

Asia Society / LKY SPP Conference
South China Sea: Central to Asia-Pacific Peace and Security
New York, March 13-15, 2013

Panel 3. Roles of International Law and Governance

The Philippines v. China Case and the South China Sea Disputes

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Abstract:

On 22 January 2013, the Philippines officially notified China that it had instituted arbitral proceedings against China under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This paper will examine the role of UNCLOS and international law in the South China Sea disputes and will focus in particular on the significance of the case instituted by the Philippines. It will explain the legal issues raised by the Philippines' Statement of Claim. It will analyse the possible impact of the case on the disputes concerning maritime claims in the South China Sea, including China's claim to rights and jurisdiction in the maritime space inside the infamous nine-dash line on the Chinese map of the South China Sea.

I. LEGAL DISPUTES IN THE SOUTH CHINA SEA

A. Disputes on Sovereignty over Off-Shore Islands

The fundamental dispute in the South China Sea concerns sovereignty over off-shore islands. China, Brunei Darussalam, Malaysia, the Philippines and Vietnam claim some or all of the islands in the Spratly Islands. China and the Philippines claim the islands in Scarborough Shoal, and China and Vietnam claim the Parcel Islands. In addition, Taiwan claims the same islands as China.

The international law on the acquisition and loss of territory (including islands) is set out in the principles and rules of customary international law. There are no provisions in the 1982 United Nations Convention on the Law of Sea (UNCLOS)¹ on how to determine which State has the better claim to sovereignty over a disputed territory. UNCLOS only sets out what maritime zones can be claimed from land territory (including islands), as well as the rights and jurisdiction of States in such maritime zones.

The fundamental principle of international law governing the settlement of disputes is that a dispute between two States on an issue of international law cannot be referred to an international court or tribunal without the consent of both parties to the dispute. Therefore, the disputes on which State has the better claim to sovereignty over the disputed islands in the South China Sea cannot be referred to any form of third party dispute settlement without the consent of all parties to the dispute.

B. Disputes concerning the 1982 UN Convention on the Law of the Sea

All of the States bordering the South China Sea and claiming sovereignty over the islands in the South China Sea are parties to UNCLOS. Therefore, UNCLOS is critically important when analysing the legal disputes in the South China Sea.

UNCLOS assumes that it is known who has sovereignty over land territory, including off-shore islands. It sets out what maritime zones can be claimed by States from their land territory and islands, and the rights and duties of coastal States and other States in the various maritime zones.

When a State becomes a party to UNCLOS, it consents in advance to the dispute settlement provisions in Part XV of UNCLOS. The general principle in Part XV is that if a dispute arises between two parties on the interpretation or application of a provision in UNCLOS, and the dispute cannot be resolved by consultation and negotiation, either party to the dispute may unilaterally bring the dispute before an international court or arbitral

¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, UNTS 1833 at 3 (entered into force 16 November 1994) [UNCLOS]. As of 19 February 2013, UNCLOS there are 165 parties (including the European Union)

tribunal,² and the decision of the court or tribunal is legally binding on both parties to the dispute.³

C. Court or Tribunal with Jurisdiction to Hear a Dispute under UNCLOS Part XV

When a State becomes a Party to UNCLOS, or at any time thereafter, it has a right to elect in advance its preferred forum for the resolution of any disputes to which it is a party.⁴ By making a formal Declaration to the UN Secretary-General, a State Party can declare that it prefers one or more of the following courts or tribunals: (1) the International Tribunal for Law of the Sea (ITLOS); (2) the International Court of Justice (ICJ); (3) an Arbitral Tribunal established under Annex VII of UNCLOS; or (4) a Special Arbitral Tribunal established under Annex VIII of UNCLOS.

If the two States Parties to the disputes have elected the same court or tribunal, that court or tribunal will have jurisdiction to hear the case, unless the Parties otherwise agree.⁵ If the States Parties to the dispute have not chosen the same court or tribunal,⁶ or have made no choice,⁷ then the dispute will go to Arbitration under Annex VII, unless the parties otherwise agree.⁸

Neither China nor the Philippines has made a declaration indicating a preference for a particular court or tribunal.⁹ Therefore the Philippines instituted arbitral proceedings against China under Annex VII.

