

THE SOUTH CHINA SEA ISSUE: ITS IMPLICATIONS ON SOUTH EAST ASIAN SECURITY

Khadga K.C.

Abstract

Although the Chinese government has a strong preference for bilateral diplomatic negotiations to resolve disputes, its status as a party to UNCLOS and its continuing failure to reach a settlement with the Philippines has exposed it to the risk of litigation. Additionally, if the arbitration goes forward, China may be at a disadvantage because several Chinese assertions about their South China Sea rights are not well supported in international law. China's leaders may also have concerns about avoid nationalists who are sensitive to any perception that the government lost control of a high profile issue to a small Southeast Asian state and a Japanese judge. Nonetheless, now that the Chinese have rejected the process, the panel will proceed without them, providing a small "victory" for Manila and potentially swinging international public opinion toward the Philippines. China being an established regional power and aspiring global power would better show her generosity to take the countries in neighborhood in confidence. For this, resolving South China Sea issue by win-win strategy will be of great benefit for regional stability and security in South East Asian region.

Background

The South China Sea covers an area of sea of some 3.5 million square kilometers, semi-enclosed by Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam. These six countries have overlapping claims to various maritime zones in this area and five of them (China, both the mainland and Taiwan; Vietnam; the Philippines; Malaysia and Brunei) claim territorial sovereignty over land features in the South China Sea.

Early in the twentieth century, the geographical scope of the Chinese state's dominion increasingly came to attract the attention of both cartographers and the government itself. In June 1933, Chinese government appointed a commission that was tasked with reviewing maps and atlases produced by private sources in China. This Review Commission of Maps for lands and water published in January 1935 a list of 132 names, both in English and Chinese, for Chinese islands and other insular features in the south China Sea, which included the Xiasha

(paracel) Islands, Dongsha (pratas) Islands, Zhongsha, including Huangyan Island¹ (Macclesfield Bank, including Scarborough Shoal), and Nansha (Spratly) Islands.² There was no reaction from Vietnam or any other State, and the Chinese naval contingent was sent to the islands and erected stone markers of Young Xing (Woody) Island in the Xisha (pratas) islands and Taiping (Itu Aba) Island in the Nansha(Spa) Islands. Following further inspections and surveys, the Chinese government internally circulated an atlas in 1947, drawing an eleven-dash line to indicate the geographical

Scope of its authority over the South China Sea, right down to the Zengmu Ansha, or James Shoal, at 30 58' N, 1120 17' E.¹ In January 1948, the Chinese Ministry of Interior published the Map of Location of South China Sea Islands (Nan Hai Zhudao Weizhi Tu) with a U-shape intermittent line to indicate the traditional boundary of China's territory in the South China Sea.² In 1953, two dashes were removed from the eleven-dash line, leaving nine segments, and in the same year the new line made its first appearance in atlases produced on the mainland of China.

It is a common view that tensions in the South China Sea began to emerge in the late 1960s as the potentials of oil and natural gas in this area came to be appreciated. In early 1949, news reports indicated that the Philippines, which gained independence in July 1946, began to show interest in the Nansha Island. In response to an inquiry by China referred to "China's Tai Ping Island," the Philippines explained that it was concerned only with protecting its fishermen in the waters adjacent to that island.³ The situation in the area changed quickly in the early 1970s. In July 1971, the Philippines declared possession of the Kalayaan (Spartly) Group.⁴ This declaration was followed by presidential Decree No. 1596, June 11, 1978.

Over the years, countless statements have been made on the disputes between the Philippines and China. Their tension flared again in April 2012, when the Philippines sent a warship to the area of Scarborough shoal and according to the Philippines, it had found Chinese fishing vessels in there (which has been claimed by China as part of Zhongsha Islands) with illegal coral and fish.⁵

It was suggested that the Scarborough Shoal accident was regarded as turning point and "unhappy conclusion taught the Philippines two lessons about dispute resolution with China over South China Sea issues: first, it was assumed that superior power and will use it; and second, in the face of such power further negotiations over sovereignty and resource claims are fruitless unless power

–based dynamics are replaced with a process in which the weak the weak and the strong are equals.”

On January 22, 2013, the Philippines shook up in discussions with China over their territorial disputes in the South China Sea by initiating an international arbitration process under the UNCLOS over recent Chinese actions.

