

## Introduction

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### I. THE DISPUTES BETWEEN THE PHILIPPINES AND CHINA IN THE SOUTH CHINA SEA

**I**N GEOGRAPHICAL TERMS, the South China Sea covers a sea area of some 3.5 million square kilometres (km) which is semi-enclosed by Brunei, China, Indonesia, Malaysia, the Philippines and Vietnam.<sup>1</sup> It is part of the Pacific Ocean, dotted by numerous islands, islets, shoals, cays, reefs and rocks that are gathered into four groups. These four island groups, or archipelagos, are known to both Chinese and foreign sources as the Xisha [Paracel] Islands; Dongsha [Pratas] Islands; Zhongsha Islands, including Huangyan Island [Macclesfield Bank, including Scarborough Shoal]; and Nansha [Spratly] Islands.<sup>2</sup> The groups fall within an area with the coordinates of 3°57' to 21°N and 109°30' to 117°50'E, stretching for a distance of approximately 1,800 km from the north to the south, and about 900 km from the east to the

<sup>1</sup> International Hydrographic Organisation, *Limits of Oceans and Seas*, Special Publication No 23, 3rd edn (Monte-Carlo, Imp Monégasque, 1953) 30–31; China Institute of Marine Affairs, State Oceanic Administration, *Zhong Guo Hai Yang Fa Zhan Bao Gao [China's Ocean Development Report]* (Beijing, Hai Yang Chu Ban She [Oceans Press], 2011) 19–20. The publication by the International Hydrographic Organisation is in the course of revision: Chris Rahman and Martin Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' (2010) 41 *Ocean Development and International Law* 315, 316.

<sup>2</sup> China Institute of Marine Affairs, *Zhong Guo Hai Yang Fa Zhan Bao Gao [China's Ocean Development Report]* 20. The Report also provides the following details: the Xisha Islands comprise 32 islands and islets, each possessing a surface area larger than five hundred square meters; the Zhongsha Islands are composed of rocks, sandbanks, and reefs among which, by virtue of two rocks, only Huangyan Island (or Scarborough Shoal or Reef) rises above sea level at high tide; the Nansha Islands consist of over 230 islands, islets, rocks, banks, and shoals, among which 25 are islands (*ibid.*, 24). Another Chinese publication describes the Dongsha Islands as comprising Dongsha [Pratas] Island, the Dongsha [Pratas] Reef, and two banks; see Guang Dong Provincial Commission of Toponymy, *Nan Hai Zhu Dao Di Ming Zi Liao Hui Bian [Collection of Materials Regarding the Geographical Names of the Islands in the South China Sea]* (Guangzhou, Guang Dong Di Tu Chu Ban She [Provincial Press of Maps and Atlases], 1987) 164–68. Useful references with regard to the geography and names of those islands may also be found in Marvyn S Samuels, *Contest for the South China Sea* (New York, Methuen, 1982) 183–94.

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west.<sup>3</sup> By virtue of its geographic position, the South China Sea forms part of the vital route for maritime trade and transport for East Asian and Southeast Asian States and their trading partners in Asia, Africa and beyond.<sup>4</sup> More than half of the annual global merchant fleet tonnage sails through the South China Sea, with over 70,000 ships entering or exiting the South China Sea through the Malacca and Singapore Straits annually.<sup>5</sup> There are rich fisheries in the South China Sea, ranking fourth in terms of annual marine production.<sup>6</sup> For example, China's marine fishery production in the South China Sea in 2011 was more than 7 million tons, with 3.39 million tons from catch production and the rest from aquaculture production.<sup>7</sup> That accounted for more than 25 per cent of the country's total catch production in 2011. That year capture fisheries in the South China Sea supported over 27,430 Chinese fishing vessels, although the majority of them seem to operate in waters off the mainland coast.<sup>8</sup> Fisheries resources are especially rich in the abyssal region of the Nansha [Spratly] Islands and their adjacent waters. In addition, there are expanding prospects for the exploitation of oil and natural gas reserves in the seabed and subsoil.<sup>9</sup>

The proximity of the littoral States of the South China Sea means that disputes over regional control and influence are bound to arise almost automatically. Such disputes have manifested themselves in a complex and intractable web of territorial and maritime jurisdictional disputes. Five countries (China, both the mainland and Taiwan; Vietnam; the Philippines; Malaysia and Brunei) claim territorial sovereignty over land features in the South China Sea and six countries (China, both the mainland and Taiwan; Vietnam; the Philippines; Malaysia; Brunei and Indonesia) have overlapping claims to various maritime zones in the area. However, disputes between the coastal States became more intense only in the post-1970 era. In the long history of the South China Sea, dating back to at least the third century AD,<sup>10</sup> China has been a major player in the area. This is evidenced not least by the fact of the name given to this sea area, which comprises numerous

<sup>3</sup> China Institute of Marine Affairs, *Zhong Guo Hai Yang Fa Zhan Bao Gao [China's Ocean Development Report]* (2011) 20.