D. Decision of the Arbitral Tribunal has Binding Force

Article 296 provides that any decision rendered by a court or tribunal having jurisdiction under this Section (Section 2) shall be final and shall be complied with by all the Parties to the dispute.¹⁰ Further, any such decision shall have no binding force except between

² Article 286, UNCLOS; see also Tommy TB Koh and S Jayakumar, "Negotiating Process of the Third United Nations Conference on the Law of the Sea", in Myron H Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 1 (Martinus Nijhoff, 1985), at para 29-134.

³ Article 296 (1), UNCLOS.

⁴ Article 287, UNCLOS.

⁵ Article 287(4), UNCLOS.

⁶ Article 287(5), UNCLOS.

⁷ Article 287(3), UNCLOS.

⁸ Article 287(5), UNCLOS.

⁹ For the up-to date official texts of declarations and statements which contain the choice of procedure under Article 287 of the UNCLOS, see online: UN Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm>.

¹⁰ Article 296 (1), UNCLOS.

the Parties and in respect of that particular dispute.¹¹ These provisions are the same as those with respect to decisions of the International Court of Justice.

E. Optional Exceptions from the Dispute Settlement Procedures in UNCLOS

Because certain categories of disputes are very sensitive in some countries, Article 298 of UNCLOS provides that States may make a formal declaration to the UN Secretary-General giving notice to all other parties that they do not accept the compulsory procedures entailing binding decisions in Section 2 of Part XV for certain categories of disputes. These categories are:¹²

- (a) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;
- (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service;
- (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

In 1996 China made a formal declaration under Article 298 stating that it does not accept the system of compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS for any of the categories of disputes listed in Article 298.¹³ It is the only State bordering the South China Sea which has made such a declaration.¹⁴

F. Disputes concerning UNCLOS Provisions not excluded by China's Declaration

If a dispute arises between one of the ASEAN claimants and China concerning the interpretation or application of provisions of UNCLOS which are not within the categories excluded by China's declaration under Article 298, and which cannot be resolved through consultations and negotiations, such disputes are subject to the compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS.

¹¹ Article 296 (2), UNCLOS.

¹² Article 298 (1), UNCLOS.

¹³ Declaration under Article 298 by the Government of the People's Republic of China (25 August 2006), see online: UN Division for Ocean Affairs and the Law of the Sea <[http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China after ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China_after_ratification)>.

¹⁴ For the up-to date official texts of declarations and statements which contain optional exceptions to the applicability of Part XV, Section 2, under Article 298 of UNCLOS, see online: UN Division for Ocean Affairs and the Law of the Sea, *supra* note 9.

II. PHILIPPINES V. CHINA ARBITRATION UNDER ANNEX VII

On 22 January 2013 the Philippines officially notified China that it had instituted arbitral proceedings against China under Annex VII of the UNCLOS.¹⁵

A. Limits of Philippines' Claim

The Philippines' claim recognizes that the Tribunal does not have jurisdiction to decide two categories of legal issues.

First, the Philippines' claim recognizes that the Tribunal has no jurisdiction over issues of territorial sovereignty.¹⁶ In other words, the Philippines recognize that the Tribunal has no jurisdiction to decide which State has the better claim to sovereignty over the disputed islands.

Second, the Philippines' claim recognizes that the Tribunal has no jurisdiction over certain categories of disputes, these being disputes that are excluded from the compulsory dispute settlement procedures in UNCLOS because of China's Declaration under Article 298 of UNCLOS.¹⁷ In its Statement of Claim, the Philippines expressly states that it is conscious of China's Declaration under Article 298 of UNCLOS excluding certain categories of disputes, including disputes on sea boundary delimitation and historic titles, from binding dispute settlement.¹⁸ The Philippines further states that it has avoided raising any subjects or making any claims that China has excluded by its Declaration under Article 298, especially those concerning boundary delimitation or historic titles.¹⁹

The Philippines argues that there are disputes between it and China on the interpretation or application of the provisions of UNCLOS other than those on territorial sovereignty, boundary delimitation or historic title. The disputes include:

- Whether China has interfered with the right of the Philippines to exercise sovereign rights over the natural resources in its exclusive economic zone (EEZ) [UNCLOS, Art 56];
- Whether China has claimed excessive maritime zones from small islands it claims sovereignty over and occupies because these islands are "rocks which cannot sustain human habitation or economic life of their own" within Article 121(3) of UNCLOS and are thus not entitled to an EEZ and continental shelf of their own;

¹⁵ See Notification and Statement of Claim of the Philippines dated 22 January 2013.

¹⁶ See paragraph 7 of the Notification and Statement of Claim.

