

## Article

# The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction

Zou, Keyuan

Available at <http://clock.uclan.ac.uk/11782/>

*Zou, Keyuan (2015) The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction. Chinese Journal of International Law, 14 (1). pp. 57-77. ISSN 1540-1650*

It is advisable to refer to the publisher's version if you intend to cite from the work.  
<http://dx.doi.org/10.1093/chinesejil/jmv008>

For more information about UCLan's research in this area go to <http://www.uclan.ac.uk/researchgroups/> and search for <name of research Group>.

For information about Research generally at UCLan please go to <http://www.uclan.ac.uk/research/>

All outputs in CLoK are protected by Intellectual Property Rights law, including Copyright law. Copyright, IPR and Moral Rights for the works on this site are retained by the individual authors and/or other copyright owners. Terms and conditions for use of this material are defined in the <http://clock.uclan.ac.uk/policies/>

# The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction

ZOU Keyuan\* and LIU Xinchang\*\*

## Abstract

The U-shaped line in the South China Sea has been recently challenged in the international community and this challenge reached its climax when the Philippines presented China with a Notification and Statement of Claim under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (LOS Convention) on 22 January 2013. In its Statement of Claim, the Philippines requests the Annex VII Arbitral Tribunal to adjudicate and declare that China's maritime claims based on the U-shaped line are contrary to the LOS Convention and invalid. Against this background, this article will analyze the issues concerning the related submissions of the Philippines.

## I. Introduction

1. On 22 January 2013, the Philippines, by a *Note verbale* with the Notification and Statement of Claim, instituted the compulsory arbitration procedures stipulated in the 1982 United Nations Convention on the Law of the Sea (LOS Convention) against the People's Republic of China (PRC), asking the Arbitral Tribunal to: (1) declare that China's rights in regard to maritime areas in the West Philippine Sea, the new name it uses to describe the South China Sea, like the rights of the Philippines,

\* Harris Professor of International Law, Lancashire Law School, University of Central Lancashire, United Kingdom. The research project from which this article derives is partially supported by the National Collaborative Centre for South China Sea Studies, Nanjing University, China.

\*\* PhD Candidate, Guanghua Law School, Zhejiang University, China.

are those that are established by the LOS Convention, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI; and (2) declare that China's maritime claims in the South China Sea based on its so-called "nine dash line" (U-shaped line) are contrary to the LOS Convention and invalid and that China is not entitled to exercise "historic rights" over the waters, seabed and subsoil beyond the limits of its entitlements under the Convention in the areas encompassed within its so-called "nine-dash line".<sup>1</sup>

2. While the arbitration case initiated by the Philippines contains various inter-related requests for relief, for the purpose of this article, we will put our focus on the legality of the U-shaped line and provide the reader with a more objective and professional assessment of the legal scenario in regard to the U-shaped line. The first part of the article will discuss China's rights and obligations under the LOS Convention; the second part will discuss the legal status of the U-shaped line and the legal implications from the line for any maritime entitlement, maritime boundary delimitation and dispute settlement in the South China Sea; and the final part is the conclusion. It is to be stated that while there are various terminologies for the U-shaped line, we have chosen to use the term "U-shaped line" as it is, in our view, more precise than the term "nine-dash line" used by the Philippines.

## II. China and the LOS Convention

3. On 10 December 1982, the United Nations Convention on the Law of the Sea was opened for signature in Jamaica, and China signed it immediately at that time. However, China ratified it in 1996, only after the LOS Convention came into force in November 1994. It is a fact that the Third UN Conference on the Law of the Sea (UNCLOS III) (1973–1982) was the first grand diplomatic conference that the Chinese Government sent its delegation to after the PRC replaced the Republic of China (ROC or Taiwan) for the seat of China in the United Nations in 1971. China was involved in negotiation and drafting of the LOS Convention, and China accepted most of the articles of the draft Convention through consensus. Some of the proposals submitted by China were finally reflected in the LOS Convention, in particular provisions on protection of marine environment,<sup>2</sup> marine scientific research,<sup>3</sup>

1 The diplomatic note and Philippines' "Notification and Statement of Claim" are available at <http://www.gov.ph/downloads/2013/01jan/20130122-Notification-and-Statement-of-Claim-on-West-Philippine-Sea.pdf>.

2 See Articles 192, 194, 209–210, 213–218, 220, and 235 of the LOS Convention. The text is available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm).

3 See Articles 143, 242, 244–245 of the LOS Convention.

and dispute resolution.<sup>4</sup> Despite some deficiencies, in its eyes, in the LOS Convention, China upholds the principles and norms of the Convention as well as most of its clauses. China regards this international treaty as the representative of the new law of the sea as opposed to the so-called old law of the sea, represented by the four Geneva Conventions on the law of the sea adopted in 1958 when the PRC was still outside the UN system and had no chance to participate in the deliberations of the four conventions.

4. In order to implement the LOS Convention at the domestic level, China enacted two basic ocean laws, i.e., the 1992 Law on the Territorial Sea and the Contiguous Zone and the 1998 Law on the Exclusive Economic Zone and the Continental Shelf.<sup>5</sup> Based on these two basic laws, China has established maritime zones under its national jurisdiction such as the internal waters, the territorial sea of 12 nautical miles (nm) from the baselines, EEZ of 200 nm from the baselines and the continental shelf. According to Article 2 of the Territorial Sea Law, China's territorial sea is a belt of maritime area adjacent to the land territory and the internal waters of China, and its land territory includes its mainland and offshore islands, Taiwan and all islands appertaining thereto including the Diaoyu Islands, the Penghu Islands, the Dongsha (Pratas) Islands, the Xisha (Paracel) Islands, the Zhongsha Islands and the Nansha (Spratly) Islands, as well as all the other islands that belong to China. In addition, the internal waters of China are those waters which lie on the landward side of the baseline of China's territorial sea. The breadth of the territorial sea is actually the reiteration of the relevant provision in China's 1958 Declaration on the Territorial Sea.<sup>6</sup>

5. After China ratified the LOS Convention, it also revised and promulgated a number of new laws and regulations governing ocean affairs. For example, China promulgated the Law on the Management of the Utilization of Marine Zones in 2001 and amended the 1982 Law on Marine Environmental Protection in 1999. A more recent law related to China's ocean affairs is the Law on the Protection of Islands, which was passed by the National People's Congress (NPC) in December 2009 and came into force on 1 March 2010.<sup>7</sup>

6. In summary, China has not only accepted the norms and rules of the LOS Convention, but also, we can say, the LOS Convention is precisely one of the international laws that conform to China's national interests. For that reason, China has reiterated on

4 See Articles 279–280 and 283 of the LOS Convention. For relevant discussion, see Yu Mincai, "China and the UN Convention on the Law of the Sea", *Contemporary International Relations* (in Chinese), 2012, No.10, 55.

