The *Philippines v. China* Jurisdictional Award and its Implications for the Republic of Korea

Henri Féron

Abstract

The *Philippines v. China* jurisdictional award seemingly challenged the rule that third party fora cannot assume jurisdiction in the context of a territorial dispute without the consent of all parties involved. The present paper analyzes the decision and identifies its implications for the Republic of Korea in territorial disputes with its Chinese, Japanese and North Korean neighbors. It finds that *Philippines v. China*, far from undermining the South Korean position in these disputes, could actually benefit it against Japan.

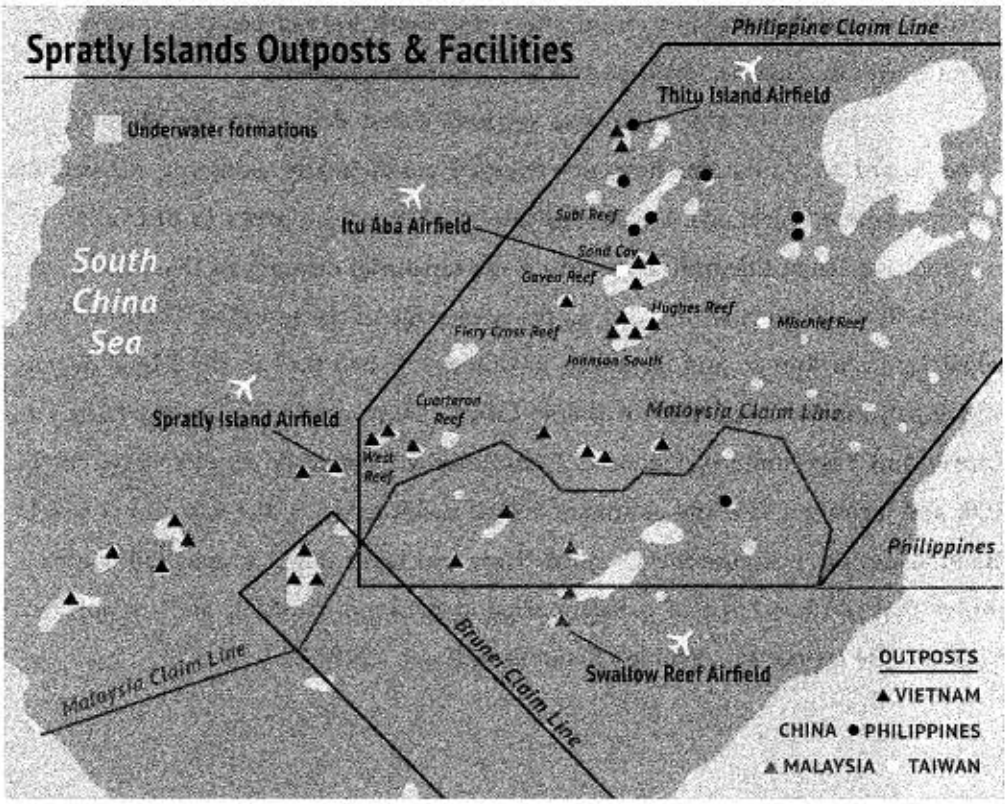
National sovereignty is the lynchpin of international law, and its corollary is that territorial disputes between states cannot be settled by a third party court or tribunal without the consent of all parties involved – whether expressed *ad hoc* or by treaty. This consent is not lightly given, since states are wary of letting non-nationals rule upon something as vital as their territorial interests. Yet recently, an arbitral tribunal assumed jurisdiction over claims indirectly related to a territorial dispute even though they were brought unilaterally by one party – the Philippines – against the will of the other – China[1]. While the award on the merits has yet to be released, the surprising denouement of this preliminary jurisdictional award will certainly lead other countries to evaluate whether other arbitral tribunals could also intervene in their own territorial disputes. The present paper will discuss the case of the Republic

1 Phil. v. China, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Perm. Ct.

of Korea (ROK), gauging to what extent the *Philippines v. China* Award on Jurisdiction and Admissibility could affect the South Korean position in territorial disputes with its Chinese, Japanese and North Korean neighbors.

The paper is divided into five sections. I first delve into the *Philippines v. China* award to determine how the tribunal could justify assuming jurisdiction despite Chinese objections. I then dedicate the rest of the paper to discussing the potential impact of the arbitral award on the territorial disputes of the ROK. I start with the ROK's dispute with China on the ownership of the so-called "Socotra Rock," called Ieodo in Korean and Suyanjiao in Chinese. I then turn to the ROK's dispute with Japan on the ownership of the so-called "Liancourt Rocks," called Dokdo in Korean and Takeshima in Japanese. I continue with another dispute between the ROK and Japan, on EEZ and continental shelf delimitation in the East China Sea. In the final section, I discuss the so-called "Northern Limit Line," a disputed maritime border that is the source of constant friction between the ROK and its northern neighbor, the Democratic People's Republic of Korea (DPRK).

I. The Tribunal's Assumption of Jurisdiction in *Philippines v. China*[2]



Why and to what extent did the tribunal accept to adjudicate Filipino claims against China in the context of their territorial disputes in the South China Sea?

The tribunal accepted to rule over Filipino claims pursuant to the compulsory dispute settlement procedures laid down in Chapter XV the United Nations Convention Law of the Sea (UNCLOS)[3], which the Philippines and China have both ratified. Chapter XV allow UNCLOS members to hold one another accountable for violations of the Convention, allowing under certain circumstances the unilateral initiation of arbitrations[4]. The Philippines made use of these procedures against

---

2 Map source: CENTER FOR INTERNATIONAL AND STRATEGIC STUDIES, http://amti.csis.org/island-tracker/ (last visited January 10, 2016).