Current Development in the South China Sea

State parties to the UNCLOS, including China and the Philippines are obliged to submit any dispute concerning the interpretation or application of the Convention, where no settlement has been reached by peaceful means of their own choosing to a judicial settlement procedure that leads to a binding decision. States are free to choose by a written declaration, one or more of the means for the settlement of disputes: (1) International Tribunal for the Law of the Sea (ITLOS); (2) International Court of Justice (ICJ); (3) an arbitral tribunal constituted in accordance with Annex VIII.² According to Article 287 of the UNCLOS, neither China nor the Philippines have chosen any particular means for the settlement of their disputes, the dispute was submitted to an Annex VII arbitral tribunal,

Upon instituting proceedings, the Philippines appointed Rudiger Wolfrum of Germany as first member for the Arbitral Tribunal. When China failed to appoint an arbitrator within 30 days of the notification, the Philippines, on 22 February 2013, requested President Shuji Yan of ITLOTS, to act on behalf of China to the appointment of Stanislaw Pawlak of Poland as second arbitrator. Judge Shuji Yan further appointed Jean-Pierre Cot (France), Chris Pinto (Sri Lanka) and Alfred

Sons. Netherlands) as the rest of three, After Jean- Pierre Cot (France) resigned from the tribunal because his marriage to a Phillipino national might have raised questions of impartiality, ¹ on 21 June 2013, Shuji Yan appointed Thomas A Mansah (Ghana) to serve as a member and president of the Arbitral Tribunal. The permanent Court of Arbitration (PCA) is now acting as registry of this case.

On 19 February 2013, China presented Note Verbal to the Philippines in which it described “ the position of China on the South China Sea issues,” rejected and returned the Philippines ‘ Notification. On 21 May 2014, PCA received a Note Verbal from China in which it reiterated its position that “it does not accept the arbitration initiated by the Philippines” and that the Note Verbal Shall not be regarded as China’s acceptance of participation in the proceedings.” ² The

Philippines filed its Memorial on 30 March 2014 and the Arbitral Tribunal fixed 15 December 2014 as the date for China to submit its Counter-Memorial.

On 22 January 2013 the Philippines officially notified China that it had instituted arbitral proceedings against China under Annex VII of the UNCLOS.³ The Philippines' Notification and Statement of Claim on 22 January 2013 raises five main issues.

The first major issue 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 claims that "China's maritime claims in the South China sea based on its so-called 'nine-dash line' are contrary to UNCLOS and invalid".⁴ The major purpose of the Philippines seems to challenge the legality of China's claim to historic rights and jurisdiction inside the nine-dash line. The second major issue concerns the "rock" status of certain reefs (these being

Scarborough shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Fierily Cross Reef, The Philippines claims that these reefs are rocks under Article 123(3) of UNCLOS entitled only to a 12nm territorial sea because they cannot "sustain human habitation or economic life of their own," and 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 the reefs.¹ The Philippines claimed that China has unlawfully prevented Philippines vessels from exploiting the living resources in the waters "adjacent to" Scarborough Shoal and Johnson Reef and China has declared maritime zones around these features, from which it has illegally sought to exclude the Philippines and other state.²

The third major issue concerns the geographic features ("submerged features" called by Notification and Statement of Claim) within the Kalayaan Island Group (KIG) claimed by the Philippines and yet currently occupied by China (these being Mischief Reef, Mc Kennan Reef, Gaven Reef, and Subi Reef. The Philippines claims that these features do not meet the definition of an island as set out in Article 121(1) and they are "all at best low-tide elevations," none of which are located on China's continental shelf, while "Mischief Reef and Mc Kennan Reef are part of the continental shelf of the Philippines".⁴

The fourth major issue concerns the Philippines' claim that it is entitled under the UNCLOS to a 12nm territorial sea, a 200 nm EEZ and a continental shelf measured from its archipelagic baselines, that China has unlawfully claimed and

exploited the living and non-living resources in that those maritime areas, and has prevented the Philippines from exploiting living and non-living resources therein.⁵ The fifth major issue concerns the Philippines' claim that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the UNCLOS.⁶

The Memorial submitted by the Philippines to the Tribunal in 2014 presents the Philippines' case on the jurisdiction of the Arbitral Tribunal and the merits of its claims. It consists of ten volumes, including more than 40 maps, for a total submission of nearly 4,000 pages. However, till the middle of August 2014, the memorial has not been available to the public. The Philippines may clarify its claims in the subsequent pleadings and oral argument, while it may not go beyond the "Claims" and the "Relief Sought" as set out in the 2013 Notification and Statement of Claim.

