ARBITRATION & ADR IN ASIA

108 Know Your Game with Foreign and Foreign-Related Arbitrations in China – Part 1  
Stephen Wong & Alfred Wu

114 A Rising Tide: Law of the Sea Disputes in Asia and Arbitration  
Leonardo Bernard & Michael Ewing-Chow

120 Developments in Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Brunei Darussalam – Part 2: Mediation  
Ahmad Jefri Rahman

126 Innovations to Arbitration Costs under the HKIAC Administered Arbitration Rules (2013): Clarity, Efficiency and Cost Control  
Jacopo Roberti di Sarsina

IN-HOUSE COUNSEL FOCUS

132 Culture, Business Negotiation and Mediation: Understanding Cultural Differences, Communication Styles and Finding Mutual Understanding  
Danny McFadden

NUTS & BOLTS LECTURE

137 Awards and Challenges to Awards – Part 2  
Catherine Mun

CASE NOTES

142 Hong Kong Court Strikes out First Ever Claim against HKIAC  
Robert Morgan & Joe Liu

146 Legality of ‘Hybrid’ Arbitration Clauses Upheld in China  
James Rogers, Lijun Cao & Matthew Townsend

BOOK REVIEWS

149 Guerrilla Tactics in International Arbitration  
Dr Nicolas Wiegand

150 Andrews on Civil Processes  
Dr Fan Yang

152 NEWS

156 EVENTS
This issue of *Asian Dispute Review* features a range of articles from across Asia, covering a broad range of arbitration and mediation-related topics. First up is an article exploring the practicalities of foreign and foreign-related arbitrations in China, by Stephen Wong and Alfred Wu. The next article is by Leonardo Bernard and Michael Ewing-Chow, which deals with the topical issue of the possible resolution of maritime boundary-related disputes under UNCLOS. Part two of Ahmad Jefri Rahman’s article follows, focusing on mediation in Brunei, while an article by Jacopo Roberti di Sarsina, surveying how arbitral tribunal fees are recovered under institutional rules, wraps up the section.

The In-house Counsel Focus article is by Danny McFadden, and discusses from his practical experience the influence of cross-cultural differences on mediation. The Nuts & Bolts Lecture features the second part of Catherine Mun’s article on challenges to awards. The Case Notes section discusses the first ever claim brought against the HKIAC, written by Robert Morgan and Joe Liu, and a recent case in the PRC dealing with the legality of hybrid arbitration clauses, written by James Rogers, Lijun Cao and Matthew Townsend. Finally, there are book reviews by Dr Nicolas Weigand on *Guerrilla Tactics in International Arbitration*, and by Dr Fan Yang on *Andrews on Civil Processes*.

General Editors
A Rising Tide: 
Law of the Sea Disputes in Asia and Arbitration

Leonardo Bernard & Michael Ewing-Chow

This article discusses the resolution of maritime boundary-related disputes by adjudication before international arbitral tribunals under the UN Convention on the Law of the Sea 1982 (UNCLOS). It focuses on pending arbitration proceedings between China and the Philippines over the activities that UNCLOS member State claimants to the Spratly and Paracel island chains in the South China Sea can undertake in accordance with UNCLOS and the difficulties arising from China’s refusal to participate in the proceedings.

Introduction

On 22 January 2013, the Philippines invoked a compulsory dispute settlement proceeding against China under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) on certain disputes in the South China Sea. UNCLOS has a complex dispute settlement regime that allows a member State to bring unilaterally any dispute regarding the interpretation or application of the Convention against another member State, either to the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) or ad hoc arbitration based on Annex VII of UNCLOS.

The Philippines has assembled a team of lawyers to represent it whereas China has refused to participate in the proceeding and has not appointed any counsel or an arbitrator to sit on the arbitration tribunal. China’s refusal to participate in the proceeding may be contrasted with the recent Bangladesh/Myanmar dispute, in which Bangladesh unilaterally brought its maritime boundary dispute against Myanmar to ITLOS. In that case, Myanmar agreed to participate in the proceeding. ITLOS issued its judgment in 2012, which was well received by both parties.

The Philippines arbitration proceeding against China is being watched closely by other littoral States in the South China Sea who also have some form of territorial claim or another in the area. The arbitration, however, will settle neither the issue of territorial sovereignty over the islands, which is not under the scope of UNCLOS, nor the issue of maritime delimitation, which is excluded by China from the application of the UNCLOS compulsory dispute settlement regime (under UNCLOS, State parties can exclude certain categories of
Thus, even if the arbitration panel finds that it has jurisdiction and issues a decision, it would not be the end of the dispute. It would only be the beginning of more disputes that would have to be resolved by negotiation and even further legal proceedings.

