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# The South China Sea Arbitration Awards: A Critical Study

Chinese Society of International Law*

## Abstract

This critical Study analyzes in detail the award on jurisdiction and admissibility of 29 October 2015 and the award of 12 July 2016 in the South China Sea Arbitration. After briefly introducing the project and the Study and describing the background to and course of the South China Sea Arbitration and the position of the Chinese Government, the Study moves to address one by one the following matters: jurisdiction; admissibility; historic rights; the status of China's Nansha Qundao and Zhongsha Qundao; the legality of China's activities in the South China Sea; due process and evidence. The Study closes with the conclusion that the Tribunal's many errors deprive its awards of validity and threaten to undermine the international rule of law. Included as annexes are five useful official documents of the Chinese government on jurisdiction, the two awards, China's territorial sovereignty and maritime rights and interests in the South China Sea, and China's adherence to the position of settling through negotiation the relevant disputes between China and the Philippines in the South China Sea.

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* This Study was completed in December 2017, and the websites cited herein were current as of 15 December 2017 unless otherwise noted. This Study is also published simultaneously in English and Chinese by the Foreign Languages Press of China. The homepage of the Chinese Society of International Law is at: http://www.csil.cn.

## Abbreviations

| | |
|---|---|
| **Award of 12 July** | The South China Sea Arbitration Award of 12 July 2016 |
| **Award on Jurisdiction** | The Tribunal's Award on Jurisdiction and Admissibility, dated 29 October 2015 |
| **China's Position Paper** | The 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, published on 7 December 2014 |
| **Convention** | United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 |
| **DOC** | 2002 China–ASEAN Declaration on the Conduct of Parties in the South China Sea, 4 November 2002 |
| **Hearing on Jurisdiction** | The Hearing held from 7 to 13 July 2015 to consider the matter of the Tribunal's Jurisdiction and, as necessary, the admissibility of the Philippines' submissions |
| **Hearing on the Merits** | The Hearing held from 24 to 30 to November 2015 to consider any outstanding issues of the Tribunal's jurisdiction and admissibility and the merits of the Philippines' submissions |
| **ICJ** | International Court of Justice |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **ILC** | International Law Commission |
| **ITLOS** | International Tribunal for the Law of the Sea |
| **PCIJ** | Permanent Court of International Justice |
| **RIAA** | Reports of International Arbitral Awards |
| **Supplemental Written Submission** | The Supplemental Written Submission of the Philippines, filed on 16 March 2015, pursuant to Article 25 of the Rules of Procedure and Procedural Order No. 3 |
| **UN** | United Nations |
| **UNCITRAL** | United Nations Commission on International Trade Law |
| **UNCLOS** | United Nations Convention on the Law of the Sea |
| **UNCLOS I** | First United Nations Conference on the Law of the Sea, 1956-58 |
| **UNCLOS II** | Second United Nations Conference on the Law of the Sea, 1960 |
| **UNCLOS III** | Third United Nations Conference on the Law of the Sea, 1973-82 |
| **UNTS** | United Nations Treaty Series |

