

Chinese Perspectives on the *Philippines-China Arbitration Case* in the South China Sea

LEE Seokwoo*, HONG Nong**

<Abstract>

From 2009 several major developments occurred that once again stirred up controversy in the South China Sea (SCS) and highlighted the difficulties of maintaining stability in the region. The Philippines has stepped forward with a series of movements, including its notification on January 22, 2013 to China that it sued this State by establishing an arbitration tribunal according to Annex VII of United Nations Convention on the Law of the Sea (UNCLOS). In response, China, on January 31, rejected this request.

What is the consequence following this? Will the arbitration tribunal exercise jurisdiction over this dispute? The formulation of a tribunal without the appointment of an arbitrator from China certainly disadvantages China. What is the impact of the Philippine's arbitration initiative for the negotiation and drafting process of the Code of Conduct that ASEAN and many stakeholders, such as US, are desperately hoping for? What is the value and role of the UNCLOS in maritime dispute settlements in the South China Sea and in a broader sense?

This paper attempts to address the above questions from the Chinese perspective. It first lays out the dispute settlement regime under Part XV of UNCLOS, and then explores the different approaches of the SCS claimant States towards a third party compulsory settlement mechanism and state practice of maritime dispute settlement. It then looks closely at the Philippines' arbitration notification and statement and discusses the process and substance of this case. It lists possible reactions of China by analyzing the potential cost and benefit of each approach. It continues to explore the impact of this test by the Philippines on the ongoing efforts and processes of a conflict management and dispute settlement in this SCS dispute. The role and value of UNCLOS in maritime dispute settlement will also be discussed.

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* Professor of International Law, Inha University Law School, Korea.

** Associate Professor, National Institute for South China Sea Studies, China.

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I . Introduction

The existing territorial and maritime disputes in the South China Sea (SCS) have been pending for decades. Despite tremendous efforts on conflict management, the settlement of the decades-old maritime dispute in the SCS seems to be politically deadlocked, and a quick solution appears to be difficult, if not impossible.

The signing of the 2002 Declaration of Conduct of Parties in the South China Sea (DoC) by China and ASEAN member States contributed to a quiet and stable period from 2002 to 2009 in this region. From 2009 several major developments occurred that once again stirred up controversy in the SCS and highlighted the difficulties of maintaining stability in the region, including the national legislation by the Philippines on the archipelagic baseline bill, the submission to the Commission of Limits of Continental Shelf (CLCS) by some claimant States, and as a consequence, China's submission to the UN Secretary General of a map of its U-shape Line which continues to arouse overwhelming reactions from the claimant States and other stakeholders. The SCS has been stirred into an even muddier pool in 2010 with the

focus switched to the China-US spat on the so-called “core interest” statement by China and the following counterpart statement on “national interest” by US Secretary of State Hilary Clinton. The tension in the SCS continued to escalate in 2011 and 2012 with a series of events between the claimants.

The Philippines has stepped forward with a series of movements, including changing the name of the South China Sea to the West Philippine Sea, and starting the stand-off in the Scarborough Shoal with China by engaging its naval ships. The most recent step was its notification on January 22, 2013 to China that it will sue this largest claimant State by establishing an arbitration tribunal according to Annex VII of United Nations Convention on the Law of the Sea (UNCLOS). In response, China, on January 31, rejected this request. What is the consequence following this? Will the arbitration tribunal exercise jurisdiction over this dispute? The formulation of a tribunal without the appointment of an arbitrator from China certainly disadvantages China. What is the impact of the Philippine’s arbitration initiative for the negotiation and drafting process of the Code of Conduct that ASEAN and many stakeholders, such as US, are desperately hoping for? What is the value and role of the UNCLOS in maritime dispute settlements in the South China Sea and in a broader sense?

This paper attempts to address the above questions from the Chinese perspective. It first lays out the dispute settlement regime under Part XV of UNCLOS, and then explores the different approaches of the SCS claimant States towards a third party compulsory settlement mechanism and state practice of maritime dispute settlement. It then looks closely at the Philippines’ arbitration notification and statement and discusses the process and substance of this case. It lists possible reactions of China by analyzing the potential cost and benefit of each approach. It continues to explore the impact of this test by the Philippines on the ongoing efforts and processes of a conflict management and dispute settlement in this SCS dispute. The role and value of UNCLOS in maritime dispute settlement will also be discussed.

II. Dispute Resolution under UNCLOS

Part XV of the UNCLOS provides for compulsory adjudication over disputes arising under the Convention. Under Article 287, States parties enjoy a choice of procedure and may choose among (1) the ITLOS, (2) the ICJ, (3) an arbitral tribunal formed under Annex VII to the Convention, or (4) a special arbitral tribunal formed under Annex VIII.

The Annex VII arbitral tribunal is the “default” procedure. In other words, where the disputing parties have not selected the same means, the dispute is referred to arbitration under Annex VII.¹⁾ Since neither the Philippines nor China agreed on a choice of tribunal, the Philippines sought Annex VII Arbitration.