5 English texts of these two laws are appended to Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Leiden/Boston: Martinus Nijhoff, 2005), 338–345.

6 The English text can be found in Office of Policy, Law and Regulation, State Oceanic Administration (ed.), *Collection of the Sea Laws and Regulations of the People's Republic of China* (Beijing: Ocean Press, 1998) (in Chinese and English), 182–183.

7 The whole text is available at [http://202.123.110.5/flfg/2009-12/26/content\\_1497461.htm](http://202.123.110.5/flfg/2009-12/26/content_1497461.htm).

many occasions that it supports the effective implementation of the LOS Convention. For example, in its Position Paper submitted to the United Nations in 2008, China emphasized that “in order to maintain a harmonious maritime order, it is important to strengthen international rule of law with the United Nations Convention on the Law of the Sea as the legal basis. The Convention, a product of many years of international negotiation, reflects the concerns of various parties in a relatively balanced manner. It has set a legal foundation and framework for building a harmonious maritime order and for addressing new maritime problems and challenges”.<sup>8</sup> It is clear that China has no reason to go against the LOS Convention in practice and the Philippine’s accusation contained in its Notification and Statement is clearly unfounded in fact and in law.

7. While it is acknowledged that the LOS Convention is a “constitution for the oceans”<sup>9</sup> being widely recognized and accepted in the international society, and playing an indispensable role in handling international relations concerning the oceans, we should also realize that the LOS Convention is under the framework of international law, and it is one of the international treaties governing ocean affairs. In this regard, it is necessary to look at Article 38 of the Statute of the International Court of Justice which stipulates the sources of international law, including:

- (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (2) international custom, as evidence of a general practice accepted as law;
- (3) the general principles of law recognized by civilized nations;
- (4) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>10</sup>

8. Based on the above, there are four sources of international law, and international conventions, though the most important, are just one of them. The LOS Convention is within the category of “international conventions”.

9. It is to be realized that the functioning of the LOS Convention cannot go well without the implementation of other separate but associated conventions and treaties,

8 “Position Paper of the People’s Republic of China at the 63rd Session of the United Nations General Assembly”, 16 September 2008, available at <http://xn-tlq87w5j9b.cn/eng/zxxx/t512751.htm>.

9 See Tommy Koh, “A Constitution for the Oceans”, in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea* (New York: United Nations, 1983), at xxxiii.

10 Article 38 of the Statute of the International Court of Justice. The text of the Statute is available at <http://www.icj-cij.org/documents/?p1=4&p2=2>.

either bilateral or multilateral, such as the four 1958 Geneva Conventions,<sup>11</sup> the 1992 Convention on Biological Diversity, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

10. The South China Sea issue is a complex and enduring conundrum in international law, not only concerning territorial sovereignty, maritime boundary delimitation, international navigation, maritime security and maritime law enforcement, but also distribution of biological marine resources, as well as exploitation and distribution of mineral resources, so that various factors arise from geology, history, politics, strategic considerations and national interests. To solve such a complicated problem, it is obviously not enough to simply rely on the LOS Convention alone.

11. In addition, when we apply international law, it is necessary to look into the applicability of customary international law. As mentioned above, one of the sources of international law stated in Article 38 of the Statute of the International Court of Justice is customary international law. As sources of international law, customary international law and international conventions carry equal legally binding force with no hierarchy, and the former should not be treated as subsidiary sources such as judicial decisions and the teachings of the most highly qualified publicists of the various nations. In the international community, it is sometimes difficult for states to achieve consensus between/among them because of their different positions and national interests. Therefore, in many fields, problems are left to be settled through other legal channels than the application of international conventions. Issues such as regional fishing and rights of navigation through international canals may not be governed by the LOS Convention. In this sense, customary international law also plays an important role in the management of ocean affairs, actually reinforcing the effectiveness of the LOS Convention. In a recent article, Ashley Roach succinctly summarizes some relevant rules of customary international law not contained in the LOS Convention that are applicable to resolving disputes involving the interpretation or application of the Convention.<sup>12</sup>

12. As international law is a live system, there is no help in being limited to a single treaty to settle various complicated issues and problems. It is not only against general principles of international law, but also against the rules and reality in the international community that the Philippines only resorts to the LOS Convention to resolve its disputes with China in the South China Sea. The legal action unilaterally initiated by the

11 They are the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. According to Article 311 of the LOS Convention, the 1958 Conventions remain valid, but the LOS Convention should prevail, as between the states parties, over them.

12 See J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 *Ocean Development and International Law* (2014), 239–259, in particular, 241.

Philippines may in fact create obstacles in solving disputes and further exacerbate the complicated situation in the South China Sea.