## Glossary of Geographic Names

| Geographic Names | Also in English |
|---|---|
| 北礁 Bei Jiao | North Reef |
| 北子岛 Beizi Dao | Northeast Cay |
| 赤瓜礁 Chigua Jiao | Johnson (South) Reef |
| 东门礁 Dongmen Jiao | Hughes Reef |
| 东沙群岛 Dongsha Qundao | Pratas Islands |
| 费信岛 Feixin Dao | Flat Island |
| 海马滩 Haima Tan | Seahorse Bank/Routh Bank |
| 鸿庥岛 Hongxiu Dao | Namyit Island |
| 华阳礁 Huayang Jiao | Cuarteron Reef |
| 黄岩岛 Huangyan Dao | Scarborough Shoal |
| 景宏岛 Jinghong Dao | Sin Cowe Island |
| 礼乐滩 Liyue Tan | Reed Bank |
| 马欢岛 Mahuan Dao | Nanshan Island |
| 美济礁 Meiji Jiao | Mischief Reef |
| 南海诸岛 Nanhai Zhudao | South China Sea Islands |
| 南康暗沙 Nankang Ansha | South Luconia Shoals |
| 南沙群岛 Nansha Qundao | Spratly Island Group ("Spratlys") |
| 南威岛 Nanwei Dao | Spratly Island/Storm Island |
| 南薰礁 Nanxun Jiao | Gaven Reefs |
| 南钥岛 Nanyao Dao | Loaita Island |
| 南子岛 Nanzi Dao | Southwest Cay |
| 仁爱礁 Ren'ai Jiao | Second Thomas Shoal |
| 双黄沙洲 Shuanghuang Shazhou | Loaita Southwest Reef/Loaita Nan Reef |
| 双子群礁 Shuangzi Qunjiao | North Danger Reefs |
| 司令礁 Siling Jiao | Commodore Reef |
| 太平岛 Taiping Dao | Itu Aba Island |
| 万安滩 Wan'an Tan | Vanguard Bank |
| 西门礁 Ximen Jiao | McKennan Reef |
| 雄南滩 Xiongnan Tan | Marie Louisa Bank/Reported Reef |
| 西沙群岛 Xisha Qundao | Paracel Islands |
| 西月岛 Xiyue Dao | West York Island |
| 永兴岛 Yongxing Dao | Woody Island |
| 永暑礁 Yongshu Jiao | Fiery Cross Reef |
| 曾母暗沙 Zengmu Ansha | James Shoal |
| 郑和群礁 Zhenghe Qunjiao | Tizard Reefs (Bank) |
| 中业岛Zhongye Dao | Thi-Tu Island |
| 渚碧礁 Zhubi Jiao | Subi Reef |

## Introduction

1. The land territory of the People's Republic of China includes the mainland of China and its coastal islands; Taiwan and all islands appertaining thereto, including Diaoyu Dao (Diaoyu Islands); Penghu Liedao (Penghu Islands); Dongsha Qundao (Pratas Islands); Xisha Qundao (Paracel Islands); Zhongsha Qundao (including Macclesfield Bank and Scarborough Shoal) and Nansha Qundao (Spratly Islands); as well as all the other islands belonging to the People's Republic of China. China is one of the countries bordering the South China Sea. China and the Philippines are States with opposite coasts; the distance between China's Zhongsha Qundao and Nansha Qundao and the Philippine Islands is less than 200 nautical miles. Since the 1970s, the Philippines has invaded and illegally occupied some islands and reefs of China's Nansha Qundao, creating a territorial issue with China over these islands and reefs. In 1997, the Philippines began to unlawfully claim sovereignty over Huangyan Dao (Scarborough Shoal) of China's Zhongsha Qundao. With the development of the international law of the sea, a maritime delimitation dispute also arose between the two States regarding certain maritime areas of the South China Sea. China and the Philippines have reached agreement on resolving through negotiations and consultations the relevant disputes in the South China Sea.

2. On 22 January 2013, invoking Article 287 of and Annex VII to the United Nations Convention on the Law of the Sea ("UNCLOS" or "Convention"), the Philippines unilaterally initiated compulsory arbitral proceedings against China ("South China Sea Arbitration" or "Arbitration"). The Philippines deliberately mischaracterized the territorial and maritime delimitation dispute in the South China Sea between China and the Philippines, and fragmented it into several isolated disputes, and camouflaged them as disputes concerning the interpretation or application of the Convention. On 19 February 2013, the Chinese government unequivocally rejected the Arbitration. The Arbitral Tribunal constituted at the request of the Philippines ("Tribunal") obstinately pushed forward the arbitral proceedings, in disregard of the fact that it manifestly had no jurisdiction over the territorial and maritime delimitation dispute between China and the Philippines and of China's resolute opposition. On 29 October 2015, the Tribunal rendered an Award on Jurisdiction and Admissibility ("Award on Jurisdiction") and, on 12 July 2016, an Award on the merits and the remaining issues of jurisdiction and admissibility ("Award of 12 July").

