УДК: 341.62:341.221.2(597)

Vietnam's Choices of Peaceful Settlement Means in the Wake of *the South China Sea Arbitration* ruling[1]

Mai-Thanh Le,
PhD., Legal researcher at Institute of State and Law, Hanoi, Vietnam.
E-mail: lemaithanhvn@yahoo.com

Tien-Duc Nguyen,
MP, Legal Researcher at Institute of State and Law, Hanoi, Vietnam.
E-mail: ng.tien.duc@gmail.com

The paper seeks to explore Vietnam's possibilities to settle the dispute peacefully through legal methods, including arbitration and judicial means, and mediation as a diplomatic method. Firstly, the paper provides a brief history of the South China Sea dispute and disputants at issue. Then, it argues that the implications from *the South China Sea Arbitration* ruling hold the same value for Vietnam case, leave a leeway for potential proceedings before an arbitral tribunal. Beside, the paper also finds an alternative to develop jurisprudence in international law of the sea on the South China Sea dispute through advisory opinions by the International Tribunal for the Law of the Sea. Finally, the paper turns to mediation as a diplomatic means with an emphasis on the role of mediator in support of related parties to settle the dispute peacefully.
Keywords: the South China Sea, peaceful dispute settlement, the South China Sea Arbitration, the Philippines v. China, Vietnam.

Выбор Вьетнамом средств мирного урегулирования спора в Южно-Китайском море вследствие решения арбитражного суда.
Май Тхань Ле, Институт государства и права, Ханой, Вьетнам.
E-mail: lemaithanhvn@yahoo.com.
Тиен Дык Нгуен, Институт государства и права, Ханой, Вьетнам.
E-mail: ng.tien.duc@gmail.com.

В представленной работе изучаются возможности Вьетнама по мирному разрешению споров с помощью правовых методов, включая арбитражные и гражданско-правовые, а также путём посредничества третьей стороны как способа дипломатического урегулирования. Даётся краткая история диспута о Южно-Китайском море и информация о его участниках. Приводятся

[1] The paper reflects solely the authors' personal opinion. It does not necessarily reflect the standing point of the Vietnamese Government (Статья отражает исключительно личное мнение авторов и может не совпадать с точкой зрения правительства Вьетнама).

доказательства в пользу того, что последствия арбитражного решения по Южно-Китайскому морю имеют большое значение для Вьетнама и предоставляют возможность для потенциальных разбирательств до арбитражного суда. Кроме того, авторами показана альтернатива развития юриспруденции в международном морском праве в вопросе вокруг Южно-Китайского моря на примере консультативных заключений Международного трибунала по морскому праву. Завершает статью анализ посредничества как дипломатического средства, акцентируется внимание на том, какую роль между всеми противоборствующими сторонами в мирном урегулировании конфликта играет посредник.
Ключевые слова: Южно-Китайское море, мирное урегулирование конфликтов, арбитраж по Южно-Китайскому морю, Филиппины против Китая, Вьетнам.

INTRODUCTION

The South China Sea dispute has been dragging on for years and will be for many more. It is certainly not an easy task to settle this dispute while the Parties have been tremendously adamant on their claims. Recently, several incidents and developments have complicated the situation further, putting the Parties under great stress. Self-restraint is required under international law, so is pacific dispute settlement. Among many efforts to resolve the dispute peacefully, the Philippines brought a lawsuit against China before the Hague-based arbitral tribunal challenging the legitimacy and legality of China's claims and actions in the South China Sea. The 2016 arbitral ruling is a sweeping victory in which the Tribunal found in favor of the Philippines on most of its counts. The ruling has, as a part of international law now, provided profound implications at the global and regional levels.

The paper seeks to explore Vietnam's possibilities to settle the dispute peacefully through legal methods, including arbitration and judicial means, and mediation as a diplomatic method. It does not seek to resolve all issues relating to sovereignty of the Parties. Even if it attempts, it would not succeed because of the jurisdictional hurdle posed under the United Nations Convention on the Law of the Sea of 1982 (hereinafter UNCLOS). However, the paper seeks to provide implications as a bargaining chip for Vietnam when negotiating with China in respect of the ongoing disputes. Its objective is to develop jurisprudence in related area, to certain extent, undercut China's nine-dash line claim, thus brings the Parties to the table for further discussion.

HISTORY OF THE SOUTH CHINA SEA DISPUTE

The Chinese call it *Nan Hai*, the Malaysians call it *Laut Cina Selatan*, The Filipinos call it *Dagat Kanlurang Pilipinas* and the Vietnamese call it *Biển Đông* (East Sea). All geographical names refer to the South China Sea. The South China Sea is geographical indication of the sea in the South of China.

It does not mean China has had sovereign rights over the waters and features at issue. And yet, there are even more claimants at dispute than geographical names. So far, all States Parties at dispute are members to the UNCLOS.

Historically, Vietnam had established sovereignty over two archipelagos — the Paracel islands (Hoang Sa archipelago) and the Spratly islands (Truong Sa archipelago) since the seventeenth century [53; 33, p. 27—60]. However, due to international turmoil and conflicts, there two types of territorial dispute have arisen at the South China Sea, namely sovereignty dispute over features and dispute on the delimitation of maritime zones [34, p. 184]. China, Taiwan, and Vietnam declare sovereignty claims over all features in the Spratlys. The Philippines claims sovereignty over 53 features called the Kalayaan Islands Group (KIG), meanwhile Malaysia claims 11 features. Brunei states its claim over a part of the water areas nearby to them in the Spratlys, including Louisa Reef and Rifleman Reef. Besides, the Paracels are disputed by only Vietnam and China.

The history of the South China Sea dispute can be divided into three periods [14, p. 153—162]. The first period displays sovereignty disputes over features until 1958. The second period from 1958 to 2009, with the emergence of international law of the sea, shows the expansion of territorial disputes together with maritime entitlement claims. In the third period from 2009 up to now, disputants have attempted to resolve disputes peacefully, however, outcomes remain to be seen.