<sup>4</sup> Rahman and Tsamenyi, 'A Strategic Perspective on Security and Naval Issues in the South China Sea' 316–18.

<sup>5</sup> *ibid.*, 317.

<sup>6</sup> Tom Naess, 'Dangers to the Environment' in Timo Kovomäki (ed), *War or Peace in the South China Sea?* (Copenhagen, NIAS Press, 2002) 43, 44.

<sup>7</sup> PRC Ministry of Agriculture, Fisheries Bureau, *Zhong Guo Yu Ye Tong Ji Nian Jian 2013 [China Fisheries Statistics Yearbook 2013]* (Beijing, Zhong Guo Nong Ye Chu Ban She [China Agriculture Press], 2013) 46.

<sup>8</sup> PRC Ministry of Agriculture, Fisheries Bureau, *Zhong Guo Yu Ye Nian Jian 2012 [China Fisheries Yearbook 2012]* (Beijing, Zhong Guo Nong Ye Chu Ban She [China Agriculture Press], 2012) 174 (that figure is for fishing vessels subject to the annual fishing ban in the South China Sea).

<sup>9</sup> Lee Lai To, *China and the South China Sea Dialogues* (Westport, Praeger, 1999) 10–12.

<sup>10</sup> Jianming Shen, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective' (2002) 1 *Chinese Journal of International Law* 94, 102–05.

islands and other insular features. The involvement of other littoral States in the South China Sea has been much more recent. The Philippines, for example, only gained independence in 1946. The issues that prompted the present arbitration have an even more recent history and date back to the beginning of the 1970s. The purpose of this brief introduction is not to elaborate on the long history of the South China Sea,<sup>11</sup> but rather to focus on the very facts that gave rise, or are relevant to the Philippines' filing of the Notification and Statement of Claim against China in January 2013.<sup>12</sup>

In June 1933, the then 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 Land 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 Xisha [Paracel] Islands; Dongsha [Pratas] Islands; Zhongsha Islands, including Huangyan Island [Macclesfield Bank, including Scarborough Shoal]; and Nansha [Spratly] Islands.<sup>13</sup> A month later, the Commission's Gazette published a map of the Chinese islands of the South China Sea.<sup>14</sup> In 1946, China recovered from Japan the Xisha [Paracel] and Nansha [Spratly] Islands.<sup>15</sup> There was no reaction from Vietnam or any other State, and the Chinese naval contingent which was sent to the islands erected stone markers on Yong Xing [Woody] Island in the Xisha [Paracel] Islands and Taiping [Itu Aba] Island in the Nansha [Spratly] Islands.<sup>16</sup>

Following further inspections and surveys, the then 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 [James Shoal], at 3°58'N 112°17'E.<sup>17</sup> In the same year, the Ministry of the Interior published a list

<sup>11</sup> For a detailed account, see Samuels, *Contest for the South China Sea* (1982). For a brief overview, see Stein Tønnesson, 'The History of the Dispute' in Timo Kovomäki (ed), *War or Peace in the South China Sea?* (Copenhagen, NIAS Press, 2002) 6–23. For an official account of the history, see Position Paper of the People's Republic of China on the Issue of the South China Sea (17 November 2000) Annex I, Doc A.27.

<sup>12</sup> Republic of the Philippines (RP), Department of Foreign Affairs (DFA), Notification and Statement of Claim (22 January 2013) Annex I, Doc B.2 (Notification and Statement of Claim).

<sup>13</sup> The Review Commission of Maps for Land and Water, *Shui Lu Di Tu Shen Cha Wei Yuan Hui Hui Kan* [Gazette of the Review Commission of Maps for Land and Water], vol 1 (Nanjing, the Commission, January 1935) 61–65.

<sup>14</sup> See the Review Commission of Maps for Land and Water, *Shui Lu Di Tu Shen Cha Wei Yuan Hui Hui Kan* [Gazette of the Review Commission of Maps for Land and Water], vol 2 (Nanjing, the Commission, April 1935) 68–69.

<sup>15</sup> See Hungdah Chiu and Choon-Ho Park, 'Legal Status of the Paracel and Spratly Islands' (1975) 32 *Ocean Development and International Law* 1, 12–13.

<sup>16</sup> Zhenhua Han, Jinzhi Lin, and Fengbin Wu (eds), *Wo Guo Nan Hai Zhu Dao Shi Liao Hui Bian* [Collection of Historical Materials Concerning Our Country's Islands in the South China Sea] (Beijing, Dong Fang Chu Ban She [Orient Press], 1988) 180–81 (reproducing a publication of May 1948, which contained an account by the Chinese naval command of the Chinese navy's action on the islands).