3. Since the Philippines' unilateral initiation of the Arbitration, China has consistently maintained its position of non-acceptance and non-participation, and its objection to the Arbitration being pushed forward. Immediately upon the issuance of each award, China solemnly stated that the award is null and void and has no binding force, and that China did not and would not accept or recognize the award.

4. As a national learned society, the Chinese Society of International Law has been closely following the Arbitration since the very beginning, as it involves a number of

complicated and significant legal issues. Through a careful study of the Tribunal's awards, the Society has come to the view that the Tribunal had no jurisdiction over any of the Philippines' submissions, and that the awards were made *ultra vires*, and are not well founded in fact or law, thus null and void. The Tribunal erroneously exercised jurisdiction over territorial issues beyond the scope of the Convention and over issues concerning maritime delimitation which China has excluded from the compulsory dispute settlement procedures under the Convention, thus acting beyond the authorization of the Convention. By disregarding the agreement between China and the Philippines on settling through negotiations and consultations all their relevant disputes in the South China Sea, the Tribunal infringed the right of China, as a State party to the Convention, to choose the means of dispute settlement on its own will. In respect of many issues, the Tribunal's interpretation and application of the Convention is flawed, and deviates from the intent of the State parties to the Convention and the object and purpose of the Convention. The Tribunal erred in denying the existence of China's historic rights in the South China Sea and the legal status of China's Nansha Qundao and Zhongsha Qundao as archipelagos, also erred in qualifying Huangyan Dao of Zhongsha Qundao and all islands of Nansha Qundao as rocks that cannot sustain human habitation or economic life of their own, and further erred in arbitrarily finding that China's relevant activities in the South China Sea were illegal.

5. These awards are not conducive to solving the dispute between China and the Philippines in the South China Sea; instead, they have complicated the related issues. They have impaired the integrity and authority of the Convention, threaten to undermine the international maritime legal order, run counter to the basic requirements of the international rule of law, and also imperilled the interests of the whole international community. In order to make a contribution to the efforts to put the record straight, safeguard peace and stability in the South China Sea, and promote the international rule of law, the Society considers it necessary to carefully study, from a legal perspective, the Tribunal's awards and to lay bare the errors therein.

6. To this end, a research group of the Society worked for more than one year (from September 2016 to December 2017) to produce this critical study on the awards ("Study"). More than 60 experts in the fields of law, international relations, history, geography, etc., participated in this project. The Society also invited more than 20 experts of recognized competence from China, including Taiwan, Hong Kong and Macao, as well as other countries to provide guidance and review drafts on specific questions. This Study, completed at the beginning of December 2017, is the outcome of these collective efforts and represents the position of the Chinese academia of international law on the awards.

7. This Study consists of an Introduction, Chapters One through Seven, and a General Conclusion:

Chapter One provides an overview of the background to and the course of the South China Sea Arbitration, and summarizes China's position of non-acceptance of

and non-participation in the Arbitration initiated by the Philippines, and its position of non-acceptance and non-recognition of the Tribunal's awards.

Chapter Two elaborates on the fact that the Tribunal manifestly had no jurisdiction over the Philippines' submissions in the Arbitration, and it acted *ultra vires*, and violated the *non ultra petita* rule by dealing with issues not included in the Philippines' submissions.

Chapter Three shows that the Tribunal failed to properly address the admissibility of the Philippines' amended submissions.

Chapter Four elaborates, with respect to the Tribunal's decisions on the Philippines' Submissions No. 1 and 2, that the Tribunal erred in addressing the relationship between the Convention and historic rights and in denying the existence of China's historic rights in the South China Sea.

Chapter Five elaborates, with respect to the the Tribunal's decisions on the Philippines' Submissions No. 3 through 7, that the Tribunal erred in addressing the status and entitlement of the relevant features of Nansha Qundao and Zhongsha Qundao separately, thereby dismembering the two archipelagos, and further erred in its interpretation and application of law, especially the "regime of islands" under Article 121 of the Convention.

