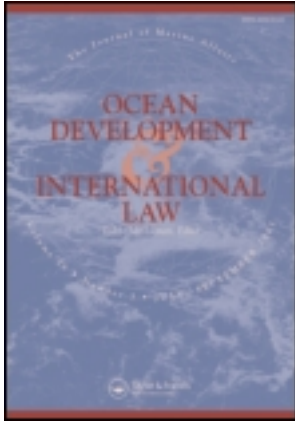


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Yu Mincai <sup>a</sup>

<sup>a</sup> Renmin University of China Law School , Beijing , People's Republic of China

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# China's Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options

YU MINCAI

Renmin University of China Law School  
Beijing, People's Republic of China

*China's responses of turning its back on the compulsory arbitration initiated by the Philippines on 22 January 2013 with respect to aspects of the South China Sea dispute between them under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea and failing to participate in constituting the five-member Arbitral Tribunal raise issues of whether the arbitral process has or can be halted by China and whether China's nonparticipation is in its best interest. This article examines the legal effects of China's actions and China's policy options with respect to the arbitral procedure started by the Philippines.*

**Keywords** China, compulsory arbitration, the Philippines, South China Sea dispute

## Introduction

On 22 January 2013, the Philippines, by a Note Verbale with the Notification and Statement of Claim on West Philippines Sea (hereafter, the Notification),<sup>1</sup> instituted the compulsory arbitration procedure against China under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>2</sup> "in order to achieve a peaceful and durable solution to the dispute" between the two states in the South China Sea.<sup>3</sup> Responding to the Philippines, China indirectly expressed its opposition the next day stating that "[w]e hope that relevant country would keep its word, . . . and refrain from taking actions that could complicate and aggravate this issue."<sup>4</sup> One week later, China formally declared its disapproval of the Philippines' initiative.<sup>5</sup> On 19 February, China categorically refused the Philippines' move to commence arbitral proceedings, returning the Note and the Notification,<sup>6</sup> and not appointing an arbitrator as required under Article 3 of Annex VII.<sup>7</sup> China has repeated its opposition on several occasions<sup>8</sup> and has also not, together with the Philippines, appointed by agreement the remaining arbitrators or the president of the Arbitral Tribunal pursuant to Article 3.<sup>9</sup>

China's uncommon responses in the practice of the Annex VII arbitrations<sup>10</sup> raise a number of questions. Does China's nonacceptance of the Notification and Statement of Claim mean that the Philippines is required to obtain China's consent to initiate the arbitral procedure? If not, does China's nonparticipation prevent the arbitral proceedings from going forward?

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Address correspondence to Mincai Yu, Associate Professor of International Law, Renmin University of China Law School, 59 Zhongguancun Street, Haidian District, Beijing, 100872, PRC.  
E-mail: ymc685@sina.com

If not, is it the right policy choice for China to refuse to participate in the written or oral proceedings, provided that the proceedings go forward? The purpose of this article is to examine the legal effects of China's actions with respect to the arbitration process commenced by the Philippines and China's policy options.

### **The Philippines' Initiation of the Arbitration and China's Objections**

The dispute in the South China Sea between China and the Philippines concerns sovereignty over islands and reefs and maritime rights and interests in the adjacent waters. The dispute has existed for a long period, intensifying in April 2012 in a face-to-face confrontation occurring, according to the Chinese Foreign Ministry, because of the attempt by Philippine warships to arrest Chinese fishing boats for allegedly illegally fishing in waters off the Huangyan Island (Scarborough Shoal).<sup>11</sup>

UNCLOS offers various peaceful means for settlement of ocean-related disputes between states. Both China and the Philippines are parties to UNCLOS, ratifying in 1996 and 1984 respectively, and thus are obliged to peacefully resolve their disputes. Part XV of UNCLOS establishes two categories of the dispute settlement procedures. One is the traditional consent-based peaceful settlement procedures involving negotiation, consultation, or conciliation. The other is the compulsory procedures entailing binding decisions. The relationship between the two categories is that any dispute concerning the interpretation or application of UNCLOS that cannot be settled by the consensual means may be referred by any party to the dispute to the compulsory procedures for settlement set out in the latter. Under Article 287 of UNCLOS, there are four possible fora for compulsory settlement: the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice; an Arbitral Tribunal constituted in accordance with Annex VII of the UNCLOS; or a special Arbitral Tribunal constituted in accordance with Annex VIII of the UNCLOS. A state can choose, by means of a written declaration, one or more of those avenues for the compulsory settlement of disputes when signing, ratifying, or acceding to UNCLOS or at any time thereafter. But when no choice has been made or no common choice is agreed, then the Annex VII arbitration is the forum for settlement.<sup>12</sup> Since 1997, 11 Annex VII arbitral proceedings have been commenced, relating to maritime matters such as sea boundary delimitation, navigation, fisheries, environmental protection, and the status of warships.<sup>13</sup>

Neither China nor the Philippines exercised its option under Article 287 to choose a forum for the dispute settlement; thus, both parties are deemed to have accepted Annex VII arbitration. This means that the Philippines has the potential to submit to the Annex VII arbitration a dispute with China concerning the interpretation or application of UNCLOS. However, whether the arbitral procedure is able to be initiated depends on whether the triggering conditions, formally and substantively, have been satisfied. The formal condition provided for in Articles 1 and 3(2) of Annex VII is that, subject to the provisions of Part XV, a party to a dispute is to address to the other party a written notification, which is to be accompanied by a statement of the claim containing the grounds on which the notification is based. To be included in the notification is the name of one arbitrator to be appointed to the tribunal. The substantive conditions have two aspects. One is that the relevant parties are not bound by agreements that exclude the compulsory procedures in Article 287 as set out in Articles 281(1) and 282 of UNCLOS. Pursuant to the two articles, a dispute is not subject to Article 287's mandatory jurisdiction where the disputants have agreed to seek settlement of the dispute by a peaceful means of their own choice and the agreement "exclude[s] any further procedure," or they have agreed, through a general, regional, or bilateral agreement or

otherwise, that such dispute shall, at the request of one of them, be submitted to a different procedure that entails binding decisions.<sup>14</sup> The second substantive condition is that the requirements in Article 286 of UNCLOS must be met. These requirements are that: (1) the dispute concerns the interpretation or application of UNCLOS; (2) the dispute does not engage the exceptions in Article 297<sup>15</sup> or the optional exceptions in Article 298; and (3) “no settlement has been reached by recourse to section 1.” China made a declaration (hereafter, the Chinese Declaration) on 25 August 2006 pursuant to Article 298 indicating that it does not accept any international judicial or arbitral jurisdiction provided for in Section 2 of Part XV of UNCLOS with respect to disputes referred to in Article 298, paragraph 1(a), (b), and (c) of UNCLOS (e.g., those related to maritime boundary delimitation, territorial disputes, or military activities).<sup>16</sup>