3 United Nations Convention on the Law of the Sea art.279 ff., Dec.10, 1982, 1833 U.N.T.S. 508 [hereinafter UNCLOS], https://treaties.un.org/doc/publication/UNTS/Volume%201833/v1833.pdf.

4 *See* UNCLOS art.287(3), *supra* note 3, at 510 (regarding the automatic acceptance of

China, unilaterally requesting the formation of an arbitral tribunal under the Permanent Court of Arbitration (PCA)[5]. The tribunal was to rule over three categories of claims regarding the interpretation and application of UNCLOS to the South China Sea[6].

The first category concerned the effects of UNCLOS on China's so-called "nine-dash line," a legally ambiguous instrument delimiting China's territorial pretensions in the South China Sea[7]. The "nine-dash line" is unique to the context of the South China Sea and is therefore of limited concern to our discussion of the implications of *Philippines v. China* for the ROK.

The second category of Filipino claims, however, concerned the legal characterization of certain maritime features in the South China Sea as islands, rocks, low-tide elevations or submerged banks (Scarborough Shoal, First and Second Thomas Shoal, Mischief Reef, Gaven Reef, McKennan Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef)[8]. This is the part we will be focusing on for implications, because the legal characterization of maritime features determines the strength of the territorial claims they generate, and therefore indirectly affects questions of territorial sovereignty.

Finally, the third category of Filipino claims concerned certain Chinese activities such as occupation, construction and fishing in the South China Sea, and whether these activities have violated UNCLOS by interfering with Filipino rights or harming the marine environment[9]. Note that it is much more difficult to foretell meaningful implications of *Philippines v. China* regarding the legitimacy of given maritime activities than it is regarding the legal characterization of maritime features.

---

arbitration by UNCLOS members for disputes regarding the interpretation and application of the Convention). *See also* UNCLOS Annex VII art.9, *supra* note 3, at 573 (according to which absence to a party to defend its case is not a bar to arbitral proceedings)

5 Phil. v. China, *supra* note 1, at 15.

6 *Id.*, at 34.

7 *Id.*

8 *Id.*

9 *Id.*, at 35.

While legal characterization predictably brings with it one or the other legal regime as defined by UNCLOS, there are just too many possible nuances the tribunal could draw defining the conditions in which various maritime activities would be legitimate. It is hence necessary to wait for the *Philippines v. China* award on the merits to draw meaningful implications for the maritime activities of third countries. Consequently, this paper will focus on the more predictable implications concerning the legal characterization of maritime features.

China has responded to the Filipino initiative by refusing to participate in the Chapter XV arbitration[10]. Instead, it openly published a position paper explaining the reasons for which it considered that the tribunal had no jurisdiction over this case. China's core argument was that the claims fell outside the ambit of the UNCLOS compulsory dispute settlement procedures because they were actually about territorial sovereignty rather than the interpretation and application of the Convention[11]. It added that, even if the dispute was found to be about interpretation, the tribunal was still precluded from assuming jurisdiction, notably because of a declaration China had made in 2006 under art.298 of the Convention[12]. This article allows a country to opt-out from the UNCLOS compulsory dispute settlement procedures for disputes concerning maritime boundaries, historic bays and titles, law enforcement activities and military activities[13]. China opted out of all these categories, and contended that this covered the subject-matter of all Filipino claims against it.

In the Award on Jurisdiction and Admissibility, the tribunal rebuffed China's argument that the Filipino claims were essentially about territorial sovereignty, noting the express Filipino demand that the tribunal not rule on this subject[14].

---

10 *Id.*, at 11.

11 MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, 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 (2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

12 Phil. v. China, *supra* note 1, at 11.

13 UNCLOS art. 298, *supra* note 3, at 515.

14 Phil. v. China, *supra* note 1, at 59 ff.

Instead, the tribunal found that the claims were indeed related to the interpretation and application of UNCLOS, and that it therefore had jurisdiction over them under Chapter XV[15]. However, the tribunal did admit that its jurisdiction over certain Filipino claims could be precluded by China's art. 298 declaration[16]. The declaration prevents the tribunal from ruling over the delimitation of maritime boundaries in zones where Chinese and Filipino claims overlap, and certain complex Filipino claims may be impossible to resolve without such a delimitation[17]. For instance, it may be impossible to determine whether Mischief Reef and Second Thomas Shoal are part of the Filipino or the Chinese exclusive economic zone (EEZ) and continental shelf without delimiting the extent of each country's zone.

It may be hard to know in advance whether resolving such complex claims will need a delimitation or not, because this may in turn depend on how nearby maritime features are characterized and whether they generate a zone large enough to create a potential conflict[18]. To continue the above example, China's ownership claims over Mischief Reef and Second Thomas Shoal could depend on whether the nearby maritime feature of Taiping/Itu Aba, over which China also competes for ownership with the Philippines[19], is characterized as an island rather than a rock. This is because Mischief Reef and Second Thomas Shoal Islands could be characterized as low-tide elevations by the tribunal, meaning they do not generate any sovereign claims of their own and need instead to lie within the maritime zone generated by another feature like Taiping/Itu Aba. Islands, defined by their ability to sustain human habitation and economic activity on their own, can generate continental shelf and EEZ claims up to 200 nautical miles (nmi) beyond their shores, whereas rocks

15 *Id.*, at 70.

16 *Id.*, at 130 ff.