Chapter Six elaborates, with respect to the Tribunal's decisions on the Philippines' Submissions No. 8 through 14, that the Tribunal erred in finding that China's relevant activities in the South China Sea were illegal and had aggravated and extended the disputes.

Chapter Seven elaborates that the Tribunal erred in procedural and evidential matters.

The Conclusion summarizes this Study in broad outline and concludes that the Tribunal's awards were made manifestly *ultra vires* and had no basis in fact and law, and the Chinese government is well justified to declare them null and void. These awards threaten the international rule of law.

## Chapter One: Background to and Course of the South China Sea Arbitration and the Position of the Chinese Government

8. On 22 January 2013, the Philippines, invoking the Convention including Annex VII thereto, unilaterally initiated arbitral proceedings against China. The Chinese government made an unequivocal statement that it would not accept or participate in the Arbitration. Such position of the Chinese government has been reiterated on many occasions. Despite China's strong position, the Tribunal obstinately pressed ahead with the arbitral proceedings and, on 29 October 2015, rendered its Award on Jurisdiction and, in 2016, its Award of 12 July. China has made clear its position not to accept or recognize these awards and has adhered to this position. This Chapter introduces the background to and the course of the Arbitration and the position of the Chinese government.

### I. Background

9. Situated to the south of China's mainland, and connected by narrow straits and waterways with the Pacific Ocean to the east and the Indian Ocean to the west, the South China Sea is a semi-closed sea extending from northeast to southwest. To its north are the mainland and Taiwan Dao of China, to its south Kalimantan Island and Sumatra Island, to its east the Philippine Islands, and to its west the Indo-China Peninsula and the Malay Peninsula. China's Nanhai Zhudao (the South China Sea Islands) consist of Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands) (see Figure 1). These archipelagos include, among others, islands, reefs, shoals and cays of various numbers and sizes. Nansha Qundao is the largest in terms of both the number of islands and reefs and the geographical area.[1] The distance from China's Zhongsha Qundao and Nansha Qundao to the Philippine Islands is less than 200 nautical miles.

10. Nanhai Zhudao are China's inherent territory. The activities of the Chinese people in the South China Sea date back to over 2,000 years ago. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them. China's sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea have been established in the long course of history, and are solidly grounded in history and law.[2]

1 The State Council Information Office of the People's Republic of China, China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 2016), paras.1-2, http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm.

2 Ibid., para.3.

11. As neighbours facing each other across the sea, China and the Philippines have closely engaged in exchanges, and the two peoples have enjoyed friendship over generations. There had been no territorial or maritime delimitation dispute between the two States until the 1970s when the Philippines started to invade and illegally occupy some islands and reefs of China's Nansha Qundao, creating a territorial issue with China over these islands and reefs; this is the core of the relevant disputes between the two countries in the South China Sea. Beginning in 1997, the Philippines started to make illegal territorial claims over China's Huangyan Dao. China resolutely opposes the Philippines' invasion and illegal occupation of, or pretensions to China's territory. In addition, with the development of the international law of the sea, a maritime delimitation dispute also arose between the two States regarding certain maritime areas of the South China Sea.

12. With regard to disputes concerning territorial sovereignty and maritime rights, China has always maintained that they should be peacefully resolved through negotiations between countries directly concerned. China and the Philippines have reached consensus on resolving through negotiations and consultations the relevant disputes, which has been repeatedly reaffirmed in a number of bilateral documents. China and the ASEAN Member States, including the Phillipines, have also made solemn commitment to resolving their territorial and jurisdictional disputes through consultations and negotiations in their 2002 Declaration on the Conduct of Parties in the South China Sea ("DOC").[3] Before the Philippines unilaterally initiated the Arbitration, China and the Philippines had not yet had any negotiation designed to settle their relevant disputes in the South China Sea. Nevertheless, the two countries did hold multiple rounds of consultations on the proper management of disputes at sea.