The first period, given the 1949 Halong Bay Agreement, the French transferred entirely sovereignty to Vietnam, including the Spratlys over which the French had declared sovereignty since 1933 [15, p. 242]. Three conferences, in Cairo (1943), Postdam (1945), and San Francisco (1951), contributed a great deal to push Japan out of the territories occupied through the use of force, including the Paracels and Spratlys. It is worth mentioning that no statements or claims regarding the maritime areas in the South China Sea were made during these three conferences. The 1951 Statement of Zhou Enlai, the Prime Minister of China, did not specify claims over maritime areas or historic water areas [17].

Amid international turmoil, Japan gave up entirely its rights and claims over the Paracels and Spratlys [52, p. 119], each disputant jumped into the water in the hope for a piece of cake. China took the eastern part of the Paracels and Itu Aba island (currently under control of Taiwan) by force in the Spratlys from the hands of the Republic of Vietnam in 1956 [25]. The Republic of Vietnam still occupied the western part of the Paracels and a number of islands in the Spratlys. However, this part of the Paracels was taken by Chinese force in 1974. Since then, China has expanded its control over nine reefs in the Spratly area [16, p. 188]. Meanwhile, the Philippines also jumped into the Spratlys dispute by arguing, given the 1951 Treaty of San Francisco, that the Spratlys, except for 7 islands stated by the French in its 1933 Notice, discovered by Tomas Cloma, a Filipino businessman, were *terra res nullius* undiscovered territory [16, p. 155]. Malaysia claimed sovereignty over the southern part of the Spratly archipelago by its 1979 maps.

The second period, with the emergence and development of international law of the sea and technology, claims over water areas were broadened. States accelerated to extend their territorial seas, exclusive economic zones (EEZ) and continental shelves through declarations and enactment of national laws[2].

This period also displays China's use of force and threat of use of force considered as a means to resolve disputes even though the United Nations Charter has strictly prohibited. Over this period, ASEAN did not play any significant role in the South China Sea dispute, partly because it was not a direct threat to the Association members' security. ASEAN kept silent on two incidents of 1974 and 1988 where China resorted to use of force to occupy Vietnam's features in the Paracels and Spratlys [11]. However, this was an alarming bell to all regional countries.

In the wake of the U.S. troops withdrawal from Subic Bay and Clark Air Base, the Philippines were left vulnerable, thus urged ASEAN to take concrete actions to prevent such an incident from happening again. In the ASEAN Foreign Ministers' Meeting of 1992, the Joint Communique on the South China Sea was issued [18]. This was the very first ASEAN's document affirming that the developments of the South China Sea dispute affect regional peace and stability, and stressing on the necessity to settle all issues through peaceful means without resorting to use of force [18]. In 1995, Manila found China's construction activity on Mischief Reef over which the Philippines, Vietnam and China claimed sovereignty. Subsequently, ASEAN expressed concerns in its documents over the incident [40; 41].

Over this period, much effort was paid to delimit maritime areas between the Parties [36—39; 42—45]. After three years of dialogues and consultations between ASEAN members and China, the 2002 Declaration of Conduct (DOC) was issued in Phnom Penh. DOC is seen as a political document, yet displays no significance on the South China Sea dispute because the provisions are too vague and obscure. There is no dispute resolution mechanism provided under DOC. Generally, efforts paid were not enough to build confidence in each party. This implies that China's policies and claims are a key factor contributing to regional instability.

On 6 May 2009, Vietnam and Malaysia made a joint submission to the Commission on the Limits of the Continental Shelf (CLCS), which presents

---

[2] Vietnam declared its 12 nautical mile territorial sea, 200 nautical mile EEZ and continental shelf on 12 May 1977, and its baseline on 12 November 1982. China enacted the law on territorial sea and contiguous zone on 25 February 1992, the law on EEZ and continental shelf on 26 June 1998, provided its base points on 15 June 1996. The Philippines issued Order No.1599 on 200 nautical mile EEZ, enacted the law RA 9522 on baseline and management of the Spratlys and Scarborough Shoal on 10 March 2009. Malaysia and Brunei reformulated their claims based on the UNCLOS. Accordingly, Malaysia enacted the 1966 law on continental shelf, and issued a map indicating features subject to Malaysia's sovereignty in 1979. Brunei declared its 200 nautical mile EEZ and claimed sovereignty over Louisa Reef lying within its EEZ. On 8 October 1979, Taiwan claimed its EEZ and continental shelf, then enacted the 1992 law on EEZ and continental shelf, the 1993 law on territorial sea and contiguous zone, and the 1999 declaration on its baseline.

claims for extended continental shelves from the mainland [19]. Notably, the Paracel and Spratly archipelagos, subject to sovereignty claims in the South China Sea, were not mentioned as base points. Both Vietnam and Malaysia seem to reach an agreement that most, if not all, features in the South China Sea shall have only territorial seas at best [35, p. 28; 16, p. 200]. The conducts of Brunei and the Philippines show that they share the same view on the regime of islands [16, p. 200]. China instantly objected by submitting a declaration to the CLCS on 7 May 2009, and alleging the Joint Submission is in violation of its sovereignty and jurisdiction [10]. Notably, this is the very first time that China officially declared its U-shaped or nine-dash line, which claims over almost all water areas and features within the South China Sea. So far, China, however, has failed to provide concrete grounds for its claim.

The third period, from 2009 up to now, is to seeking for resolution to the management and peaceful settlement of the dispute. Over the period, the South China Sea dispute has attracted enormous attention from international community. In 2010, at ASEAN Regional Forum, the State Secretary Hillary Clinton stated American interests at stake in the South China Sea, marking the pivotal and rebalancing foreign policy of the U.S. in Asia [30].