South China Sea Arbitration Processes

15th December 2014, the deadline for submitting its counter-memorial will be a "watershed" for China to manage the strategy to cope with the arbitration. The first step for China will be to challenge the jurisdiction of the Arbitral Tribunal, even if it has to face with a series of procedural issues, including but not limited to: (i) whether China's 2006 Declaration based on Article 298 of the UNCLOS has "opt-out" effect to exempt China from the compulsory jurisdiction of the UNCLOS, including the Annex VII Arbitration, (ii) whether there is negative legal consequence for the "default of procedure", since China has consistently demonstrate that it would not participate in the proceeding; (iii) whether the admissibility requirements which are set out in the UNCLOS have been satisfied so that the Tribunal may further proceed the case; (iv) whether there are other possible legal grounds to challenge the jurisdiction of the Tribunal.

On 25 August 2006, China expressly made declaration under Article 298 of the UNCLOS which reads as follows: "the Government of the people's Republic of China 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."⁷ Under Article 298, State are allowed to make declarations to exclude the compulsory binding procedure for the settlement of disputes under the Convention in respect of certain specified categories

Of disputes concerning sea boundary delimitation of historic days or titles, military activities and disputes in respect of which the Security Council is exercising the jurisdiction assigned to it by the UN Charter. Realizing they said Declaration, the Philippines declares that “ the Philippines is conscious of China’ Declaration of 25 August 2006, and has avoid raising subjects or marking claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.”

Thirty –five Parties to the ULCLOS have made declarations to indicate that they do not accept any one or more of the procedures provided for part XV, Section 2 (compulsory procedures entailing binding decision) with respect to one or more of the categories of disputes set out in Article 298, paragraph 1. Moreover, eight countries, including China, Equatorial Guinea, Thailand, South Korea, Gabon, Iceland, France and Paulau “ made no choice” (see Annex) as to the four means of the dispute settlement (ITLOS, ICJ, Arbitral Tribunal under Annex VII, special arbitral tribunal in accordance with Annex VIII) which are set out in Article 287 of the UNCLOS.

In the present case, the issue of whether China ‘s 2006 Declaration might be one of the obstacles for the Annex VII arbitration has to be examined together with Article 298 and Article 287 of UNCLO. UNCLO leaves no room for State parties to opt-out the compulsory procedures if certain states involved with certain categories of disputes. However, once a State had opportunity “ to choose, by means of a writhe declaration, one or more of the means for the settlement of disputes concerning the interpretation or application of UNCLOS”, AND IT “made no choice”, does that necessarily means that State opt-out from the cases concerning “interpretation or application of UNCLOS” as well ?The answer is the opposite .

If China can successfully convince the Tribunal that the real disputes claimed by the Philippines are all related with the categories which are excluded by Article 298, the Tribhuna may not be able to proceed the process, giving the fact that 81 states and entities (162) parties of the UNCLOS till 2012³ have made declaration or statement

On the interpretation and application of the provisions contained in the UNCLOS in accordance with Article 310, 287 and 298. However, if the Philippines can convince the Tribunal that the claims are directly related with” interpretation and explanation of UNCLOS”, which seems to be uneasy, then Article 287 (3)¹ will be applied and the Philippines may have a better case in the preliminary stage.

The most efficient way for China to exempt itself from the arbitration will be to challenge the jurisdiction of the Arbitral Tribunal during the period of “preliminary objections”. Since China has declared its position for not presenting in the case whether the UNCLOS provides any safeguard for the right of non-appearing party is therefore critical to China. Article 9, Annex VII of the UNCLOS provides: “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 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 in law.”