Article 3 of Annex VII governs the constitution of the arbitral tribunal. Each party has the right to appoint one of the five members of the arbitral panel. After the party instituting the proceedings has selected the first member of the tribunal (who may be a national)²⁾, the other party has 30 days to appoint the second member (who may also be a national)³⁾ - but if the latter fails to appoint the second member within that time, the party instituting the proceedings may request that the appointment be made by the President of ITLOS.⁴⁾ As for selecting the remaining three members of

¹⁾ United Nations Convention on the Law of the Sea, arts. 287 (3) and (5), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*]. *Mauritius v. United Kingdom*, which was instituted in December 2010 and is still pending; *Bangladesh v. India*, which was instituted in October 2009 and is still pending; *Barbados v. Trinidad and Tobago*, which was instituted in February 2004 and decided by a final award rendered on April 11, 2006; *Guyana v. Suriname*, which was instituted in February 2004 and decided by a final award rendered on September 17, 2007; *Malaysia v. Singapore*, which was instituted in July 2003 and terminated by an award on agreed terms rendered on September 1, 2005; and *Ireland v. United Kingdom* (“MOX Plant Case”), which was instituted in November 2001 and terminated through a tribunal order issued on June 6, 2008.

²⁾ *Id.* Annex VII, art. 3(b).

³⁾ *Id.* Annex VII, art. 3(c).

⁴⁾ *Id.* Annex VII, arts. 3(c) and (e).

the tribunal and its president, if the parties are unable to reach agreement, these appointments are made by the President of ITLOS at the request of either party.⁵⁾ Finally, should a vacancy in the tribunal occur, it should be filled “in the manner prescribed for the initial appointment.”⁶⁾

III. An Overview on the Arbitration Notification of the Philippines

On January 22, 2013, the Philippines submitted a Notification and Statement of Claim to China (hereafter referred to as Notification and Statement) under Article 287 and Annex VII of UNCLOS, in order to initiate arbitral proceedings over maritime dispute in the South China Sea.⁷⁾ On January 31, China rejected and returned the Notification and Statement of Claim of the Philippine government to initiate arbitral proceedings, and reiterated its opposition to the Philippines' request of taking South China Sea disputes to an arbitration tribunal.⁸⁾

In accordance with article 3(b) of Annex VII, the Notification and Statement of Claim included the appointment of ITLOS Judge Rüdiger Wolfrum (Germany) as a member of the arbitral tribunal. After this, the Chinese government had 30 days from January 22 to appoint an arbitrator. However, on February 19, 2013, China officially refused to participate in the arbitral proceedings.⁹⁾

⁵⁾ *Id.* Annex VII, art. 3(d).

⁶⁾ *Id.* Annex VII, art. 3(f).

⁷⁾ Department of Foreign Affairs (DFA Philippines), *DFA: Notification and statement claim on West Philippine Sea*, Official Gazette, Jan. 22, 2013, available at <http://www.gov.ph/2013/01/22/dfa-notification-and-statement-claim-on-west-philippine-sea-january-22-2013/>.

⁸⁾ *China reiterates opposition to Philippines' arbitration bid*, SinaEnglish, Feb. 20, 2013, available at <http://english.sina.com/china/2013/0220/563275.html>.

⁹⁾ *China rejects Philippines' arbitral request*, China Daily, Feb. 19, 2013, available at http://www.chinadaily.com.cn/china/2013-02/19/content_16238133.htm.

Following China's decision not to participate, the Philippines requested the President of the ITLOS, Judge Shunji Yanai, by a letter dated February 22, 2013 to appoint one member of the arbitral tribunal, pursuant to article 3(c) and (e) of Annex VII. The President subsequently appointed ITLOS Judge Stanislaw Pawlak (Poland) as an arbitrator.

Through a letter dated March 25, 2013, the Philippines requested the President, pursuant to article 3(d) and (e) of Annex VII, to "appoint the three additional members of the arbitral tribunal and name one among them to serve as the president of the tribunal." On April 24, 2013, the President appointed three arbitrators: Jean-Pierre Cot (France), Chris Pinto (Sri Lanka) and Alfred Soons (the Netherlands). In addition, the President appointed Chris Pinto as president of the arbitral tribunal.

However, through a letter dated May 27, 2013, the Philippines informed the President that "Mr M.C.W. Pinto has elected to step down as a member and President of the arbitral tribunal in these proceedings" and that "[t]he vacancy left by his departure therefore needs to be filled," and requested, in accordance with article 3(e) and (f) of Annex VII, that the President appoint a replacement. On June 21, 2013, the President appointed former President of the ITLOS, Mr. Thomas A. Mensah (Ghana) as arbitrator and president in the arbitral proceedings.

The composition of the five-member Annex VII arbitral tribunal is now as follows: Thomas Mensah, president (Ghana), Jean-Pierre Cot (France), Stanislaw Pawlak (Poland), Alfred Soons (the Netherlands) and Rüdiger Wolfrum (Germany).

Despite China's non-participation, therefore the arbitral tribunal was nonetheless formally constituted and recently held its first meeting at The Hague, Netherlands on July 11, 2013. Following this meeting, the tribunal gave its first Procedural Order, fixing a deadline of March 30, 2014 for the Philippines to file a memorial and adopting the Rules of Procedure.¹⁰⁾

¹⁰⁾ Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable, Permanent Court of Arbitration (Aug. 27, 2013), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529.