Meanwhile, ASEAN countries are concerned about the developments and tension in the South China Sea, and desire to resolve disputes through peaceful means. The concern has urged ASEAN countries to strenuously promote confidence-building measures, engage in practical maritime cooperation, and more importantly, set an agenda to conclude a binding Code of Conduct (COC) in spite of the DOC in place.

China has viewpoints as follow: (i) The current situation remains peaceful, stable, and is still under control; (ii) Settle all disputes through friendly bilateral negotiations and talks based on historical and legal grounds; (iii) No internationalization, multilateralization or ASEANization of the dispute; (iv) No external intervention in the South China Sea issues; (v) As a major power, China has its legitimate interests at issue [13].

From the legal perspective, the South China Sea issues contains an abundance of particularities and complexes relating to coastal states, archipelagic states, and land-locked states, for example maritime delimitation, fishery zones, straits, marine research, environmental protection and preservation. Hence, in order to settle the dispute, the Parties must express willingness and good faith, and abide by the UNCLOS, Article 123 specifically on states' cooperation.

Furthermore, the large number of claimants shows the need to address issues through multilateral rather than bilateral channel, which is not what China desires. Several ASEAN countries have attempted to put the issue on ASEAN's agenda, however, China, with "check-book diplomacy", has sought way to shut it out and insisted on settling the dispute through bilateral negotiations and talks [47].

Negotiations and talks, nevertheless, have been going in circle since the Parties are too adamant on their claims, thus generating no outcomes. Meanwhile, China has unilaterally carried out many activities and belligerent conducts

in disputed waters triggering other Parties [12]. China's action have complicated the situation and intensified tensions between parties, including the Philippines and Vietnam. The Philippines decided to file a lawsuit against China before an Annex VII UNCLOS arbitral tribunal to challenge such actions. Despite China's denial of the Tribunal's jurisdiction, the Tribunal found its jurisdiction, and then ruled in favor of the Philippines on 12 July 2016. The sweeping victory for the Philippines has profound implications for related Parties to the dispute.

PROSPECTIVE SETTLEMENT METHODS

Article 279 of the UNCLOS reaffirms States Parties' obligation to resolve disputes peacefully consistent with the Charter of the United Nations (UN). Accordingly, States Parties must have recourse to all dispute settlement methods set out under Article 33 of the UN Charter [20][3]. Article 33 of the UN Charter stresses the variety of consent-based modes of dispute settlement that remain open to States prior to the institution of mandatory procedures entailing binding decisions. This view is sustained in Article 280 of the UNCLOS that the right of States Parties to choose any peaceful means to resolve a dispute is not impaired by any of the provisions in Part XV. Briefly, States remain the "complete masters" of how their disputes are settled [55; 24, p. 169—181]. Diplomatic and/or legal methods are available for states to settle their disputes peacefully.

In case parties cannot sort out a means to settle the dispute, Articles 286 and 287 of the UNCLOS provide that a dispute shall be submitted at the request of any party to the dispute to (a) the International Court for the Law of the Sea (ITLOS); (b) the International Court of Justice (ICJ); (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII of the UNCLOS.

Arbitration Under Annex VII Of The Unclos

In *the South China Sea Arbitration*, the Philippines questioned the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime features and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by China in light of the UNCLOS. Article 9 of Annex 2 of the UNCLOS provides that non-participation of a party in the proceedings does not constitute a bar to the proceedings [50, para. 116—144]. However, the tribunal must take steps to ensure procedural fairness to both parties without compromising the efficiency of the proceedings. Therefore, before examining merits of the case, the tribunal must satisfy all requirements for its jurisdiction.

---

[3] Virtually all States are members of the UN, and thus Article 279 of the UNCLOS carries as much weight as Article 33 of the UN Charter in the resolution of disputes.

Jurisdictional conditions

Article 281 and 282 envisage dispute settlement methods outside the framework of Part XV UNCLOS. Article 281 of the UNCLOS provides procedure where the parties have not reached any settlement. It is based on two premises: (i) the existence of a dispute concerning the interpretation and application of UNCLOS; (ii) whether the Parties "have agreed to seek settlement of the dispute by a peaceful means of their own choice." Meanwhile, Article 282 of the UNCLOS provides obligations under general, regional or bilateral agreements between the parties. The agreed means shall apply in lieu of the compulsory procedures if four requirements are met: (i) the parties must have agreed through a "general, regional or bilateral agreement or otherwise" that, (ii) at the request of any part to the dispute, (iii) the dispute shall be submitted to a procedure "that entails a binding decision," and (iv) that the parties have not otherwise agreed to retain access to the compulsory procedures.

In *the Philippines v. China*, for the purpose of Articles 281 and 282, the Tribunal examined not only multilateral instruments, including Declaration of Conduct (DOC) [4], Treaty of Amity and Cooperation (TAC) [34], and the Convention on Biological Diversity (CBD) [6], but also bilateral documents between the two parties. These are multilateral agreements also binding both Vietnam and China presently. According to the Tribunal's reasoning, there are certain takeaways drawn out for Vietnam case, as follow:

A. Multilateral treaties

Firstly, although the DOC shares some hallmarks of an international treaty, DOC does not create legal rights and obligations, but merely restates and reaffirms existing obligations of states parties. Historically, DOC was never intended by its drafters to be a legally binding agreement with respect to dispute resolution, but rather an aspirational political document [50, para. 217]. This view is reinforced by the fact that the Parties' subsequent conduct is not consistent [50, para. 217], showing no intent to be bound by DOC. However, even if DOC were a binding document, the second element of Article 281 does not require parties to pursue any agreed means of settlement indefinitely [1, para. 71; 3, para. 76; 21, para. 60; 26, para. 60; 31, para. 60; 32, para. 55][4]. Parties are only required to abide by any time limit set out in their agreement, which is not mentioned in DOC.