The Philippines sent China the written Notification containing the disputing facts, its claim and the grounds on which it is based, as well as the nomination of ITLOS judge Rudiger Wolfrum (Germany) as a member of the Arbitral Tribunal, so it has complied with the formal requirements for the initiation of the arbitration. The Philippines is obviously of the view that it has also met the substantive requirements under Part XV. In its view, “no agreement to the contrary currently exists” between it and China,<sup>17</sup> the dispute concerns the interpretation or application of UNCLOS, and its arbitral claims do not fall within the Chinese Declaration. The Philippines asserts that the dispute concerns: (a) whether the parties’ respective rights and obligations with regard to the waters, seabed, and maritime features of the South China Sea are governed by the provisions of UNCLOS; (b) whether China’s claims based on the “nine dash line” (China calls it the “dotted line”<sup>18</sup>) are inconsistent with those provisions; (c) whether, under Article 121 of UNCLOS, some maritime features in the South China Sea are islands, low-tide elevations, or submerged banks, and whether they are capable of generating the entitlement to maritime zones greater than 12 miles; and (d) whether China has violated the right of navigation of the Philippines in the waters of the South China Sea, and the rights of the Philippines with regard to the living and nonliving resources within its exclusive economic zone (EEZ) and continental shelf.<sup>19</sup> The Philippines’ view is that these matters are irrelevant to maritime boundary delimitation, historic bays or titles, or military activities.<sup>20</sup> Finally, with no settlement having been reached, the Philippines stated that, on numerous occasions dating back to 1995, it has been, fully and in good faith, exchanging views with China regarding the settlement of their disputes concerning the 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 nonliving resources, and the status of the Nansha Islands (the Spratly Islands) and the Huangyan Island. The Philippines stressed that all possibilities of settlement by negotiation have been exhausted such that Article 281(1) allows it to have recourse to the compulsory process entailing a binding decision in Part XV.<sup>21</sup>

The Philippines’ statements were not acceptable to China. From China’s perspective, “the request for arbitration by the Philippines is manifestly unfounded” and China stated that its rejection thereof “has a solid basis in international law.”<sup>22</sup> China’s view is that:

[t]he claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea.

and that:

Therefore, . . . the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines.<sup>23</sup>

Furthermore, China noted that its 2006 Declaration “exclud[es] disputes regarding such matters as those related to maritime delimitation from the compulsory dispute settlement procedures, including arbitration.”<sup>24</sup> China also pointed out that “China has been committed to resolving disputes through bilateral consultation and negotiation . . . . To solve relevant disputes through negotiation between directly-concerned sovereign states is also the consensus between China and ASEAN countries as stipulated in the Declaration on the Conduct of Parties in the South China Sea (DOC).”<sup>25</sup> China opines that the Philippines’ act of commencing the arbitration “violates the consensus and replaces it by another one.”<sup>26</sup>

China’s two arguments do not directly refer to the relevant provisions of UNCLOS, but they are in essence about the substantive requirements for a compulsory arbitration to proceed. To put it another way, China could argue that an agreement on solving the South China Sea disputes exists between both parties. As early as 1997, the member states (including the Philippines) of the Association of Southeast Asian Nations (ASEAN) and China “agreed to resolve their disputes in the South China Sea through friendly consultations and negotiations in accordance with universally recognized international law, including the 1982 UN Convention on the Law of the Sea.”<sup>27</sup> This commitment was further endorsed in the 2002 DOC, which states in paragraph 4 that China and the ASEAN states “undertake to resolve their territorial and jurisdictional disputes by peaceful means, . . . through friendly consultations and negotiations by sovereign states directly concerned.”<sup>28</sup> Arguably, the phrase “to resolve . . . through friendly consultations and negotiations by sovereign states directly concerned” excludes the resort to or intervention of an Annex VII Arbitral Tribunal and the 2002 DOC is an agreement that “exclude[s] any further procedure” within the meaning of Article 281(1) of UNCLOS.

The statements by China that it “has indisputable sovereignty over the Nansha Islands and their adjacent waters. Territorial sovereignty dispute caused by the Philippines’ illegal encroachment on some islets of China’s Nansha Islands is the root cause and essence of relevant dispute between China and the Philippines in the South China Sea,”<sup>29</sup> is an argument that the matter in dispute does not concern the interpretation or application of UNCLOS. Finally, the alleged rights violated by China relate to the overlapping claims by both parties to the maritime rights in the South China Sea;<sup>30</sup> thus, there is an issue of the sea boundary delimitation that is excluded from the compulsory arbitral jurisdiction under Article 298 and the Chinese Declaration.

China further has noted that the Philippines has not negotiated in good faith to settle the dispute under Article 283(1) because it has not entered into “negotiations with a view to arriving at an agreement,” but merely has gone “through a formal process of negotiation as a sort of prior condition for the automatic application of” the compulsory arbitration.<sup>31</sup> Evidence given of this is the Philippines’ position on the joint development in the South China Sea, which states that “following the Chinese model, is a violation of the Philippine Constitution. Joint development should be in accordance with Philippine law.”<sup>32</sup>

## China's Nonacceptance of the Arbitration

China's action of refusing to accept the present arbitration is understandable. China has consistently maintained that negotiations and consultations should be used to settle the insular and maritime disputes in the South China Sea, rather than engagement of any form of compulsory third party settlement procedure.<sup>33</sup> Nevertheless, China's usual position of avoidance of arbitration or compulsory adjudication is not directly applicable to the Philippines' arbitration since, as a result of China's ratification of UNCLOS and Article 287, China has given its advance consent to the possibility of an Annex VII arbitration. Consequently, the Philippines has access to the procedures and can commence them without China's new consent. This is the meaning of the compulsory jurisdiction.