17 *Id.*

18 *Id.*

19 Note that Taiping/Itu Aba is currently occupied by Taiwanese forces. However, for historical reasons, China and Taiwan have the exact same pretensions to sovereign ownership in the South China Sea. China is therefore also claiming Taiping/Itu Aba as its own.

can only generate up to 12 nmi of territorial sea claims[20]. Since Mischief Reef and Second Thomas Shoal are more than 12 nmi away from Taiping/Itu Aba, and since there are no other potentially Chinese islands nearby that could generate the necessary maritime zone to compete with the Philippines over ownership of the low-tide elevations, China's case over Mischief Reef and Second Thomas Shoal could depend entirely on the recognition of Taiping/Itu Aba as an island. By contrast, the Philippines can always lay claim over these two features through their nearby undisputed island of Palawan, whether or not Taiping/Itu Aba is an island or rock, and whether it is recognized as Chinese or Filipino.

Since determining jurisdiction in these complex claims would require a characterization of maritime features and zones, and since such an inquiry does not have an exclusively preliminary character, the tribunal decided that jurisdiction would in this case have to be considered in conjunction with the merits[21]. If it later turned out in the award on the merits these problematic claims indeed require a delimitation, then the claim would have to be dismissed as a dead end, because China's art.298 declaration precludes the tribunal from delimiting Chinese maritime boundaries. The tribunal could only finalize its ruling on the merits claim if a delimitation was unnecessary. To continue the above example, if the tribunal found that Taiping/Itu Aba was indeed an island, this would create a situation where delimitation becomes necessary to determine whether Mischief Reef and Second Thomas Shoal are in the Filipino EEZ or continental shelf zone[22]. Since the ownership of Taiping/Itu Aba is undetermined, and since it lies beyond the tribunal's jurisdiction to determine it, the tribunal must reason by assuming it could be Chinese. If Taiping/Itu Aba were a Chinese island, it would generate Chinese EEZ and continental shelf claims overlapping with Filipino ones over Mischief Reef and Second Thomas Shoal. The tribunal would then have no way to confirm or deny the Filipino claim that the two features are in the Filipino EEZ and continental shelf zone. Ruling over this claim would require a delimitation of the Chinese and Filipino

20 UNCLOS art.121, *supra* note 3, at 442.

21 Phil. v. China, *supra* note 1, at 140.

22 *Id.* at 143.

maritime zones, to see whether Mischief Reef and Second Thomas Shoal fall in one or the other. However, the tribunal is precluded from engaging in the delimitation of Chinese maritime zones by China's art. 298 declaration, leaving the analysis in a dead end and forcing the tribunal to refrain from concluding on this claim. Conversely, if Taiping/Itu Aba were not recognized as an island, then China would have no meaningful way of competing with the Filipino EEZ and continental shelf claims generated by Palawan island, making a delimitation unnecessary and allowing the tribunal to conclude in favor of the Philippines for the ownership of Mischief Reef and Second Thomas Shoal.

What does this all mean for the ROK? The *Philippines v. China* award on jurisdiction allows us to draw certain general implications for third countries. As we have seen, an arbitral tribunal formed pursuant to Chapter XV of UNCLOS may find it has jurisdiction over member claims that are related to the interpretation and application of the Convention, even if those claims have indirect implications for territorial sovereignty[23]. For instance, a Chapter XV tribunal may determine whether a particular maritime feature should be legally characterized as an island, rock, low-tide elevation or submerged feature under UNCLOS, even if a particular characterization would strengthen or weaken a party's sovereign claim over other features nearby. Of course, if a party to the dispute has made an art.298 declaration to opt-out from UNCLOS compulsory dispute settlement procedures for the delimitation of maritime boundaries, then the arbitral tribunal will have to respect this declaration and refrain from delimiting any zones of that party overlapping with those of the counter-party. Yet even if it cannot rule over delimitation, a Chapter XV tribunal may still have jurisdiction to determine whether the maritime features the first party claims to own are at all capable of generating a zone overlapping with those of the counter-party: "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlement of the parties overlap"[24]. Let us now determine whether these principles are capable of giving the edge to one or the other side in the

23 *Id.* at 59.

24 *Id.* at 61.

territorial disputes between the ROK and its Chinese, Japanese and North Korean neighbors.

II. Implications of *Philippines v. China* for the Socotra Rock (Ieodo/Suyanjiao)

What are the implications of the *Philippines v. China* jurisdictional award for the dispute between the ROK and China on the so-called "Socotra Rock"? Socotra is a submerged rock which is located 4 to 5 m below sea level even at low tide. The ROK and China agree that this submerged status makes it incapable of generating any territorial claims[25]. The two countries disagree, however, on whether Socotra lies in the Chinese or Korean EEZ[26]. I will discuss here whether a Chapter XV tribunal could change the status quo on its legal characterization or on the question of ownership. As UNCLOS members, the ROK and China have access to the Convention's compulsory dispute settlement procedures and may unilateral initiate arbitration in conformity with Chapter XV of UNCLOS. Note, however, that the ROK and China have both made art. 298 declarations to opt out of these procedures as far as the delimitation of maritime boundaries is concerned[27].

Could a Chapter XV tribunal accept a unilateral demand to change the legal characterization of Socotra into a feature capable of generating territorial claims? The tribunal would indeed have jurisdiction over such a demand, because it does not imply the delimitation of maritime boundaries and is therefore not caught by Korean or Chinese exclusions under art. 298. A demand to characterize Socotra as a feature capable of generating territorial claims would concern the interpretation of the concept of submerged features in the UNCLOS framework, and therefore fully lie

---

25 Shannon Tiezzi, *Is China Ready to Solve One of its Maritime Disputes?*, THE DIPLOMAT (Nov. 7, 2015, http://thediplomat.com/2015/11/is-china-ready-to-solve-one-of-its-maritime-disputes/.