¹⁷ Declaration under Article 298 by the Government of the People's Republic of China, *supra* note 13.

¹⁸ See paragraph 7 of the Notification and Statement of Claim.

¹⁹ See paragraphs 7 and 33 – 40, Notification and Statement of Claim.

- Whether China has illegally occupied and claimed sovereignty over certain submerged features which are not subject to a claim of sovereignty because they are not islands, but instead are part of the seabed.

B. Main Issues Raised in the Philippines' Case

The Philippines' Notification and Statement of Claim raises four main issues. The most important is whether China can lawfully make any maritime claim based on its nine-dash line, either to sovereignty over the waters or to sovereign rights to the natural resources within the waters. The Philippines requests the Arbitral Tribunal to rule that China can only claim rights to maritime space in maritime zones measured from land territory (including islands), and that claims from the nine-dash line are not consistent with UNCLOS. The main purpose of the case seems to be to challenge the legality of China's claim to historic rights and jurisdiction inside the nine-dash line.

The second major issue raised in the Statement of Claim concerns the maritime claims that can be made from the disputed islands currently occupied by China, that is, Scarborough Shoal and three islands that are within the Kalayaan Island Group (KIG) claimed by the Philippines (these being Johnson Reef, Cuarteron Reef and Fiery Cross Reef). The Philippines requests the Tribunal to rule that all of the "islands" occupied by China (the naturally formed areas of land above water at high tide) are "rocks" entitled only to a 12 nm territorial sea because they cannot "sustain human habitation or economic life of their own", as set out in Article 121(3) of UNCLOS. It also requests the Tribunal to declare that China has unlawfully claimed maritime entitlements beyond 12 nm from these features and has unlawfully interfered with the exercise by the Philippines of its rights and freedoms in the maritime space surrounding Scarborough Shoal and Johnson Reef

The third major issue raised in the Statement of Claim concerns the geographic features in the KIG that are currently occupied by China but do not meet the definition of an island as set out in Article 121(1) because they are not naturally formed areas of land above water at high tide (these being Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef). The Philippines argues that such features are not subject to a claim of sovereignty and that China's occupation of them is illegal because they are part of the continental shelf of the Philippines.

The fourth major issue raised in the Statement of Claim is that China has unlawfully prevented Philippine vessels from exploiting the living resources in the waters "adjacent to" Scarborough Shoal and Johnson Reef. The Philippines has requested the Tribunal to issue an Award that requires China to refrain from preventing Philippine vessels from exploiting, in a sustainable manner, the living resources in the waters "adjacent to" Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with UNCLOS "at or in the vicinity" of these features.

III. PROCEDURAL ISSUES

A. Effect of China's Failure to Participate in the Arbitration

When the Philippines instituted proceedings on 22 January 2013 by giving the necessary Notification to China, it also nominated Judge Rudiger Wolfrum of Germany as its arbitrator. China had 30 days from the date of this notification to nominate one arbitrator. However, on 19 February 2013, just before the 30 days were up, China announced that it had rejected and returned the Philippines' Notification.

The Philippines can now request the President of the International Tribunal for the Law of the Sea (ITLOS), Judge Yanai of Japan, to appoint an arbitrator on behalf of China, who must be selected from persons on the UN List of Arbitrators. The remaining three arbitrators are to be appointed by agreement between Philippines and China, within 60 days from the date of Philippines' Notification of Claim. If the Parties failed to reach an agreement within the said time limit, the President of ITLOS shall appoint the remaining three arbitrators, who must be selected from persons on the UN List of Arbitrators.²⁰ The UN List consists of the persons nominated by States Parties to UNCLOS.²¹ The President of ITLOS will also nominate one of the three arbitrators he selects to serve as the President of the Tribunal. The Tribunal will then be constituted and it will determine its Rules of Procedure.

The fact that China is refusing to participate in the proceedings will not stop the arbitral proceedings from going ahead. If China fails to appear to defend the case, the Philippines may request the Tribunal to continue with the hearing and make an Award.²² The absence of one of the parties to the dispute or the failure of a party to the dispute to defend the case is not a bar to the proceedings. Before making the Award in the absence of a party to the dispute, the Arbitral Tribunal must satisfy itself that: (1) it has jurisdiction; and (2) the claim is well founded in fact and law.²³

The Philippines has carefully crafted its Statement of Claim so that it mainly raises disputes on the interpretation and application of provisions of UNCLOS other than those on the delimitation of maritime boundaries. Therefore, there is a good chance that the Tribunal will decide that it has jurisdiction over some issues raised in the Philippines' Statement of Claim, and will proceed to hear the case.