<sup>17</sup> *ibid.*

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of 172 geographical names, in both Chinese and English, for the islands in the South China Sea.<sup>18</sup> In February 1948, China published an atlas of national administrative districts through the Commerce Press, Beijing, reflecting the 1947 atlas.<sup>19</sup> In May 1949, the four island groups in the South China Sea and other attached islands were placed under the authority of the Hainan District of Guang Dong Province.<sup>20</sup>

China has maintained its position since 1949 with only relatively minor changes over the years.<sup>21</sup> China's position has been gradually clarified and strengthened by national legislation and official documents. Four such documents are of particular importance. Firstly, on 4 September 1958 China promulgated its Declaration on the Territorial Sea.<sup>22</sup> Article 1 not only provided for a 12 nautical mile (nm) territorial sea, but also applied that breadth to China's mainland coast, coastal islands, and such off-lying islands as the Penghu Islands [Pescadores], the Dongsha [Pratas] Islands, the Xisha [Paracel] Islands, the Zhongsha Islands [Macclesfield Bank, including Scarborough Shoal (Huangyan Island)] and the Nansha [Spratly] Islands. Secondly, Article 2 of the 1992 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China reiterated the above provision.<sup>23</sup> Thirdly, in a Note Verbale addressed to the United Nations Secretary-General dated 7 May 2009, China stated that it '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'.<sup>24</sup> Attached to that Note was a map illustrating the well-known Chinese position showing the islands and waters in the South China Sea enclosed by a nine-dash line, which has since been made the main bone of contention by the Philippines.<sup>25</sup> Fourthly, on 14 April 2011 China addressed another Note Verbale to the United Nations Secretary-General in which it reiterated its earlier statement of May 2009.<sup>26</sup>

<sup>18</sup> Shicun Wu and others (eds), *Nan Hai Wen Ti Wen Xian Hui Bian [Collection of Documents on the Issue of the South China Sea]* (Hai Kou City, Hai Nan Chu Ban She [Hainan Press], 2001) 28–36.

<sup>19</sup> Guang Dong Provincial Commission of Toponymy (n 2) 212.

<sup>20</sup> Wu and others, *Nan Hai Wen Ti Wen Xian Hui Bian [Collection of Documents on the Issue of the South China Sea]* 37–38.

<sup>21</sup> Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Journal of International Law* 98, 102–08.

<sup>22</sup> Declaration of the Government of the People's Republic of China on China's Territorial Sea (4 September 1958) Annex I, Doc A.33. The declaration was approved by the Standing Committee of the People's Congress on 4 September 1958, thus making it part of Chinese law.

<sup>23</sup> Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (25 February 1992) Annex I, Doc A.31.

<sup>24</sup> Note Verbale CML/17/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (7 May 2009) Annex I, Doc A.24.

<sup>25</sup> See Notification and Statement of Claim, paras 2, 3, 5, 6, 11–14, 20, 27, 31, 39, 41.

<sup>26</sup> Note Verbale CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (14 April 2011), Annex I Doc A.23 (Note Verbale CML/8/2011 (14 April 2011)).

These documents have been accompanied by significant administrative acts performed by China during the same period. In 1959, Hainan District established an administrative office on Yong Xing [Woody] Island to administer the affairs of the Xisha [Paracel], Zhongsha [Macclesfield Bank, including Scarborough Shoal (Huangyan Island)] and Nansha [Spratly] Islands. The office was transferred to the authority of the provincial government of Guang Dong Province in 1969.<sup>27</sup> In 1984, the Chinese National People's Congress included within the territorial scope of the newly established Hainan Administrative Region, and later Hainan Province, 'the islets, reefs and sea areas of Xisha, Nansha, and Zhongsha islands'.<sup>28</sup> No protest was lodged against any of these measures by other States. In June 2012, the Ministry of Civil Affairs announced the decision of the State Council to establish Sansha City, to replace the existing administrative office for the affairs of the Xisha, Zhongsha and Nansha Islands and adjacent waters.<sup>29</sup> There was no reference to any nine-dash line in that decision. The municipal government of the new city, like the previous administrative office established in 1959, was headquartered on Yong Xing [Woody] Island. It is subject to the authority of the provincial government of Hainan Province. On 27 November 2012, the People's Congress of Hainan Province adopted a set of amended local regulations on border control and security in the coastal areas of the province.<sup>30</sup> The regulations are applicable to the coastal areas of the province and sea areas under its jurisdiction (Article 2). The enforcement of these regulations is entrusted to the public security authorities of the province at all levels (Article 5). Article 31 prohibits foreign ships and their crew from illegally anchoring in the territorial sea of the province, disembarking at local ports without permission, illegally landing on islands subject to the jurisdiction of the province, damaging buildings and other facilities on those islands, illegal broadcasting and other acts in violation of the regulations. Foreign ships and their crew found in breach of this provision can be stopped, boarded, inspected, arrested, expelled or diverted (Article 47). The territorial scope of application of

<sup>27</sup> Guang Dong Provincial Commission of Toponymy (n 2) 163. The Dongsha Islands were already part of Guangdong Province at the time.

<sup>28</sup> Decision of the Second Session of the Sixth National People's Congress on the Establishment of the Hainan Administrative Region (31 May 1984), reproduced in Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *The Laws of the People's Republic of China (1983–1986)* (Beijing, Ke Xue Chu Ban She [Science Press], 1987) 146. The islands remained so administered when Hainan became a province in April 1988, *ibid*, *The Laws of the People's Republic of China (1987–1989)* (Beijing, Ke Xue Chu Ban She [Science Press], 1990) 249.