26 *Id.*

27 For a list of all the art.298 opt-out declarations, see: Settlement of Disputes Mechanism, UNITED NATIONS (Apr. 10, 2013) http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm (last visited Jan. 3, 2015).

within the jurisdiction of a Chapter XV tribunal. However, even if such a tribunal can accept the demand at a jurisdictional level, it will most likely dismiss it on the merits. Although UNCLOS does not explicitly detail the regime governing rocks submerged at both low and high tide, it can be concluded by analogy that submerged features do not generate any territorial claims. If rocks emerged at both low and high tide generate territorial sea claims up to 12 nmi from their shores[28], and if low-tide elevations emerged only at low tide cannot generate territorial sea claims without themselves being situated within 12 nmi of an island or mainland[29], then it appears straightforward to conclude that submerged rocks that are never emerged generate even less claims and should be governed by the regime of the continental shelf[30]. To hold otherwise would open the floodgates to all sorts of territorial claims based on submerged rocks perhaps hundreds of meters below sea level. Morever, even if the tribunal were to find that Socotra could be characterized as a low-tide elevation, the feature would still not be able to generate any territorial sea claim because it is much farther away than 12 nmi from the nearest undisputed Korean or Chinese island – which are respectively Mara island, 80 nmi away, and Yushan island, 155 nmi away. It is hence hard to see how *Philippines v. China* could have any bearing on the legal characterization of Socotra.

Could a Chapter XV tribunal accept a unilateral demand to decide whether Socotra lies in the Korean or Chinese EEZ? One might have thought so given that, two weeks after *Philippines v. China*, the ROK and China ushered to announce official negotiations on EEZ delimitation[31]. Upon closer examination, however, it does not appear that a Chapter XV tribunal would accept a demand on EEZ delimitation. As mentioned above, the ROK and China both made an art.298 declaration to opt out of UNCLOS compulsory dispute settlement procedures for claims related to maritime

28 UNCLOS art.121(3), *supra* note 3, at 442.

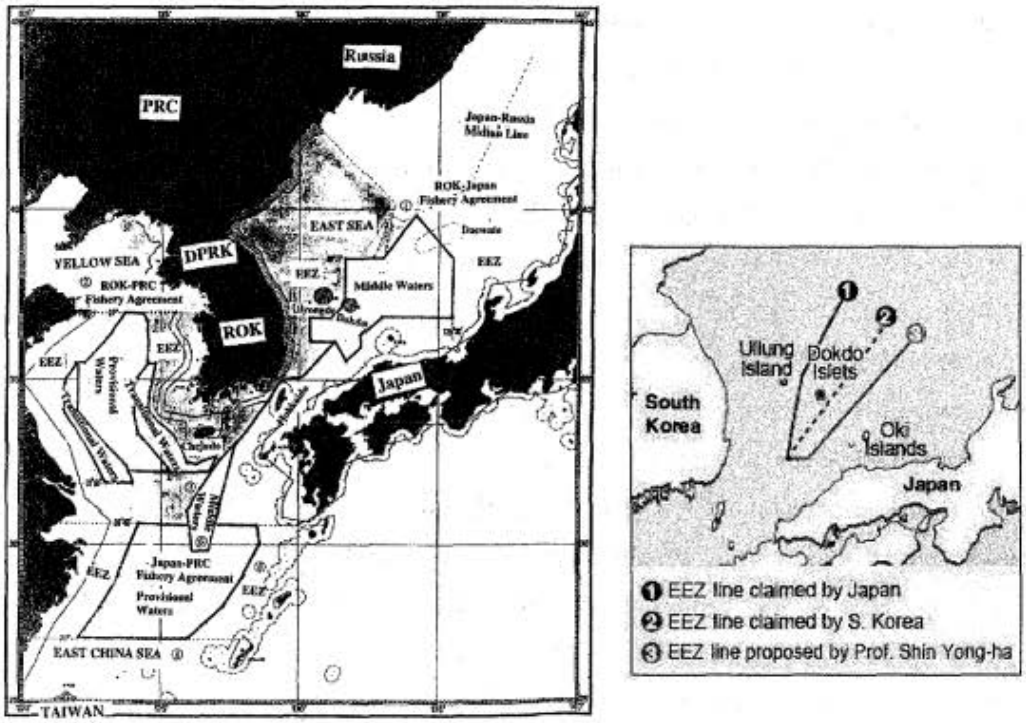
29 UNCLOS art. 13(2), *supra* note 3, at 403.

30 UNCLOS art. 76(3), *supra* note 3, at 428.

31 Tiezzi, *supra* note 25.

boundaries[32]. Since EEZ delimitation is plainly related to the determining of maritime boundaries, the tribunal cannot coherently accept jurisdiction on this subject – or at least not without the consent of both parties. There is hence no change to the status quo that existed before *Philippines v. China*. Since *Philippines v. China* does not imply that a Chapter XV tribunal would change the legal characterization of Socotra, nor that it would accept to delimit Korean and Chinese EEZs in the Yellow Sea, we can conclude that the case has no bearing on the Socotra dispute between the ROK and China.

32 UNITED NATIONS, *supra* note 27.



What are the implications of the *Philippines v. China* jurisdictional award for the dispute between the ROK and Japan on the so-called "Liancourt Rocks" (Dokdo on the above map[33])? The Liancourts consist of two main islets and thirty-five smaller, emerged rocks. First, the ROK and Japan disagree on the legal characterization of these features: whether they are islands capable of generating up to 200 nmi of EEZ and continental shelf claims or whether they are rocks only generating up to 12 nmi of territorial sea. The determining factor here is the ability of the Liancourts to sustain human habitation and economic activity on its own. The Korean position seems to be that the Liancourts are a rock, and the Japanese that they are islands[34].