### III. Legal Status of the U-shaped Line in International Law

13. It is believed that China relies, at least partially, on the U-shaped line for its claims in the South China Sea. The line first appeared on the map in December 1914, which was compiled by Hu Jinjie, a Chinese cartographer, but only included the Pratas and the Paracels.<sup>13</sup> In 1935, the Committee on Examining the Water and Land Maps of the Republic of China published the names of 132 islets and reefs of the four South China Sea archipelagos. The publication had an annexed map which marked the James Shoal at the location of about 4° north latitude, 112° east longitude, though there was no demarcation of the line on the map.<sup>14</sup> On 1 December 1947, just two years after the Second World War when Japan unconditionally surrendered and China recovered Taiwan and the South China Sea islands from Japan, the Chinese Ministry of Interior renamed the islands in the South China Sea and formally allocated them into the administration of the Hainan Special Region.<sup>15</sup> Meanwhile, the same ministry prepared a location map of the islands in the South China Sea, which was first released for internal use. In February 1948, the Atlas of Administrative Areas of the Republic of China was officially published, in which the above map was included. This is the first official map with the line for the South China Sea. It has two general characteristics: the southernmost end of the line was set at 4° north latitude, thus including the James Shoal; and an eleven-segment line was drawn instead of the previous continuous line. According to the official explanation, the basis for drawing the line was: “[t]he southernmost limit of the South China Sea territory should be at the James Shoal. This limit was followed by our governmental departments, schools and publishers before the anti-Japanese war, and it was also recorded on file in the Ministry of Interior. Accordingly it should remain unchanged”.<sup>16</sup> The map is official and, therefore, different from those previously drawn by individual cartographers. Since 1948, maps officially published in both mainland China and Taiwan are almost the same regarding the line.<sup>17</sup>

13 See Han Zhenhua, *A Compilation of Historical Materials on China's South China Sea Islands* (Beijing, Oriental Press, 1988) (in Chinese), 355.

14 See Zou Keyuan, *The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over The Spratly Islands*, 14 *The International Journal of Marine and Coastal Law* (1999), 33.

15 See Ministry of Interior, *An Outline of the Geography of the South China Sea Islands* (National Territory Series, 1947), Figure 11, 861.

16 The official document is reprinted in Han Zhenhua, above n.13, 181–184.

17 Zou Keyuan, *China's U-shaped Line in the South China Sea Revisited*, 43 *Ocean Development and International Law* (2012), 18–34. It is noted that two segments

14. Since the above official explanation did not clarify the legal status of the line, commentators may explain it in their own ways, thus different views and opinions have arisen among Chinese scholars both from mainland China and Taiwan on the U-shaped line as (a) a line indicating that the geographic features within are Chinese territory; or (b) a line of historic waters;<sup>18</sup> or (c) a line of historic rights; and (d) a line indicating that the marine resources within belong to China. According to Wu Shicun, President of the National Institute for South China Sea Studies, the U-shaped line is based on the theory of “sovereignty + UNCLOS + historic rights”. According to this theory, China enjoys sovereignty over all the features within this line, and enjoys sovereign right and jurisdiction, defined by the LOS Convention, for instance, EEZ and continental shelf when certain features fulfill the legal definition of Island Regime under Article 121 of the LOS Convention. In addition to that, China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development.<sup>19</sup>

15. Evidence from China’s practice may be helpful for the explanation of the line. In 1958, China promulgated the Declaration on China’s Territorial Sea, in which China declared that the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, and the Nansha Islands all belonged to China.<sup>20</sup> Although the Declaration did not mention the line in the South China Sea, it had some implications for the line. First, the Declaration says that between the mainland and its coastal islands and the archipelagos in the South China Sea, there existed certain areas of the high seas. Secondly, it provides that the method measuring the Chinese territorial sea of 12 nautical miles by straight baselines for the mainland and its coastal islands is also applicable to the archipelagos in the South China Sea. In 1992, China promulgated the Law on the Territorial Sea and Contiguous Zone which reiterates that China’s territorial sea is 12 nm measured by straight baselines, and the breadth of the territorial sea is also applicable to Chinese offshore islands including the islands in the South China Sea.<sup>21</sup> More significantly, in the 1998 Law of the People’s Republic of China on the Exclusive Economic

of the line in the Gulf of Tonkin were removed from the map published by mainland China after the 1950s.

- 18 According to the 1993 Policy Guidelines of the South China Sea issued by the Government of the Republic of China on Taiwan, the waters within the line are Chinese “historic waters”.
- 19 Observer Research Foundation, “ORF South China Sea Interview”, *South China Sea Monitor*, Vol. 2 (1) (January 2013), 9; available at [http://www.orfonline.org/cms/sites/orfonline/modules/southchina/attachments/issue1-2013\\_1357907409226.pdf](http://www.orfonline.org/cms/sites/orfonline/modules/southchina/attachments/issue1-2013_1357907409226.pdf). Chinese approaches are also reflected in Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 *American Journal of International Law* (2013), 98–124.
- 20 See Office of Laws and Regulations, State Oceanic Administration (ed.), above n.6, 3.
- 21 See Zou Keyuan, above n.14, 35.



Zone and the Continental Shelf, Article 14 provides that “[t]he provisions in this Law shall not affect the historic rights enjoyed by the People’s Republic of China”.<sup>22</sup>

16. In practice, the Chinese government in 1992 leased oil exploration blocks in the Vanguard Bank area in the South China Sea to a foreign oil company. China claimed “indisputable sovereignty” over the Nansha and Xisha Islands and their adjacent waters. When Vietnam, in 1996, leased petroleum concessions of an area of the Nansha Islands to a foreign company, China protested to such acts as “an encroachment on China’s sovereignty and its maritime rights and interests”.<sup>23</sup> In 2008, China Marine Surveillance began to conduct regular maritime patrols in waters (including the South China Sea) under China’s jurisdiction within the U-shaped line. China Maritime Law Enforcement Bulletin 2008 records that China “[...] sent a total of 355 (frame) maritime surveillance ships, aircraft, kept watch on 406 (frame) foreign vessels, aircraft and other targets, found 38 infringement acts and stopped them in time”.<sup>24</sup> In 2009, China submitted diplomatic notes protesting the submissions of outer continental shelf claims made by Vietnam and Malaysia to the United Nations Commission on the Limits of the Continental Shelf, attaching a map of the South China Sea to its diplomatic notes.<sup>25</sup> It is to be noted that while this is the first time that China officially submitted the U-shaped line map to the United Nations, it is not the first time that China made the map public. In fact as mentioned above, China publicised the map as early as 1948. The Philippines has attempted, by its Statement of Claim, to mislead the international community into believing that China did not publicise the U-shaped line until 2009.