<sup>29</sup> *cf* 'Min Zheng Bu Guan Yu Guo Wu Yuan Pi Zhun Di Ji San Sha Shi De Gong Gao' [Notice by the Ministry of Civil Affairs on the Approval by the State Council of the Establishment of Sansha City] (21 June 2012) [www.gov.cn](http://www.gov.cn).

<sup>30</sup> *cf* 'Hai Nan Sheng Yan Hai Bian Fang Zhi An Guan Li Tiao Li' [Regulations on Border Control and Security of the Coastal Areas of Hainan Province] (adopted by the Provincial People's Congress on 27 November 2012, effective as of 1 January 2013) [www.hainan.gov.cn](http://www.hainan.gov.cn). The original regulations were adopted by the Congress in November 1999.

these regulations is determined by, among others, the 1992 Law on the Territorial Sea and the Contiguous Zone.

In contrast, the Philippines emerged as a player in the South China Sea rather late in the day. In 1956, Philippine businessman Thomas Cloma and his associates landed on some features in the Nansha [Spratly] Islands and asserted ownership over them. However, this private act did not gain any official recognition from the Philippine Government.<sup>31</sup> It remained an isolated incident and has little relevance to the present case. It was only in 1971 that the Philippine Government suddenly claimed the 53 maritime features occupied by Cloma in 1956 as the Kalayaan Island Group (KIG). In 1978, the Philippine President, in Decree No 1596, declared that the KIG as well as its seabed, subsoil, continental margin and air space belong, and are subject to 'the sovereignty of the Philippines'.<sup>32</sup> However, all of these acts, as well as the 2009 Republic Act No 9522 revising the Philippine archipelagic baselines and reiterating the claim to sovereignty over the KIG and Scarborough Shoal,<sup>33</sup> and the 2012 Administrative Order by President Aquino unilaterally renaming 'the waters around, within and adjacent to' the KIG and Scarborough Shoal as 'the West Philippine Sea',<sup>34</sup> met with a consistent line of protests and challenges from China.<sup>35</sup> In addition, the military occupation of some insular features in the Nansha Islands by the Philippines could not affect China's territorial sovereignty over these features.<sup>36</sup> It is well-established that the illegal use of force does not produce any legal effect in international law.<sup>37</sup>

<sup>31</sup> Samuels (n 2) 81–86; Diane Drigot, 'Oil Interests and the Law of the Sea: The Case of the Philippines' (1982) 12 *Ocean Development and International Law* 23, 44; Benito O Lim, 'Tempest over the South China Sea: The Chinese Perspective on the Spratlys' (2000) 36 *Asian Studies* 69, 77.

<sup>32</sup> Presidential Decree No 1596 — Declaring Certain Areas Part of the Philippine Territory and Providing for their Government and Administration (11 June 1978), reprinted in Aileen San Pablo-Baviera (ed), *The South China Sea Disputes: Philippine Perspectives* (Quezon City, Philippine China Development Resource Center & Philippine Association for Chinese Studies, 1992) 55.

<sup>33</sup> Republic Act No 9522 — An Act to Amend Certain Provisions of Republic Act No 3046, as Amended by Republic Act No 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes (10 March 2009), reprinted in United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No 70 (2009) 32.

<sup>34</sup> Administrative Order No 29, s 2012 (5 September 2012) [www.gov.ph](http://www.gov.ph).

<sup>35</sup> See eg Note Verbale CML/12/2009 from the Permanent Mission of the People's Republic of China to the UN Secretary-General (13 April 2009), Annex I, Doc A.25; Note Verbale CML/8/2011 (14 April 2011) (n 26).

<sup>36</sup> For the islands and maritime features occupied by the Philippines, see PRC Ministry of Foreign Affairs (MFA), 'Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea' (26 April 2013) Annex I, Doc A.14.

<sup>37</sup> *cf* Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, arts 2 (3) and 33 (1) (UN Charter), art 2(4) which states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625 (XXV), Annex, principle I: 'The