Besides, since an express exclusion of recourse to the Part XV dispute resolution procedures is decisive, given the absence of such express exclusion, the Tribunal held that DOC and TAC do not pose any obstacle to its jurisdiction [51, para. 223—224]. This requirement is in line with the overall object and purpose of the Convention as a comprehensive agreement, which

[4] In the Southern Bluefin Tuna case, the ITLOS held that "a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention [on the Law of the Sea] when it concludes that the possibilities of settlement have been exhausted".

emphasized that "the system for the settlement of disputes must form an integral part and an essential element of the Convention" [54, para. 53].

For the sake of Article 282 of the UNCLOS, only the CBD establishes a compulsory procedure that entails a binding decision. Article 27(3) of the CBD provides that a party to the CBD may lodge a written declaration with the Depositary that, for a dispute not resolved in accordance with Article 27(1) or (2), it accepts one or both of arbitration or International Court of Justice adjudication as compulsory. In fact, however, neither the Philippines nor China has deposited such a declaration, thus it is not available "at the request of any party" as required under Article 282 of the UNCLOS. As a result, there is no existing compulsory procedure for dispute settlement between the two Parties in light of Article 282. This ruling holds the same value for Vietnam case where Vietnam has not deposited its request to settle a case under the CBD. Generally, the dispute settlement provisions in the CBD cannot preclude an Annex VII arbitral tribunal's jurisdiction.

B. Other bilateral statements between Vietnam and China

After numerous incidents[5], Vietnam and China attempted to mend some fence with the purpose for the management of maritime disputes between the two Parties. The Parties issued the Joint Declaration of 27 February 1999 relating to the mode of behavior to be implemented in order to solve "any differences" in the East Sea of Vietnam (South China Sea). Section 3 of the Declaration states:

"…The two sides agree to maintain the existing negotiation mechanism on the sea issues, and through persistent peaceful negotiations, try to find out a basic and long-term solution acceptable to both sides. Pending such solution, the two sides by proceeding from easy to difficult issues will actively conduct discussions to seek possibilities and solutions to implement bilateral cooperation on the sea… At the same time, the two sides should refrain from any actions that are likely to further complicate or widen the dispute, and from the use of force or the threat to use force…" [57, p. 13].

In 2000, the Joint Statement for comprehensive cooperation was signed by two Foreign Ministers. Section XI is devoted to the East Sea (South China Sea) and the two sides agreed to: "maintain the existing negotiation mechanisms

[5] Inter alia, on 15 March 1997, the Voice of Vietnam announced that China had sent "Kanta Oil Platform No. 3" together with two "pilot ships Nos 206 and 208" to carry out exploratory oil drilling in areas lying within Vietnam's continental shelf (BBC/FE 2870 B/4, 18 March 1997; BBC/FE 2871 B/4, 19 March 1997). On 20 May 1998, Vietnam's Ministry of Foreign Affairs Spokesman stated that the Chinese ship "Discovery 08" was operating in the Spratly archipelago and even "deeply" into Vietnam's continental shelf and that this was a violation of Vietnam's territorial sovereignty. The Chinese response came on May 21 when a spokesman for China's Ministry of Foreign Affairs stated that China had "indisputable" sovereignty over the Spratly islands and their surrounding waters and that the presence of Chinese ships in these waters "for normal" activities was within China's sovereign rights. On May 22 the spokesperson for Vietnam's Foreign Ministry said that the ship and two armed fishing vessels had withdrawn from Vietnam's "sea areas".

on marine issues and to persist in seeking a fundamental and everlasting solution acceptable to both sides through peaceful negotiations." They agreed not to take "actions to complicate and aggravate disputes" and not to resort to use of force or threat of use of force. Finally, they would consult each other in a timely manner if a dispute occurs and adopt a constructive attitude when handling disputes in order to prevent them from impeding the development of bilateral relations.

The latest joint statement made by the two Parties in respect of the South China Sea is the Agreement on Basic Principles guiding the settlement of sea-related issues in Beijing on October 11th, 2011.

"3. In negotiations on sea-related issues, the two sides seriously abide by agreements and common perceptions reached by their high-ranking leaders and seriously implement the principles and spirit of the 'Declaration on the Conduct of Parties in the East Sea [South China Sea]' (DOC). For sea-related disputes between Vietnam and China, the two sides shall solve them through friendly talks and negotiations. Disputes relating to other countries shall be settled through negotiations with other concerned parties" [49].

All three documents, in the most of their parts, reaffirmed their existing obligations with regard to the East Sea (South China Sea) dispute. Repetition of aspirational political statements across multiple documents "does not *per se* transform them into a legally binding agreement" [51, para. 244]. Therefore, Vietnam is not bound to proceed negotiations if found that it is not possible to reach a final agreement between two Parties.

However, some may claim the choice of words in the 2011 Vietnam — China Guiding Principles intents *prima facie* to bind two Parties. Hence, the document sets forth bilateral obligation to negotiate sea-related disputes, which both Viet Nam and China shall undertake before taking any further steps.

Besides, states parties shall exchange their views when a dispute arises as provided in Article 283 of the UNCLOS which requires to engage in some exchange of views regarding the means to settle the dispute" [9, para. 282—283]. The *Arctic Sunrise* Tribunal held that, under Article 283, the Parties shall "exchange views regarding the means by which a dispute that has arisen between them may be settled... Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute" [2, para. 151]. It indicates that obligation to exchange views and obligation to negotiate are two distinct obligations.

In the *South China Sea Arbitration*, the Tribunal concluded that the DOC, along with discussions on the creation of the Code of Conduct (COC), represents such an exchange on the means of settling the Parties' dispute *per se* [51, para. 355]. Furthermore, the Philippines as well as Vietnam have always insisted on multilateral negotiations involving other ASEAN Member States or the submission of the Parties disputes to one of the third-party mechanisms under the UNCLOS. China, in turn, was adamant that only bilateral talks could be considered. This fact displays that China was aware of the issues, and attempts by the Parties to explore a mutually agreeable settlement

procedure, yet unsuccessful. Thereafter, a party is "not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" [21, para. 47].