17. All these Chinese legislative activities, economic activities, and maritime law enforcement activities, while not directly reflecting clear proposition of the waters within the U-shaped line, have provided evidences proving China’s attitude towards its territorial and maritime claims in the South China Sea. In addition to the sovereignty, sovereign rights and maritime jurisdiction China enjoys under general international law including the LOS Convention, it is believed that the U-shaped line can generate historic rights which are allowed in general international law as well.

22 See People’s Daily (in Chinese), 30 June 1998. An unofficial English version translated by Zou Keyuan can be found in *The MIMA Bulletin*, Vol. 7 (1), 1999, 27–29. A variant English translation is available in *Law of the Sea Bulletin*, No. 38, 1998, 28–31.

23 Xinhua News Agency, Beijing, 17 April 1996.

24 See China Maritime Law Enforcement Bulletin 2008, available at [http://www.soa.gov.cn/zwgk/hygb/zghyzzzfgb/2008nzghyzzzfgb/201212/t20121217\\_22961.html](http://www.soa.gov.cn/zwgk/hygb/zghyzzzfgb/2008nzghyzzzfgb/201212/t20121217_22961.html).

25 See People’s Republic of China, Letter to the U.N. Secretary General, Doc. CML/17/2009, 7 May 2009; and Letter to the U.N. Secretary General, Doc. CML/18/2009, 7 May 2009, in Response to the Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf, Executive Summary, May 2009 and Vietnam Submission to the Commission: North Area, April 2009, available at [www.un.org/los/clcsnew/clcshome.htm](http://www.un.org/los/clcsnew/clcshome.htm).

#### IV. Historic Rights in International Law

18. While there is no specific definition of historic rights in international law, the term historic rights is different from that of historic waters. According to Bouchez, “Historic waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States”.<sup>26</sup> Once recognized as historic waters, the waters became the internal waters or territorial sea of the coastal state. As is acknowledged, the term historic waters “is still generally viewed as an established part of the international law of the sea”.<sup>27</sup> Regarding the South China Sea, the People’s Republic of China has never claimed that the waters within the U-shaped line are Chinese historic waters.

19. In the case of *Tunisia v. Libyan Arab Jamahiriya*, the International Court of Justice (ICJ) in its judgment made a statement concerning historic rights, that “general international law [...] does not provide for a single ‘regime’ for ‘historic waters’ or ‘historic bays’, but only for a particular regime for each of the concrete, recognized cases of ‘historic waters’ or ‘historic bays’”.<sup>28</sup> The jurisprudence of the ICJ concerning historic rights is well summarized by Ted McDorman:

historic claims to waters (historic waters and historic rights) exist in international law; there is a difference between historic waters, which involves exclusivity of rights, and historic rights, which are not exclusive; UNCLOS is not exhaustive of the rights and jurisdiction that a State may have respecting waters and resources; and there is flexibility in the rights exercisable by a State that successfully maintains a claim to historic waters.<sup>29</sup>

20. There is no express provision on historic rights or historic waters in the LOS Convention. But, the Convention does mention related concepts in a number of provisions such as Article 10(6) which provides that “[t]he foregoing provisions do not apply to so-called ‘historic’ bays, or in any case where the system of straight baselines provided for in article 7 is applied”, and Article 15 which provides that “Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median

26 Leo J. Bouchez, *The Regime of Bays in International Law* (Leyden: A.W. Sythoff, 1964), 281.

27 Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-appraisal* (Leiden: Martinus Nijhoff, 2008), 296.

28 ICJ Reports 1982, 74.

29 See Ted L. McDorman, “Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the Nine-Dash Line”, in S. Jayakumar, Tommy Koh and Robert Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Cheltenham: Edward Elgar, 2014), 152–153.

line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith". According to Article 298, issues of historic bays and historic titles fall within the scope of optional exceptions to compulsory dispute settlement mechanism. It can be inferred that concepts of historic rights and historic waters are very much left over to be continuously governed by general international law including customary law. It is rightly pointed out that "whether historic rights exist is not a matter regulated by UNCLOS" though some parts of the LOS Convention are relevant when it comes to the use of marine resources.<sup>30</sup>

21. In customary international law, we can see, from a series of state practices including international jurisprudence, the development of the concept of historic rights which has met the requirements of the formation of customary international law—state practice and *opinio juris*. The concept of historic rights is evolved from historic waters, which usually defined as historic bays and historic straits. In the case of the *United Kingdom v. Norway* on fisheries, the ICJ formally accepted the assertion of Norway relating to historic rights. In this case, Norway's declaration of its territorial waters is not consistent with general international law, but is still determined to be valid. The ICJ examined the former practices of Norway, and found that the Norwegian maritime delineation method had been applied continuously without interruption for about 60 years, and had never been opposed by other countries. The Court thus assumed that this demarcation action was consistent with international law, and so recognized Norway's historic rights.<sup>31</sup> Since then, in *Gulf of Fonseca* in 1992, the ICJ not only recognised the existence of historic rights in international law, but also determined that the historic rights of specific waters can be shared by more than one country.<sup>32</sup>

22. There are other cases in state practice such as the historic claim of the former Soviet Union for the Peter the Great Bay,<sup>33</sup> and Libya's claim for the Gulf of Sidra. Among the relevant cases, the most important one is the claim of historic rights by

30 See Ted L McDorman, *ibid.*, 152.

31 See the fisheries case *United Kingdom v. Norway*, Judgment of 18 December 1951, available at <http://www.icj-cij.org/docket/files/5/1809.pdf>.