A state's right to unilaterally initiate the Annex VII arbitration procedure was confirmed by the *Barbados-Trinidad and Tobago Annex VII* Arbitral Tribunal, which stated that:

In practice the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations. . . . Upon the failure . . . , Article 287 entitles one of the Parties unilaterally to refer the dispute to arbitration.

This unilateral right to invoke the UNCLOS arbitration procedure is expressly conferred by Article 287 which allows the unsettled dispute to be referred to arbitration "at the request of any party to the dispute"; it is reflected also in Article 1 of Annex VII.<sup>34</sup> The tribunal went on to emphasize that:

Article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged.<sup>35</sup>

Likewise, the authoritative "United Nations Convention on the Law of the Sea 1982: A Commentary" comments on Article 286 that:

Once a State ratifies or otherwise expresses its consent to be bound by the Law of the Sea Convention, by that action it expresses also its consent to the applicability to disputes to which it is a party of procedures specified in section 2 of Part XV. No further agreement between the parties to a dispute is necessary to submit the dispute to the procedures specified in section 2 of Part XV. . . . Any party to the dispute may submit it to the appropriate court or tribunal, without having to obtain consent from the other party.<sup>36</sup>

Given that the Philippines has the right to institute compulsory arbitration, China's opposition essentially arises with respect to preliminary objections to the Annex VII Arbitral Tribunal exercising jurisdiction over the dispute. The validity of preliminary objections regarding jurisdiction that can be raised are not decided by China (the respondent), but are ultimately determined by the Arbitral Tribunal. Article 288(4) of UNCLOS provides that, if there is a dispute as to whether a tribunal has jurisdiction, the matter is to be settled by that tribunal. The Arbitral Tribunal in *Southern Bluefin Tuna Case*, the first arbitration under Annex VII, commented that "it is for this Tribunal to decide whether the 'real dispute' between the Parties does or does not reasonably . . . relate to the obligations set forth in the treaties whose breach is alleged."<sup>37</sup> Similarly, the Virginia Commentaries note, as to the

question of how it would be determined that no settlement had been reached in Article 281, that:

Can one party to the dispute determine that important fact on its own, or will it necessary for the parties to agree that there is no chance for them to reach a settlement? It was considered to be consistent with international jurisprudence that a party may submit a case to the procedures specified in part XV whenever it considers that the procedure chosen by the parties is on longer likely to lead to a settlement. If, however, the other party objects and claims that there is still a chance to reach a settlement by the chosen procedure, the tribunal or court to which the matter is submitted will have to decide this preliminary objection to its jurisdiction.<sup>38</sup>

In the cases involving an Annex VII Arbitral Tribunal where ITLOS was requested to prescribe provisional measures under Article 290(5) of UNCLOS, every respondent made its objections to the jurisdiction of the relevant tribunal or court, which made its own decision on the matter.<sup>39</sup>

### **China's Nonparticipation in the Arbitral Proceedings**

However, different from an existing court structure such as ITLOS, Annex VII sets out a process for the tribunal to be established, in which it is seen as necessary for the respondent to participate or cooperate. Article 3 of Annex VII provides that the Arbitral Tribunal is to consist of five members. The party instituting the proceedings is to appoint one member, the other party to the dispute is, within 30 days of receipt of the notification, to appoint one member. The three other members are to be appointed by agreement between the parties. The Philippines, when instituting the proceedings, nominated one arbitrator while China did not, individually or together with the Philippines, make an appointment or appointments within the time limit. China, by calling for the Philippines to “return to the right track of resolving disputes through bilateral negotiations” may have hoped the Philippines would stop or suspend the proceedings.<sup>40</sup> However, the Philippines responded that “China’s action will not interfere with the process of Arbitration initiated by the Philippines. . . . The Arbitration will proceed under Annex VII of UNCLOS and the 5-member arbitration panel will be formed with or without China.”<sup>41</sup>

It is the case that China’s actions (or inaction) cannot impair the progress of the arbitration. Article 3 of Annex VII provides that when a respondent fails to appoint an arbitrator within a 30-day period or when the parties are unable to reach agreement on the appointment of the three other arbitrators or the president of the tribunal within 60 days of receipt of the notification, unless the parties agree that any appointment be made by a person or a third state chosen by the parties, the applicant instituting the proceedings may, within 2 weeks of the expiration of the 30-day or 60-day period, request the president or the next senior member of ITLOS who is available and is not a national of one of the parties to make the necessary appointments. Such appointments are to be made within a period of 30 days of the receipt of the request.

The Philippines made such request on 22 February 2013 and on 25 March 2013, respectively to ITLOS president and judge Shunji Yanai to appoint one arbitrator who should have been nominated by China and the three other arbitrators or the president who should have been jointly nominated by China and the Philippines.<sup>42</sup> According to Article 3, in doing the above, the president is to engage “in consultation with the Parties,” including

the party in default. In three previous Annex VII arbitration cases, the president had, at the request of one party, made such appointments after consultations with relevant parties.<sup>43</sup> If a state refuses to engage in consultation, is the ITLOS president without authority to make the necessary appointments? Article XX A(2) of the Vienna Convention on Civil Liability for Nuclear Damage<sup>44</sup> has no requirement for consultation in the case of requesting a third party to appoint arbitrators, stating that where a dispute is submitted to arbitration, if, within 6 months from the date of the request the parties to the dispute are unable to agree on the organization of the arbitration, a party may request the president of the International Court of Justice or the secretary-general of the United Nations to appoint one or more arbitrators. No reference is made to consultation with the relevant parties and the situation is clear that a state cannot block the procedure by not consulting. However, the above analogy cannot enable the consultation procedure to be used to bar the ITLOS president from making the appointments. First, from the perspective of terminology, the term “consultation” in Article 3 does not have the same meaning as the term “agreement” in the same article. If the respondent’s lack of cooperation is able to block the ITLOS president from doing his work, then “agreement” should have been used in Article 3 rather than “consultation.”