IV. The Matter of Jurisdiction

Article 283 of UNCLOS requires the parties to the dispute to proceed expeditiously to “an exchange of views regarding the settlement through negotiation or other peaceful means.” The parties are also required to proceed expeditiously to an exchange of views “where a procedure for the settlement of such a dispute has been terminated without a settlement.”¹¹⁾ The Philippines claims in its Notification and Statement that its obligation to exchange views has been satisfied.¹²⁾ Its argument is unconvincing as it is well known that China has been calling on the other claimant States, including the Philippines, to engage in direct negotiation on territorial and maritime disputes. The Philippines, however, has inclined towards a regional approach, e.g., putting the dispute under the ASEAN umbrella against China. In its draft of the Code of Conduct (CoC), it insists on including a third-party compulsory settlement mechanism, while China believes that CoC should serve as a conflict management forum, rather than a dispute settlement forum. In the Scarborough Shoal stand-off, China has called on the Philippines to a direct negotiation on this issue.¹³⁾ The Philippines rejected bilateral negotiation with China and chose to call for international support instead.¹⁴⁾

¹¹⁾ UNCLOS, *supra* note 1, art. 283.

¹²⁾ DFA Philippines, *supra* note 7, ¶¶ 25-30.

¹³⁾ Liu Weiming, Spokesman of MFA of China said on June 14, 2012 that China hopes to solve the Huangyan Island through negotiation with the Philippines. *See*, 中方:望菲方与中方相向而行處理黃岩島問題 [*China: Wang Philippines and China towards the problem of handling the Huangyan Island*], National Institute for South China Sea Studies, June 15, 2012, http://www.nanhai.org.cn/news_detail.asp?newsid=2636.

¹⁴⁾ Minister of DFA of the Philippines Albert Del Rosario stated on November 11 2012 that the Philippines does not accept a bilateral approach to address the South China Sea dispute, which is not a bilateral or regional issue, but an international issue. *See*, 菲律賓稱將主辦東盟內部南海聲索國四方會議 [*Philippines said it would host the ASEAN countries within the South Sound Quartet cable*], National Institute for South China Sea Studies, Nov. 22, 2012, http://www.nanhai.org.cn/news_detail.

Article 295 of UNCLOS requires the States to exhaust local remedies before submitting to the procedures of UNCLOS Part XV. China and ASEAN are still working on drafting a CoC. The condition set by Article 295 of local remedies has not been satisfied in the case between the Philippines and China.

There are two opposite views on whether an arbitration tribunal will be established without China's agreement with the Philippines. Since China on January 31, 2013 returned to the Philippines its Notification and Statement, the arbitration tribunal will likely rule out itself the jurisdiction. There could be another argument, however. Whether a court or tribunal established under UNCLOS-Part XV has jurisdiction, does not depend on the recognition or acceptance of State party after the dispute occurs. China, with its ratification of UNCLOS in 1996, accepts the jurisdiction of dispute settlement mechanism set by UNCLOS-Part XV, unless the disputes fall under an exception. The Philippines has expressed a deep confidence based on this interpretation. In a statement, the Department of Foreign Affairs of the Philippines said China's action "will not interfere with the process of arbitration initiated by the Philippines on January 22, 2013 ... The arbitration will proceed under Annex VII of UNCLOS and the 5-member arbitration panel will be formed with or without China."¹⁵⁾

China made a declaration under Article 298 of UNCLOS to exclude any disputes with relevance to territory, maritime delimitation, historic titles, and military activities from a third party compulsory body. China's 2006 Declaration states that it "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."¹⁶⁾ Article 299 defines the right of the parties

asp?newsid=4294.

¹⁵⁾ Pia Lee-Brago, *China rejects UN arbitration on West Philippine Sea*, The Philippine Star, Feb. 20, 2013, available at <http://www.philstar.com/headlines/2013/02/20/910910/china-rejects-un-arbitration-west-phl-sea>.

¹⁶⁾ U.N. Oceans & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, *Declarations and statements*, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Chinaafter (China made the declaration on

to agree upon a procedure. Paragraph 1 states that “A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute.”

IV.1. Claim of the Philippines

In its Notification and Statement of Claims, the Philippines made four distinct claims: (1) China’s nine-dashed line is invalid; (2) China occupied mere rocks on Scarborough Reef rather than significant features; (3) China’s structures on submerged features are illegal; and (4) Chinese harassment of Philippine nationals at sea is also illegal.¹⁷⁾

On January 22, 2013, the Philippines Foreign Minister also made the following statement:

1. The Philippines asserts that China’s so-called nine-dash line claim that encompasses virtually the entire South China Sea/West Philippine Sea is contrary to UNCLOS and thus unlawful.
2. Within the maritime area encompassed by the 9-dash line, China has also laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as islands under UNCLOS, but are parts of the Philippine continental shelf, or the international seabed. In addition, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are “rocks” under Article 121(3) of UNCLOS.
3. China has interfered with the lawful exercise by the Philippines of its rights within its legitimate maritime zones, as well as to the aforementioned features and their surrounding waters.
4. The Philippines is conscious of China’s Declaration of August 25, 2006 under

Aug. 25, 2006).

¹⁷⁾ DFA Philippines, *supra* note 7.

Article 298 of UNCLOS (regarding optional exceptions to the compulsory proceedings), and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.¹⁸⁾

Being clearly aware of China's rational, in the Notification and Statement, the Philippines attempted to de-link its statement from the terms of "territory", "maritime delimitation", and "historic title". First, in its paragraph 31, the Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are described as submerge features that are below sea level at high tide, which qualifies as "rocks" under Article 121(3) of UNCLOS, and are entitled to generate a Territorial Sea no broader than 12 nm. It is correct to understand that defining the legal status of insular features falls within the jurisdiction of a court or tribunal under UNCLOS. However, the Philippines must present a clear fact that China actually abuses the definition of Article 121. In this case, China has never stated that all the features are entitled to a maritime zone as EEZ or continental shelf. The Philippine's claims in its Notification and Statement are thus questionable.