It is reasonable to foresee that the China’s rights, both with regard to any preliminary objections, whether of jurisdiction or of admissibility, and the merits of the case, can be safeguarded by the arbitral tribunal’s obligation to “satisfy itself” that it has jurisdiction over the dispute and the claim is well founded in fact and in law.² It’s also important that default of appearance is nothing unusual in international adjudication, Modern procedural law does not treat a party in default as guilty, and is far from regarding failure to appear as a fact confessio.³ The only problem is to what extent the tribunal is obliged to search for possible jurisdiction problems and to discuss every conceivable objection to the Tribunal’s jurisdiction that a creative party like China might raise.⁴p.

According Article 20 of the Rules of Procedure¹ released by the Arbitral Tribunal on 27 August 2013, China has right to raise preliminary objections to challenge the jurisdiction of the Tribunal, based on two conditions: first, a plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial. The Deadline for China has to submit the plea to will be Dec 15, 2014; second, prior to a ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.

In the *Notification and Statement of Claim*, the Philippines claims that since the first “Philippines–China Bilateral Consultations on the South China Sea Issue” in 1995, the Philippines and China have exchanged views regarding the disputes concerning entitlements to maritime areas in the South China Sea, the exercise within those maritime areas of rights pertaining to navigation and the exploitation of living and non living resources, and the status of maritime features in the Spratly Islands and at Scarborough Shoal. However, no settlement has been reached after

numerous meetings and exchanges of diplomatic correspondence for 17 years.² Therefore, the diplomatic record leaves no doubt that the requirement in Article 283³ that the “parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means” has been satisfied.⁴

China may rely on Article 281 of the UNCLOS⁵ to exclude the application of compulsory dispute settlement while whether there has been any “agreement “regarding solving the dispute between the Philippines and China in the South China

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China may relay on Article 281 of the UNCLOS⁵ to exclude the application of compulsory dispute settlement, while whether there has been any "agreement 'regarding solving the disputes between the Philippines and China in the South China

Sea which is set out in Article 281 is the breakthrough. At least three agreements can be evoked as such "agreement" under Article 281.

First, the 2002 Declaration on the conduct of parties in the South China Sea (DOC) provides that: "the parties concerned undertake ¹ to resolve their territorial and jurisdiction dispute by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign state directly concerned, in accordance with universally recognized principles of international law, including the UNCLOS."² The fact that there has been an agreement can further be evidenced by official documents jointly issued by the two governments, such as the joint press statement on 3 September 2004 during the state visit of China by Macapagal-Arroyo, joint statement on 1 September 2004 during the

state visit of China by Aquino III. The two joint statements reaffirm previous commitments undertaken under the DCO.

Second Article 13 of the Treaty of Amity and Cooperation in Southeast Asia of 1976³ (TAC) provides that “the High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially likely to disturb regional peace and harmony, they shall reform from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.” Article 13 clearly establishes a legal obligations for the parties to settlement their disputes by negotiation and “at all times”. Moreover, there is no limit to the categories of disputes that may fall under the obligation to negotiate. The only condition is that disputes must be “on matters directly affecting them.”

Third, Tripartite agreement reached by China, the Philippines and Vietnam. On 14 March 2005, the China National Offshore Oil and Gas Corporation, Philippine

Over which Security Council is exercising functions assigned to it by the UN Charter.¹

On the contrary, China may argue that five groups of claims brought up by the Philippines fall within the exceptions to compulsory jurisdiction set out in Article 298 (1) as follows: The first group of claims relates to the Philippines’s argument that China is claiming sovereignty over the maritime areas lying within or encompassed by the “ambiguous nine-dash line”. Based on two Note Verbal’s (CML/17/2009² and CML/8/2011³), what China claim was sovereignty over the four groups of islands in the South China Sea, namely, Dong Sha (Pratas), Xisha (parcel), Zhongsha (Scarborough Shoal), and Nansha (Spratly) Archipelagos. China may argue that the two Note Verbal’s do not mention any claim to sovereignty over maritime areas “based on” the nine-dash line and what China does claim in the South China Sea in terms of maritime areas are the zones under the UNCLOS. So, the disputes are not about the UNCLOS as legal basis of their claims to maritime zones, but about territorial sovereignty over the island groups in the South China Sea and the extent of the maritime zones generated by these island groups.