Next, if the respondent’s refusal of consultations could stop the constitution of the Arbitral Tribunal, then the compulsory arbitration set up by UNCLOS and the competence conferred by Article 3 of Annex VII on the ITLOS president over the composition of the Arbitral Tribunal would make no sense. This can be shown by the contrast with relevant conventions stipulating that in the event of the parties’ achievement of no agreement on the organization of the Arbitral Tribunal, such arbitral proceedings automatically terminate. For example, Article 16(1) of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>45</sup> provides that any dispute between two or more states parties that cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within 6 months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration any one of those parties may refer the dispute to the International Court by request in conformity with the Court’s Statute. Under this article as long as the disputants have been unable to agree on the organization of the arbitration within a reasonable time, the process of the arbitral proceedings is to terminate, no matter whether it has been referred to the International Court or not. Article 3 of Annex VII has no similar arrangement. The Annex VII arbitral tribunal procedure is based on the presumption that it cannot be denied. The Virginia Commentaries comment on Article 3 that:

also important is the fact that no opening is given to the possible frustration of the arbitral proceedings through the failure of a party to take the requisite action. In this regard, the text presents an apparently flawless procedure by which the arbitrators and the President are appointed by a third party within fixed time limits.<sup>46</sup>

The ITLOS president appointed, within the fixed time limit in Article 3, ITLOS judge Stanislaw Pawlak (Poland) as one member of the Arbitral Tribunal in March 2013.<sup>47</sup> One month later, the president nominated the rest of the members of the Arbitral Tribunal.<sup>48</sup> As a result, the China-Philippine Arbitral Tribunal composed of five members was set up apparently without China’s involvement. Despite a vacancy on this tribunal occurring due to the resignation of Chris Pinto on 6 May,<sup>49</sup> the arbitral proceedings will still not be affected because subparagraph (f) of Article 3 of Annex VII provides the procedure for the filling of a vacancy. That is, a vacancy is to be filled in the manner prescribed for the



initial appointment. Thus, the Philippines requested the ITLOS president on 27 May to name another arbitrator.<sup>50</sup> On 21 June 2013, the president appointed former president and ITLOS judge Thomas A. Mensah as arbitrator and president of the Arbitral Tribunal.<sup>51</sup>

Even if China does not participate in the written or oral proceedings of the Arbitral Tribunal, this cannot affect the process of the proceedings and the validity of the arbitral award. Article 9 of Annex VII provides that, 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 does not constitute a bar to the proceedings. In accordance with Article 296 of UNCLOS and last sentence of Article 9 of Annex VII, no matter whether China appears before the Arbitral Tribunal or not, as long as the tribunal satisfies itself that it has jurisdiction over the dispute and that the Philippines' claim is well founded in fact and law, the award rendered will be final and binding and is to be complied with by both parties. Article 11 of Annex VII further underlines that an award is without appeal, unless the parties have agreed in advance to an appellate procedure.

### **China's Reparticipation in the Written or Oral Proceedings**

China cannot stop the proceedings of the Arbitral Tribunal or question the validity of the award possibly unfavorable to it on the grounds of its noninvolvement. So whether China should maintain its existing policy or reengage by submitting written proceedings and being part of the oral proceedings is an important matter. China's continual nonparticipation will generate certain adverse consequences, one of which will be not having the chance to make its own arguments objecting to the Arbitral Tribunal's jurisdiction and the admissibility on the dispute,

#### ***Objections to the Arbitral Tribunal's Jurisdiction***

China will face a challenge in its efforts to object successfully to the Arbitral Tribunal's jurisdiction relying on Article 286 of UNCLOS. First, the argument that the Philippines' case deals primarily with a territorial dispute over which the tribunal has no jurisdiction is likely not to be accepted by the tribunal. The Philippines carefully asserted that "China's maritime claims in the South China Sea based on its so-called 'nine dash line' are contrary to UNCLOS and invalid."<sup>52</sup> China may refute that the dotted line is a sovereignty line over the islands and reefs in the South China Sea and irrelevant to UNCLOS. These different views may be understood by the tribunal as a dispute concerning the interpretation or application of UNCLOS, namely, whether UNCLOS is applicable to the Chinese dotted line. In the previous Annex VII arbitration cases, the respondent often claimed that the matter in dispute was not a dispute concerning the interpretation or application of the UNCLOS. Such arguments have not been successful. In the *ARA Libertad Case*, for example, Ghana maintained that there was no dispute with Argentina on the interpretation or application of UNCLOS in that Article 32 of UNCLOS was not applicable to acts by warships occurring in internal waters, with the consequence that an Annex VII arbitral tribunal would not have prima facie jurisdiction over the dispute presented by Argentina, and that ITLOS did not have jurisdiction to order the provisional measures requested by Argentina.<sup>53</sup> ITLOS did not accept Ghana's view, stating that a difference of opinions exists between Ghana and Argentina as to the applicability of Article 32 and, thus, a dispute appears to exist between them concerning the interpretation or application of UNCLOS and so an Annex VII Arbitral Tribunal would have prima facie jurisdiction over the dispute.<sup>54</sup>

Second, what the Philippines is seeking from the Arbitral Tribunal is not a determination of which party has sovereignty over the islands claimed by both of them or to delimit any maritime boundaries between them in the South China Sea,<sup>55</sup> but to declare that China's maritime claims based on the dotted line violate the Philippines' entitlements to the maritime spaces, or that China has illegally interfered with the Philippines' right of navigation in the South China Sea.<sup>56</sup> Article 297(1)(a) and (b) of UNCLOS provides that disputes concerning rights of navigation or domestic laws or regulations compatible with UNCLOS "shall be subject to the procedures provided for in section 2." Thus, it seems difficult that China's Article 298 Declaration will result in the exclusion of the tribunal's jurisdiction.