With the United Nations Convention on the Law of the Sea (UNCLOS or the Convention) entering into force for China in June 1996, the parties to the disputes in the South China Sea have increasingly based their claims, policies and legal arguments on relevant provisions of the Convention.<sup>38</sup> There has thus always been a temptation for the coastal States of the South China Sea to have recourse to the compulsory dispute settlement procedures of Part XV of UNCLOS when they are frustrated by the slow pace of other means of peaceful dispute settlement. It must, however, be recalled that there are two unique regional mechanisms for the peaceful settlement of disputes in the South China Sea within the Association of Southeast Asian Nations (ASEAN) framework: the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC)<sup>39</sup> and the Treaty of Amity and Cooperation in Southeast Asia.<sup>40</sup> Both provide for the settlement of disputes through friendly consultations and negotiations between the States directly concerned. Neither of these mechanisms is incompatible with the provisions of UNCLOS. On the contrary, both qualify as 'peaceful means of [the parties'] own choice' in terms of UNCLOS, Part XV, section 1. The DOC for one specifically refers to 'the 1982 UN Convention on the Law of the Sea' as part of the legal basis for resolving territorial and jurisdictional disputes in the South China Sea. The two regional mechanisms embody and epitomise the regional approach to the peaceful settlement of maritime disputes in the South China Sea. UNCLOS is part of the legal fabric of this regional mechanism, but by no means the only thread in that fabric. Consultations and negotiations continue to offer the best prospect for the peaceful settlement of the territorial and jurisdictional disputes in the South China Sea, which is shown by the constant reaffirmation of the commitments in the DOC and the continued and persistent efforts of all sides to work for a Code of Conduct (COC) in the South China Sea that will further promote peace and stability in the region.<sup>41</sup> It is against this background of constructive and on-going efforts

territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal'.

<sup>38</sup> Nguyen Hong Thao and Ramses Amer, 'A New Legal Arrangement for the South China Sea?' (2009) 40 *Ocean Development and International Law* 333, 333–49.

<sup>39</sup> ASEAN-China Declaration on the Conduct of Parties in the South China Sea (signed during the 8th ASEAN Summit in Phnom Penh, 4 November 2002) (DOC), reproduced in Vaughan Lowe and Stefan Talmon (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Oxford, Hart, 2009) Doc 69, 771–72.

<sup>40</sup> Treaty of Amity and Cooperation in Southeast Asia (signed on 24 February 1976; entry into force 21 June 1976) 1025 UNTS 15063. China acceded to the Treaty on 8 October 2003.

<sup>41</sup> See eg 'Guidelines for the Implementation of the Declaration on the Conduct of Parties in the South China Sea' (20 July 2012), 'ASEAN-China Joint Statement on 10th Anniversary of DOC in South China Sea' (19 November 2012), ASEAN's 'Six Point Principles on the South China Sea' (20 July 2013) [www.asean.org](http://www.asean.org). At the ASEAN-China Sixth Senior Officials' Meeting and the Ninth Joint Working Group (JWG) Meeting on the Implementation of the DOC in Suzhou, China, on 14–15 September 2013 the participants decided to authorize the JWG to

within the ASEAN-China framework to resolve the disputes in the South China Sea in a spirit of friendship and cooperation that the Philippines' unilateral institution of arbitral proceedings must be seen.

## II. THE SOUTH CHINA SEA ARBITRATION

The States Parties to UNCLOS, including China and the Philippines,<sup>42</sup> 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. This obligation constitutes one of the great novelties and achievements of UNCLOS. States are free to choose one or more of the following means for the settlement of their disputes: (i) the International Tribunal for the Law of the Sea (ITLOS); (ii) the International Court of Justice (ICJ); (iii) an arbitral tribunal constituted in accordance with UNCLOS Annex VII or (iv) a special arbitral tribunal constituted in accordance with UNCLOS Annex VIII.<sup>43</sup> In case the States have made no choice, or if States have not chosen the same means of dispute settlement, disputes are to be submitted to arbitration in accordance with Annex VII of UNCLOS.<sup>44</sup> As neither China nor the Philippines have chosen any particular means for the settlement of their disputes, any dispute is to be submitted to an Annex VII arbitral tribunal.<sup>45</sup>

At around one o'clock on 22 January 2013, the Chinese Ambassador to the Philippines HE Ma Keqing was summoned to the Department of Foreign Affairs (DFA) and was handed a Note Verbale by Assistant Secretary Teresa Lazaro.<sup>46</sup> The Note Verbale contained the written Notification under Article 287 and Article 1 of UNCLOS Annex VII, and the Statement of Claim on the grounds on which the Notification is based, in order to initiate arbitral proceedings to challenge, before an UNCLOS Annex VII arbitral tribunal, China's claims to sovereignty and sovereign rights over areas of the South China Sea and the underlying seabed within the so-called 'nine-dash line', and to clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements

have detailed consultations over the COC; see PRC MFA, 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference' (16 September 2013) [www.fmprc.gov.cn](http://www.fmprc.gov.cn).

<sup>42</sup> The Philippines is a party since 8 May 1983 and the People's Republic of China since 7 June 1996.

<sup>43</sup> UNCLOS, art 287(1).

<sup>44</sup> UNCLOS, art 287(3) and (5).

<sup>45</sup> See United Nations, Division for Ocean Affairs and the Law of the Sea, 'Settlement of disputes mechanism — 1. Settlement of disputes mechanism under the Convention: Choice of procedure under article 287 and optional exceptions to applicability of Part XV, Section 2, of the Convention under article 298 of the Convention', [www.un.org/depts/los](http://www.un.org/depts/los).