This finding imposes modest obligation upon states parties, holds the same legal value for Vietnam because it did attempt to exchange views with China through a number of multilateral agreements and bilateral talks, for example Vietnam is also a state party to DOC.

Regarding obligation to negotiate, it is not necessary for the negotiations to proceed over a lengthy period, provided that they are serious and in good faith [7, para. 206; 31, para. 55][6]. A party is not obliged to pursue procedures under Part XV Section 1 of the UNCLOS when it concludes that the possibilities of settlement have been exhausted [21, para. 47]. Moreover, an obligation to negotiate "does not imply an obligation to reach an agreement" [28, para. 108], and "the States concerned… are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation" [51, para. 350]. The implication is that the obligation to negotiate does not pose a high bar to States Parties when instituting arbitration.

In brief, it is plausible to conclude that there is none of the provisions in either multilateral or bilateral agreements between Vietnam and China poses any bar to the Annex VII arbitral tribunal if instituted by Vietnam by virtue of (a) an obligation to negotiate does not necessarily prolong lengthy if a Party concludes that the possibilities of settlement have been exhausted; (b) there is no express exclusion of recourse to compulsory procedures under Part XV of UNCLOS; (c) none of multilateral treaties provide a settlement procedure between the Parties that entails a binding decision.

Limitations and exceptions to the jurisdiction of a tribunal

Section 3 of Part XV sets out certain limitations and optional exceptions to the jurisdiction of an arbitral tribunal instituted under Annex VI of UNCLOS. Article 297 provides limitations on jurisdiction that automatically applicable to any dispute between State Parties to the Convention. Article 298 allows States Parties, by declaration, exclude certain types of disputes from the compulsory dispute settlement procedures, which was activated entirely by the 2006 Declaration of China [46].

According to Article 297 of the UNCLOS, there is no compulsory dispute settlement for EEZ disputes with regards to the exercise of discretionary powers of the coastal State over fishing and marine scientific research. This article, nevertheless, raises at least two issues. One the one hand, the issue relates to the categorization of a dispute regarding a claim over an EEZ around

[6] The tribunal in Barbados v. Trinidad and Tobago held that: "the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations… Upon the failure of the Parties to settle their dispute by recourse to Section 1, i.e. to settle it by negotiations, Article 287 entitles one of the Parties unilaterally to refer to the dispute to arbitration".

a disputed island or rock and the exercise of a coastal State's jurisdiction over living resources within this EEZ. This type of dispute shall be exempted from the compulsory procedures by virtue of Article 297. On the other hand, if this is a dispute concerning entitlement to an EEZ under Part V and Article 121(3) of UNCLOS, a court or tribunal may entertain jurisdiction. Thus the scope of compulsory procedures may change according to the formulation of a dispute [58, p. 402]. Based on the second chain of reasoning, the Tribunal in *South China Sea Arbitration* found it had jurisdiction to address the matter raised in the Philippines' Submission No. 3, 4, 6, and 7 concerning maritime entitlements generated by certain features in the South China Sea.

Article 298 sets out categories of disputes shall be exempted from Section 2 procedures, which are: (a) disputes relating to sea boundary delimitations, or those involving historic bays or titles; (b) disputes concerning military activities, law enforcement activities in regard to the exercise of sovereign rights or jurisdiction; (c) disputes in respect of which the UN Security Council is exercising the functions assigned to it by the Charter of the United Nations. The third exception evidently falls outside the scope of the South China Sea dispute since there is no activity carried out under the auspices of the UN Security Council.

In the Tribunal's view, a number of the Philippines' submissions do not possess an "exclusive preliminary character", and are in significant respects interwoven with the merits [51, para. 392]. Hence, the Tribunal shall rule its jurisdiction on such a plea in conjunction with the merits of the case.

Due to such limitations and exceptions, it is heavily dependent upon claimant's submissions in order to overcome the jurisdictional hurdle. As an underdog at dispute as the Philippines, Vietnam may put similar submissions on the table as did the Philippines. The paper examines one example of such a claim that might be put forward by Vietnam.

Firstly, Vietnam may ask an arbitral tribunal to reaffirm the ruling by *the Philippines v. China* tribunal that none of features in the South China Sea is entitled to EEZ and continental shelf, including those in the Paracels. This is not a submission asking for sea boundary delimitation [51, para. 155—157]. Nor is the South China Sea a historic bay or title [50, para. 205—229][7]. Therefore, the first exception in Article 298 is not applicable in this case.

The objective of such a claim is to limit maritime entitlements of the Parties. This claim does not entirely go against Vietnam's sovereign interest. Therefore,

[7] The Tribunal, in the South China Sea Arbitration, has clarified that "the term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although "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'. Finally, a 'historic bay' is simply a bay in which a State claims historic waters".

Woody and Triton islands or any features in the Paracels shall not have maritime entitlements in light of Article 121 of UNCLOS other than 12 nautical mile territorial sea at best.

Then, Vietnam may bring up the cases as the 2011 incident where Chinese fishing vessel No. 62226 with the support of two Chinese fishery administration vessels No. 311 and No. 303, cut off the Viking II, a vessel hired by Vietnam National Oil and Gas Group for the exploration purpose within the continental shelf of Vietnam, then veered with acceleration [58]. Albeit warning flares from Vietnamese vessels, vessel No. 62226 still headed on and rammed the exploration cables of Viking II. Its specialized cables splashing device was consequently trapped in Viking II's cables, jamming Viking II operation. As soon as that happened, the two Chinese fishery administration vessels and some fishing vessels, rushed in to rescue the vessel No. 62226.