33 Map by Kang Joon-Suk, *The United Nations Convention on the Law of the Sea and Fishery Relations between Korea, Japan and China*, 27 MARINE POLICY 118 (2003), dx.doi.org/10.1016/S0308-597X(02)00084-2.

34 Jon M. Van Dyke, *Legal Issues Related to Sovereignty Over Dokdo and its Maritime*

Second, the ROK and Japan also disagree on the ownership over these features, each claiming them as its own[35]. This has made it impossible for the two countries to agree on a delimitation of their EEZ in the East Sea/Sea of Japan. Japan's claims are based on the EEZ that would be generated by the Liancourts if they were recognized as Japanese islands. Although certain Korean scholars such as Prof. Shin Yong-ha have called upon their government to mirror these claims (see map below[36]), the ROK visibly treats the Liancourts as Korean rocks incapable of generating an EEZ, and instead bases its own claims on the undisputed Korean island of Ulleungdo. Official Korean EEZ claims therefore run up to the line of equidistance with the nearest undisputedly Japanese islands, Oki-gunto. Since Ulleungdo is much closer to the Liancourts (47.2 nmi) than Oki-gunto (85 nmi), this line of equidistance would still leave the Liancourts in Korean waters.

Note that, while efforts to reconcile Korean and Japanese EEZ claims in the area have remained fruitless, the ROK and Japan did agree on a joint fishing agreement in 1998[37]. The agreement separated the issues of fishing and EEZ demarcation by defining a "middle waters" or "intermediate zone" in the Liancourts area in which both Korean and Japan fishermen could freely operate without prejudice to the question of territorial sovereignty[38]. However, the agreement does not regulate the exploitation of other natural resources such as methane hydrate deposits – a potentially massive energy source that could be of prime strategic importance for the Korean or Japanese economies[39].

Boundaries, 38 OCEAN DEVELOPMENT & INT'L L. 197 (2007), http://www.dokdo-takeshima.com/wordpress/wp-content/images/jonvandyke-doc.pdf.

35 *Id*, at 158.

36 Map by Park Song-wu, 'Current EEZ Line Was Badly Chosen,' The Korea Times (April 21, 2006), http://hosting03.snu.ac.kr/~bigbear1/press/koreatimes060421.htm.

37 See Kang, *supra* note 33, at 117.

38 *Id.*

39 *Dream Energy Source: Methane Hydrates May Ignite New Energy War in Asia*, BUSINESS KOREA (May 2, 2014, 6:50 PM), http://www.businesskorea.co.kr/english/news/industry/4389-dream-energy-source-methane-hydrate-may-ignite-new-energy-war-asia. *See also* Keith Johnson, *Burning Ice and*

I will discuss here whether a Chapter XV tribunal could change the status quo on the Liancourts' legal characterization or on the question of ownership. As UNCLOS members, the ROK and Japan have access to the Convention's compulsory dispute settlement procedures. Unlike the ROK, however, Japan has not made an art. 298 declarations to opt out of the UNCLOS compulsory dispute settlement procedures for the delimitation of maritime boundaries[40]. Accordingly, although Japan cannot bring a claim involving the delimitation of Korean maritime boundaries before a chapter XV tribunal without the ROK's consent, the ROK can bring always bring a claim involving the delimitation of Japanese maritime boundaries – assuming Japan does not decide to make an art.298 declaration before the ROK does so. That being said, since the delimitation of boundaries in the East Sea/Sea of Japan depends on the legal characterization and the ownership of the Liancourts, these questions must be analyzed individually.

Could a chapter XV tribunal accept a unilateral demand to characterize the Liancourts as an island or rock? This legal characterization is a matter that does not fall within the scope of art. 298 declarations excluding the delimitation of maritime boundaries. Instead, the characterization depends upon interpreting art. 121(3) of UNCLOS, which defines rocks by their inability to sustain human habitation or economic activity on their own[41]. The tribunal may therefore accept unilateral demands from either the ROK or Japan to determine whether the Liancourts are a rock or an island. Which country would benefit from such an arbitration? Although the ROK visibly considers the Liancourts to be rocks, it would not really suffer from an arbitral award that characterized them as islands. As long as the question of ownership remains unresolved, any ability to base EEZ or continental shelf claims on the Liancourts is a double-edged sword that can equally serve the ROK and Japan to challenge each other's maritime zones. On the other hand, an arbitral award characterizing the Liancourts as rocks only capable of generating 12 nmi of territorial

---

the Future of Energy, FOREIGN POLICY (April 5, 2014), http://foreignpolicy.com/2014/04/25/burning-ice-and-the-future-of-energy/.

40 UNITED NATIONS, *supra* note 27.

41 UNCLOS art.121(3), *supra* note 3, at 442.

sea would clearly profit the ROK over Japan, because they would drastically shrink the EEZ that Japan can plausibly claim in the area. Japanese EEZ claims would have to be based on the far islands of Oki-gunto instead of the Liancourts, allowing the ROK to gain the upper hand in EEZ delimitation negotiations because of the greater proximity of Ulleungdo. Indeed, it appears likely that a Chapter XV tribunal would agree with the Korean characterization of the Liancourts as rocks, given the number of distinguished foreign scholars such as Jon Van Dyke, Douglas Johnston and Mark Valencia who agree that the Liancourts are barren and inhospitable features that cannot sustain life on their own[42]. The *Philippines v. China* award on the merits may offer additional guidance on this question, as it will probably have to determine the status of Taiping/Itu Aba, a feature of similar size (0,46 km²) to the Liancourts (~0,20 km²). A point that will deserve particular attention is whether or not the existence of a limited fresh water source on Taiping/Itu Aba proves determinant for the characterization as island or rock, since the Liancourts also feature such a limited fresh water source (albeit contaminated by guano). In any case, a successful Korean bid to have the Liancourts recognized as rocks by a Chapter XV tribunal would make it much easier for the ROK to convince Japan to accept an EEZ delimitation line that runs equidistant between Ulleungdo and Oki-gunto. This EEZ delimitation agreement would give both sides much more certain conditions for exploiting natural resources such as methane hydrates in this area. Note also that this agreement would not need to renegotiate the joint fishing zones or determine ownership over the Liancourts if these aspects prove too contentious.

