This paper was submitted by the author for the "Managing Tensions in the South China Sea" conference held by CSIS on June 5-6, 2013. The views expressed are solely those of the author, and have not been edited or endorsed by CSIS or the Sumitro Chair for Southeast Asia Studies.

**The South China Sea Issue and the Role of International Law: a Chinese Perspective**

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## 1. The role of international law in resolving China's boundary issues: a review of China's practice

China's relations with the neighboring states has since long been governed by the so-called "tribute system", which is quite alienated to the Westphalia regime that is said to give birth to today's international law. The contemporary colonial ruling by the West in the region also makes the boundary issues more complicated. China's long land borders, numerous neighbors and long, complex history of relations with neighboring states have generated border disputes. It can be said that each boundary dispute is but one element in a complex political and historical situation.

PRC government used to maintain the "unequal treaty" doctrine and a selective approach regarding boundary treaties concluded by the old regimes with imperial or colonial powers. It is also not a surprise to hear from time to time in the quarrels over boundary issues with adjacent states, such as a particular piece of land is divine and sacred, and belongs to China since time immemorial.

However, when investigating PRC's state practice since the 1990s, the author found a change of this mind-set.[1] For example, China and Vietnam reached a comprehensive land boundary agreement in December 1999. China and Russia reached an agreement concerning the western part of the border in September 1994. With respect to the more contentious eastern part of their border, the two powers reached an initial agreement in May 1991, a supplementary agreement in October 2004, and a supplementary protocol in July 2008, which was said to be a final settlement of the 4300 kilometer frontier. Most strikingly, China moved beyond two centuries of intermittent blood-shed over competing claims to territorial sovereignty on the Sino-Russian border to a conventional international legal agreement delimiting the two states' territories. China and India are engaged in ongoing talks to address China's last unsettled land boundary.

It indicates that China has discarded the "naturalist" position which holds that territory is divine and sovereign issues (including boundary issues) is non-negotiable. Instead, China seems to work on settling boundary disputes by making and relying on positive legal agreements. The policy or mind-set change can be explained in a great context of China's agenda on "peaceful rise" -- the success of the implementation of this agenda depends on a peaceful and stable boundary. This logic will also apply to maritime boundary issues, which however in contrast have only recently emerged on China's foreign relations agenda, has been achieved only limited progress.

Overall, international law has come to be seen as a more important and necessary means for China to achieve its foreign policy ends, even though obstacles and uncertainty persist.

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[1] Xinjun Zhang, "International Law in Managing Unsettled Maritime Boundaries: A Report on the Sino-Japanese Dispute Over the East China Sea," Myron H. Nordquist, John Norton Moore (eds.) *Maritime Border Diplomacy* (Marina Nijhof, 2012).

## 2. Negotiation as the primary means for boundary dispute settlement: a review of China's position

By the end of the 1990s, China had successfully settled most of her land boundary disputes with neighboring countries by the means of direct negotiation. No other means has been attempted or tried in settling land boundary disputes. On maritime boundary disputes, what approaches does China typically choose to handle them?

The first test came in the dispute over Diaoyu/Senkaku Islands in East China Sea. In June 1979, the Chinese government proposed to the Japanese counterpart through diplomatic channels that China was willing to jointly develop resources in the waters of the disputed Diaoyu/Senkaku Islands. It was the first time that China formally articulated the policy of "setting aside disputes and pursuing joint development" as its position on the settlement of territorial/maritime disputes with littoral states. The PRC has maintained this policy consistently since then, not only with Japan on the East China Sea disputes, but also in formulating policy with regard to the South China Sea issues and Spratly disputes.[2]

Therefore, even before the 1982 UNCLOS was adopted, China had formulated its policy regarding the approach toward peaceful settlement of disputes over maritime space. The legal essence of this policy in procedural context is that it takes bilateral negotiation as the primary means of dispute resolution. This policy shall be firstly reviewed under general international law on peaceful settlement of disputes, bearing mind that China is bound by Article 2(3) and Article 33(1) of the Charter of the United Nations (hereafter the UN Charter).[3]

Article 2(3) of the UN Charter obliges states to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. "Setting aside disputes and pursuing joint-development" is intrinsically non-violent. But when the proposal of "setting aside disputes" is not accepted by other parties to the disputes, and the continuance of a dispute is likely to endanger international peace and security, does "setting aside disputes" policy appear compatible to the UN rules? The author will argue that it is.

Under Article 33(1) of the UN Charter, when the continuance of a dispute is likely to endanger the maintenance of international peace and security, the parties to that dispute shall, "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Although negotiation appears in the first place of this long list of procedures, the Article is not understood to have set any substantive priorities among these procedures.[4] However, it is also believed that "negotiations occupy a somewhat special position;"[5] similarly, the author will argue that negotiation is *de facto* prior to other procedures. The reason is that Article 33(1) emphasizes that the listed procedures, together with "other peaceful means" must be the

[2] http://www.fmprc.gov.cn/chn/pds/ziliao/tytj/t10650.htm (in Chinese)

[3] It is noted that they were also codified in the UNCLOS Article 279.

[4] Bruno Simma (ed.), *Charter of the United Nations: a commentary*, Oxford; New York: Oxford University Press; 1994, p.509.

[5] Ibid.

parties's “own choice”. Article 33(1) only offers parties the listed procedures as options to choose, and which one to choose depends on their mutual consent. It means that unless parties to a dispute agree in negotiation to enter into other procedures, they are not bound by any particular procedures prescribed in Article 33(1), even if this may lead to impasse.[6] Free choice of procedures in practice may stay at the level of negotiation only.[7]

If one party believes that only negotiation may bring about satisfactory solution, while the other may consider that other third party options constitute a satisfactory settlement, Article 33(1) provides no procedural device for resolving this dilemma.[8] In this case, “setting aside disputes” and in the mean time negotiating for practical measures to prevent disputes from the worst scenario of endangering the maintenance of international peace and security is very much plausible under Article 33(1).