Third, the argument that the Philippines has not satisfied the obligation prescribed by Article 283(1) is without significant authoritative support. In the case law, whenever the respondent raises the applicant's refusal to continue with negotiations to contest jurisdiction, the tribunal's response has consistently been that the parties are not obliged to continue negotiations when one party concludes that all possibilities of settlement have been exhausted.<sup>57</sup> The *Barbados-Trinidad and Tobago* Annex VII Arbitral Tribunal further recognized that the unilateral invocation of the arbitration procedure by an applicant cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS or to general international law.<sup>58</sup>

However, Article 281(1) of UNCLOS and the 2002 DOC may enable China to successfully object to the Arbitral Tribunal's jurisdiction. That is to say, China may be able to successfully argue that the 2002 DOC is an "agreement" within the meaning of Article 281(1), thus excluding the Annex VII compulsory arbitration, so that the Arbitral Tribunal has no jurisdiction over the dispute. In this regard, support can be found in the reasoning and the award made by the Arbitral Tribunal in the *Southern Bluefin Tuna Case*. Australia and New Zealand as one party, and Japan as the other party, had conflicting contentions on whether Article 16 of the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT)<sup>59</sup> did or did not preclude recourse to the compulsory arbitral proceedings in Section 2 of UNCLOS Part XV.<sup>60</sup> The tribunal admitted that the terms of Article 16 of CCSBT did not expressly and in so many words exclude the applicability of any procedure, including the procedures of Section 2 of Part XV of UNCLOS.<sup>61</sup> However, it went on to find that the absence of an express exclusion of any procedure in Article 16 was not decisive.<sup>62</sup> Article 16(2), in its first clause, directs the referral of a dispute not resolved by any of the means in the first paragraph of the parties' "own choice" for settlement "to the International Court of Justice or to arbitration," but "with the consent in each case of all parties to the dispute." Clearly the ordinary meaning of these terms is that the dispute is not referable to adjudication by the International Court or to arbitration "at the request of any party to the dispute." The consent in each case of all parties to the dispute is required.<sup>63</sup> Consequently, Article 16 of CCSBT "exclude[s] any further procedure" within the contemplation of Article 281(1) of UNCLOS.<sup>64</sup> To further support its conclusion, the tribunal highlights two reasons, one of which is that a significant number of international agreements with maritime elements, postdating the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Many of these agreements effect such exclusion "by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and consultation or other method acceptable to the parties to the dispute. . . ."<sup>65</sup> Therefore, the tribunal is without jurisdiction to rule on the merits of the dispute.<sup>66</sup>

Following the Arbitral Tribunal's reasoning, despite paragraph 4 of the 2002 DOC containing no express words excluding the Annex VII arbitration, the ordinary meaning of the terms of this paragraph "to resolve their territorial and jurisdictional disputes . . .

through friendly consultations and negotiations by sovereign states directly concerned” (emphasis added) is to “exclude any further procedure” within the reach of Article 281(1) of UNCLOS. Thus, the 2002 DOC is “an agreement” requiring that a dispute be settled “by mutually agreed procedures” “by negotiation and consultation,” and precludes the Philippines’ unilateral referral of the dispute to compulsory arbitration under UNCLOS.

### ***Objections to the Arbitral Tribunal’s Admissibility***

Even if China fails to contest jurisdiction successfully, it still has good arguments for challenging the Arbitral Tribunal’s admissibility of the dispute. China can, by “piercing the corporate veil,” argue that most parts of the Philippines’ claims are not justiciable, including as follows:

- the invalidity of the South China Sea “dotted line” (item 2);
- China’s occupation of the submerged features on the Philippines’ continental shelf—Mischief Reef, McKennan Reef, Gaven Reef, and Subi Reef, and the termination of the occupation (items 4–7);
- Huangyan Island, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are rocks, but not islands under Article 121(3) of UNCLOS (item 8);
- China’s refraining from preventing Philippine vessels from exploiting the living resources in the waters adjacent to Huangyan Island and Johnson Reef (item 9); and
- China’s unlawful claim and exploitation of the resources in the Philippines’ EEZ and continental shelf, and unlawful prevention of the Philippines from exploiting the resources therein (item 11).<sup>67</sup>

All the above involve the territorial sovereignty issue over relevant islands and reefs or the issue of maritime delimitation resulting from the overlapping claims to the maritime areas in the South China Sea, thus coming within the wording of China’s Article 298 Declaration.

Moreover, whether a maritime feature is characterized as an island or a rock under Article 121(2) or (3) is also in essence related to its effect on maritime boundary delimitation. In the case law, whenever the parties concerned dispute whether a maritime feature is defined as an island or a rock, the primary implications of the decision of a court or tribunal is related to the feature’s relevance in the delimitation of a maritime boundary line. In the *Anglo/French Continental Shelf Arbitration*, a difference of view between the parties occurred with regard to the legal status of Eddystone Rocks in the English Channel. The United Kingdom argued that the Eddystone Rocks are “an island for all purposes,” including for maritime zone entitlement, but France maintained that Eddystone Rocks belong to the category of “low-tide elevations.”<sup>68</sup> The Court of Arbitration found that what it was called on to decide was not the general question of the legal status of the Eddystone Rocks as an island or a rock on the basis that the Arbitration Agreement did not invest it with competence to resolve differences between the parties regarding the delimitation of the territorial sea of either of them, but the relevance of the features in the delimitation of the median line in the channel as between the United Kingdom and France.<sup>69</sup> Similarly, in the *Maritime Delimitation in the Black Sea Case*, the two parties disagreed as to the status of Serpents’ Island. Romania claimed that the island was a rock incapable of sustaining human habitation or an economic life of its own under Article 121(3) while the Ukraine argued that it was indisputably an “island” under Article 121(2), rather than a “rock.”<sup>70</sup> The International Court concluded, after examining the relevant geography and the effects of the feature on the maritime entitlements as well as the acts of Ukraine, that the presence of Serpents’ Island did not call for an adjustment of the

provisional equidistance line; thus, it did not need to consider whether Serpents' Island fell within Article 121(2) or (3).<sup>71</sup> This jurisprudence has been followed by the International Court in the *Territorial and Maritime Dispute Between Nicaragua and Colombia Case*. In this dispute, the parties differed regarding the entitlements that may be generated by the maritime features Albuquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla, and Bajo Nuevo. Nicaragua contended that all the features were rocks with no entitlement to a continental shelf or EEZ within the exception in Article 121(3).<sup>72</sup> But Colombia argued that they were islands falling outside the exception in Article 121(3) and, thus, have the same maritime entitlements as any other land territory, including an entitlement to a territorial sea of 12 nautical miles, an EEZ, and a continental shelf.<sup>73</sup> The International Court, after reiterating its finding made in the *Black Sea Case*, concluded that:

it is not necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina.<sup>74</sup>