That being said, could a Chapter XV tribunal accept a unilateral demand that would in any way affect the ownership over the Liancourts? *Philippines v. China* did not change anything to the fact that a Chapter XV tribunal cannot determine ownership over an island or rock without the consent of all parties involved. This is not about to happen in the case of the Liancourts, as the ROK consistently refuses to cooperate with Japanese attempts to bring the question of ownership before the International Court of Justice. Could ownership be determined indirectly by a claim

42 Van Dyke, *supra* note 34, at 197. Also quoting DOUGLAS M. JOHNSTON AND MARK J. VALENCIA, PACIFIC OCEAN BOUNDARY PROBLEMS—STATUS AND SOLUTIONS 113 (1991).

asking whether the Liancourts are on the Korean or Japanese EEZ or continental shelf? Such a claim could not be raised by Japan against the ROK because of the Korean art.298 declaration, but it could be raised by the ROK against Japan. However, if the ROK refuses to resort to third party fora to determine the ownership directly, it is hard to see why it would want to determine it indirectly through the delimitation of maritime zones. In any case, the question of ownership cannot really be resolved for the Liancourts in the way that they could for Mischief Reef and Second Thomas Shoal. In *Philippines v. China*, ownership over Mischief Reef and Second Thomas Shoal could be indirectly determined only if the two features were characterized as low-tide elevations that do not generate any territorial claims of their own and only if it were found that China had no way to claim them for want of an EEZ and continental shelf source that could compete with the Filipino island of Palawan. Contrarily to Mischief Reef and Second Thomas Shoal, the Liancourts generate their own territorial claims – whether as rocks or islands – and their ownership is therefore not dependent on falling within the Korean or Japanese EEZ or continental shelf. Even if the Liancourts were somehow characterized as a low-tide elevation, both the ROK and Japan would have islands less than 200 nmi away that could potentially cover them with their EEZ. There hence seems to be no meaningful ways for the ROK to affect the question of ownership over the Liancourts by raising a claim before a Chapter XV tribunal.

In conclusion, while *Philippines v. China* does not seem to imply useful ways to assert Korean ownership over the Liancourts, it may allow a change in the status quo on legal characterization. The ROK or Japan could unilaterally initiate a Chapter XV arbitration to have the Liancourts characterized as either rock or island. The ROK has little to lose from such an arbitration, even if the tribunal agreed with Japan that the Liancourts are islands. As long as the question of ownership remains unresolved, any ability to base EEZ or continental shelf claims on the Liancourts is a double-edged sword that can be used both by the ROK and Japan. If, however, the tribunal characterized the Liancourts as rocks only capable of generating 12 nmi of territorial sea, the ROK could gain the upper hand against Japan in EEZ negotiations even without resolving the question of ownership. A characterization of the Liancourts as

rocks would force Japan to base its EEZ and continental shelf claims on Oki-gunto instead, giving the ROK an edge in EEZ delimitation because of the greater proximity of Ulleungdo. Since foreign commentators tend to agree with the Korean characterization of the Liancourts as rocks, it would seem advisable for the ROK to initiate a Chapter XV arbitration on the legal characterization of the Liancourts. It would be safest in this case to explicitly ask the tribunal not to rule on the question of ownership.

IV. Implications of Philippines v. China for the East China Sea "Intermediate Zone"

What are the implications of the *Philippines v. China* jurisdictional award for the dispute between the ROK and Japan on EEZ and continental shelf in the East China Sea? Korean claims based on the island of Chejudo conflict with Japanese ones based on the maritime features of Danjo Gunto and Hizen Torishima. Although the ROK recognizes Japanese ownership over these features, it disputes their characterization by Japan as islands capable of generating EEZ and continental shelf claims[43]. Moreover, since Danjo Gunto and Hizen Torishima are separated from the main Japanese islands by a deep trench on the sea-bed, the ROK claims that the Korean continental shelf extends to or almost to those features according to the doctrine of natural prolongation[44]. Japan insists instead on delimiting the continental shelf according to the doctrine of equidistance. While this leaves the ROK and Japan unable to agree on a delimitation of the EEZ and the continental shelf in the East China Sea, the two countries did sign a treaty in 1974 for the joint exploitation of natural resources in the disputed area[45]. The ROK-Japan joint fishing agreement of 1998 also defined this area as "middle waters" or "intermediate zone"[46], allowing

43 Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18 INT'L J. MARINE & COASTAL L. 509, 527 (2003).

44 *Id.*

45 Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Japan-S. Kor., Jan. 30, 1974, 1225 U.N.T.S. 19778.

Korean and Japanese fishermen to operate freely in the area without prejudice to the question of sovereignty.