Second, in Paragraph 40 of the Notification and Statement, it states that "the Philippines' claims do not fall within China's Declaration of August 25, 2006, because they do not: concern the interpretation or application of Article 15, 74 and 84 relating to sea boundary delimitations; involve historic bays or titles ... concern military activities or law enforcement activities ..." However, China could also argue that many of the issues (but not all) stated by the Philippines cannot be ruled on without considering some aspects of boundary delimitation. In addition, some of China's "law enforcement activities" in its claimed waters are excluded from arbitration, as provided by Article 298, paragraph 1(a)(iii). "The only way for UNCLOS to have jurisdiction over the case is to give it a retrospective power, which

¹⁸⁾ Secretary Albert del Rosario, *Statement: The secretary of foreign affairs on the UNCLOS arbitral proceedings against China*, Official Gazette, Jan. 22, 2013, available at <http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/>.

arguably constitutes an abuse of rights and goes against the legal principle of good faith (Article 300 of UNCLOS).¹⁹⁾ Hence, the Arbitration Tribunal will not give itself jurisdiction based on the claims of the Philippines.

IV.2. China's Response

The day after the Philippines filed its Notification and Statement of Claims, on January 23, 2013, the Chinese Foreign Ministry spokesman stated that China has “indisputable sovereignty” over the South China Sea under “abundant historical and legal grounds.”²⁰⁾ He blamed the cause of the dispute on the Philippines’ “illegal occupation of some of the Chinese islets and atolls of the Spratly Islands,” and claimed that China has been “consistently working towards resolving the disputes through dialogue and negotiations to defend Sino-Philippine relations and regional peace and stability.”²¹⁾

On February 19, 2013, however, China officially refused to participate in the proceedings.²²⁾ In addition, China accused the Philippines of making factually flawed and false accusations, and violating the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DoC).²³⁾ China also repeated its preference for direct

¹⁹⁾ B.A. Hamzah, *Has Manila broken ranks with ASEAN?*, New Strait Times, Feb. 6, 2013, available at <http://www.nst.com.my/opinion/columnist/has-manila-broken-ranks-with-asean-1.213736#>.

²⁰⁾ *China reiterates islands claim after Philippine UN move*, BBC, Jan. 23, 2013, available at <http://www.bbc.co.uk/news/world-asia-21163507>.

²¹⁾ *Id.*

²²⁾ *China rejects Philippines' arbitral request*, *supra* note 9.

²³⁾ Declaration on the Conduct of Parties in the South China Sea, Nov. 4, 2002, available at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> [hereinafter *DoC*]. Article 5 states that “[t]he Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.” See also *id.*, art. 4.

bilateral talks.²⁴⁾ Subsequently, as mentioned above, the President of ITLOS appointed the second arbitrator. Later, on 24 April 2013, the President also appointed the remaining three arbitrators.

That same day, China offered a more detailed explanation of its position in a press conference held at its Ministry of Foreign Affairs.²⁵⁾ China's position may be summarized as follows:

1. The Philippines - not China - is illegally occupying various islands in the South China Sea.
2. Although the Philippines claims it is not contesting sovereignty, it has consistently stated that it is seeking a "durable solution", which is "self contradictory."
3. The "Land Dominates the Sea" principle means that all of the Philippines' claims are essentially maritime delimitation claims that involve questions of territorial sovereignty. Such questions, however, are excluded from UNCLOS arbitration. Thus, China's rejection of the arbitration has a "solid basis in international law."
4. Every nation in the region has committed to the Declaration of the Code of Conduct for the South China Sea (DoC), which obligates them to resolve disputes on territorial and maritime rights through bilateral negotiations.

Recently, on July 16, 2013, China reiterated its position at another press conference at the Ministry of Foreign Affairs.²⁶⁾

²⁴⁾ *China rejects Philippines' arbitral request, supra note 9.*

²⁵⁾ Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea*, Apr. 26, 2013, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.html>.

²⁶⁾ Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Statement on the South China Sea*, July 16, 2013,

V. Issues to Consider

Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction of the dispute but also that the claim is well founded in fact and law.²⁷⁾ China considered both the note and notice of arbitration as having “serious mistakes both in fact and law.”²⁸⁾

Paragraph 11 in the Notification and Statement accuses China of claiming “almost the entirety of the South China Sea ... it is (has) sovereign over all of the waters, all of the seabed, and all of the maritime features within this ‘nine dash line’.”²⁹⁾ China has never stated that it claims “all of the waters and seabed’ within the U-shape Line. The Notification and Statement obviously confuses the concept of sovereignty referring to insular features and 12 nm of territorial sea arising from them, and the sovereign right given to 200 nm of EEZ and the Continental Shelf. By mixing these two concepts, the Philippines deliberately sent a wrong message about China’s claim in the Notification and Statement.

In paragraph 13, the Philippines assert that “China placed the entire maritime area within the ‘nine dash line’ under the authority of the Province of Hainan ...” What this paragraph appears to refer to is the Regulation of the Security of Coastal Areas and Borders passed by Hainan Provincial People’s Congress on November 27, 2012. Hainan was established as a province and a special economic zone in 1988, which authorizes Hainan the jurisdiction right to govern part of the South China Sea under China’s territorial and maritime claim. It is an amendment to the 1999 Regulation of the Security of Coastal Areas and Borders to address the new challenges that China faces in its maritime jurisdiction areas, which certainly does not include “all waters within the ‘nine dashed line’” as alleged by the Philippines. This background of this

available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1059343.shtml>.