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Background to the dispute
The underlying source of the tension in the South China Sea is the territorial sovereignty disputes over the Spratly Islands (claimed partially or wholly by Brunei Darussalam, China, Taiwan, Malaysia, the Philippines and Vietnam), the Paracel Islands (claimed by China, Taiwan and Vietnam), and the Scarborough Shoal (claimed by China, Taiwan and the Philippines). For most of the claimants, the legal disputes about territorial sovereignty are complicated by different historical narratives and by sensitive issues of nationalism and domestic politics. This makes negotiating a resolution of the sovereignty disputes very difficult.

The disputes are complicated by China’s ‘nine-dash line’. The nine-dash line was drawn in 1947 by the then Chinese Nationalist Government and was first published in February 1948. After the formation of the People’s Republic of China in 1949, the map was adopted by the Communist Party in Mainland China and officially used by China for the first time in 2009, in its response to the joint submission to the Commission on the Limits of the Continental Shelf made by Malaysia and Vietnam. China has not given any explanation on what the nine-dash line means, nor the co-ordinates of these dashes. In the meantime, other claimant States, such as Vietnam and the Philippines, have consolidated their claims in line with UNCLOS, by claiming a 200 nautical miles exclusive economic zone (EEZ) from their respective mainland coasts.

All of the States bordering the South China Sea and claiming sovereignty over the various islands are parties to UNCLOS. The Convention does not, however, prescribe any procedure for the determination of sovereignty and instead only sets out what maritime zones may be claimed from land territory (including islands), as well as the rights and jurisdiction of States in such maritime zones. This means that sovereignty disputes over the islands in the South China Sea cannot be resolved by the compulsory dispute settlement mechanism under UNCLOS.

When a State becomes a party to UNCLOS, it consents in advance to the compulsory dispute settlement mechanism under the Convention. This means that if a dispute arises between two parties on the interpretation or application of a provision in UNCLOS, either party to the dispute has the option to bring the dispute unilaterally before the ICJ, ITLOS or an ad hoc arbitration tribunal. The dispute settlement provisions in UNCLOS are, therefore, an exception to the general principle that a dispute between two States on an issue of international law may not be referred to an international court or tribunal without the prior consent of both of the States that are parties to the dispute.

The arbitration proceeding brought by the Philippines under the UNCLOS compulsory dispute settlement mechanism astutely avoids the question of sovereignty. The Philippines’ claim was based on one important premise: that, no matter which claimant has sovereignty over the islands in the South China Sea, there are still legal questions pertaining to the entitlement, rights and obligations of each of the claimants in conducting activities in the waters of the South China Sea. The Philippines challenges China’s claim of maritime zones based on its ‘nine-dash line’ instead of from any land.
Philippines questions whether some features in the South China Sea are entitled to generate the 200 nautical mile EEZs, since they are so small that it is almost impossible for these features to be inhabited. Unlike the issue of sovereignty, these are legal questions that are ostensibly covered by the compulsory dispute settlement mechanism under UNCLOS.

**China’s non-participation**

Although UNCLOS does not allow member States to make any reservations, it does provide States with the option of excluding maritime boundary delimitation claims from its compulsory binding dispute settlement mechanism. China has made a formal declaration exactly to this effect and this is one of the main reasons why China refuses to accept the jurisdiction of the ad hoc arbitration tribunal formed under UNCLOS. China’s position is, therefore, that it does not recognize the jurisdiction of the arbitration tribunal. It has refused and continues to refuse to participate in any stages of the arbitral process.

The dispute settlement provisions in UNCLOS are unique in that, by ratifying or acceding to the Convention, States are considered to have given their prior consents to settle all disputes arising from the interpretation and application of the Convention through the Convention’s compulsory binding dispute settlement mechanism, of which one of the options is arbitration.

The fact that China is refusing to participate does not prevent the arbitral proceedings from going ahead and the tribunal making an award. Whether or not China’s refusal to participate is wise remains to be seen. Currently, the arbitral tribunal has been formed (without China appointing any arbitrators) and it has received more than 4,000 pages of legal arguments and evidence from the Philippines, arguing both the jurisdiction issue as well as the merits of the claim. China has, for the reasons discussed, not made any submissions to the tribunal.