The location where Viking II was operating lies about 70 nautical miles off the south-central coast of Vietnam and about 350 nautical miles south of China's Hainan island [32]. It is within the continental shelf of Vietnam. The location of the incident is far beyond the limit that China could possibly claim its sovereign rights pursuant to the UNCLOS.

One more case concerns the 2014 China's drilling rig placed illegally in Vietnam's continental shelf.

There is thus no situation of overlapping entitlements and no possible basis for the application of the exception to jurisdiction in Article 298(1) (a)(i).

Because the areas of the South China Sea at issue can only constitute the EEZ of Vietnam, Article 297(3) (a) and military or law enforcement exception in Article 298(1)(b) of the UNCLOS pose no obstacle to a tribunal's jurisdiction. These provisions serve to limit compulsory dispute settlement where a claim is brought against a State's exercise of its sovereign rights in its own EEZ, however, "do not apply where a State is alleged to have violated the Convention in respect of the EEZ of another State" [50, para. 695].

Therefore, Vietnam could submit to an Annex VII arbitral tribunal to find that (i) China has breached Article 77 of the UNCLOS with respect in the area of Vietnam's sovereign rights in its EEZ; (ii) China has, by virtue of the conduct of Chinese law enforcement vessels, created a serious risk of collision and danger to Vietnamese vessels and personnel, as a consequence, violated Rules 2, 6, 7, 8, 15, and 16 of the International Regulations for Preventing Collision at Sea of 1972 and Article 94 of the UNCLOS.

Judicial Settlement

In 2006, China made a declaration to exclude all four compulsory procedures. This declaration results in a disagreement on choice of procedure in light of Article 287(1) of Section 2 regardless of Vietnam's choosing. Article 287(5) of Section 2 envisages the possibility that the Parties could not conclude on a specific choice of procedure set out in the paragraph 1, provides that the dispute may only be submitted to arbitration in accordance with Annex VII of UNCLOS.

As a result, this provision bars Vietnam from bringing a dispute concerning the interpretation or application of UNCLOS against China before International Tribunal for the Law of the Sea (ITLOS) or International Court of Justice (ICJ).

However, judicial settlement apparently is not the most desirable tactic that States Parties would want to employ. Like the ICJ, ITLOS is empowered to give advisory opinions exercised in the name of Seabed Disputes Chamber as well as the ITLOS full court. However, requesting an advisory opinion from ITLOS appears more feasible than from the ICJ. The objective of seeking advisory opinions from ITLOS is to call international attention to the dispute, and China to clarify its claims, especially regarding its historic rights and the nine-dash line. The advisory opinion, if successfully obtained, may strengthen bargaining powerof not only Vietnam but also States Parties to the dispute in the South China Sea if proceed negotiations with China.

There is no express provision for the advisory jurisdiction of ITLOS under either the UNCLOS or the ITLOS Statute. This is also an argument against the advisory jurisdiction of the Tribunal because it would be acting *ultra vires* under the UNCLOS.

In the very first advisory opinion proceeding, the Tribunal clarified its jurisdiction in giving advisory opinions [29]. Article 21 of the ITLOS Statute provides that the jurisdiction of the Tribunal comprises three elements, *inter alia*, "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". The scope of "matters", in the Tribunal's view, is broader than "disputes", which implicitly includes advisory opinions [29, para. 56].

Article 138(1) of the ITLOS Rules prescribes that the Tribunal "may give an advisory opinion on a legal question" if there is an international agreement related to the purposes of the UNCLOS specifically confers advisory jurisdiction on the Tribunal. This provision contains strict prerequisites for the request of an advisory opinion from the ITLOS full court. These are: (i) an international agreement must exist; (ii) such an international agreement must relate to the purpose of the UNCLOS; (iii) the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement; (iv) the request must involve a legal question;

Meeting these requirements is not an insurmountable task for States Parties. In fact, ASEAN as a whole or States Parties at issue may reach an agreement, for example to establish a fishery association or commission to regulate fishing activities within East Sea, which is closely related to the purposes of the UNCLOS. Besides, such an agreement must contain a provision conferring advisory jurisdiction on ITLOS Tribunal. Finally, questions set forth must be framed in terms of law.

Albeit non-binding effect, the advisory opinions provide certain implications and help developing jurisprudence within the South China Sea dispute. The perk side of this means is that the consent of States not members of the agreement is not relevant, and thus may be disregarded [29, para. 75—76]. In other words, the Tribunal may pronounce on the rights and obligations of third States not members of the agreement without their consent.

Mediation

Mediation with a third-party involvement is a crucial means of dispute settlement. A mediator can be an active participant authorized by the Parties to devise new ideas, solutions and facilitate communication between the Parties. An emphasis should be placed on the mediator who must be seen as neutral, impartial and able in parties' eyes. As a channel for information, a mediator can also remind the Parties of their real objectives, encourage rethinking, and devise suitable compromises [23, p. 567].

Some have endorsed the view that Indonesia might play a role as a mediator in the management of the South China Sea dispute due to its active participation [8]. However, there might be conflicting interests arising if Indonesia undertakes this role. Even though Indonesia, on several occasions, has denied having any territorial dispute with China, there were incidents that escalated tension between China and Indonesia on China's nine-dash line [8]. Mediation can only take place if the parties to a dispute consent. This brings to the next point that China is far more likely to reject Indonesia's role as a mediator since Indonesia's interests are at stake. Besides, ASEAN has proven its ineffectiveness to handle regional disputes, especially for the South China Sea dispute. In spite of united voice as a bloc, the ASEAN has shown divisions in addressing the South China Sea dispute [27]. Furthermore, its mechanism requires an absolute consensus, which exacerbates the situation by unable to produce any effort to bridge the gap between the Parties to the dispute.

A prospective mediator should be having a friendly relation with all States Parties to the dispute in order to stimulate talks, and yet such mediator must be powerful enough to curb tension potentially outbreak during the talks. The mediator may be able to exert its influence on the parties by exploiting the role, offering inducements to agree in certain forms, for example rewards, or indicating the costly price if the Parties fail to settle [22, p. 26—41].