In sum, China so far has maintained a policy of "setting aside disputes and pursuing joint development" toward controversies concerning maritime space, and has been especially allergic to any movement toward "internationalization" of the South China Sea issue. Having said this, now being a Party State to UNCLOS that is in force, can China still maintain this policy under UNCLOS when its dispute settlement mechanism shall be applied as *lex specialis* for peaceful settlement of disputes? A fundamental difference between the UNCLOS dispute settlement (Part XV) and that of the UN system is that, in principle, any dispute concerning the interpretation or application of UNCLOS shall, where no settlement has been reached by recourse to peaceful means by their own choice (section 1 of Part XV), be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under Section 2 (compulsory procedure entailing binding decisions). The real challenge to the China's position came alone with Philippines’ application for a arbitral proceeding under UNCLOS Annex VII against China on January 22, 2013.

**3. The Compromissory clause in the UNCLOS and China's non-participation in the ongoing arbitration**

More specifically, Article 287(1) of the UNCLOS avails parties a choice of binding procedures for the settlement of their disputes, but when no choice of the particular procedure has been made by the parties or they have chosen different procedures, then under paragraph 3 of that Article, both Parties are deemed to have accepted arbitration in accordance with Annex VII to UNCLOS. Since China has not chosen any of such procedures, this provision enables a claimant of the UNCLOS party state to unilaterally invoke Annex VII arbitration against China in respect of disputes concerning interpretation or application of the UNCLOS.

So, when becoming a Party to the UNCLOS and ostensibly bound by Article 287, China could have a chance to review its policy on its preferred means of maritime dispute settlement, i.e., negotiation, and change it if necessary to conform to the UNCLOS. But China did not. It can be

[6] Ibid.

[7] Myron H. Nordquist (editor-in-chief), *United Nations Convention on the Law of the Sea, 1982: a commentary Vol.5* (Martinus Nijhoff 2002), p. 123

[8] Ibid.

argued that China did not change the policy simply because it believed - whether it was a correct one or not will be another matter - that the judicial means in the regime of the UNCLOS dispute settlement would be avoided in the settlement of maritime space dispute, including that in the South China Sea.

Article 286 of the Convention is a compromissory clause which enables judicial settlement under the UNCLOS; this provision is the key in understanding why China believes that its "setting aside dispute" policy could be alright. Article 286 prescribes,

[*Application of procedures under this section*] Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

It is self-evident that there are three conditions for judicial settlement in this compromissory clause. The first is the condition of “subject to section 3”. In the case concerning maritime space dispute, Article 298 in section 3 permits States to make written declarations excluding the operation of procedures provided for in Section 2 (i.e., judicial means) with respect to certain categories of disputes. Second, in matters "where no settlement has been reached by recourse to section 1," the immediately relevant procedures are to be found in Article 281, 282 and 283. Third and overall, the subject matter must be "the interpretation or application of this Convention ".

Article 298.1. (a) (i) further prescribes:

[*Optional exceptions to applicability of section 2*]
1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles …

This provision enables a Party State, at any time when it sees appropriate, to make a declaration to preclude certain categories of disputes concerning interpretation or application of the UNCLOS from compulsory procedure entailing binding decisions. On 25 August 2006, China submitted to the UN General Secretary, as appears in the UN website which translated from Chinese, the following written declaration:

The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.[9]

[9] http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification.

In a contentious case, the decision of a respondent state not to participate the proceedings initiated by an applicant state may be made in various contexts. In the legal sense, such a decision must be made under its belief that the court or tribunal does not have jurisdiction. Again, whether it is a correct one or not will be another issue. In case that the jurisdiction of the court is solely relied by the applicant state on a compromissory clause, then the respondent state must have a lot to say regarding the interpretation of the compromissory clause.

China's decision not to participate in the instant case was made by China's interpretation of Article 286. It can be said the same interpretation might have already been maintained by China in deciding not to discard its "setting aside disputes" policy regarding the South China Sea when it ratified the UNCLOS – in a belief that the maritime space disputes will never be subject to judicial settlement even by the UNCLOS dispute settlement mechanism.

This belief is not imaginary but based on China's interpretation of the compromissory clause, on which the Philippines relies exclusively in its application as its jurisdictional basis but which in China's view manifestly grant no jurisdiction on the dispute submitted therein.

Two major reasons explaining China's non-participation can be found in such an interpretation. First, this dispute by its very nature is a territorial dispute over Nasha (Spratly) Islands, or, it is inseparable from the Nansha dispute. From the jurisdictional perspective, China could argue that the territorial dispute is nothing relevant to the "interpretation or application of the Convention" in Article 286 and therefore shall not fall into the jurisdiction of the arbitral tribunal.

Second, it can be argued that the very phraseology of "subject to section 3" in Article 286 of the Convention makes this compromissory clause very unique and therefore attention shall be paid by the arbitral tribunal in deciding whether its jurisdiction can be found within this provision. Article 286 is not a normal format of compromissory clause - if compared it with compromissory clauses raised in various cases before the PCIJ and the ICJ. Article 286 within the structure of its own permits exception of certain categories of disputes concerning interpretation or application of the Convention; this seems to have never happened in case law.

The importance of this unique format of Article 286 is that, it sets equal footing for the applicant state and respondent state in arguing whether the jurisdiction is well established. The tribunal of arbitration needs to give them equal treatment in deliberating whether it shall have jurisdiction when setting its jurisdictional test regarding the dispute in the preliminary phase.