

Accounts and Grounds



In a recent interview with China's Xinhua News Agency, **Xu Hong**, head of the Department of Treaty and Law of the Chinese Foreign Ministry, commented on the Position Paper. Edited excerpts of the interview follow:

Why did the Chinese Government publish the Position Paper?

Xu: On January 22, 2013, the Philippines unilaterally initiated international arbitral proceedings regarding its dispute with China in the South China Sea. The Chinese Government is firmly opposed to this, and has reiterated on several occasions its position to neither accept nor participate in the arbitration.

Despite China's objection, the Philippines has been obstinately pushing the arbitral proceedings. Some people, who do not know the truth, have questioned China's position of not accepting or participating in the arbitration. Some others, who harbor ulterior motives, have made one-sided and misleading readings of international rules and, on that basis, made accusations or insinuations that China does not abide by international law, and have branded China as a "challenger" to international rules.

In response to this situation and with a view to clearing up the confusion, the Chinese Government published the Position Paper to elaborate on the legal basis for China's position that the Arbitral Tribunal has no jurisdiction in this case and to demonstrate that China's position not to accept or participate in the proceedings stands on solid ground in international law.

The Chinese Government's Position Paper clearly states that the Arbitral Tribunal has no jurisdiction in the arbitration initiated by the Philippines. What are the grounds for this position?

Xu: It is quite obvious that the Arbitral Tribunal

has no jurisdiction in the arbitration. The Position Paper presents this view by making analyses from the following three aspects:

First, the essence of the Philippines' claims. The subject matter of the Philippines' claims is essentially an issue of territorial sovereignty—one which, however, goes beyond the scope of the UN Convention on the Law of the Sea (Convention). The dispute settlement procedures within the framework of the Convention are confined to disputes concerning the interpretation or application of the Convention and therefore are not competent for addressing a matter that falls outside the scope of the Convention.

Second, the bilateral agreement reached between China and the Philippines concerning this issue. Through a series of bilateral and multilateral instruments, China and the Philippines have agreed to settle their disputes in the South China Sea through friendly consultations and negotiations, to the exclusion of all other means. This is a mutual obligation binding on the two states under international law. By unilaterally submitting the dispute to arbitration, the Philippines has breached the agreement between the two states and violated international law.

Third, the dispute settlement clauses of the Convention itself. Even if the subject matter of the Philippines' claims could be considered in part as concerning the interpretation or application of the Convention, it constitutes an integral part of maritime delimitation between China and the Philippines. However, China has already excluded, through a declaration made in 2006 pursuant to Article 298 of the Convention, dis-

putes concerning maritime delimitation, inter alia, from the application of arbitration and other compulsory procedures.

It follows from the above three points that the Arbitral Tribunal has no jurisdiction over the claims that the Philippines has submitted for arbitration.

There is one view stating that the arbitration the Philippines has initiated pursuant to the Convention is in itself a peaceful means of dispute settlement; yet, China, a party to the Convention and a champion of peaceful settlement of international disputes, has refused to accept or participate in this arbitration. This makes China's stance look unconvincing. How would you comment on this?

Xu: States have at their disposal many ways of resolving disputes peacefully. The most important and preferred means is direct negotiation between the state parties to a dispute, rather than arbitration.

Under international law, it is the sovereign right of the states concerned to choose a means of dispute settlement. Arbitration is only one of the means, and it must be based on the principle of consent. In a bilateral dispute, if one party does not accept or participate in arbitration, the other party shall not institute arbitration against its will.

Although the Convention provides for arbitration and other compulsory procedures for dispute settlement, recourse to this category of procedures is subject to conditions and constraints. This category of procedures can only be employed to settle disputes concerning the interpretation or application of the Convention. If the state parties to a dispute have chosen other means of dispute settlement of their own accord, the chosen means has priority over this category of procedures. Furthermore, a state party may also make a declaration pursuant to the Convention to exclude specified categories of disputes from the application of the compul-

sory procedures.