<sup>46</sup> Note Verbale No 13-0211 from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila (22 January 2013) Annex I, Doc B.1.

in the West Philippine Sea under UNCLOS.<sup>47</sup> The Philippines contends that China's nine-dash line 'is, to put it plainly, illegal. It is arbitrary and bereft of any basis or validity under international law, specifically the United Nations Convention on the Law of the Sea or UNCLOS'.<sup>48</sup>

On 19 February 2013, two days before the expiry of the time-limit to appoint an arbitrator, China formally expressed its opposition to the institution of proceedings. The Ambassador of China to the Philippines, Ma Keqing, presented a Note Verbale to the Department of Foreign Affairs of the Philippines, which set out 'the Position of China on the South China Sea issues',<sup>49</sup> and returned the Philippines' Note Verbale of 22 January 2013, as well as the attached Notification and Statement of Claim.<sup>50</sup>

The reasons of China for rejecting the arbitration are threefold. First, the dispute submitted to arbitration by the Philippines is essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involves the question of territorial sovereignty over certain relevant islands and reefs, including the Nansha [Spratly] Islands and Huangyan Island [Scarborough Shoal].<sup>51</sup>

The Convention

makes it clear right at the beginning that it aims at 'establishing a legal order for the seas and oceans with due regard for sovereignty of all states'. The Convention is not an international treaty to regulate disputes of territorial sovereignty between states, nor can it serve as the basis to arbitrate such disputes.<sup>52</sup>

Indeed, disputes concerning territorial sovereignty are not the disputes 'concerning the interpretation or application of this Convention'. Moreover, in 2006, the Chinese Government made a declaration pursuant to Article 298 of UNCLOS excluding disputes concerning maritime delimitation from the compulsory dispute settlement procedures, including arbitration.<sup>53</sup>

Second, the Philippines is bound by its solemn commitment in the 2002 ASEAN-China DOC to resolve its territorial and jurisdictional disputes with China by peaceful means through friendly consultations

<sup>47</sup> See RP DFA, 'SFA Statement on the UNCLOS Arbitral Proceedings against China' (22 January 2013) [www.dfa.gov.ph](http://www.dfa.gov.ph).

<sup>48</sup> "'Philippine Policy Response and Action'" by Hon. Albert F del Rosario, Secretary of Foreign Affairs' (5 August 2011) [www.philippine-embassy.org.il](http://www.philippine-embassy.org.il).

<sup>49</sup> The Chinese Note Verbale is not in the public domain.

<sup>50</sup> See PRC MFA, 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference' (19 February 2013) Annex I, Doc A.17. See also PCA 'Arbitration between the Philippines and China, Arbitral Tribunal, First Press Release' (27 August 2013) [www.pca-cpa.org](http://www.pca-cpa.org).

<sup>51</sup> PRC MFA, 'Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea' (26 April 2013) Annex I, Doc A.14.

<sup>52</sup> PRC MFA, 'Foreign Ministry Spokesperson Hong Lei's Remarks on ASEAN Foreign Ministers' Statement on the Six-Point Principles on the South China Sea Issue' (21 July 2012) [www.fmprc.gov.cn](http://www.fmprc.gov.cn).

<sup>53</sup> Declaration by the People's Republic of China under Article 298 UNCLOS (25 August 2006) Annex I, Doc A.26. See also 'China's refusal of arbitration request by Philippines meets international law: Senior diplomat' (30 August 2013) [english.peopledaily.com.cn](http://english.peopledaily.com.cn).

and negotiations.<sup>54</sup> The Note Verbale of 22 January 2013 and the attached Notification and Statement of Claim ‘violate the consensus’ reached by ASEAN countries and China in the DOC.<sup>55</sup> The Foreign Ministry spokesperson declared: ‘it is regrettable that over recent years, the Philippines has changed its attitude and approach in handling the issue, gone back on its consensus with China, [and] broken its commitment in the DOC’.<sup>56</sup> China was especially disappointed by the institution of arbitral proceedings because the Philippines had previously repeatedly reaffirmed its commitment to the DOC and to addressing the disputes through ‘peaceful negotiations’ or ‘peaceful dialogue’.<sup>57</sup>

Third, the Note Verbale and the Notification and Statement of Claim ‘contain serious errors in fact and law as well as false accusations against China’.<sup>58</sup>

UNCLOS Annex VII, Article 3 provides rules for the constitution of an Annex VII arbitral tribunal. The appointment of the five arbitrators and the election of the president of the tribunal go through several stages. The party instituting the proceedings appoints one member, preferably chosen from a list of arbitrators drawn up and maintained by the Secretary-General of the United Nations, who may be its national. Every State Party to UNCLOS is entitled to nominate four arbitrators to that list. Nominees shall be experienced in maritime affairs and enjoy the highest reputation of fairness, competence and integrity,<sup>59</sup> and must not necessarily possess the nationality of the nominating country. Neither China nor the Philippines has nominated any person to the list of arbitrators.<sup>60</sup> The other party to the proceedings shall, within 30 days of receipt of the notification under UNCLOS Annex VII, Article 1, also appoint one member of the tribunal to be chosen preferably from the list of arbitrators, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of the 30-day period, request the President of the ITLOS to make the necessary appointment.<sup>61</sup> The ITLOS President shall

<sup>54</sup> DOC (n 39) para 4.