32 See the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, <http://www.icj-cij.org/docket/files/75/6671.pdf>.

33 See J. Ashley Roach, *The Maritime Claims Reference Manual and the Law of Baselines*, 72 *International Law Studies* (1998), 181, available at [https://www.usnwc.edu/Research—Gaming/International-Law/New-International-Law-Studies-\(Blue-Book\)-Series/International-Law-Blue-Book-Articles.aspx?Volume=72](https://www.usnwc.edu/Research—Gaming/International-Law/New-International-Law-Studies-(Blue-Book)-Series/International-Law-Blue-Book-Articles.aspx?Volume=72).

Tunisia.<sup>34</sup> Tunisia claimed historic rights beyond its territorial sea, particularly historic fishing rights, arguing that such historic rights may influence the delimitation of exclusive economic zones (EEZ) in the future. In the view of the ICJ, historic rights or historic waters and the continental shelf belong to two completely different legal regimes under customary international law; the former is based on acquisition and occupation, while the latter is based on the existence of rights “*ipso facto* and *ab initio*”.<sup>35</sup> As can be seen from the judgment, the Court recognized the existence of historic rights, and also recognized that the historic rights would to a certain extent affect the delimitation of the EEZs of coastal states.

23. In the case of Eritrea and Yemen in 1998, both states claimed historic rights in the Red Sea. Eritrea claimed its rights to islands in the Red Sea based on a chain of title extending back over more than 100 years. Yemen based its claim to the disputed islands on original, historic, or traditional title. The Tribunal confirmed that,

the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain “historic rights” which accrued in favour of both parties through a process of historical consolidation as a sort of “*servitude internationale*” falling short of territorial sovereignty. Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of populations on both sides of the Red Sea.<sup>36</sup>

24. Finally, the Tribunal held that “neither Party has been able to persuade the tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal’s decision.”<sup>37</sup>

25. On 11 May 2009, the Kingdom of Tonga submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the LOS Convention, information on the limits of the continental shelf beyond 200 nautical

34 See the case concerning the Continental Shelf, *Tunisia v. Libyan Arab Jamahiriya*, Judgment of 24 February 1982, available at <http://www.icj-cij.org/docket/files/63/6267.pdf>.

35 *Ibid.*, para. 100.

36 For details of the case, see W. Michael Reisman, “Eritrea-Yemen Arbitration Award, Phase II: Maritime Delimitation”, 94 *American Journal of International Law* (2000), 721–736.

37 See the award of the Arbitral Tribunal in the First Stage—Territorial Sovereignty and Scope of the Dispute of 9 October 1998, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1160](http://www.pca-cpa.org/showpage.asp?pag_id=1160).

miles from the baselines from which the breadth of the territorial sea is measured. It stated that,

The Kingdom of Tonga is proud to have the longest continuous legal claim of historic title to maritime domain in the world. The Royal Proclamation issued by His Majesty George Tubou, King of Tonga, on 24 August 1887 claims national jurisdiction by the Kingdom of Tonga over “all islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and a half degrees of south latitude and between the one hundred and seventy-third and the one hundred and seventy-seventh degrees of west longitude from the Meridian of Greenwich”.<sup>38</sup>

26. In the submission, Tonga further expressed that,

Historic title is recognized in international law and in the United Nations Convention on the Law of the Sea (International Law Commission, 1962). Historic title is recognized in the Convention in the context of several other provisions, such as article 15 on the delimitation of the territorial sea between States with opposite or adjacent coasts in Part II on the Territorial Sea and Contiguous Zone, and article 46 use of terms in Part IV on Archipelagic States. The Kingdom of Tonga asserts in this Submission consistency between its claim of historic title made by means of the Royal Proclamation of 24 August 1887 and its maritime jurisdiction as established in the United Nations Convention on the Law of the Sea (the Convention).<sup>39</sup>

27. For further clarification, the Kingdom of Tonga applies the concept of historic title in international law to all those maritime spaces established under its national jurisdiction in agreement with the Convention that can be included within the geographical limits defined in the Royal Proclamation of 24 August 1887. The breadth of the maritime spaces under the national jurisdiction of the Kingdom of Tonga within and beyond the geographical limits established by the Royal Proclamation of 24 August 1887 are defined in accordance with the relevant provisions of the Convention relating to internal and archipelagic waters, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Thus the implementation of the Convention is consistent with the decision of the Kingdom of Tonga to maintain its claim of historic title over the land and maritime spaces established within the geographical limits included in the Royal Proclamation of 24 August 1887.<sup>40</sup>

38 A partial submission of data and information on the outer limits of the continental shelf of the Kingdom of Tonga pursuant to part VI of and annex II to the United Nations convention on the law of the sea. Available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/ton46\\_09/ton2009executive\\_summary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/ton46_09/ton2009executive_summary.pdf).

39 Ibid.

40 Ibid.

28. Summarizing its claims, Tonga believes that historic rights have been acknowledged by various international conventions including the LOS Convention (for example, article 15, article 46), and the historic rights of waters claimed by Tonga, are consistent with international law, which should be recognized and protected.

29. Again, in the case of maritime disputes between Bangladesh and Myanmar, the two parties have agreed that Article 15 of the Convention should be applied to the delimitation of the territorial sea in this case. Therefore, in accordance with this provision, the International Tribunal for the Law of the Sea (ITLOS) needs to consider whether there are historic rights or other special circumstances causing the inapplicability of the equidistance line. In this case, the ITLOS mainly considered the issue of whether St. Martin Island of Bangladesh constitutes *other special circumstances* that should exclude the application of equidistance line principle. The Tribunal observed that St. Martin Island is an area of about 8 square kilometers, and being a permanent residence of about 7,000 people, the island is also an important operation base of the Bangladesh Navy and Coast Guard. As St. Martin Island is within 12 nautical miles from Bangladesh's territorial sea, it is almost the same distance (6.5 nautical miles) to Bangladesh and to Myanmar.<sup>41</sup>

30. The Tribunal concludes that, in the circumstances of this case, there are no compelling reasons that justify treating St. Martin Island as a special circumstance for the purposes of article 15 of the Convention or that prevent the Tribunal from giving the island full effect in drawing the delimitation line of the territorial sea between the Parties.<sup>42</sup>

31. From the various international practices, we can conclude that historic rights have been asserted by many countries, and international dispute settlement bodies have considered the existence of historic rights in making their judgments or awards, and admitted that the concept of historic rights is fully valid in accordance with international law. Although there are disagreements among different states in some cases, such differences are not about the concept itself, but about the degree to which to recognize historic rights in detail. Moreover, such differences, in fact, will not affect the international recognition of historic rights under general international law.