Regarding the arbitration initiated by the Philippines, as discussed above, the essence of the subject matter of its claims is territorial sovereignty, an issue completely beyond the scope of the Convention. China and the Philippines have reached agreement to settle their relevant disputes through negotiation. And China has never accepted any compulsory procedures for the relevant disputes. It follows that the unilateral initiation of compulsory arbitration by the Philippines is a clear abuse of the compulsory procedures provided for in the Convention. Such a practice is and should be frowned upon internationally. By refusing to accept or participate in the arbitration initiated by the Philippines China is defending its sovereign right to choose a means of dispute settlement of its free will. Our decision is an exercise of the rights we enjoy under international law, and is well founded on international law.

A core claim made by the Philippines concerns the maritime rights China asserts on the basis of the dotted line in the South China Sea. Some voices in the international community have expressed the hope that China clarify the meaning of the dotted line. But the Position Paper does not answer these questions. What are the considerations behind this?

Xu: In 1948, then Chinese Government published an official map that displayed the dotted line in the South China Sea. The Position Paper does mention this fact when setting out the historical background to the relevant dispute in the South China Sea.

China's position on the issue is consistent and clear. China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China's sovereignty and maritime rights and interests in the South China Sea have formed and evolved over a long period of his-

tory. They are solidly grounded in history and law and have been continuously upheld by the Chinese Government.

Given China's decision not to accept or participate in the arbitration, the Position Paper of the Chinese Government only expounds on its view that the Arbitral Tribunal has no jurisdiction over this case. It does not address the substantive issues involved in the arbitration. This point is made very clear in the introduction of the Position Paper.

It has been learned that the Arbitral Tribunal requested that China submit its counter-memorial before December 15 of this year. The Chinese Government has chosen to publish the Position Paper at this juncture. May the Position Paper be considered as a response to the request of the Arbitral Tribunal? What effect will the Position Paper have on the Arbitral Tribunal?

Xu: The Position Paper of the Chinese Government is neither a counter-memorial on the arbitration nor a response to the request of the Arbitral Tribunal. The publication of the Position Paper does not represent China's acceptance of or participation in the arbitration initiated by the Philippines. China's position not to accept or participate in the arbitration will not change.

The Chinese Government publishes this Position Paper in order to set forth its legal positions, together with due reasoning and support, on the matter of jurisdiction in this arbitration. On the basis of international law, this Position Paper debunks the Philippines' groundless assertions and projects China's image as a defender and promoter of the international rule of law. I believe that any organ or individual that conscientiously upholds the rule of law will respect and appreciate the stand of the Chinese Government.

What positive effect will the publication of the Position Paper have on the settlement of relevant disputes in the South China Sea

and the maintenance of peace and stability in the South China Sea?

Xu: The Position Paper elucidates legally why the Arbitral Tribunal has no jurisdiction over the compulsory arbitration unilaterally initiated by the Philippines and why China's decision to neither accept nor participate in the arbitration is well grounded in law. At the same time, the Position Paper stresses that negotiation is recognized by international law as the most direct, most effective and most frequently used means of peaceful settlement of international disputes. It sends a message to the international community that the relevant countries must properly handle their disputes in the South China Sea; any attempt to impose one's will on others will get nowhere, and consultation and negotiation are the right way forward.

As pointed out in the Position Paper, through negotiation China has settled its land boundary with almost all of its neighbors and has delimited its maritime boundary in Beibu Bay with Viet Nam. Facts have shown that the existence of differences is nothing to be afraid of, neither is the complexity of the issues. As long as the relevant countries have the goodwill and engage in friendly consultations and negotiations on an equal footing, they can enhance mutual trust, expand common understanding and gradually and properly settle their territorial and maritime delimitation disputes. The same is true with the South China Sea issue.

China urges the Philippines to return to the right track of negotiation to settle the disputes. China is also ready to work with all relevant countries to resolve their disputes through negotiation and on the basis of respect for historical facts and international law, and strengthen win-win cooperation, to jointly maintain peace and stability in the South China Sea. ■