13. China is committed to peacefully settling, through negotiations with countries directly concerned, territorial and jurisdictional disputes in the South China Sea in accordance with international law including the Convention. The Convention consists of 17 parts with 320 articles and 9 annexes, providing for rules regulating territorial sea and contiguous zone, straits used for international navigation, archipelagic States, exclusive economic zone, continental shelf, high seas, regime of islands, enclosed or semi-enclosed seas, right of access of land-locked States to and from the sea and freedom of transit, the Area, protection and preservation of the marine environment, marine scientific research, development and transfer of marine technology, settlement of disputes, and so on. Part XV of the Convention deals with the settlement of disputes concerning the interpretation or application of the Convention. Land territorial matters are beyond the scope of the Convention, and the disputes thereabout beyond the scope of this dispute settlement. According to Article 298 of the Convention, State Parties have the right to file a written declaration to exclude from compulsory dispute settlement procedures disputes concerning maritime delimitation, historic bays or

3 Declaration on the Conduct of Parties in the South China Sea, para. 4.

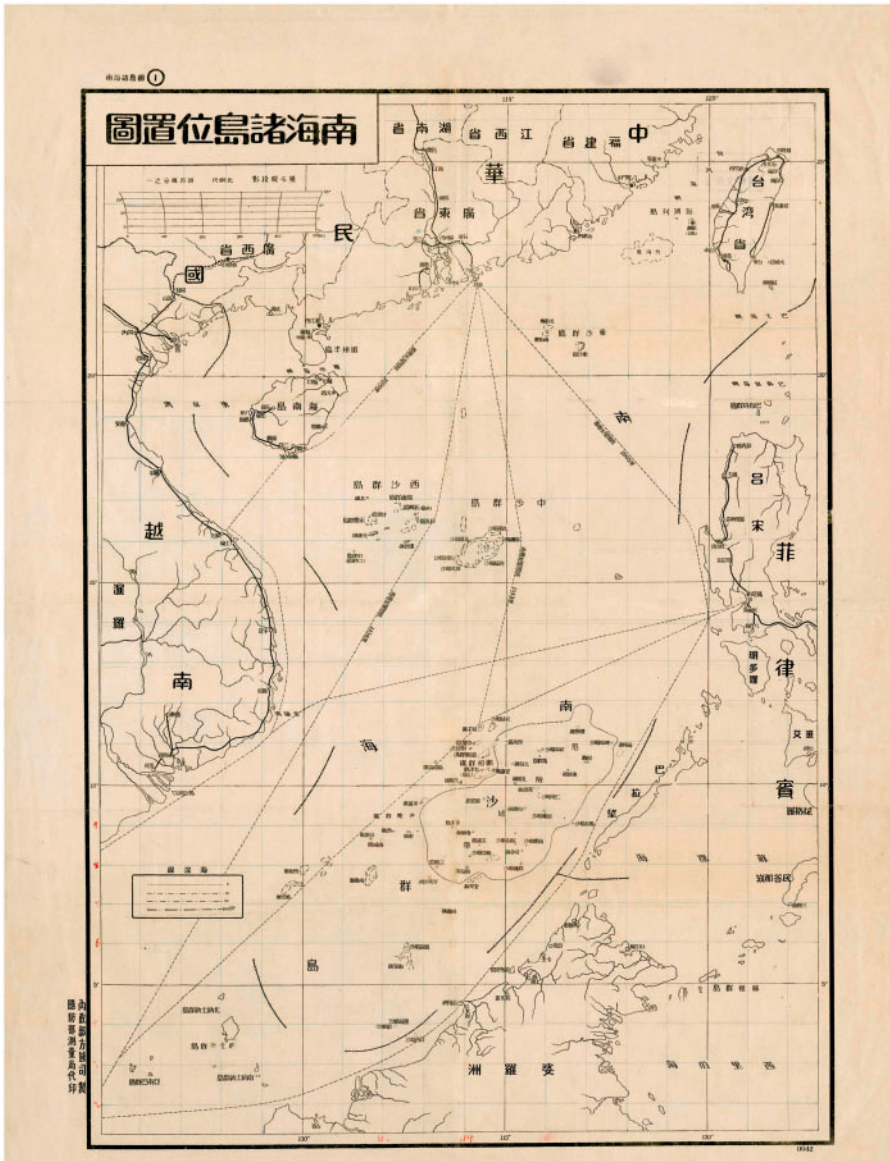


**Figure 1:** Nanhai Zhudao Wei Zhi Tu (Location Map of the South China Sea Islands)

(Map displaying the "dotted line" in the South China Sea, drawn by the Chinese government and in all official maps of China published since 1947)

titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. And China has excluded all such disputes from compulsory procedures under the Convention by filing a declaration in 2006 in accordance with Article 298 of the Convention.

## II. Course of the South China Sea Arbitral Proceedings

14. On 22 January 2013, the Department of Foreign Affairs of the Republic of the Philippines presented a note verbale to the Embassy of the People's Republic of China in the Philippines, together with a Notification and Statement of Claim, initiating arbitral proceedings against China.[4] In its Notification and Statement of Claim, the Philippines designated Rüdiger Wolfrum, a German national, as a member of the Arbitral Tribunal.[5]

15. In its Notification and Statement of Claim, the Philippines sought an award that:

> (1) declares that the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid; (2) determines whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and (3) enables the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.[6]

16. On 19 February 2013, China rejected and returned the Philippines' note verbale and the attached Notification and Statement of Claim.