32. Therefore, the Chinese government can surely pronounce that within the remit of the U-shaped line, China enjoys historic rights, and such assertions are in accordance with international law. The exercise of such historic rights should not be interfered with by other coastal states, even by using some selected provisions of the LOS Convention.

33. Historic rights is an abstract concept itself, but in specific international practice, it can be implemented in various formations, for example, in the consideration of the delimitation of exclusive economic zones, the delimitation of continental shelves, the

41 See *Dispute concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment of 14 March 2012, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf).

42 *Ibid.*, 50–51.

distribution of fishing resources, international maritime communications, the management of marine environmental protection, the use of mineral resources, etc. Under the existing framework of international law, the factors generating historic rights should be included in the process of dispute settlement.

34. It is worth noting that historic rights do not conflict with the provisions of the LOS Convention, and are confirmed by general international law. The Philippine allegation that all historic rights have been superseded by the LOS Convention is completely false. On the contrary, the LOS Convention recognizes historic claims at least within the context of the territorial sea. It is recalled that when the UN International Law Commission discussed the issues of historic waters and historic rights in the 1960s, it realized that the “concept of ‘historic waters’ has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe”,<sup>43</sup> and the historic waters concept was seen as “necessary in order to maintain a State’s title to some areas of water which might escape the codification formula”.<sup>44</sup> It is clear and logical that when a coastal state extends its maritime zones outwards from the coast, that state should respect the existence of any historic rights and waters which have already existed on the high seas. When historic claims can well exist vis-à-vis the territorial sea, such claims should be more justified vis-à-vis the EEZ, as the latter is a weaker maritime zone than a territorial sea in terms of sovereignty, sovereign rights and maritime jurisdiction for a coastal state. In addition, as a general rule, any law such as the LOS Convention has no retrospective force to revoke acquired rights prior to its adoption.

35. It is strongly believed that the Philippines itself has recognized the existence of historic rights in international law, in particular as reflected in the renowned international cases including *Anglo-Norwegian Fisheries* (1951), *Fisheries Jurisdiction* (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland) (1971), *Gulf of Maine* (Canada/United States) (1984), and the *Eritrea/Yemen* case. Interestingly, most of them are maritime boundary delimitation cases not directly relevant to the arbitration case as the Philippines did not ask the Arbitral Tribunal to deliberate any maritime boundary issues and/or territorial sovereignty over disputed geographic features in the South China Sea.

## V. China’s Historic Rights in the South China Sea

36. China’s historically formulated U-shaped line in South China Sea has given China historic entitlement to the land as well as maritime areas within the line. As clearly

43 See UN Secretariat, “Judicial Regime of Historic Waters, Including Historic Bays”, UN Doc A/CN.4/143, 9 March 1962, reprinted in ILCYB (1962-II), 7.

44 Ibid.; cited in McDorman, above n.29, 150.

indicated above, China's historic entitlement is consistent with general international law and has been recognized, at least implicitly, by the international community for more than 60 years. It is well perceived that such entitlement will play an important role in the future maritime delimitation in the South China Sea. However, on the other hand, the burden of proof lies on the Chinese side that China has the responsibility to demonstrate the existence of such historic rights and entitlement so as to further consolidate its claims and convince the international community.

37. For the burden of proof, China may be able to argue that since ancient times, China has been continuously exercising its legitimate rights and authority in the South China Sea, in particular the use of marine resources, construction of artificial structures and installations, marine scientific research, maritime law enforcement, navigation, and military uses.

#### V.A. Use of marine resources

38. In the case between Barbados and the Republic of Trinidad and Tobago of 2006, the Arbitral Tribunal recognized the historic fishing rights as were previously recorded in the negotiations between the two countries.<sup>45</sup> Historical evidence from archaeological discovery proves that Chinese fishermen were active in the waters near the South China Sea islands no later than the Southern Dynasty (AD 402–589).<sup>46</sup> For a thousand years since then, Chinese fishermen have been operating in the waters very frequently, and also created a sailing guide, “the Road Book”, to record the course and distance, and the names of each reef along the way of fishing, which has been in use ever since.<sup>47</sup> Long-term usage by fishermen has established the historic fishing rights of China in the waters. While Chinese operations and utilization of biological marine resources of the waters exist throughout history, very few neighboring states did frequent fishing in this water area except for Vietnam, which also enjoys certain historic fishing rights in the South China Sea. In addition to fishing, Chinese also extracted salt from the sea waters in the South China Sea. It is reasonably assumed that if technology had allowed in history, the Chinese would have extracted other mineral resources from the sea too.

#### V.B. Construction of artificial islands and installations

39. Only China has established artificial facilities in waters within the U-shaped line over history—that is, in 1925 the Chinese Government began planning the construction of observatories, radios and lighthouses. But due to political unrest, this was not

45 Case between Barbados and the Republic of Trinidad and Tobago, Arbitration Awards of 11 April 2006, 94.

46 Fu Kuen-chen, Study on the Legal Status of the South China Sea (Taipei: 123 Information Publishing, 1995) (in Chinese), 58.

47 Han, above n.13, 5–6.



fully completed until 1935.<sup>48</sup> In 1936 the Chinese government set up observatories, radios and lighthouses in the Paracel Islands.<sup>49</sup>

### **V.C. Marine scientific research**

40. Since ancient times, there are many records in China on the study of the South China Sea; since Guo Shou Jing of the Yuan Dynasty (AD 1279) astronomical measurements have been made in the South China Sea.<sup>50</sup> And in 1883, China protested against the German marine investigations and surveys in the waters, and forced the Germans to stop their investigations. Since the 20<sup>th</sup> century, Chinese scientific investigations of the waters have never stopped.