China’s non-participation is not the first time a State has refused to participate in an international proceeding. The United States famously did so in the case brought by Nicaragua before the ICJ in 1984, which did not stop the ICJ from finding that it had jurisdiction and rendering a judgment in 1986. More recently, Russia did so in the *Arctic Sunrise* case brought against it by the Netherlands before ITLOS. ITLOS nevertheless proceeded to hear and grant the request of the Netherlands for provisional measures in the absence of Russia. In their joint separate opinion, Judges Wolfrum and Kelly explained that the non-appearing party not only weakens its own position concerning the legal dispute, but also hampers the other party in pursuing its rights and interests in the proceedings in question.

**What’s next?**

The Philippines submitted their memorial on 30 April 2014. If China still refuses to participate and to provide any responses, then the tribunal may issue a jurisdictional decision as early as next year. If the tribunal finds that it has jurisdiction to hear the case, the award it issues will be legally binding on both China and the Philippines. The award, however, would not resolve the disputes in the South China Sea. The tribunal’s decision would not resolve the underlying dispute concerning which State has sovereignty over the disputed islands since, as previously mentioned, this issue is not governed by UNCLOS and thus is not within the jurisdiction of the tribunal. Furthermore, the award also would not resolve
the issue of how to determine the maritime boundaries in any areas of overlapping claims. This is because disputes on the delimitation of maritime boundaries are outside the jurisdiction of the tribunal.

Moreover, the award would not consider the positions of the other claimants in the South China Sea, as it would only be binding on the Philippines and China. However, if the tribunal in its award chose to clarify that China cannot make claims to maritime space based on the nine-dash line, this would be important not only for the Philippines but also for the other claimants. This would force China to make maritime claims from land territory and islands in accordance with UNCLOS and international law, which is what the Philippines and all other claimants have to date based their claims on (except for Taiwan, which has similar claims to China).

If China failed to implement the award, or were to take action contrary to it, the Philippines would have the right to go back to the same tribunal and request further orders regarding implementation of the award. On the other hand, if China chose to ignore the award, significant political pressure might be brought to bear on it by the international community. This happened to the US after the Nicaragua case and to Russia in the Arctic Sunrise case.

China’s reluctance to subject itself to the jurisdiction of international courts and tribunals (except on trade and economic issues) stands in contrast with the general trend in Asia, in which more and more States are showing willingness to settle disputes between them through international legal binding adjudication. The following examples are illustrative.

Myanmar accepted binding adjudication over its dispute with Bangladesh when the latter unilaterally brought their maritime boundaries dispute before ITLOS. The decision of the tribunal in that case was well received by the parties and both have finalised their maritime boundaries on the basis of the judgment, which was issued in 2012.

Bangladesh is now in the middle of arbitration proceedings against India to settle their maritime boundaries, after invoking the same compulsory dispute settlement mechanism under UNCLOS.

Timor Leste (East Timor) instituted an arbitration proceeding against Australia in 2013 on disputes in relation to the Timor Sea Treaty. Timor Leste also invoked the compulsory jurisdiction of the ICJ to issue provisional measures against Australia when Australian agents seized documents and data from the legal advisor of Timor Leste in connection with the Timor Sea arbitration case.

In a 2011 land territorial dispute, Cambodia requested the ICJ to interpret the judgment the Court had issued in 1962 in awarding the Temple of Preah Vihear to Cambodia, and asked the Court to clarify whether Cambodia or Thailand had sovereignty over the land area in the vicinity of the temple.

[S]uch international adjudications and arbitrations are probably only the beginning of a rising tide of disputes that will be brought before independent third party adjudicators for legally binding settlement.
The ICJ issued a judgment in 2013 declaring that Cambodia has sovereignty to the whole area surrounding the temple and that Thailand should withdraw their forces from the vicinity of the temple.17

Malaysia and Indonesia brought their sovereignty dispute over Sipadan and Ligitan islands to the ICJ, which judgment was handed down in 2002.18

Malaysia and Singapore settled their sovereignty dispute over Pedra Branca after the ICJ handed down its judgment on the matter in 2008.19

Claimant States other than China in the South China Sea disputes have also, on numerous occasions, indicated their willingness to consider settling their disputes through legal binding adjudication.

Conclusion

These cases follow the growing trend of Asian countries to settle sovereignty related disputes through international adjudication. All of this suggests that such international adjudications and arbitrations are probably only the beginning of a rising tide of disputes that will be brought before independent third party adjudicators for legally binding settlement. This is, of course, preferable as it is a peaceful method of dispute resolution.20