In addition, if the Tribunal issues an award, it will be legally binding on both China and the Philippines.²⁴ If China fails to implement the award, or takes action contrary to it, the

²⁰ Article 3 (c), (d) & (e), Annex VII, UNCLOS.

²¹ For the full list of arbitrators nominated by State Parties under Annex VII, see online: UN Treaty Collections <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en>.

²² See generally Article 9, Annex VII, UNCLOS.

²³ Article 9, Annex VII, UNCLOS.

²⁴ Article 11, Annex VII, UNCLOS.

Philippines has the right to go back to the same Tribunal and request further orders regarding the implementation of the Award.²⁵ This could be a potential source of embarrassment for China.

B. Intervention in the Case by other States

In contrast to cases heard by ITLOS or the ICJ, there is no procedure for Intervention by a Third State Party to UNCLOS in cases before an Arbitral Tribunal under Annex VII. Generally speaking, no right of intervention exists in relation to arbitrations, which is ultimately founded upon the consent of the Parties. Accordingly, no State may intervene in the proceedings without the consent of the Parties to the dispute.²⁶

C. Settlement of the Case

The Parties to a dispute governed by Part XV of UNCLOS can agree to settle the case through negotiations before the arbitration actually begins, or any time thereafter.²⁷ Therefore, China has several months to attempt to negotiate with the Philippines to agree to settle the dispute before the Tribunal makes a decision.

D. Philippines' Could Request Provisional Measures

In the final paragraph of its Statement of Claim, the Philippines expressly reserved the right to preserve its rights under UNCLOS, including the right to make a request for Provisional Measures.²⁸ If China responds to the Philippines' claim by taking action to assert its rights in a manner contrary to the rights of the Philippines, the Philippines could seek remedy by way of Provisional Measures from ITLOS or the Arbitral Tribunal to preserve its rights, pending the final decision of the Arbitral Tribunal.

If the Philippines wishes to request Provisional Measures to preserve its rights before the Arbitral Tribunal is established, it may request Provisional Measures from ITLOS.²⁹ Once the arbitral tribunal has been established, it must request Provisional Measures from the Arbitral Tribunal.

Before granting Provisional Measures, the Court or Tribunal must first establish that it *prima facie* has jurisdiction under Part XV of UNCLOS and that the urgency of the situation so requires the granting of the measures.

²⁵ Article 12, Annex VII, UNCLOS.

²⁶ John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 1999) at 208 – 209.

²⁷ Article 280, UNCLOS.

²⁸ Paragraph 43 of the Statement of Claim.

²⁹ Article 290 (5), UNCLOS.

IV. THE EFFECT OF THE AWARD ON THE SOUTH CHINA SEA DISPUTES

A. Legality of Maritime Claims within the Nine-Dash Line

If the Tribunal rules that China cannot make any maritime claims based on the nine-dash line, but only from islands, China would be under a legal obligation to bring its maritime claims into conformity with UNCLOS and claim rights and jurisdiction over resources only in maritime zones measured from islands over which it claims sovereignty. This would cast a dark shadow on the legitimacy of any claims made by China to resources in the maritime space within the nine-dash line that are not within a maritime zone claimed from an island.

As a matter of law, such a decision would be binding only on the two Parties to the case. However, such a ruling would greatly benefit Vietnam, Malaysia, Brunei and even Indonesia, as the nine-dash line also overlaps with their EEZ claims.

B. Issues concerning Islands and Rocks

One of the other important issues raised in the case is whether the islands occupied by China are rocks within Article 121(3) entitled to a 12 nm territorial sea but not to an EEZ or continental shelf. Such a ruling would greatly benefit the Philippines, especially in the case of Scarborough Shoal. Scarborough Shoal is located in waters within the EEZ of the Philippines. It consists of mostly of a submerged reef but the reef contains small 4-6 rocks which are permanently above water at high tide. If the Tribunal held as a matter of law that these features are rocks within Article 121(3) and only entitled only to a 12 nm territorial sea, it would give the Philippines the sovereign right to explore and exploit all of the natural resources in and under the waters beyond 12 nm from the rocks.