I will discuss here whether a Chapter XV tribunal could change the status quo on EEZ and continental shelf delimitation between the ROK and Japan in the East China Sea. We saw in the discussion on the Liancourts that the ROK and Japan are both UNCLOS members with access to the compulsory dispute settlement procedures of Chapter XV of the Convention. However, we also saw that Japan, unlike the ROK, had not made an art. 298 declaration to opt out of these compulsory procedures for the delimitation of maritime boundaries[47]. This means that although Japan cannot unilaterally initiate an arbitration involving the delimitation of Korean maritime boundaries without Korean consent, the ROK can initiate one involving Japanese maritime boundaries. However, it appears risky for the ROK to directly demand a Chapter XV tribunal to delimit the Korean and Japanese continental shelf in the East China Sea, because the natural prolongation doctrine on which the ROK bases its claims has somewhat fallen out of favor over the past decades[48]. Moreover, Japan could possibly neutralize a Korean demand to delimit the EEZ in the East China Sea by arguing that the matter was already settled by the agreements on the joint exploitation of maritime resources in the area. For these reasons, it may be wiser for the ROK to focus on neutralizing the ability of Danjo Gunto and Hizen Torishima to generate EEZ and continental shelf claims. By demanding the Chapter XV tribunal to characterize these features without delimiting the continental shelf, the ROK can undermine the Japanese position in negotiations without risking an unfavorable delimitation by a third party forum.

Could a Chapter XV tribunal accept a unilateral demand to characterize Danjo Gunto and Hizen Torishima as rocks incapable of generating EEZ or continental shelf claims? Yes. Just as we demonstrated above that a Chapter XV tribunal could accept a demand to characterize the Liancourts as a rock, so could it in the case of these features. How likely is the ROK to win such a claim? Danjo Gunto

---

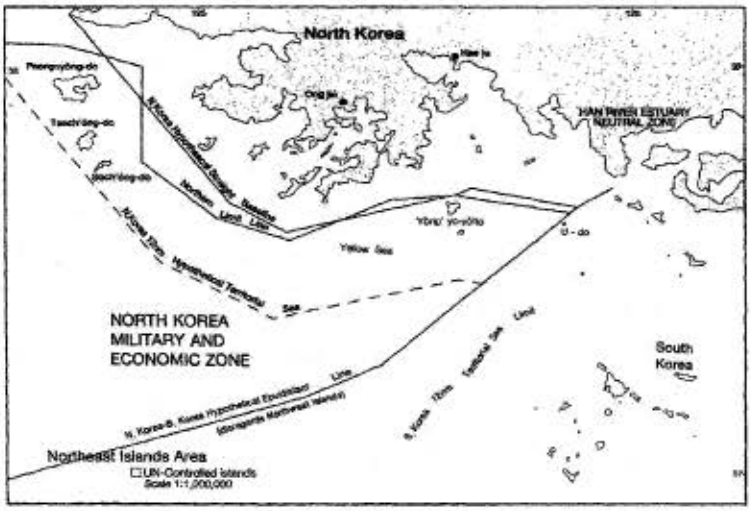
46 See zone 6 on the map displayed at note 33.

47 UNITED NATIONS, *supra* note 27.

48 Van Dyke, *supra* note 43, at 524.

are bigger than the Liancourts (total superficy of 4,95 km² instead of ~0,20 km²), introducing an element of uncertainty. However, they are uninhabited, and they have been described as potential rocks by such distinguished scholars as Jonathan Charney[49]. Meanwhile, Hizen Torishima are so minuscule, with a combined superficy of 200 m² (0,0002 km²), that it is hard to imagine how any tribunal could ever consider it a full-fledged island. The ROK may therefore have its chances to get a Chapter XV tribunal to characterize Danjo Gunto and Hizen Torishima as rocks incapable of sustaining Japanese EEZ and continental shelf claims. This would give the ROK the upper hand in negotiations on EEZ and continental shelf delimitations – although it might have to wait for the current joint exploitation agreements to run their course.

IV. Implications of *Philippines v. China* for the Northern Limit Line[50]



Source : US Gov't

49 Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 732 (1995), http://heinonline.org/HOL/Page?handle=hein.journals/ajil89&div=53&g_sent=1&collection=journals.

50 Map source: WIKIPEDIA, https://en.wikipedia.org/wiki/File:12nm_hypothetical_Territorial_Sea_compared_with_Northern_Limit_Line,_North_Korea.jpg (last visited January 10, 2016).

What are the implications of the *Philippines v. China* jurisdictional award for the dispute between the ROK and the DPRK on the so-called "Northern Limit Line" (NLL)? The NLL is a line of military control representing the northernmost point to which US and ROK naval units are allowed to sail in the Yellow Sea – hence the name "limit line"[51]. The line was unilaterally traced by the US Commander of Naval Forces for Korea to avoid incidents with the DPRK after the end of the Korean War[52], as the Armistice Agreement's failure to provide a sea demarcation line between the ROK and DPRK meant that conflicts could rapidly escalate out of control in this area. The ROK has since come to regard the NLL as the *de facto* demarcation line between South and North Korean waters[53]. However, the DPRK claims that it was initially not informed of the tracing of the NLL and that it has challenged it numerous times since then, notably in 1955, 1973, 1989 and 1999[54]. In 1999, it has traced and announced its own "Inter-Korean Military Demarcation Line" further south, representing the North Korean view of where the sea demarcation line should equitably be[55]. Nevertheless, the ROK has responded with force to attempts by North Korean vessels to cross south of the NLL, insisting the DPRK tacitly recognized it as demarcation line by remaining silent up to 1973 and by agreeing to the South-North Basic Agreement in 1992[56]. I will discuss here whether the *Philippines v. China* jurisdictional award could change this status quo.

Could the DPRK strengthen its position by asking a Chapter XV tribunal to

---

51 CENTRAL INTELLIGENCE AGENCY, BGI RP 74-9 / CIA-RDP84-00825R003001200001-7, THE WEST COAST KOREAN ISLANDS 2 (1974), http://www.kpajournal.com/declassified-documents-old/The%20West%20Coast%20Islands%20January%201974.pdf.