### **Termination of the Proceedings as a Result of Negotiations and Consultations**

Repatriation by China in the proceedings may be conducive to the creation of a positive atmosphere for cooperative settlement of the dispute in which China and the Philippines may be able to negotiate and consult to reach an agreement or consensus terminating the proceedings. The termination of the arbitral proceedings has arisen numerous times regarding Annex VII arbitrations. Regarding the China-Philippine Arbitration, two options are available pursuant to Article 3 of Annex VII and the practice of the Annex VII arbitrations. One is unilateral termination; namely, the applicant does not request the tribunal to continue the proceedings when the respondent does not appear before it or the applicant applies to withdraw the case. The latter is what occurred in the *MOX Plant Case*, where Ireland formally notified on 15 February 2007 the Annex VII Arbitral Tribunal of the withdrawal of its claim against the United Kingdom about the building and operation of the MOX Plant at Sellafield on the Irish Sea. On 6 June 2008, the tribunal issued an order terminating the proceedings.<sup>75</sup>

The other option is a consensual termination where the parties to a dispute reach an accord of settlement to terminate the arbitral procedure. This occurred in the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*. In 2003, Malaysia instituted the Annex VII arbitral procedure against Singapore with respect to the latter reclaiming of land in and around the Straits of Johor. On 26 April 2005, the parties signed a Settlement Agreement and an Award on Agreed Terms was issued by the Arbitral Tribunal to terminate the proceedings on 1 September 2005.<sup>76</sup> More recently, it has occurred in the *ARA Libertad* Arbitration where Argentina and Ghana concluded an agreement on 27 September 2013 that brought the proceedings to an end.<sup>77</sup> Undoubtedly, the Arbitral Tribunal will issue a Termination Order in due course.<sup>78</sup>

Among the above-mentioned options, it does not appear likely that the Philippines will itself stop the proceedings. However, if China were to actively engage in negotiations with the Philippines, it may be more likely that both parties would achieve a win-win agreement or a consensus to individually or jointly terminate the proceedings. That this possibility

exists may be gleaned by the Philippines itself not expressing full confidence in winning the case.<sup>79</sup>

## Conclusion

While it may be the case that the compulsory arbitration procedure triggered by the Philippines is a disguised maritime boundary delimitation dispute involving the unsettled sovereignty over islands and reefs in the South China Sea, China still should seek to resolve the dispute by legal means within the framework of UNCLOS. Opposition to the arbitration and nonparticipation in the arbitral proceedings are unlikely to be effective in settling the matters. China possesses sufficient legal means to join in the “legal competition” started by the Philippines. China has strong arguments to present to the Arbitral Tribunal that it lacks jurisdiction and admissibility over the present dispute. Therefore, China’s best policy option is to reparticipate in the arbitral proceedings.

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## Notes

1. The Philippines, “Notification and Statement of Claim,” 22 January 2013, attached to the Statement by Secretary of Foreign Affairs Albert del Rosario on the UNCLOS Arbitral Proceedings Against China to Achieve a Peaceful and Durable Solution to the Dispute in the WPS, available at [www.gov.ph/2013/01/22/statement-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/](http://www.gov.ph/2013/01/22/statement-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/).

2. U.N. Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, 1833 *U.N.T.S.* 397.

3. Statement by Secretary of Foreign Affairs Albert Del Rosario, *supra* note 1.

4. China, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 23 January 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1007746.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1007746.shtml) (accessed 23 January 2013).

5. China, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 31 January 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1010280.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1010280.shtml) (accessed 19 February 2013).

6. China, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 19 February 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015317.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015317.shtml) (accessed 19 February 2013).

7. See “Arbitrators Appointed in the Arbitral Proceedings Instituted by the Republic of the Philippines against the People’s Republic of China,” ITLOS Press Release/191, 25 April 2013, available at the International Tribunal for the Law of the Sea Web site at [www.itlos.org](http://www.itlos.org).

8. See China, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 20 February 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015425.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015425.shtml) (accessed 20 February 2013); Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on 26 March 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1025838.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1025838.shtml) (accessed 26 March 2013). See also Foreign Ministry Spokesperson’s Comments 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, 26 April 2013, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml) (accessed 26 April 2013).

9. “Arbitrators Appointed,” *supra* note 7.

10. In the prior Annex VII arbitration cases, the respondent generally had nominated its own arbitrator and appointed by agreement with the applicant the rest and the president of the arbitral tribunal. The exceptions are the cases involving:

- the dispute between Bangladesh and India, "President of the Tribunal Appoints Three Arbitrators in the Arbitral Proceedings Instituted to Settle the Maritime Boundary Dispute Between Bangladesh and India in the Bay of Bengal," ITLOS Press Release/143, 8 March 2010, available at the ITLOS Web site, supra note 10;
- the dispute between Argentina and Ghana, "Three Arbitrators Appointed in the Arbitral Proceedings Instituted by the Argentine Republic Against the Republic of Ghana in Respect of a Dispute Concerning the Vessel *ARA Libertad*," ITLOS Press Release/189, 5 February 2013, available at the ITLOS Web site, supra note 10; and
- the dispute between Mauritius and the United Kingdom, "Three Arbitrators Appointed by the President of the Tribunal in the Arbitral Proceedings Instituted by Mauritius Against the United Kingdom in Respect of the Dispute Concerning the Marine Protected Area Related to the Chagos Archipelago," ITLOS Press Release/164, 25 March 2011, available at the ITLOS Web site, supra note 7.