On top of that, legal methods are rather sensitive in states' relations, thus considered as the last resort only. Therefore, in Vietnam's position, mediation is more fit and reasonable. However, mediation appears not feasible since it depends heavily on parties' consent and willingness which China fails to demonstrate.

CONCLUDING REMARKS

The South China Sea dispute contains an abundance of particularities and complexes. Hence, in order to settle the dispute, the Parties must express willingness and good faith, and abide by the UNCLOS, Article 123 specifically on states' cooperation. Moreover, the issue must be addressed multilaterally, rather than bilateral talks and negotiations since many conflicting interests and claims are at stake. If a party, however, does not express willing to cooperate, yet unilaterally carry out belligerent conducts at disputed water areas, other Parties are entitled, under the UNCLOS, to bring a lawsuit against that party before an Annex VII arbitral tribunal to challenge the legality and legitimacy of such conducts.

As examined above, conditions for a tribunal's jurisdiction can be met. In order to surmount the exceptions under Article 298, it depends heavily on how Vietnam frames their submissions to the tribunal. However, it is not an impossible task since there were a number of incidents happened in the South China Sea where China disregarded Vietnam's sovereign rights in its maritime waters and acted in a dangerous manner with respect to maritime safety.

Besides, asking for advisory opinions by ITLOS full court also paves the way for the development of international jurisprudence on the present case, and attraction of attention from international community. A multilateral treaty may be sufficient to meet the prerequisites, and questions must be framed in terms of law.

Finally, the paper looks at mediation as a diplomatic method to settle the current dispute peacefully. The role of mediator has a tremendous importance that has strong influence to bring parties closer. A prospective mediator should be having a friendly relation with all States Parties to the dispute in order to stimulate talks, and yet such mediator must be powerful enough to contain the parties. All endeavors should be paid in the hope to settle the dispute peacefully for regional stability and prosperity.

States are operating in a world with peremptory norms and order. Hence, it is important to stress that, regardless of any methods, the pursuing of settlement of disputes must contain ground-rules, *inter alia*, the Parties shall completely abide by international law, including the UNCLOS. Self-restraint and refraining from escalating tension and armed conflicts are mandatory while dispute settlement is still underway.

REFERENCES

1. *ARA Libertad (Republic of Argentina v. Ghana), Provisional Measures, Order of 15 Dec. 2012*. ITLOS Reports, 2012. (In Eng.)
2. *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), Merits Award of 14 Aug. 2015*. ITLOS Reports, 2015. (In Eng.)
3. *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 Nov. 2013*. ITLOS Reports, 2013. (In Eng.)
4. *ASEAN*. Available at: http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 (accessed 18.10.2016). (In Eng.)
5. *ASEAN. 1976*. Available at: http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976 / (accessed 18.10.2016). (In Eng.)
6. *ASEAN. 1992*. Available at: https://www.cbd.int/convention/text/default.shtml (accessed 18.10.2016). (In Eng.)
7. *Barbados v. Trinidad and Tobago, Award of 11 Apr. 2006*. 2006. (In Eng.)
8. Bruno and Thierry. *Indonesia: A Bigger Role in the South China Sea. 2014*. Available at: http://thediplomat.com/2014/07/indonesia-a-bigger-role-in-the-south-china-sea/ (accessed 18.10.2016). (In Eng.)
9. *Chagos Marine Protected Area (Mauritius v. The U.K.), Award of 18 Mar. 2015*. 2015. (In Eng.)

10. *China's Submission to CLCS in 2009*. Available at: http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf (accessed 22.10.2016). (In Eng.)
11. *CNN. China and Vietnam: A Timeline of Conflict. 2011*. Available at: http://edition.cnn.com/2011/WORLD/asiapcf/06/27/china.vietnam.timeline/ (accessed 22.10.2016). (In Eng.)
12. *Country: China*. Available at: http://amti.csis.org/island-tracker/chinese-occupied-features. (accessed 18.10.2016). (In Eng.)
13. Foreign Minister of China Yang Jiechi. *Remarks at ASEAN Regional Forum 17 2010*. Available at: http://www.fmprc.gov.cn/eng/zxxx/t719460.htm (accessed 17.10.2016). (In Eng.)
14. Hong-Thao Nguyen. Bien Dong — Ba Giai Doan, Bon Thach Thuc, Hai Cach Tiep Can Khu Vuc va Mot Niem Tin [The South China Sea — Three Periods, Four Challenges, Two Regional Approaches and One Faith]. In: Quy-Binh Dang. *Tim Kiem Giai Phap vi Hoa Binh va Cong Ly o Bien Dong* [Seeking Measures for Peace and Justice on the South China Sea]. Diplomacy Academy of Vietnam, 2016. (In Viet.).
15. Hong-Thao Nguyen. *Le Vietnam et ses Defferends maritimes dans la mer de Bien Dong (Mer de Chine Meridionale)* [Vietnam and Its Maritime Difference in the Sea of Bien Dong (South China sea)]. Pedone, 2004. (In Fr.)
16. Hong-Thao Nguyen. Vietnam's Position on the Sovereignty over Paracels & the Spratlys: Its Maritime Claims. *Journal of East Asia and International Law*, 2012. (In Eng.)
17. *Hsinhua News Agency*, *China Information Bureau*. Press Administration Publ., Peking, 16/5/1951. (In Eng.)
18. *Joint Communique 25th ASEAN Ministerial Meeting 1992*. (In Eng.)
19. *Joint Submission of Malaysia and Vietnam to CLCS*. Available at: http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mysvnm_clcs33_2009e.pdf (accessed 22.10.2016). (In Eng.)
20. Klein Natalie. *The Dispute Settlement Procedure Under UNCLOS*. Cambridge University Press Publ., 2004. (In Eng.)
21. *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 Oct. 2003*. 2003. (In Eng.)
22. Merrills John. *International Dispute Settlement*. Cambridge University Press Publ., 2011. (In Eng.)
23. Merrills John. The Means of Dispute Settlement. In: Malcolm D. Evans. *International Law*. Oxford University Press Publ., 2014. (In Eng.)
24. Mestral A. de. Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective. In: Thomas Buergenthal. *Comtemporary Issues in International Law, Essays in Honor of Louis B. Sohn 1984*. (In Eng.)
25. Monique Chemillier-Gendreau. *La souveraineté sur les archipels Paracels et Spratleys* [Sovereignty over the Archipelagos of Paracels and Spartlys]. 1998. Available at: http://nghiencuubiendong.vn/en/publications/vietnamese-publications/698-a-legal-analysis-in-support-of-viet-nams-position-regarding-the-paracel-a-spratly-islands (accessed 27.10.2016). (In Fr.)
26. *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 Dec. 2001*. ITLOS Reports, 2001. (In Eng.)
27. Nicholas Khoo. *Why ASEAN is in Disarray in the South China Sea. 2016*. Available at: http://nationalinterest.org/blog/the-buzz/why-asean-disarray-the-south-china-sea-17973 (accessed 18.10.2016). (In Eng.)
28. *Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 Oct. 1931*. PCIJ, 1931. (In Eng.)
29. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) of 2 Apr. 2015*. ITLOS, 2015. (In Eng.)