<sup>55</sup> PRC MFA, ‘Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference’ (19 February 2013) Annex I, Doc A.17.

<sup>56</sup> PRC MFA, ‘Foreign Ministry Spokesperson Hua Chunying’s Remarks on the Philippines’ Statement on the South China Sea’ (16 July 2013) Annex I, Doc A.4.

<sup>57</sup> See eg RP DFA, ‘AFP Chief of Staff, Chinese Military Officials Reaffirm Peaceful Resolution of South China Sea Disputes’ (9 December 2010) and ‘Joint Statement of the Republic of the Philippines and the People’s Republic of China’ (1 September 2011) [www.dfa.gov.ph](http://www.dfa.gov.ph).

<sup>58</sup> Embassy of the PRC in the Republic of the Philippines, ‘Chinese Spokesperson Hong Lei’s remarks on China returned the Philippines’ Notification on the submission of South China Sea issue to international Arbitration’ (19 February 2013) Annex I, Doc A.17.

<sup>59</sup> UNCLOS Annex VII, art 1.

<sup>60</sup> Only 31 of the 166 Parties to UNCLOS have nominated one or more persons to the List of Arbitrators; see United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI: Law of the Sea, 6. United Nations Convention on the Law of the Sea, [treaties.un.org](http://treaties.un.org).

<sup>61</sup> UNCLOS Annex VII, art 3(c).

appoint a person from the list of arbitrators within a period of 30 days of the receipt of the request and in consultation with the parties.<sup>62</sup> The three other members of the tribunal shall be appointed by agreement between the parties. They shall be chosen preferably from the list of arbitrators and shall be nationals of third States, unless the parties agree otherwise. The parties to the proceedings shall also appoint the President of the arbitral tribunal from among those three members. If, within 60 days of receipt of the arbitration notification, the parties are unable to reach agreement on the appointment of one or more of the arbitrators, or on the appointment of the President of the tribunal, the remaining appointment or appointments shall be made by the President of the ITLOS at the request of a party to the dispute.<sup>63</sup> Such a request must be made within two weeks of the expiration of the aforementioned 60-day period. The President of the ITLOS shall appoint the remaining arbitrators and the President of the arbitral tribunal from the list of arbitrators within a period of 30 days of the receipt of the request and in consultation with the parties. The constitution of the Annex VII arbitral tribunal thus takes at most 104 days from the receipt of the arbitration notification.<sup>64</sup>

Upon instituting proceedings, the Philippines appointed Rüdiger Wolfrum of Germany as a member of the Arbitral Tribunal.<sup>65</sup> When China failed to appoint an arbitrator within 30 days of receipt of the arbitration notification, the Philippines, at the earliest possible moment, on 22 February 2013, requested the President of ITLOS, Judge Shunji Yanai of Japan, to act on behalf of China and appoint another member of the Arbitral Tribunal in accordance with UNCLOS Annex VII, Article 3(c) and (e). This led to the appointment of Stanisław Pawlak of Poland as the second arbitrator.<sup>66</sup> Due to China's non-participation in the proceedings, the three remaining arbitrators and the President of the Arbitral Tribunal could not be appointed 'by agreement between the parties'. Again, at the earliest possible moment, the Philippines in a letter

<sup>62</sup> *ibid*, art 3(e). The ITLOS President 'shall' make the appointment of the arbitrator from the list. The parties, on the other hand, only have to choose their arbitrators 'preferably' from the list.

<sup>63</sup> It is not unusual that the parties cannot agree on the appointment of one or more arbitrators or on the appointment of the president of the tribunal; see *Bangladesh v India*, ITLOS/Press 143 (8 March 2010) and ITLOS/Press 198 (19 July 2013); *Argentina v Ghana (ARA Libertad Arbitration)* ITLOS/Press 189 (5 February 2013); and *Mauritius v United Kingdom*, ITLOS/Press 164 (25 March 2011). See also *Guyana v Suriname* (2007) 139 ILR 566, 578 [12] where a substitute arbitrator was appointed by the Tribunal in accordance with its Rules of Procedure.

<sup>64</sup> In the present case, the final date for the constitution of the Tribunal would have been 6 May 2013.

<sup>65</sup> UNCLOS Annex VII, art 3(b). Rüdiger Wolfrum is a judge of the ITLOS and was its president from 2005 to 2008. Judge Wolfrum was nominated to the list of arbitrators by Mongolia on 22 February 2005; see United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No 58 (2005) 30.