The broader significance of the decision of the Tribunal's decision on Article 121(3) will depend on the Tribunal's reasoning. The Tribunal could decide to rule only on whether the small islands occupied by China are rocks within Article 121(3), and confine its decision to the precise characteristics of those islands. This would leave open the question of whether any of the larger islands in the Spratlys (which are claimed by China but occupied by others) might in principle be entitled to an EEZ and continental shelf of their own. This would enable China to claim an EEZ and continental shelf from the larger islands, which would result in a fairly large area of overlapping EEZ claims.

C. Issues concerning Low-Tide Elevations and Submerged Features.

The Tribunal could also decide that some of the features occupied by China are not islands because they are not naturally formed areas of land surrounded by and above water at high tide as required by UNCLOS. Therefore, it could decide that no maritime zones of any kind can be claimed from such features. However, the Tribunal would also be likely to point out that under UNCLOS, if a low-tide elevation is within 12 nm of a feature which meets the

definition of an island, the low-tide elevation can be used as a basepoint in measuring the territorial sea from such island.

The Philippines has requested the Tribunal to rule that China's occupation of the low-tide elevations or submerged features is illegal because such features are part of the continental shelf of the Philippines measured from its main archipelago. However, if the Tribunal leaves open the question of whether any of the islands in the Spratlys are entitled to an EEZ and continental shelf of their own, the Tribunal could rule that it cannot decide whose continental shelf such features are part of without engaging in maritime boundary delimitation, which is outside its jurisdiction.

D. Issues concerning Interference with Sovereign Rights and Jurisdiction

The Philippines has also asked the Tribunal to rule that China has interfered with the right of navigation and other rights of the Philippines in waters surrounding the disputed features, which it asserts is within the EEZ of the Philippines. If the Tribunal decides that the islands on Scarborough Shoal are rocks within 121(3) and not entitled to an EEZ and continental shelf of their own, the area in dispute between China and the Philippines would be limited to the rocks themselves and the 12 nm territorial sea adjacent to them. If the Tribunal also rules that China has no historic rights and jurisdiction within the nine-dash line, then the areas outside the 12 nm territorial sea measured from the rocks would be within the EEZ of the Philippines. Therefore, the Tribunal could rule that it would be unlawful for China to interfere with the right of navigation or other rights of the Philippines in the waters surrounding Scarborough Shoal that are outside the territorial sea measured from the rocks.

V. CONCLUSIONS

First, it seems likely that the arbitral proceedings will continue without the participation of China, unless the parties agree to settle the case; and if the Tribunal issues an Award, it will be legally binding on both China and the Philippines.

Second, the decision of the Tribunal will not resolve the underlying dispute concerning which State has the better claim to sovereignty over the disputed islands. This issue is not governed by UNCLOS.

Third, the decision of the Tribunal will not resolve the issue of how to determine the maritime boundaries in any areas of overlapping claims. The decision is unlikely to address the issue of what effect should be given to the small islands in a maritime delimitation. This is because disputes on the delimitation of maritime boundaries are outside the jurisdiction of the Tribunal.

Fourth, the Philippines will have achieved a major victory if the Tribunal rules in their favour on the most important issue to them – that China cannot make claims to maritime space based on history and the nine-dash line, but, like the Philippines and all other Parties to

UNCLOS, it can only make maritime claims from land territory and islands in accordance with UNCLOS and international law. A victory on this issue will be important not only for the Philippines, but for the other claimants.

Fifth, there is also a possibility that the Philippines may be victorious on the nine-dash line issue and the issues concerning rocks and islands, but that the decision of the Tribunal will not clarify the areas in dispute for purposes of Joint Development. This is because the decision of the Tribunal on Article 121(3) may only decide that the islands occupied by China are rocks which are not entitled to an EEZ and continental shelf of their own. It may leave open the question of whether China may lawfully maintain that the larger islands in the Spratlys (currently occupied by Taiwan, the Philippines and Vietnam) may in principle be entitled to an EEZ and continental shelf of their own. If this issue were left unresolved, China could lawfully maintain that much of the area in the KIG is an area of overlapping claims.

Finally, although it is impossible to predict how the case will turn out, it is hoped that as a result of the decision of the Tribunal, all of the claimants, including China, will clarify their claims and bring them into conformity with UNCLOS. This would set the stage for negotiations on what many observers believe is the only viable long-term solution to the legal disputes in the South China Sea - setting aside the disputes on territorial sovereignty and jointly developing the resources in the areas of overlapping maritime claims.