30. Secretary of State of the U.S. Hillary R. Clinton. *Remarks at ASEAN Regional Forum 17 2010*. Available at: http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm (accessed 17.10.2016). (In Eng.)
31. *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Award on Jurisdiction and Admissibility of 4 Aug. 2000*. RIAA, vol. XXIII, 2000. (In Eng.)
32. *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 Aug.* 1999. ITLOS, 1999. (In Eng.)
33. Thanh-Dam Truong, Karim Knio. *The South China Sea and Asian Regionalism: A Critical Realist Prospective*. Springer Publ., 2016. (In Eng.)
34. Thanh-Ha Thi Nguyen, Dang-Thang Nguyen. Mot so suy nghi ve bo quy tac ung xu o Bien Dong [Reflections on the Declaration of Conducts on the South China Sea]. In: Quy-Binh Dang. *Tim kiem giai phap vi hoa binh va cong ly o Bien Dong* [Seeking Measures for Peace and Justice in the South China Sea]. Diplomacy Academy of Vietnam Publ., 2016. (In Viet.)
35. Thanh-Hai Do. *Vietnam's Involving Claims in the South China Sea. 2016*. Available at: http://nsc.anu.edu.au/documents/occasional-5-brief-5.pdf (accessed 20.10.2016). (In Eng.)
36. *The 1969 Indonesia — Malaysia Continental Shelf Agreement*, 1969. (In Eng.)
37. *The 1974 Malaysia — Thailand Maritime Delimitation Agreement*, 1974. (In Eng.)
38. *The 1979 Thailand — Malaysia Joint Development Agreement*, 1979. (In Eng.)
39. *The 1992 Vietnam — Malaysia Joint Development Agreement*, 1992. (In Eng.)
40. *The 1995 Bangkok Summit Declaration*, 1995. (In Eng.)
41. *The 1995 Joint Communique of ASEAN Foreign Ministers' Meeting*, 1995. (In Eng.)
42. *The 1997 Vietnam — Thailand Maritime Delimitation Agreement,* 1997. (In Eng.)
43. *The 2000 Tonkin Gulf Agreement between Vietnam and China,* 2000. (In Eng.)
44. *The 2003 Vietnam — Indonesia Continental Shelf Agreement*, 2003. (In Eng.)
45. *The 2009 Brunei — Malaysia Maritime Delimitation Agreement*, 2009. (In Eng.)
46. *The Declaration of China pursuant to Article 298 of the UNCLOS*, 2006. (In Eng.)
47. *The EU, The South China Sea, and China's Successful Wedge Strategy, 2016*. Available at: https://amti.csis.org/eu-south-china-sea-chinas-successful-wedge-strategy/ (accessed 20.10.2016). (In Eng.)
48. *The Ministry of Foreign Affairs of Vietnam*. Available at: http://www.mofahcm.gov.vn/vi/mofa/tt_baochi/pbnfn/ns110610100618 (accessed 20.10.2016). (In Eng.)
49. *The Ministry of Foreign Affairs of Vietnam. 2013*. Available at: http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns131016150351/view (accessed 20.10.2016). (In Eng.)
50. *The South China Sea Arbitration (The Philippines v. China), Award on Jurisdiction and Admissibility of 29 Oct. 2015*. PCA, 2015. (In Eng.)
51. *The South China Sea Arbitration (The Philippines v. China), Final Award of 12 July 2016*. 2016. (In Eng.)
52. The U.S. Department of States. *Records on Conference for the Conclusion and Signature of the Peace Treaty with Japan*. 1951, P. 119. (In Eng.)
53. *Thien Nam Tu Chi Lo Do Thu, ban do Hong Duc* [Hong Duc map]. Vien Nghien cuu Han Nom [Institute of Han-Nom Studies]. (In Viet.)
54. *UN Conference on the Law of the Sea, 185th Meeting*. 26.03.1983. (In Eng.)
55. *United Nations Convention on the Law of the Sea 1982: A Commentary*. (In Eng.)
56. *Vietnam accuses China of sabotage 2011*. Available at: http://www.smh.com.au/world/vietnam-accuses-china-of-sabotage-20110601-1fgec.html (accessed 16.10.2016). (In Eng.)
57. Vietnam — China Joint Declaration. *Vietnam Law & Legal Forum*, vol. 5, no. 54, 1999. (In Eng.)
58. Yoshifumi Tanaka. *The International Law of the Sea*. Cambridge University Press Publ., 2012. (In Eng.)