Moreover, to China, the Philippines does not mention eight maritime features in the Spratly islands which is occupies but claimed by China as part of Nansha Archipelagos, namely, Northeast Cay (Beizi Dao), Thitu Island (Zhongye Qunjiao), Loaita Island (Nanyue Dao), Flat Island (Feixin Dao), Nanshan Island

(Mahuan Dao), West York Island (Xiyue Dao), Commodore Reef (Siling Jiao), Double Egg Yolk West York Island (Xiyue Dao), Commodore Reef (Siling Jiao), Double Egg Yolk

Shoal (Shuanghuang Shazhou). Territorial disputes over these maritime features are not mentioned in the Notification and Statement of Claim, yet they illustrate that the territorial disputes between the two States are not limited to the ones the Philippines choose to present. Moreover, the Philippines made no reference to those islands of the Spratly Archipelago that are occupied by Vietnam and Malaysia, and the claims of these states to maritime areas overlapping with those by the Philippines.¹ To China, the real dispute is about territorial sovereignty over Nansha and Zhongsha Archipelago, which is not subject to the Tribunal's jurisdiction. The second and third group of claims concern Philippines' claims on the maritime features occupied by China, either are "low-tide elevations" such as Mischief Reef, Mc Kennan Reef Gavan Reef, and Subi Reef, or "rocks" under Article 121(3) of UNCLOS such as Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef. According to the Philippines, none of the reefs qualified as "low tide elevations" are located on China's continental shelf, while "Mischief Reef and Mc Kennan Reef are part of the continental shelf of the Philippines".

However, the questions of whether the four reefs are part of the Chinese continental shelf cannot be answered without determining the questions of whether China enjoy territorial sovereignty over these maritime features. The four reefs in questions are all part of the Nansha Archipelago. China might argue that while the Philippines has tried to isolate the quest on of the legal status of these four reefs, there are numerous other maritime features in the vicinity of these reefs, some of these features are proper islands of good size which generate their own continental shelf an EEZ. Itu Aba (Taiping, 10degree23'N and 114degree22'E) island may serve as an example. Within the spartly Islands, the location of Taiping Island is less than 200 nm from the four reefs in question (see table below).

Maritime Feature	Location	Distance from Itu Aba (Taping) Island
Mischief Reef	9degree54'N, 115degree32'E	74.7nm
McKennan Reef	9degree54'N, 115degree 28'E	29nm
Gaven Reef	10degree13'N, 114degree 13'E	12.9nm
Subi Reef	10degree55'N, 114degree05'E	36.7nm

Similarly, in case of other three maritime features situated in the Nansha Archipelago, namely, Johnson Reef, Cuarteron Reef and Fiery Cross Reef, China would not have to claim any maritime zones “from these features”, because they are located in close vicinity of several proper islands which generate an EEZ and continental shelf extending to these reefs beyond. Again, Itu Aba serves as an example. All three reefs in the sparsely islands are located less than 200nm from Itu Aba (see table below)

Maritime Feature	Location	Distance from Itu Aba (Taiping) Island
Johnson Reef	9degree42’N, 114degree22’E	39.7nm
Cuarteron Reef	8degree51’N, 112degree50’E	128.2 nm
Fiery Cross Reef	9degree33’N, 112degree 54’E	78.8 nm

As to the fourth group of claims concerning the Philippines claim to maritime zones and corresponding rights in the South China Sea, especially with regard to the Philippines’s claim that China has unlawfully acted “in the Philippines” EEZ and continental shelf”, it’s difficult to establish a Chinese counter-claim without determining the extent of the Philippines’ maritime zones in the South China Sea as well as those of China. China may argue that the real dispute between the two parties in the South China Sea concerns maritime boundary delimitation which, as result, is indeed territorial disputes over the Nansha (sparsely) and Zhongsha (Macclesfield Bank, including Scarborough Shoal) Archipelagos.¹

For the fifth group of claims concerning the right to navigation, unless the Philippines identify the exact locations where the alleged interference took place or to specify what that” interference with the exercise by the Philippines” look like, and the what are the legal basis advanced by China for such interference, once may perceive that these “unlawful activities” turn out to be enforcement measures to enforce Chinese domestic laws and regulations within the China’s EEZ in the South China Sea, which again falls into the exception clause to compulsory jurisdiction under Article 298(1).