52 *Id.*

53 *Id.*

54 John Van Dyke et al., *The North/South Korea Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POLICY 149 (2003), http://dx.doi.org/10.1016/S0308-597X(02)00088-X.

55 John Van Dyke, *The Maritime Boundary between North & South Korea in the Yellow (West) Sea*, 38 NORTH (Jul. 29, 2010), http://38north.org/2010/07/the-maritime-boundary-between-north-south-korea-in-the-yellow-west-sea/.

56 MINISTRY OF NATIONAL DEFENSE (ROK), THE REPUBLIC OF KOREA POSITION REGARDING THE NORTHERN LIMIT LINE (2002), http://www.military.co.kr/english/NLL/NLL.htm.

strike down the NLL as illegal and illegitimate?

At first sight, the DPRK appears to have its chance on the merits[57]. The NLL was unilaterally traced by the US, cuts deeply within the DPRK's 12 nmi territorial sea line and does not correspond to an equidistant demarcation line between the two countries. Even the United States government seems to consider internally that the NLL cannot be supported in international law. In the CIA's assessment, as declassified documents show, the NLL "crosses water presumed to be under uncontested North Korean sovereignty"[58], "has no legal basis in international law"[59], and "is binding only on those military forces under the command or operational control of [the US Commander of Naval Forces for Korea]"[60]. Henry Kissinger came to a similar assessment as Secretary of State, as some of his declassified messages show: "[i]nsofar as it purports unilaterally to divide international waters, [the NLL] is clearly contrary to international law"[61].

However, the DPRK will be unable to bring a unilateral arbitral claim against the ROK for two procedural reasons. The first is that the DPRK is not a member of UNCLOS and can therefore not resort to the compulsory dispute settlement procedures detailed in the Convention's Chapter XV. The DPRK can only resort to the "traditional" dispute resolution mechanisms of international law, which require both parties to a dispute on territorial sovereignty to agree bringing the matter before a third party forum such as the International Court of Justice. Of course, the DPRK could overcome this hurdle by simply ratifying UNCLOS. The second problem, though, is that the NLL dispute between the ROK and DPRK is a dispute about the delimitation of maritime boundaries, and that the ROK made an art. 298 declaration

---

57 See Van Dyke et al., *supra* note 54, at 153.

58 CIA, *supra* note 51, at 2.

59 *Id.*

60 *Id.*

61 Daniel T. Kate and Peter S. Green, *Holding Korea Line Seen Against Law Still U.S. Policy*, BLOOMBERG BUSINESS (December 17, 2010, 5:06 AM), http://www.bloomberg.com/news/articles/2010-12-16/defending-korea-line-seen-contrary-to-law-by-kissinger-remains-u-s-policy.

opting out of the UNCLOS compulsory dispute settlement procedures for such subjects[62]. This means that a chapter XV tribunal will not be able to accept a unilateral arbitral claim by the DPRK on the legitimacy of the NLL demarcation. The ROK would have to expressly agree to such an arbitration for it to proceed, which corresponds to the status quo that already existed before the *Philippines v. China* jurisdictional award.

We can thus conclude that *Philippines v. China* does not have meaningful implications for the dispute between ROK and DPRK on the legitimacy of the NLL, as the ROK remains shielded by its art. 298 declaration against any unilateral claims related to maritime boundaries.

Conclusion

This paper has demonstrated why the ROK has little to fear from the implications of the *Philippines v. China* jurisdictional award, and why it may even benefit from it against Japan.

The ROK's territorial sovereignty is largely shielded from unwanted unilateral claims by its art. 298 declaration to opt out of UNCLOS compulsory dispute settlement procedures for claims related to maritime boundaries. This declaration prevents Chapter XV tribunals from accepting unilateral Chinese claims about the demarcation of Chinese and Korean EEZs around Socotra rock. It also prevents such tribunals from entertaining unilateral demands by Japan to determine the ownership of the Liancourt rocks. And finally it also protects the ROK from any challenges by the DPRK regarding the legitimacy of the NLL.

Conversely, the ROK could benefit from initiating a Chapter XV arbitration against Japan over the legal characterization of the Liancourts, explicitly asking the tribunal not to rule over the question of ownership. The ROK would not suffer from an award that agreed with the Japanese characterization of the Liancourts as an island, because the ownership dispute allows the ROK to mirror any EEZ or continental shelf claims made by Japan on the basis of the Liancourts. On the other

62 UNITED NATIONS, *supra* note 27.

hand, an award that agreed with the Korean characterization of the Liancourts as rocks would to a large extent negate Japanese EEZ claims in the area. Japan would have to base its claims on the undisputedly Japanese islands of Oki-gunto. It would therefore become easier for the ROK to convince Japan to accept an EEZ delimitation that runs at the line of equidistance between Oki-gunto and the nearest undisputed Korean island of Ulleungdo. This agreement would not have to renegotiate joint fishing zones or the actual ownership of the Liancourts if these points prove too contentious. It would however provide some certainty to exploit other natural resources such as methane hydrates, and it would ensure that the Liancourts are surrounded by Korean waters.

Finally, the ROK could also benefit from initiating a Chapter XV arbitration against Japan over the legal characterization of Danjo Gunto and Hizen Torishima, explicitly asking the tribunal not to delimit the EEZ or continental shelf in this area. This would allow the ROK to undermine Japanese claims over the East China Sea without risking an unfavorable continental shelf delimitation. Indeed, it appears the ROK has fair chances to get a Chapter XV tribunal to characterize Danjo Gunto and Hizen Torishima as rocks. A victory would ultimately give the ROK the upper hand against Japan in negotiations on EEZ and continental shelf delimitations in the East China Sea.