²⁷⁾ UNCLOS, *supra* note 1, Annex VIII, art. 9.

²⁸⁾ *China reiterates opposition to Philippines' arbitration bid available*, Xinhua News Agency, Mar. 20, 2013, *available at* <http://english.sina.com/china/2013/0220/563275.html>.

²⁹⁾ DFA Philippines, *supra* note 7.

amended Regulation must be taken into consideration. China's maritime jurisdiction right has been seriously violated in the areas around Paracel Islands (Xisha Islands), which is governed by the Hainan Provincial Government, by activities such as illegal fishing by foreign vessels. In order to enhance legal enforcement, the Hainan Provincial People's Congress decided to revise the 1999 Regulation by adding new provisions, such as authorizing its legal enforcement vessels to board the foreign vessels that conduct illegal activities in China's internal waters and territorial seas.

In paragraphs 20, 22, 23 and 24 of its Notification and Statement, the Philippines seems to imply that the nine-dash line claim constitutes a claim to extended zones around the features. China has never specifically claimed maritime zones beyond a territorial sea around the features that it occupies or claims. Adjacent waters can mean the territorial sea—not necessarily EEZ or continental shelf. “The Philippines brings the case to the tribunal under UNCLOS. Those familiar with jurisdictional claims in the South China Sea are aware of the nine-dash line, published in 1948. This means the line has preceded UNCLOS by thirty-four years; UNCLOS came into force in 1996.”³⁰⁾

In Paragraph 31 of the Notification and Statement, the Philippines alleges that the “nine-dashed line” claim is “invalid,” “a violation of UNCLOS” and “unlawful”. However, a claim to historic title (rights) is not *prima facie* “invalid,” a violation of UNCLOS or “unlawful”. China has never claimed “sovereignty” over the area (not the islands) as “historic waters”. This is “an abuse of legal process” by the Philippines which is prohibited by Article 294 and cause for “no further action in the case.” China seems to claim “historic title” (rights) to a share of the resources within the line. There is a difference between historic waters and historic title or historic rights. In particular, “historic waters” usually implies a regime of internal waters in which there is no freedom of navigation. The other terms do not imply this.

V.1. Consequences of Not Participating

³⁰⁾ Hamzah, *supra* note 19.

Article 9 of Annex VII Arbitration (Default of appearance) provides as follows:

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. *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 law.³¹⁾

By acceding to UNCLOS, China has already consented to Annex VII Arbitration as the “default” mode of dispute resolution. At the minimum, China has consented to the creation of an arbitration tribunal and the competence of that tribunal to decide whether it has jurisdiction.

In short, China’s refusal to participate has only succeeded in losing its chance to (1) appoint a sympathetic arbitrator or president, and (2) attempt to persuade the tribunal with submissions. This may ultimately negatively affect the findings of the tribunal on both jurisdiction and the merits.

V.2. Does the Annex VII Arbitral Tribunal have jurisdiction? What is the Effect of China’s 2006 Declaration?

The biggest obstacle to the Philippines’ claims is the issue of jurisdiction.

Under Article 288(4) of UNCLOS, an Annex VII arbitral tribunal has the power to decide its own jurisdiction. Here, the question of jurisdiction will turn on the interpretation and application of China’s Declaration on 25 August 2006, which excludes several disputes from consideration by the tribunal, including disputes concerning sea boundary delimitations, historic bay or titles, and territorial sovereignty disputes.³²⁾

³¹⁾ Emphasis added.

³²⁾ *Declarations and statements, supra* note 16

In its Statement of Claim, the Philippines' lawyers tried to carefully avoid implicating any of these "off-limits" categories - in particular boundary delimitations. The Statement of Claims states that:

the Philippines seeks an Award that: (1) declares that the Parties' respective rights and obligations in regard to the waters, sewed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid; (2) determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and (3) enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.³³⁾

Such careful wording can also be seen in the final pages of the Statement of Claim which address the "Relief Sought."³⁴⁾

However, it is possible that the arbitral tribunal may find that some of the Philippines' claims implicate sea boundary delimitations.³⁵⁾ If so, the tribunal will likely conclude that it has no jurisdiction over those claims. Ultimately, the applicability of a China's 2006 Declaration is something that the tribunal will decide under its *Kompetenz-Kompetenz*.

It must be noted however that the tribunal will determine the issue of its

³³⁾ DFA Philippines, *supra* note 7.

³⁴⁾ Dapo Akande, *Philippines Initiates Arbitration Against China over South China Seas Dispute*, EJIL: Talk!, Jan. 22, 2013, available at <http://www.ejiltalk.org/philippines-initiates-arbitration-against-china-over-south-china-seas-dispute/>.

³⁵⁾ Susan Simpson, *Annex VII Arbitration, Annex V Mandatory Conciliation, and China's Nine-Dashed Line*, The View from LL2 Blog, Feb. 27, 2013, available at <http://viewfromll2.com/2013/02/27/annex-vii-arbitration-annex-v-mandatory-conciliation-and-chinas-nine-dashed-line/>.

jurisdiction without China's arguments since China has refused to participate.

