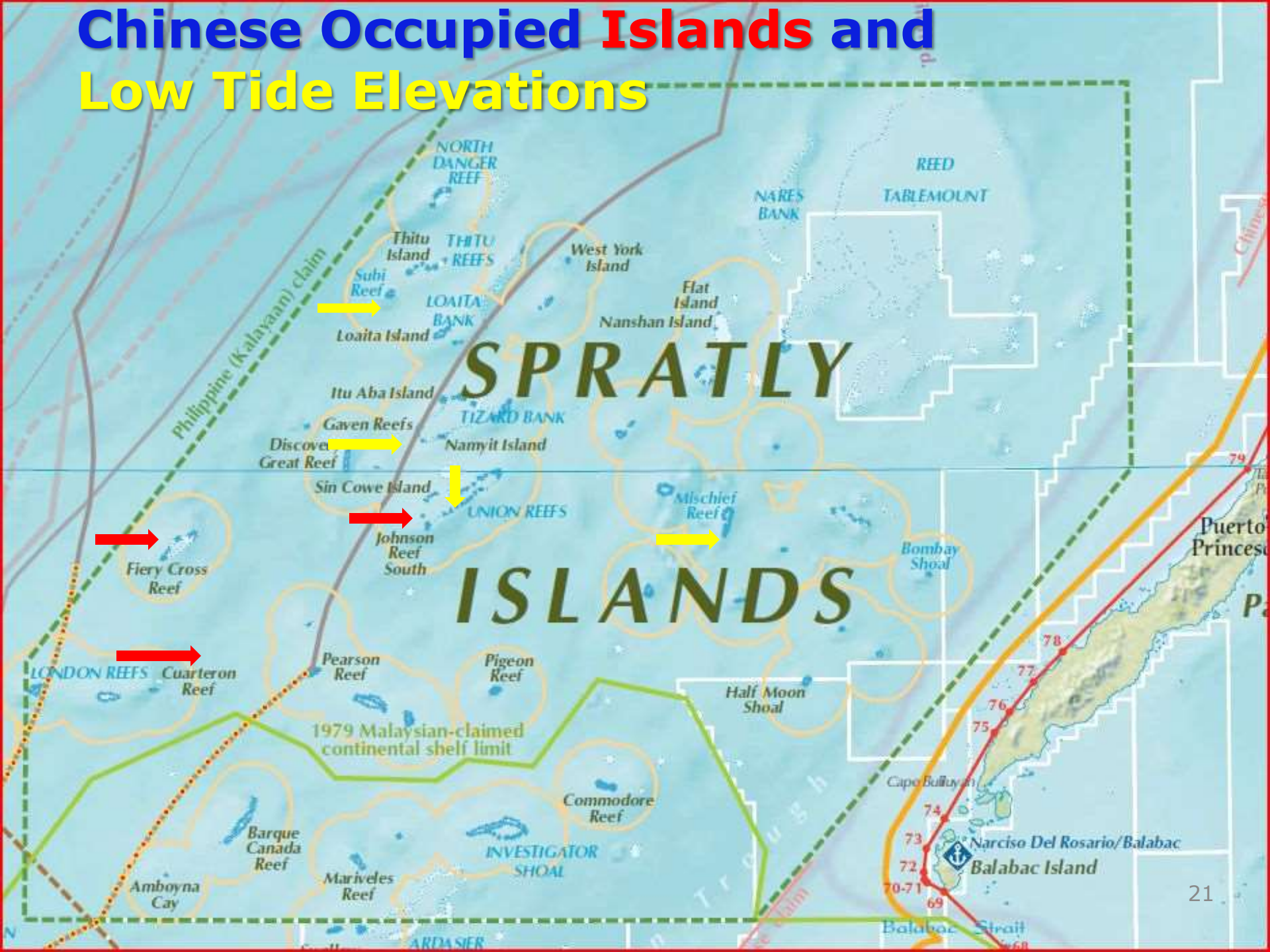
Relief Sought by Philippines

5. Declare that Philippines is entitled maritime zones measured from its archipelagic baselines
6. Declare that China has unlawfully claimed and unlawfully exploited living and non-living resources in the Philippines' EEZ and on the Philippines' continental shelf
7. Declare that China as unlawfully interfered with navigation rights and other rights of the Philippines in areas within and beyond its 200 nm EEZ
8. Require China to bring its domestic legislation into conformity with UNCLOS

What Philippines Does NOT Seek

1. Does NOT seek a determination of which Party enjoys **sovereignty over the islands** claimed by them
2. Does NOT request any **delimitation of maritime boundaries**
3. Philippines is conscious of China's Declaration under Article 298 and has avoided raising any subjects or making any claims that China excluded from arbitral jurisdiction
4. Claims do not fall within China's Declaration under Article 298:
 1. Do not concern boundary delimitation
 2. Do not involve historic bays or titles or military activities or law enforcement activities