17. On 23 March 2013, Shunji Yanai, the then President of the International Tribunal of the Law of the Sea ("ITLOS") and a national of Japan, appointed Stanislaw Pawlak, a national of Poland, as arbitrator.

18. On 24 April 2013, Shunji Yanai appointed Jean-Pierre Cot, a national of France, and Alfred H.A. Soons, a national of the Netherlands, as arbitrators, and M.C.W. Pinto, a national of Sri Lanka, as arbitrator and President of the Tribunal.

19. On 21 May 2013, Pinto withdrew from the Arbitral Tribunal as a result of certain questions from the Philippines.

4 The Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines, No. 13-0211.

5 Ibid., Attachments: Notification and Statement of Claims, para.42.

6 Ibid., para.6.

20. On 21 June 2013, Shunji Yanai appointed Thomas A. Mensah, a national of Ghana, as arbitrator and President of the Tribunal.

21. On 28 February 2014, the Philippines applied for leave to amend its Statement of Claim by adding a request to determine pursuant to the Convention the status of Ren'ai Jiao, which the Philippines described as "Second Thomas Shoal".

22. On 11 March 2014, the Tribunal granted the requested leave and accepted the Philippines' Amended Statement of Claim.

23. On 30 March 2014, the Philippines submitted its Memorial and annexes thereto, presenting its 15 submissions.[7]

24. On 7, 8, and 13 July 2015, the Tribunal held two rounds of hearing on jurisdiction, with only the Philippines appearing and presenting its arguments. Indonesia, Japan, Malaysia, Thailand and Viet Nam were present as observers.

25. On 29 October 2015, the Tribunal issued its Award on Jurisdiction. The *dispositif* stated that the Tribunal:

> A. FINDS that the Tribunal was properly constituted in accordance with Annex VII to the Convention.
>
> B. FINDS that China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction.
>
> C. FINDS that the Philippines' act of initiating this arbitration did not constitute an abuse of process.
>
> D. FINDS that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.
>
> E. FINDS that the 2002 China-ASEAN [*sic*] Declaration on Conduct of the Parties in the South China Sea, the joint statements of the Parties referred to in paragraphs 231 to 232 of this Award, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, do not preclude, under Articles 281 or 282 of the Convention, recourse to the compulsory dispute settlement procedures available under Section 2 of Part XV of the Convention.
>
> F. FINDS that the Parties have exchanged views as required by Article 283 of the Convention.
>
> G. FINDS that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 3, 4, 6, 7, 10, 11, and 13, subject to the conditions noted in paragraphs 400, 401, 403, 404, 407, 408, and 410 of this Award.
>
> H. FINDS that a determination of whether the Tribunal has jurisdiction to consider the Philippines' Submissions No. 1, 2, 5, 8, 9, 12, and 14 would involve consideration of issues that do not possess an exclusively preliminary