Due to the uncertainty hanging over the jurisdiction issue, it is not surprising that the Philippines selected the former president of ITLOS, Rüdiger Wolfrum, as its arbitrator. Judge Wolfrum has stated that

there can be no doubt that disputes concerning the interpretation or application of other provisions, that is, those regarding the territorial sea, internal waters, baselines and closing lines, archipelagic baselines, the breadth of maritime zones and islands, are disputes concerning the Convention (see articles 3 to 15, 47, 48, 50, 57, 76 and 121).³⁶⁾

In other words, he believes that UNCLOS tribunals have the jurisdiction over delimitation disputes that arise in the context of UNCLOS provisions even if they do not directly concern delimitation, so long as they indirectly affect it.³⁷⁾

Furthermore, the implications of Judge Wolfrum's statement regarding the applicability of UNCLOS to such disputes on state declarations that reject the application of UNCLOS in such matters is that UNCLOS would nevertheless apply. Regarding state declarations [not under art. 298], the general view would be that they are not legally binding and that the subject matter is subject to dispute settlement under the UNCLOS. The Convention is famously a "package deal" and it specifically states in Article 309 that "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." Article 310 then goes on to set the terms for such declarations/statements and it is noted that while these are not precluded they should not "purport to exclude or modify the legal effect of the provisions of this Convention."

³⁶⁾ Rüdiger Wolfrum, *Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs*, at 4, Oct. 23, 2006, available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf.

³⁷⁾ See Simpson, *supra* note 35.

VI. Possible Scenarios

China has a fundamental decision to make. It can respond and become enmeshed in the international legal system - largely developed, dominated, and driven by the West according to Western perspectives on philosophy and principles - where it may be at a disadvantage. Moreover, while the Philippines appointed Judge Rüdiger Wolfrum (Germany) as a member of the arbitral tribunal under Article 3(b) of Annex VII, China has lost its chance to appoint an arbitrator in its favor. Subparagraph (c) gives the other party to a dispute 30 days upon receiving the notification to appoint one member to be chosen preferably from the list drawn up and maintained by the Secretary-General of the United Nations. Since China has not made this appointment, the Philippines requested that the appointment be made by the President of ITLOS in accordance with subparagraph (e). Furthermore, subparagraphs (d) and (e) provide that if the parties are unable to reach an agreement on the appointment of one or more the members of the tribunal within 60 days of the receipt of the notification, the President shall make the necessary appointments. In this case, Judge Shunji Yanai, a Japanese national, has accordingly appointed the other four arbitrators to form this five-member Arbitration Tribunal. With one arbitrator appointed by the Philippines - a decision made after a thoughtful consideration - together with four arbitrators appointed by the President of ITLOS, the membership of the tribunal does not favor China in any way.

Another possibility is that the panel can be recomposed if the states involved so agree - a panel can be suspended by the initiating party, and if it can be suspended it can certainly be reconstituted.

Article 298, paragraph 2 of UNCLOS provides that “A State Party that has made a declaration under paragraph 1 [of Article 298] may *at any time* withdraw it, or agree to submit a dispute excluded by such declaration to a procedure specified in the Convention.”³⁸⁾ Withdrawal of a declaration that earlier sought to place a category of

³⁸⁾ Emphasis added.

disputes outside the jurisdiction of a tribunal would seem to have the consequence of restoring the tribunal's jurisdiction with respect to that category of disputes. Since such withdrawal is permitted "at any time", it could take place after the tribunal has been established.

In such a situation, should the party withdrawing its declaration be "punished" by not being permitted to choose a member of the tribunal in the same manner as the Claimant State? If such a situation arises, it is for the tribunal as presently constituted to decide the matter.

Annex VII Article 2 provides that:

1. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity.
2. If at any time the arbitrators nominated by a State Party in the list so constituted shall be fewer than four, that State Party shall be entitled to make further nominations as necessary.

If actions under Article 3 do not foreclose the possibility of taking action under Article 2, then presumably China would still maintains the right to nominate four arbitrators. The language "if at any time" under Article 2(2) suggests that reconstitution of a tribunal is a possibility when a party has not participated in contributing names for arbitrators list. This makes a fair amount of sense because it would ensure that parties have some ownership in the process thereby giving the process legitimacy from the perspective of participating States.

It seems clear from the plain language of Annex VII that each party is at a minimum entitled to have at least one arbitrator entirely of their choosing who may be one its nationals. At least three of the arbitrators should have been on lists submitted by the parties and presumably China did not submit any lists for consideration. The ITLOS president is supposed to rely on the Article 2 list and "in consultation with the parties." To the extent that any existing tribunal does not reflect

a Chinese approved arbitrator or selection of arbitrators from a joint Philippines and China list, it is believed that the current tribunal lacks legitimacy as a dispute resolution body.

Annex VII specifically provides for the possibility of a non-collaborating party in the proceedings and permits the arbitration to move to the merits phase and even grant a final award. It is also possible for the arbitral tribunal to act upon the request of one of the parties (the applicant) and suspend the proceedings, in order to allow the parties to exercise their preference for another arbitration; the tribunal could even condition termination to the fact that alternative proceedings materialize within a certain period of time and eventually resume proceedings if that does not occur.