### **V.D. Maritime law enforcement**

41. No later than the beginning of the 18<sup>th</sup> century, China began to exercise law enforcement authority, including the right of hot pursuit, in the South China Sea. In “Qing Shi Lu”, there is a lot of information about China arresting pirates and sea robbers in the South China Sea. For example, arrests took place in October 1791, and in December 1844 respectively.<sup>51</sup>

### **V.E. Navigational rights**

42. From the beginning of the third century AD, China began navigating in the South China Sea, and the Chinese people first created the names of the reefs on a chart. In the “Road Book” (geng lu bu), there are records of the Xisha and Nansha Islands and the ranges of the big reefs, which even in today’s perspective are still accurate, and there are also many other ancient history books of China recording these sea routes.<sup>52</sup> It was the Chinese people who first opened up the routes. In the Song dynasty, China has opened up the maritime routes to the Philippines, starting from Quanzhou, crossing the South China Sea, passing Champa, bypassing Borneo (now western Kalimantan), and then to Ma Yi (now the Philippine Mindoro Island), San Yu (now Philippine Luzon Island in the West Bank area), and other places.<sup>53</sup>

48 Han, *ibid.*, 289.

49 Han, *ibid.*, 227.

50 Han, *ibid.*, 9.

51 See Yunnan Institute of History (ed.), *Records of the Qing Dynasty: Selected Historic Materials of Vietnam, Myanmar, Thailand and Laos* (Yunnan People’s Publishing, 1985) (in Chinese), 254 and 324.

52 Han, above n.13, 42–80.

53 Li Yongcai (ed.), *A Brief History of Hegemony Struggling in Ocean Exploration* (Ocean Publisher, 1990) (in Chinese), 106.

## V.F. Military use

43. From the historical point of view, within the U-shaped line, only China and Vietnam have historical evidence of naval operations in these waters. For example, in the Northern Song Dynasty, China had in fact visited Paracel Islands (then known as the Jiu Ru Luo Zhou “九乳螺洲”).<sup>54</sup> And also, in the Han, Song, Yuan dynasties, there were naval battles with the Vietnamese.<sup>55</sup>

44. The above historical evidences could be used to support China’s claims to historic rights in the South China Sea, in particular in the context of exploration and use of marine resources, and could constitute a convincing reply against the possible Philippine allegation that China may not demonstrate that it ever acquired “historic rights” in maritime areas beyond its present-day UNCLOS entitlements.

45. Within the U-shaped line, China has also claimed submerged features including Macclesfield Bank and James Shoal. While there is no express applicable rule in international law to support such claims, China’s claim is mainly based on the concept of historic rights/title in addition to the rules on territory acquisition.<sup>56</sup> The entitlement of a coastal state to the continental shelf, which is part of the sea bed and subsoil, also reinforces the claim over a submerged geographic feature.

46. In the Notification and the Statement of Claim, the Philippines repeatedly mentions that China’s claims on the South China Sea are based on the U-shaped line, using the specific wording expressed as “based on”, “within”, “encompassed by”.<sup>57</sup> These descriptions are seriously deviating from the true meaning of the U-shaped line. In fact, China does not claim everything within the U-shaped line, but sovereignty and maritime entitlement allowed by general international law including the LOS Convention plus historic rights acquired in accordance with general international law. It is recorded that in the 2011 diplomatic note to the Philippines, China clearly stated that:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. [...] Since 1930s, the Chinese Government has given publicly several times the geographical scope of China’s Nansha Islands and the names of its components. China’s Nansha Islands are therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People’s

54 Han, above n.13, 7.

55 Fu, above n.46, 165–170.

56 See Zou Keyuan, How Coastal States Claim Maritime Geographic Features: Legal Clarity or Conundrum?, 11 Chinese JIL (2012), 760–761.

57 See Notification and Statement of Claim on West Philippine Sea.

Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law of the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.<sup>58</sup>

47. Obviously, China's claims on the South China Sea are principally based on the provisions concerning the territorial sea, the exclusive economic zone and continental shelf under the LOS Convention, rather than historic rights deriving from the U-shaped line. The Philippines mistakenly attributed all the Chinese claims to the U-shaped line, and distorted the legal nature and status of the line; and such distortion is contrary to historical and legal facts. China, together with other states parties to the LOS Convention in the world including the Philippines, holds the view that the LOS Convention is the basis of the maritime claims of territorial sea, EEZ and continental shelf.

48. Another visible distortion also lies with the Philippine allegation that China's historic rights claim only began in 1998.<sup>59</sup> Without mentioning the state practice of the Republic of China founded in 1911, the relevant practice of the People's Republic of China can be traced back to the 1950s when the PRC declared that the Bohai Gulf and the Chiungchow Strait were China's inland waters by historical reasons.<sup>60</sup> China recognized the Soviet historic bay claim to the Peter the Great Bay in 1957.<sup>61</sup> On the other hand, when we look at Article 14 of China's 1998 Law on the Exclusive Economic Zone and Continental Shelf, it actually does not specify that historic rights must be within the U-shaped line in the South China Sea and there is no official explanation to that effect, though in our understanding, historic rights do exist within the U-shaped line. Second, the historic rights reserved in the 1998 Law are related to the EEZ and continental shelf as it is indicated, without reference to the territorial sea. Thus the scope of these historic rights is limited.

49. As we all understand, the rule of historic rights is a rule of exception to general rules of international law including the LOS Convention. It is illogical, and completely incorrect, to assume that the Chinese territorial and maritime claims in the South China Sea are only historic rights. In fact, the Chinese claim to historic rights is a

58 See [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf).

59 This statement may be borrowed from a hastily-prepared article written by two French scholars: Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 *American JIL* (2013), 129.

60 "In several thousand years of history it has been constantly under the actual jurisdiction of our country, and not only has our country always considered it as an internal sea, but also [this in fact] is internationally recognized". Fu Chu, *Concerning the Question of Our Country's Territorial Sea*, Beijing, 1959; translated in J.A. Cohen and Hungdah Chiu, *People's China and International Law* (Princeton: Princeton University Press, 1974), 484.