Discussion

The Philippines’s approach to judicial dispute appears to be four-prong public relations strategy: First, the Philippines tried to create an image that China has been opposed to the rule of law and a rule-based international society; Second,

the Philippines attempted to represent its dispute with China as battle of "David against Goliath" with arbitration taking the role of "on equal terms and in a level playing field", Third , the Philippines created the impression that arbitration was the "last resort" , having "exhausted almost all political and diplomatic avenues for a peaceful negotiated settlement of its maritime dispute with China"; Finally, the Philippines tried to portray the institution of arbitration proceedings against China as an action that "benefits all nations" and through which the Philippines is "able to reinforce unimpeded commerce and... to do away with the threat to freedom of navigation from the region," thereby indirectly implying that China was impeding freedom of navigation and lawful commerce in the South China Sea.

For the Philippines, the best scenario is the Tribunal might decide in favor of all or part of the claims brought up by the Philippines , especially legal status of the U-shape line; the worst case scenario is the Philippines might lose on jurisdiction. However, more important than winning the case seems to be opportunity for the Philippine. Government is to publicize its case against China to the world and to generate support for its position both at home and abroad. Compared with the portrait of "David against Goliath" created by the Philippines, the South China Sea Arbitration case is "like an onion with different layers," if one carefully exam it from a legal perspective. It's reasonable to foresee that the preliminary objections to be raised by China, if it decides to act, will include the issue of lack of jurisdiction in the Arbitral Tribunal, inadmissibility issue, and other objections of a preliminary character. For China, the best case scenario is either the Tribunal would decide that itself has no jurisdiction over the present case, or the Philippines might withdraw the case; the worst case scenario is that China might lose all of part of the subject matters on the merits and would have to face the decision of whether to comply with the tribune.

Several prospects can be observed at this stage of the proceedings: first, although it is expected that subject matters should be set out in the Notification and Statement of Claim, the Philippines declared that it "reserves the right to supplement and/or amend its claims and the relief sought as necessary". New claims or amendments of the existing claims may be already supplemented by the 2014 Memorial of nearly 4000 pages submitted by the Philippines; second, The Socialist Republic of Vietnam also claims part of the South China Sea. There have been lots of reports saying that the Government of Vietnam is planning to take legal action against China for its movement of an oil rig into disputed waters in

the South China Sea.¹ Vietnam may participate in the Arbitral Tribunal brought up by the Philippines, or initiate a separate case against China. In either case, legal action will jeopardize relations between Vietnam and China and the Vietnamese Government may be subject to various pressures. The best strategy for Vietnam may be subject to various pressures. The best strategy for Vietnam might be to wait for the result of the South China Sea Arbitration case. The rivalry among China, the Philippines, Vietnam, Malaysia has escalated which dragged extra-regional power i.e. the USA. Therefore, peaceful settlement of South China Sea issue may ensure the regional security of South East Asia.

Endnotes

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In July 1971, after sent a diplomatic note on behalf of Cloma to Taipei demanding the ROC's withdrawal from Itu Aba, in the early of same year, Ferdinand Marcos announced the annexation of the 53 island group known as Kalayaan, although since neither Cloma or Macros specified which fifty three features constituted Kalayaan, the Philippines began to claim as many features as possible.

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Notification and statement of Claim of the Philippines dated 22 January 2013.

⁴ Department of Foreign Affairs of the Republic of Philippines, Notification and statement of Claim, Jan 22, 2013, paras 2, 11.

Notification and Statement of Claim, para 24.

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Notification and Statement of Claim, para 14.

Notification and Statement of Claim, paras 15-17.

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Notification and Statement of Claim, paras 31.

For the declaration and reservation made by the State parties of the UNCLOS, see "Untitled Nations Convention on the Law of the Sea" (United Nations Treaty Collection), available at

https://treaties.un.org/pages/ViewDetailsIII.aspx?andsrc=TREATYanmtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec, access date: July 20, 2014.

Notification and Statement of Claim, para 7.

Article 309 of the UNCLOS states: no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."

Yann-huei Song, *Survey of Declarations or Statements Made by the Parties to the Law of the Sea Convention: 30 years after Adoption*, *The International Journal of Marine and Coastal Law* 28 (2013),

Article 20 of the Rule of Procedure of South China Sea Arbitration case states that “ the Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any claim made in the proceeding “, and “ The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question.”