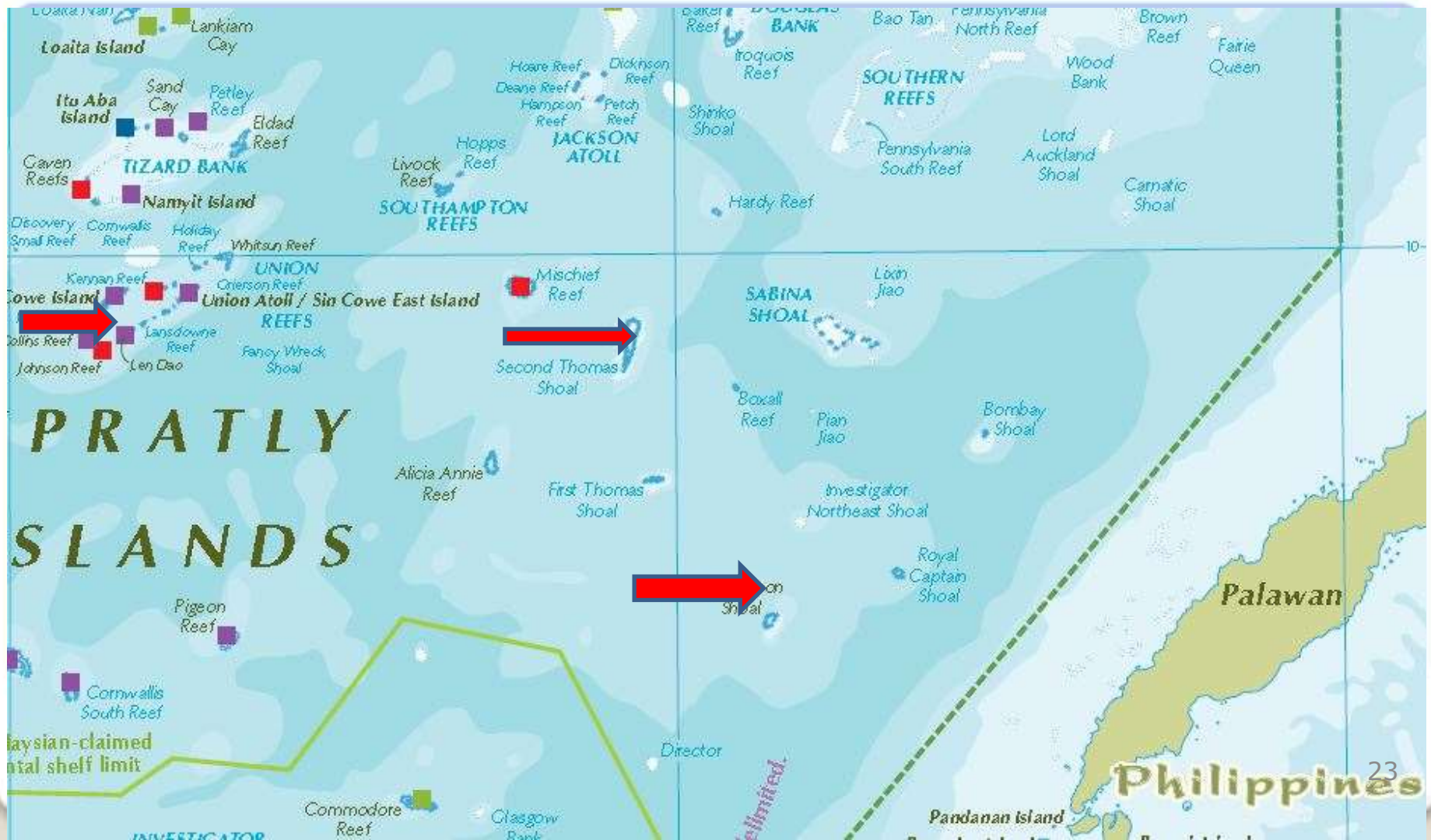
Chinese Occupied Islands and Low Tide Elevations



Cuarteron Reef : “Rock” outside EEZ of Philippines?



Mischief Reef, Johnson Reef and Second Thomas Shoal & Half Moon Shoal



Mischief Reef: Low-Tide Elevation with Installations & Structures ?



Second Thomas Shoal: Low-Tide Elevation in whose jurisdiction?



Johnson Reef: “Rock” being converted to an Island ?



Scarborough Shoal: Rock or Island?



Scarborough Shoal





Challenge to Jurisdiction ?