61 See *People's Daily* (in Chinese), 23 September 1957.

supplement to China's above general claims. Although China's 2009 diplomatic note is attached with a map which contains the U-shaped line, we cannot logically come to a conclusion that China's claims in the South China Sea are all based on the U-shaped line. As the Chinese government states clearly, "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community".<sup>62</sup>

50. By describing China's claims as historic claims, the Philippines has packaged its case as a case to settle maritime entitlement disputes in the South China Sea. But in reality, without the determination of who owns the geographic features in the South China Sea, how can a court or arbitral tribunal decide on the maritime entitlement? In essence, the case initiated by the Philippines is concerned about territorial sovereignty, sovereignty-related issues, and maritime boundary delimitation, which are excluded by the 2006 Chinese Declaration in accordance with Article 298 of the LOS Convention.<sup>63</sup> As Article 298 also mentions historic bays and titles, any disputes concerning historic rights should be exempted as well. It is opined by a leading scholar on the law of the sea that "[h]istoric title in Article 298, which is a permissible basis for a State to exempt itself from compulsory dispute settlement, must have a broader meaning than the term historic title in Article 15 where the existence of historic title merely displaces equidistance as a method of delimitation".<sup>64</sup>

51. In general, "[a] dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another".<sup>65</sup> A dispute cannot be established unilaterally, by using a claim countering against a non-existent or hypothetical claim of the other party, nor should a dispute be grounded on a premise which has no factual basis, an incorrect characterization of the legal situations between the claimant and the respondent. It is believed that the Arbitral Tribunal is able to appreciate this simple fact and will declare no jurisdiction over the case or will rebut the Philippines' unreasonable and excessive claims.

62 See [www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm\\_c.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm_c.pdf).

63 On 25 August 2006, China made such a declaration. The whole text is available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China) after ratification.

64 Ted L. McDorman, above n.29, 152.

65 J.G. Merrilles, *International Dispute Settlement*, 4<sup>th</sup> ed. (Cambridge, Cambridge University Press, 2005), 1.

## VI. Conclusion

52. Regarding the arbitration case initiated by the Philippines, China stated that it would not participate in the arbitration and accused the Philippines of complicating the issue.<sup>66</sup> China accused the Philippines of distorting “the basic facts underlying the disputes between China and the Philippines. In so doing, the Philippines attempts to deny China’s territorial sovereignty and clothes its illegal occupation of China’s islands and reefs with a cloak of ‘legality’ ”.<sup>67</sup> China asked the Philippines to go back to the right track of negotiation and consultation to settle the disputes so as to avoid further damages to the bilateral relations between the two countries.<sup>68</sup>

53. Except for the WTO dispute settlement mechanisms and economic arbitration, China does not accept the compulsory jurisdiction of the International Court of Justice or the compulsory settlement mechanisms under the LOS Convention for the disputes concerning maritime boundary delimitation, historic bays and titles or military activities.<sup>69</sup> As most of the reliefs being sought by the Philippines are in fact closely related to the territorial sovereignty over the disputed islands and islets, maritime boundary delimitation, and even historic title and historic rights, China had a compelling reason to raise preliminary objections, as such kind of disputes are excluded by China in accordance with Article 298 of the LOS Convention. For the above reasons, it seems extremely difficult for the Arbitral Tribunal to establish its jurisdiction over the case.<sup>70</sup> But on the other hand, China’s reluctance to participate in international dispute settlement mechanisms such as Annex VII Arbitration could have a negative impact on China’s image in the world. It is suggested that China should participate

66 See “China: No to UN arbitration on sea row”, available at <http://www.abs-cbnnews.com/nation/02/01/13/china-no-un-arbitration-sea-row>.

67 “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, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml>.

68 “Answers from the Foreign Ministry to the questions at a press conference on the search of the disappearing passenger airplane of the Malaysian Airlines and the issue of the South China Sea”, 26 March 2014, available at <http://world.people.com.cn/n/2014/0326/c1002-24745397.html>.

69 See above n.63.

70 For relevant literature, see Sienho Yee, “The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections”, 13 Chinese JIL (2014), 663–739. It is noted that on 7 December 2014, the Chinese government issued the “Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines” which explained in detail why the Arbitral Tribunal has no jurisdiction over the case; and the Position Paper is available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

in the arbitral proceedings to defend itself no matter how the case is disguised.<sup>71</sup> As the case is highly politicised with strong support from the US government and the deep involvement of Americans,<sup>72</sup> there is a strong suspicion whether this politically backed case would have already become part of the overall rebalancing strategy of the United States in order to contain a rising China. Even if the Arbitral Tribunal should grant all the Philippine relief, such an award would in reality only exacerbate the tensions in the South China Sea, instead of helping settle the disputes. Nevertheless, while it is acknowledged that the Annex VII mechanism of the LOS Convention is not a proper forum for the settlement of sovereignty disputes, it is suggested that China and the Philippines could learn from their neighbours like Indonesia, Malaysia and Singapore to bring their disputes to the International Court of Justice for settlement when they cannot reach agreement through bilateral talks.

- 71 See Yu Mincai, *China's Response to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options*, 45 *Ocean Development and International Law* (2014), 1–16.
- 72 For example, the Assistant Secretary of State Daniel Russell recently gave a testimony at the US Congress. According to him, “I want to reinforce the point that under international law, maritime claims in the South China Sea must be derived from land features. Any use of the ‘nine dash line’ by China to claim maritime rights not based on claimed land features would be inconsistent with international law”. And “we fully support the right of claimants to exercise rights they may have to avail themselves of peaceful dispute settlement mechanisms. The Philippines chose to exercise such a right last year with the filing of an arbitration case under the Law of the Sea Convention”. See “Maritime Disputes in East Asia”, Testimony, Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, Washington, DC, 5 February 2014, available at <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.