Notification and Statement of Claim, paras 25-29.

Article 283 (1) of the UNCLOS states : “ no reservation or exceptions may be made to this convention unless expressly permitted by other articles of this Convention.”

Yann –huei Song, Survey of Declarations or Statements Made by the Parties to the Law of the Sea Convention: 30 Years after Adoption, *The International Journal of Marine and Coastal Law* 28 (2013),

Stephen Talmon, The South China Sea Arbitration: Is There a Case to Answer? In Stephen Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration Case: A Chinese Perspective*, Hart Publishing, 2014, p.19.

Fishery Jurisdiction (Federal Republic of Germany v. Iceland). (Jurisdiction), [1973] ICJ Rep 49, 53 [13].

Michael Sheng-ti Gau, Issue of Jurisdiction in Cases of Default of Appearance, In Stephen Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration Case: A Chinese Perspective*, Hart Publishing, 2014, p.85.

Article 287 (3) of UNCLOS reads : “ A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII. “

Article 20 of the Rule of South China Sea Arbitration case states that “the Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any claim made in the proceeding”, and “ The Arbitral tribunal shall rule on any plea concerning its jurisdiction as preliminary question. “

Notification and Statement of Claim , paras 25-29. Article 283 (1) of the UNCLOS states that “ when a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”

Notification and Statement of Claim, para 30.

Article 281 (1) of the UNCLOS provides that “ if the States parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by resources to such means and the agreement between the parties does not exclude any further procedure A word such as “undertake” is not lightly used in diplomatic document, and the special thrust carried by such wording, a serious promise, is unmistakable. As in the ICJ Genocide case, “the ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the contracting parties... it is not merely hortatory or purposive.” See Application of the Convention on the prevention and punishment of the Crimes of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits), 2007 ICJ Rep 43,111 [162].

ASEAN-China Declaration on the conduct of parties in the South China Sea, signed during the 8th ASEAN Summit in Phnom Penh, Nov 4,2002, para 4.

Treaty of Amity and Cooperation in Southeast Asia, done at Denpasar, Bali, Indonesia among Indonesia, Singapore, Malaysia, Thailand and the Philippines (Signed on 24 Feb 1976, entered into force on 21 June 1976) 1025 UNTS 15063 (TAC). China acceded to the Treaty, as amended by two subsequent protocols of 1987 and 1998, on 8 October 2003. China also ratified the third protocol to the TAC (dated 23 July 2010) on 26 August 2011.

Notification and Statement of Claim, para 40.

To protest an infringement of its sovereignty, sovereign rights and jurisdiction in the South China Sea, China declared that: China “has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attachment map) “. See Note Verbale CML/17/2009 (May 7,2009) from the permanent Mission of the PRC to the UN secretary-General with regard to the joint submission made by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf (7 May 2009);The map attached is also reproduced by the same Note Verbal.

The Note reads as follows: “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and

jurisdiction over the relevant waters as well as the seabed and subsoil thereof ... Since 1930s, the Chinese Government has given publicity several times the geographic scope of China's Nansha (Spratly) island and the names of its components. China's Nansha Islands is therefore clearly defined. In Addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the people's Republic of China on the Territorial Sea, Exclusive Economic Zone and Continental Shelf."Note Verbal (CML/8/2011) from the permanent Mission of the PRC to the UN Secretary-General with regard to the joint submission made by Malaysia and Vietnam to the Commission on the Limits of the Continental shelf (14 April 2011), Annex I, Doc A.23. This note was sent with reference to the Republic of Philippines's Note Verbal No 000228 dated 5 April 2011 (Philippines Note verbal (5 April 2011)).

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Peter A. Dutton, Cracks in the Global Foundation: International Law and Instability in the South China Sea, in Patrick M. Cronin, ed., *Cooperation from strength: The United States, China and the South China Sea*, Center for a New American Security, January 2012. Available at http://www.enas.org/files/documents/publications/CNAS/CooperationFromStrength_Cronin.pdf, access date: July 20, 2014.

Peter A. Dutton, *The Sino-philippine Maritime Row: International Arbitration and the South China Sea*, Center for a New American Security, 201

Also known as Democracy Reef (), and Bajo de Masinloc or panatag Shoal.

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