<sup>66</sup> Stanisław Pawlak was appointed to the list of arbitrators by Poland on 14 May 2004, see United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No 58 (2005) 28.

dated 25 March 2013,<sup>67</sup> requested the President of the ITLOS to appoint the three additional members of the Arbitral Tribunal and name one among them to serve as the President of the Tribunal. On 24 April 2013, the ITLOS President appointed Jean-Pierre Cot (France),<sup>68</sup> Chris Pinto (Sri Lanka)<sup>69</sup> and Alfred Soons (the Netherlands)<sup>70</sup> as arbitrators, and named Chris Pinto as President of the Arbitral Tribunal.<sup>71</sup> In May 2013, Chris Pinto resigned from the Arbitral Tribunal because his marriage to a Filipino national might have raised questions of impartiality.<sup>72</sup> In a letter dated 27 May 2013, the Philippines requested the ITLOS President to appoint another arbitrator and President for the Tribunal ‘to ensure the impartiality of the arbitral proceeding’ and ‘assure that any award that might be rendered in these proceedings is accorded the full degree of respect to which it is entitled, and is as safe as possible from attack by anyone who might be motivated to undermine it’.<sup>73</sup> On 21 June 2013, within the 30-day period, the ITLOS President filled the vacancy by appointing Thomas A Mensah (Ghana) to serve as a member and President of the Arbitral Tribunal.<sup>74</sup> It is of interest to note in this context that President Mensah was nominated to the list of arbitrators by Ghana only a couple of days before his appointment on 30 May 2013, which suggests that this might have been a ‘nomination with a view’ of being appointed to the Tribunal.<sup>75</sup>

On 11 July 2013, the members of the Arbitral Tribunal held their first constitutive meeting at The Peace Palace in The Hague at which the Tribunal designated The Hague as the seat of the arbitration and the Permanent Court of Arbitration (PCA) as the Registry for the proceedings.

<sup>67</sup> The 60-day period for the appointment of the remaining arbitrators and the President of the Tribunal ended on 23 March 2013 which fell on a Saturday. The Philippines submitted its request to the ITLOS President on Monday, 25 March 2013.

<sup>68</sup> Jean-Pierre Cot, who has been a judge of the ITLOS since 2002, was nominated to the list of arbitrators by Mongolia on 22 February 2005, together with Rüdiger Wolfrum; see United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No 58 (2005) 30.

<sup>69</sup> Former Secretary-General of the Iran-United States Claims Tribunal Chris Pinto was nominated by Sri Lanka on 8 April 2002, *ibid*, 31.

<sup>70</sup> Alfred HA Soons, Professor of Public International Law and Director of the Netherlands Institute for the Law of the Sea, was nominated by the Netherlands on 9 February 1998; see *ibid*, 30.

<sup>71</sup> See ITLOS/Press 191 (25 April 2013) [www.itlos.org](http://www.itlos.org).

<sup>72</sup> In a letter dated 6 May 2013, Judge Pinto informed the Agent of the Philippines, Solicitor General Francis H Jardeleza, that his wife is a Filipino national; see ‘Tribunal to Hear PH Territorial Case vs China Now Complete’ (29 June 2013) [www.panaynewsphilippines.com](http://www.panaynewsphilippines.com). See also ‘Lankan Judge in the UN Panel Resigns’ (7 June 2013) [www.dailymirror.lk](http://www.dailymirror.lk).

<sup>73</sup> Michaela del Callar, ‘For Having Pinay Wife, Sri Lankan Judge in PHL Arbitral Proceedings vs China Resigns’ (7 June 2013) [www.gmanetwork.com](http://www.gmanetwork.com).

<sup>74</sup> See ITLOS/Press 197 (24 June 2013) [www.itlos.org](http://www.itlos.org).

<sup>75</sup> Dr Thomas A Mensah is a former Judge and the First President of the ITLOS. See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI: Law of the Sea, 6. United Nations Convention on the Law of the Sea, ‘Notifications made under article 2 of annexes V and VII (List of conciliators and arbitrators)’ [treaties.un.org](http://treaties.un.org).

The parties had previously been requested to submit their views on these two matters, and the Philippines had consented to both. At the meeting, the Tribunal adopted a set of draft Rules of Procedure and invited the parties to comment on the Rules by 5 August 2013. It also requested the parties to propose a schedule for the submission of their written pleadings.<sup>76</sup> On 31 July 2013, the Philippines submitted comments on the draft Rules. China, on the other hand, on 1 August 2013 addressed a Note Verbale to the PCA in which it reiterated its position that 'it does not accept the arbitration initiated by the Philippines' and stated that it would not be participating in the proceedings.<sup>77</sup>

In its first Procedural Order on 26 August 2013, the Arbitral Tribunal formally adopted the Rules of Procedure and fixed 30 March 2014 as the date by which the Philippines should submit its Memorial. The Rules of Procedure which, at the time of writing, have not yet been released to the public, set out, *inter alia*, the course of action to be taken by the Tribunal in the event that one of the parties does not appear in the proceedings.<sup>78</sup>

<sup>76</sup> RP DFA, 'Phil Arbitral Proceedings Against China Now Officially Under Way' (16 July 2013) [www.dfa.gov.ph](http://www.dfa.gov.ph).

<sup>77</sup> PCA Press Release (27 August 2013) [www.pca-cpa.org](http://www.pca-cpa.org). The Chinese Note Verbale is not in the public domain.

<sup>78</sup> *ibid.*