- Under Article 288 of UNCLOS, if one party challenges the jurisdiction of the Tribunal, the Tribunal will decide the issue of whether it has jurisdiction
- If China formally challenged jurisdiction this issue could be heard as a preliminary matter, before any hearing on merits

Grounds on which China could Challenge Jurisdiction

1. Dispute raised by Philippines cannot be separated from issues of sovereignty and maritime boundaries, and these issues are not within the jurisdiction of the Tribunal
2. Dispute excluded by China's Declaration under Art 298
3. Parties have not exhausted all means of settling the dispute by negotiation
4. The 2002 Declaration of Conduct is a binding agreement that provides that disputes between the parties can only be resolved by negotiation

Appointment of 1st two arbitrators

- 22 Jan 2013 - Philippines gave Notification & Statement of Claim nominated **Judge Rudiger Wolfrum (Germany)** as arbitrator
- 19 February – China sent Note Verbale stating that it did not intend to participate in the case
- 22 February – Philippines requested ITLOS President to appoint one arbitrator. Following consultation with the parties by correspondence, ITLOS President Yanai appointed ITLOS Judge **Stanislaw Pawlak (Poland)** as a member of the tribunal

Appointment of Remaining 3 Arbitrators

- 25 March 2013 –Philippines requested ITLOS President to appoint the remaining 3 arbitrators
- 23 April 2013 - ITLOS President appointed:
 - **Jean-Pierre Cot** (ITLOS Judge, France) (UN List by Mongolia)
 - **Alfred Soons** (The Netherlands) (UN List by The Netherlands)
 - **Chris Pinto** (Sri Lanka) **PRESIDENT** (UN List by Sri Lanka)

Replacement of President of Tribunal

- 27 May 2013 : the Philippines informed ITLOS President Yanai that Chris Pinto has elected to step down from the Tribunal and requested that the President appoint a replacement
- 30 May 2013: Ghana nominated Thomas Mensah to the UN List of Arbitrators
- 21 June 2013: ITLOS President Yanai appointed **Mr Thomas Mensah** (former ITLOS President) to replace Chris Pinto as President of the Tribunal

First Procedural Order of Tribunal

- 11 July 2013: Tribunal met for first time in Peace Palace at The Hague
 - Tribunal decided that the Permanent Court of Arbitration at The Hague shall act as registry
- July 2013: Tribunal provided both parties with draft Rules of Procedure and timetable for the proceedings
 - 31 July 2013: Philippines submitted comments on the draft
 - 1 August 2013: China reiterated that not participating in the case
- 27 August 2013: Tribunal issued first Procedural Order adopting **Rules of Procedure** and fixing **30 March 2014** as the date on which the Philippines must submit its **written Memorial**

Philippine's Legal Team

- Solicitor General Francis H Jardeleza
- Paul Reichler, Foley Hoag, Washington DC
- Larry Martin, Foley Hoag, Washington DC
- Prof Bernard Oxman, University of Miami
- Prof Philippe Sands, University College London
- Prof Alan Boyle, University of Edinburgh

Second Procedural Order of Tribunal

- 30 March 2014: **Philippines submitted Memorial**
 - Memorial addresses issues on Jurisdiction and Admissibility as well as its claims on the Merits
- 14-15 May 2014: Tribunal met for second time at The Hague
- May 2014: Tribunal gave each party the opportunity to comment on scheduling and draft Procedural Order No. 2
- 29 May 2014: Philippines submitted comments; China reiterated that it does not accept the arbitration
- 3 June 2014: Tribunal issued Procedural Order No. 2 fixing **15 Dec 2014** as the **date for China to submit its Counter-Memorial**

What Next? China could still Object to the Jurisdiction of the Tribunal before 15 Dec 2014

- Article 20 of Rules of Procedure:
 - 2. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial. A Party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator.
 - 3. The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

What Next? Supplemental Written Submission by Philippines?

- 2. In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party.
- The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal **within three months of the Arbitral Tribunal's invitation.**
- The supplemental submission of the appearing Party shall be communicated to the non-appearing Party for its comments which shall be submitted **within three months** of the communication of the supplemental submission.

What Next? Hearings before the Tribunal

Article 23. Hearings

- 1. There shall be a hearing at which the Parties may make their oral submissions. A hearing shall be held as soon as practicable and preferably within three months of the close of written pleadings.
- 2. The Arbitral Tribunal shall give the Parties adequate advance notice of the date, time, and place of any hearing.

Article 14 : Upon consulting the Parties, the Arbitral Tribunal may conduct hearings at any location it considers appropriate.

What Next? Site visits and production of evidence?

Article 22. Evidence

- 2. The Arbitral Tribunal may take all appropriate measures in order to establish the facts including, when necessary, the conduct of a visit to the localities to which the case relates. The Parties shall afford the Arbitral Tribunal all reasonable facilities in the event of such a visit.
- 4. . . the Arbitral Tribunal may, at any time during the arbitral proceedings, require the Parties to produce documents, exhibits or other evidence within such a period of time as the Arbitral Tribunal shall determine

What next? Expert Opinion Testimony

- After seeking the views of the Parties, the Arbitral Tribunal may appoint one or more independent experts.
- That expert may be called upon to report on specific issues and in the manner to be determined by the Arbitral Tribunal.

Estimated Timeline by Philippine's Counsel Paul Reichler at CSIS talk

- 31 Mar 2014 Philippine's Memorial Deadline
- 15 Dec 2014 China's Counter-Memorial Deadline
- 16 Dec 2014 Tribunal's Questions to Philippines
- 16 Mar 2015 Philippine's Answers to Questions
- 7-18 July 2015 Oral Hearings before the Tribunal
- Jan 2016 Anticipated Issuance of Award

Thanks for your Attention !

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