The other Annex VII arbitration cases are:

- *MOX Plant Case Between Ireland and United Kingdom*, available at the Permanent Court of Arbitration (PCA) Web site at [www.pca-cpa.org](http://www.pca-cpa.org);
- *Guyana v. Suriname*, see *Arbitral Award*, 7 September 2007, available at the PCA Web site;
- *Land Reclamation by Singapore in and Around the Strait of Johor (Malaysia v. Singapore)*, available at the PCA Web site;
- *Barbados and Trinidad and Tobago*, see *Arbitral Award*, 11 April 2006, available at the PCA Web site; and
- *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, see *Award on Jurisdiction and Admissibility*, available at [www.worldbank.org/icsid/bluefintuna/award080400.pdf](http://www.worldbank.org/icsid/bluefintuna/award080400.pdf) (accessed 1 March 2013).

11. See Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on 11 April 2012, available at [www.fmprc.gov.cn/eng/xwfw/s2510/2511/t923058.shtml](http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t923058.shtml) (accessed 19 March 2013).

12. UNCLOS, supra note 2, art. 287, paras. 3 and 5.

13. They are:

- *M/V "Saiga" Case Between Saint Vincent and the Grenadines and Guinea, Judgment*, 1 July 1999, available at the ITLOS Web site, supra note 7;
- *Southern Bluefin Tuna Case Between Australia and New Zealand and Japan*, supra note 10;
- *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean Between Chile and European Union*, for more information see the ITLOS Web site, supra note 7;
- *MOX Plant Case Between Ireland and United Kingdom*, supra note 10;
- *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor Between Malaysia and Singapore*, supra note 10;
- *Case Relating to the Delimitation of the Exclusive Economic Zone and Continental Shelf Between Barbados and Trinidad and Tobago*, supra note 10;
- *Case Relating to Maritime Boundaries and Associated Matters Between Guyana and Suriname*, supra note 10;
- *Case Concerning the Delimitation of the Maritime Boundary in the Bay of Bengal Between Bangladesh and India*, for further information see the PCA website, supra note 10;

- *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, 14 March 2012, for further information see the ITLOS Web site, supra note 7;
- *ARA Libertad Case Between Argentina and Ghana*, for further information see the PCA Web site, supra note 10; and
- *Case Concerning the Establishment by the United Kingdom of a Marine Protected Area Around the Chagos Archipelago Between Mauritius and United Kingdom*, for further information see the PCA Web site, supra note 10.

14. UNCLOS, supra note 2, arts. 281–282.

15. *Ibid.*, Article 297, any dispute arising out of: (1) the exercise by the coastal state of a right or discretion in accordance with Article 246; (2) a decision by the coastal state to order suspension or cessation of a research project in accordance with Article 253; (3) sovereign rights of the coastal state with respect to the living resources in the EEZ or their exercise, including the discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other states, and the terms and conditions established in its conservation and management laws and regulations.

16. China's Declaration, available at the U.N. Division of Ocean Affairs and the Law of the Sea Web site at [www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm) (accessed 7 April 2013).

17. Notification and Statement of Claim, supra note 1, at 15.

18. The dotted line in the South China Sea was formally announced by the Chinese government in 1948. See Remarks by Foreign Minister Yang Jiechi at the ARF Foreign Ministers' Meeting, 24 July 2011, available at [www.fmprc.gov.cn/eng/zxxx/t842183.htm](http://www.fmprc.gov.cn/eng/zxxx/t842183.htm) (accessed 15 October 2012). The nine dotted line (U-shaped line) was appended to China's Notes Verbales in 2009 with respect to submissions made by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf. China, Note Verbale to Secretary-General of the United Nations, doc. CML/17/2009, New York, 7 May 2009 and Note Verbale to Secretary-General of the United Nations, Doc. CML/18/2009, New York, 7 May 2009, both available at the Commission on the Limits of the Continental Shelf Web site at [www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm).

19. Notification and Statement of Claim, supra note 1.

20. *Ibid.*, at 16.

21. *Ibid.*, at 10–12.

22. Foreign Ministry, 20 February 2013, supra note 8.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*; Foreign Ministry, 23 January 2013, supra note 4. Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, available at [www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjzyhy/2608/2610/t15311.htm](http://www.fmprc.gov.cn/eng/wjb/zzjg/gjs/gjzyhy/2608/2610/t15311.htm) (accessed 4 February 2013).

26. *Ibid.*; Foreign Ministry, 31 January 2013, supra note 5.

27. "ASEAN-China Cooperation Towards the 21st Century," 1997 Joint Statement of the Meeting of Heads of State/Government of the Member States of ASEAN and the President of the People's Republic of China of 16 December 1997, paragraph 8, available at [www.asean.org/news/item/joint-statement-of-the-meeting-of-heads-of-state-government-of-the-member-states-of-asean-and-the-president-of-the-people-s-republic-of-china-kuala-lumpur-malaysia-16-december-1997](http://www.asean.org/news/item/joint-statement-of-the-meeting-of-heads-of-state-government-of-the-member-states-of-asean-and-the-president-of-the-people-s-republic-of-china-kuala-lumpur-malaysia-16-december-1997) (accessed 18 April 2013).

28. Declaration on the Conduct of the Parties, supra note 25.

29. Foreign Ministry, 23 January 2013, supra note 4.

30. The Philippines has complained that maritime zones greater than 12 nautical miles surrounding Huangyan Island and Chigua Jiao, claimed by China, encroach on its 200–nautical-mile EEZ and continental shelf and prevent it from enjoying its rights under UNCLOS. Notification and Statement of Claim, supra note 1, at 10.

31. *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, [1969] *I.C.J. Reports* 47.

32. The Philippines, "Possible Q & A on the Legal Track," 22 January 2013, available at [www.dfa.gov.ph/index.php/newsroom/dfa-releases/7300-statement-by-secretary-of-foreign-affairs-albert-del-rosario-on-the-unclos-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps](http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7300-statement-by-secretary-of-foreign-affairs-albert-del-rosario-on-the-unclos-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps) (accessed 23 January 2013).