Alternatively, China can withdraw from (denounce) UNCLOS, or simply ignore the legal process, which has its own costs and benefits. Denunciation takes a year to go into effect and the case would proceed anyway. In addition, denunciation would likely result in international opprobrium and a continuous propaganda coup for anti-China factions in both the West and Asia. It will likely create fear and even instability in the region and draw many Asian States closer to the US as a “balancer” to China. Furthermore, China would lose the major propaganda advantage it has in Law of the Sea issues over the US—namely, that the US did not ratify the Convention and therefore has questionable legitimacy or credibility to cite or interpret various provisions in its favor.

There are also benefits to this approach. Withdrawal would provide more flexibility for China. Like the US, China could remain outside the Convention and pick and choose to follow favorable parts and interpretations without legal harassment and repercussions. It would send a strong message that China is not to be trifled with—that it will not be taken advantage of by small Asian countries and will set new precedents in international law and practice if necessary to protect its interests.

Even if no award of substance is made, a series of reactions may follow as a consequence. Once the Philippine’s test achieves its purpose, other countries who has maritime disputes with China may follow this practice. China will find itself in a passive position being continuously sued by other claimant States. This will damage

China's image and its belief in and efforts towards resolving the disputes through direct negotiation will end in vain.

The worst case scenario for China is that the Arbitration Tribunal makes an award that is not in China's favor. Though the Arbitration Tribunal does not have the capacity to force a country to implement its award, China's refusal to implement the award, if it chooses to do so, will result in a continuous propaganda coup for China in the SCS.

VII. Implication for SCS Dispute Resolution

By signing the DoC in 2002, China and ASEAN have laid down a political foundation for creating a peaceful and stable environment in the SCS. To address the so-called "no teeth" problem - DoC does not have a legal binding force - China and ASEAN are slowly working toward drafting a code of conduct (CoC). In the meantime, the question of how to implement the DoC is still listed as an important agenda. In July 2011, China and the ASEAN members reached a consensus on implementing the DoC³⁹⁾, laying a solid foundation for practical cooperation in the SCS. It was agreed that they should bring consultations on the guidelines to an early conclusion, implement the DoC in earnest and enhance practical cooperation. Subsequently, Chinese Premier Wen Jiabao stated at 14th China-ASEAN Summit on November 18, 2011 that China will establish a three billion Yuan (approximately half billion US dollar) China-ASEAN maritime cooperation fund.⁴⁰⁾

The difficulty of negotiating CoC has two aspects. First, among the ten ASEAN members, it is hard to reach consensus on many issues, e.g., which maritime areas

³⁹⁾ Nong Hong, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* 193 (Routledge, 2012).

⁴⁰⁾ Press Release, Premier Wen's statement at 14th China-ASEAN Summit, Chinese Government's Official Web Portal (Nov. 18, 2011), *available at* http://english.gov.cn/2011-11/18/content_1997716.htm.

should be included in the CoC (Vietnam wants to include Paracel Island in the CoC), whether a third-party compulsory settlement mechanism should be included in the CoC (the Philippines insists on including it in the CoC). Second, between China and ASEAN, China does not seem comfortable being left behind during the negotiation process. It wishes to participate in the negotiation from the very beginning, rather than waiting for the ASEAN to reach consensus before approaching it.

It is impossible to predict when the CoC will be finalized given these difficulties. The Philippines' Arbitration Initiative in January seems to add new elements to the process. So far, there has been no official response from the other claimant States of the SCS in support of the Philippines. "Their silence results possibly from disagreement with the manner the Philippines handled a vital matter in the light of Statement on ASEAN's Six Point Principles on the South China Sea of July 20 last year."⁴¹⁾ "However, many see Manila's action as a desperate act -- a publicity stunt to regain international prestige following the Scarborough Shoal fiasco in April last year."⁴²⁾ There is also skepticism from within the Philippines. "However neither party has invoked UNCLOS Article 283 (1) which should have been the first step."⁴³⁾ Although no one can predict the future of the CoC, ASEAN will very likely encounter pressure from China in the negotiation process. The unity of ASEAN will again be challenged.

VIII. Role of UNCLOS

The adoption of UNCLOS in 1982 has led to a period of relative stability in global ocean affairs by providing a legal framework for the sustainable development

⁴¹⁾ Hamzah, *supra* note 19.

⁴²⁾ *Id.*

⁴³⁾ *Special interview with Alberto A. Encomienda*, 2 (2)South China Sea Monitor 10 (Feb. 2013), available at http://www.observerindia.com/cms/sites/orfonline/modules/southchina/attachments/issue1_1359813399581.pdf.

of the oceans and its natural resources. However, in recent times there have been calls to amend the Convention because of some shortcomings. Many questions are raised about the effectiveness of UNCLOS in preventing or managing conflicts pertaining to marine resources. Is UNCLOS playing a positive role in addressing the SCS dispute? To what extent do the States involved in the SCS recognize the connection and relevance of UNCLOS and the settlement of disputes in this region?

Many SCS scholars, particularly Chinese, are skeptical about the role of UNCLOS and argue that many of the provisions of UNCLOS have increased the complexity of SCS disputes, such as the historic title concept vs. EEZ regime, and the fierce competition for occupying the features in the SCS. UNCLOS may be perceived to have certain shortcomings, such as lacking a definition of “historic water” regime, the vague provision on the status of an ‘island’ and ‘rock’, a lack of clear provision on the legitimacy of military activities in a foreign country’s EEZ, and the limitation and exclusion of third party compulsory dispute settlements which makes many disputes difficult to address in a timely manner. However, there is room for a third party forum to play its assumed role. First of all, article 121(3) of UNCLOS does give the court or tribunal a role to play in this picture. Neither article 297 nor 298 excludes disputes related to the definition and determination of a feature to be an island or a rock from the compulsory dispute settlement mechanism. The Philippines, in its Notification and Statement, has rightly point to this. Second, by closely reading the provisions of UNCLOS, it is fair to claim that the court or tribunal has a role to play in many issues, such as “prompt release” and environmental protection. Third, a third party forum, upon request, can determine the nature of a specific military activities, and thereby provide a guidance on whether these activities are legitimate in a foreign country’s EEZ, which will to a large extent reduce the potential military conflict in this regard.

All the States involved in the SCS disputes have developed a comparatively comprehensive marine legal system under the framework of UNCLOS. These legislations provide a legal framework to deal with many maritime issues in a domestic context. Nevertheless, in the situation where multiple issues interrelate with

each other, such as the SCS, a theoretically sound legal system does not always work out well in many fields, such as maritime delimitation, overlapping maritime jurisdiction claims, fishing disputes, trans-boundary marine environmental pollution, and so on. Hence, a third party compulsory dispute settlement regime needs to play its desired role. China, Vietnam and Indonesia are against international litigation, and in all occasions insist on the merits of negotiation, while the Philippines is more willing to bring an extra party to the stage. Nevertheless, in recent years as it has been argued, China should be encouraged to place more weight on the third party dispute settlement mechanism, given its desire for greater responsibilities in many contemporary global issues and its role in international organizations.

IX. Conclusion

Despite decades of political, diplomatic and legal efforts, the pending territorial and maritime disputes in the SCS remain a hot issue which arouses increasing attention from within the region and other stakeholders around the world. Whether UNCLOS is effective in maintaining good order at sea and managing marine resources has been questioned by academics and security practitioners.

Despite the difficulty given the new elements of the SCS disputes since 2009, China and ASEAN are working towards drafting the Code of Conduct which aims at providing some “teeth” with legally binding force to the 2002 DoC. The Philippines, however, having lost patience in the ASEAN way of managing conflicts, has recently decided to break ranks with and move a forward by suing China before an Arbitration Tribunal established under Annex VII of UNCLOS. China, to no one’s surprise, rejected this initiative, as it believes that the Tribunal will not have jurisdiction, and China considered both the note and notice of arbitration as having serious mistakes both in fact and law. It is unpredictable how this will end up. However, without a doubt, it adds a new element to the ongoing process of negotiating the CoC. The unity of ASEAN is also being challenged.

Despite containing “mistakes of facts and laws” in its Notification and Statement, the Philippines did make a test on the applicability of the third party compulsory settlement mechanism in the SCS. Although it has been described as a political show to pressure China, with or without any further development, this attempt must still be given credit for testing the dispute settlement mechanism in this region against a culture of “not bringing one’s neighbors to court.” China may see this as a chance to reconsider its attitude towards the role of international litigation.

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<국문요약>

남중국해 관련 필리핀-중국 중재재판에 대한 중국의 입장

이석우* · HONG Nong(洪农)**

2009년부터 가열되고 있는 남중국해에서의 다양한 해양분쟁은 역내에서 가장 극심한 불안요소로 기능하고 있다. 이러한 상황에서 이해당사국 가운데 하나인 필리핀은 2013년 1월 22일 남중국해 분쟁해결을 위해 유엔해양법협약 제7부속서(중재재판)에서 정한 절차에 따른 중재재판 개시를 목적으로 중국에 서면통고를 하였으나, 중국은 서면통고를 받은 후 중재재판 참여를 공식적으로 거부하였다.

이러한 필리핀의 중재재판 개시 시도는 실제적, 절차적인 측면에서 다양한 국제법적 쟁점을 포함하고 있는데, 중국의 중재재판에의 불참이 가지는 법적인 함의; 중재재판의 동 분쟁에 대한 관할권 행사의 여부; 중국측 중재재판관 선임 없이 구성된 중재재판의 결과에 대한 법적인 타당성 및 결과 여부에 따른 중국에 대한 집행가능성; 동 중재재판 개시가 ASEAN 역내 국가 및 미국을 비롯한 이해 관련국가에 대해 미치는 영향; 그리고, 남중국해에서의 해양분쟁해결을 위한 유엔해양법협약(UNCLOS)의 기능과 역할 등이 그 예시이다.

이 연구는 이러한 제 문제들을 중국의 입장에서 접근하고 있다. UNCLOS 제15부 분쟁해결제도를 개괄한 후, 해양분쟁해결에 대한 제3자 강제해결제도 및 국가관행에 있어 SCS 이해당사국의 상이한 접근 및 이해를 살펴본다. 그리고 나서, 필리핀 정부의 서면통고에 대한 주요 쟁점들을 살피고, 동 사건의 향후 절차 및 실제법적 문제들에 대해 분석한다. 각각의 경우에 있어 중국 정부의 입장이 어떻게 전개될 수 있는지 예측한다. 이러한 과정을 통해 동 중재재판의 진행이 남중국해 해양분쟁의 관리와 해결에 있어 어떤 함의를 가질 수 있는지 추출한다. 해양분쟁해결에 있어 UNCLOS의 역할에 대해서도 분석한다.

주제어: 유엔해양법협약, 남중국해, 중국, 필리핀, 해양분쟁해결, 중재재판

* 인하대학교 법학전문대학원 교수 (국제법 전공).

** 중국 남해연구원(南海研究院) 부교수.