33. China stated on several occasions during the course of the UNCLOS III negotiations that disputes should be settled through negotiation and consultation on an equal footing and on the basis of mutual respect for sovereignty and territorial integrity, and that the submission of a dispute to the compulsory settlement procedure must have the consent of the parties to the dispute. See Doc. A/CONF.62/SR.60 (1976), 24; Doc. A/CONF.62/SR.103 (1978), 67; Doc. A/CONF.62/SR.112 (1979), 13–14. At the Sixty-Seventh Session of the General Assembly in 2012, China repeated that "[a]s to international insular and maritime disputes, China maintains its position that sovereign States directly concerned should seek a peaceful settlement through friendly consultation and negotiation based on international law, including the Convention." General Assembly Sixty-Seventh Session, *Official Records*, Doc. A/67/PV.52 (2012), 13.

34. Barbados and Trinidad and Tobago, Award of the Arbitral Tribunal, *supra* note 10, at 64.

35. *Ibid.*, at 64–65.

36. M. H. Nordquist, S. Rosenne, and L. B. Sohn, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Dordrecht: Martinus Nijhoff, 1989), 38, 39.

37. *Southern Bluefin Tuna Case*, *supra* note 10, at 87.

38. Nordquist et al., *supra* note 36, at 23.

39. See, for example, *Southern Bluefin Tuna Case*, in which Japan argued that an Annex VII Arbitral Tribunal would not have *prima facie* jurisdiction over disputes concerning southern bluefin tuna submitted by Australia and New Zealand and, accordingly, that ITLOS was without authority to prescribe any provisional measures. ITLOS denied Japan's arguments and concluded that it is appropriate to prescribe provisional measures. *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Requests for Provisional Measures, Order, 27 August 1999, 33, 39–85, available on the ITLOS Web site, *supra* note 7.

40. Foreign Ministry, 19 February 2013, *supra* note 6.

41. The Philippines, Department of Foreign Affairs' Statement on China's Response to the Philippines' Arbitration Case, 19 February 2013, available at [www.dfa.gov.ph/index.php/newsroom/dfa-releases/7465-the-department-of-foreign-affairs-statement-on-chinas-response-to-the-philippines-arbitration-case](http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7465-the-department-of-foreign-affairs-statement-on-chinas-response-to-the-philippines-arbitration-case) (accessed 20 February 2013).

42. "Arbitrators Appointed," *supra* note 7.

43. See "Three Arbitrators Bangladesh and India," *supra* note 10; "Arbitrators Appointed Argentina-Ghana," *supra* note 10; "Arbitrators Appointed Mauritius-United Kingdom," *supra* note 10.

44. Protocol to Amend the Convention on Civil Liability for Nuclear Damage, 12 September 1997, (1997), 36 *ILL.M.* 1454.

45. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 1678 *U.N.T.S.* 221.

46. Nordquist et al., *supra* note 36, at 427.

47. "Arbitrators Appointed," *supra* note 7.

48. *Ibid.* They are Chris Pinto, president (Sri Lanka), Jean-Pierre Cot (France), and Alfred Soons (the Netherlands).

49. See "Lankan Judge in the UN Panel Resigns," 7 June 2013, available at [www.dailymirror.lk/news/30568-lankan-judge-in-the-un-panel-resigns.html](http://www.dailymirror.lk/news/30568-lankan-judge-in-the-un-panel-resigns.html) (accessed 8 June 2013).

50. *Ibid.* Also see "New Arbitrator and President Appointed in the Arbitral Proceedings Instituted by the Republic of the Philippines Against the People's Republic of China," ITLOS Press Release/197, 24 June 2013, available at the ITLOS Web site, *supra* note 7.

51. "New Arbitrator and President Appointed," *supra* note 50.

52. Notification and Statement of Claim, *supra* note 1, at 13.

53. See *The "ARA Libertad" Case (Argentina v. Ghana) (Provisional Measures)*, 15 December 2012, at 13, available on the ITLOS Web site, *supra* note 7.



54. *Ibid.*, at 15, 16.

55. Notification and Statement of Claim, *supra* note 1, at 3, 16.

56. *Ibid.*, at 2, 4–6, 11, 14, 16.

57. See *Southern Bluefin Tuna Case*, *supra* note 10, at 34, 60, 96; *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, 3 December 2001, 54–62, available at the ITLOS Web site, *supra* note 7; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures), 8 October 2003, 33–34, 47–53, available at the ITLOS Web site, *supra* note 7; *Barbados v. Trinidad and Tobago*, *supra* note 10, at 18–22, 62–64; *Guyana and Suriname*, *supra* note 10, at 39, 46, 80, 133, 152.

58. *Barbados-Trinidad and Tobago Arbitration*, *supra* note 10, at 64.

59. Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, 1819 *U.N.T.S.* 359, Article 16, reads in part

(1) If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. (2) Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

60. *Southern Bluefin Tuna Case*, *supra* note 10, at 48, 59, 76.

61. *Ibid.*, at 97.

62. *Ibid.*

63. *Ibid.*, at 98–99.

64. *Ibid.*, at 100.

65. *Ibid.*, at 103–104.

66. *Ibid.*, at 111.

67. Notification and Statement of Claim, *supra* note 1, at 17–19.

68. *Delimitation of the Continental Shelf (United Kingdom/France)*, *U.N. Reports of International Arbitral Awards*, XVIII (1977), at 8, 19, 66, 67–71.

69. *Ibid.*, at 72.

70. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] *I.C.J. Reports* 120, 121.

71. *Ibid.*, at 122–123

72. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, 63, available at the International Court of Justice Web site at [www.icj-cji.org](http://www.icj-cji.org).

73. *Ibid.*, at 65.

74. *Ibid.*, at 68.

75. See *MOX Plant Case*, *supra* note 10.

76. See *Case Concerning Land Reclamation, Award On Agreed Terms*, 1 September 2005, *supra* note 10.

77. See *The ARA Libertad Arbitration (Argentina V Ghana)*, PCA Press Release, 27 September 2013, available at the PCA Web site, *supra* note 10.

78. *Ibid.*

79. The Philippines answered the question of “[w]ill we win our case” that “[w]e believe we have a very good case under international law. In any legal action, however, there are many different factors to consider.” “Possible Q & A,” *supra* note 32.