7 Memorial of the Philippines, Vol. I, pp.271-272.

character, and accordingly RESERVES consideration of its jurisdiction to rule on Submissions No. 1, 2, 5, 8, 9, 12, and 14 to the merits phase.

I. DIRECTS the Philippines to clarify the content and narrow the scope of its Submission 15 and RESERVES consideration of its jurisdiction over Submission No. 15 to the merits phase.

J. RESERVES for further consideration and directions all issues not decided in this Award.[8]

26. On 24, 25, 26, and 30 November 2015, the Tribunal held two rounds of hearing on the remaining issues of jurisdiction and admissibility and the merits (hearing on the merits), with only the Philippines appearing and presenting its arguments. Australia, Indonesia, Japan, Malaysia, Singapore, Thailand and Viet Nam were present as observers.

27. On 30 November 2015, the Philippines presented its 15 Final Submissions in writing, which had undergone several rounds of major amendments, requesting the Tribunal to adjudge and declare that:

> A. The Tribunal has jurisdiction over the claims set out in Section B of these submissions, which are fully admissible, to the extent not already determined to be within the Tribunal's jurisdiction and admissible in the Award on Jurisdiction and Admissibility of 29 October 2015.
>
> B. (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> (2) China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS;
>
> (3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> (4) Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
>
> (5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

8 Award on Jurisdiction, para.413.

(6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

(7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

(8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

(10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

(11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;

(12) China's occupation of and construction activities on Mischief Reef
   (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
   (b) violate China's duties to protect and preserve the marine environment under the Convention; and
   (c) constitute unlawful acts of attempted appropriation in violation of the Convention;

(13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

(14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
   (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
   (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;

(c) endangering the health and wellbeing of Philippine personnel stationed at Second Thomas Shoal; and

(d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and

(15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.[9]

28. On 12 July 2016, the Tribunal rendered an award on the remaining jurisdictional issues and merits. The Tribunal first incorporated its Award on Jurisdiction and declared that it had jurisdiction to consider the matters raised by the Philippines in its Submissions No. 1 through 13, and 14(d) and that such claims were admissible; but that it had no jurisdiction to consider the Philippines' Submissions No. 14(a) to (c) for their involving "military activities", and with respect to the Philippines' Submission No. 15, there was not a dispute between the two States such as would call for the Tribunal to exercise jurisdiction.[10] The *dispositif* reads as follows:

**A. In relation to its jurisdiction, the Tribunal:**

(1) FINDS that China's claims in the South China Sea do not include a claim to 'historic title', within the meaning of Article 298(1)(a)(i) of the Convention, over the waters of the South China Sea and that the Tribunal, therefore, has jurisdiction to consider the Philippines' Submissions No. 1 and 2;

(2) FINDS, with respect to the Philippines' Submission No. 5:

a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;

9 Award of 12 July, para.112.

10 Ibid., para.1203.

c. that there are no overlapping entitlements to an exclusive economic zone or continental shelf in the areas of Mischief Reef or Second Thomas Shoal; and

d. that the Tribunal has jurisdiction to consider the Philippines' Submission No. 5;

(3) FINDS, with respect to the Philippines' Submissions No. 8 and 9:

a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;

c. that Reed Bank is an entirely submerged reef formation that cannot give rise to maritime entitlements;

d. that there are no overlapping entitlements to an exclusive economic zone or continental shelf in the areas of Mischief Reef or Second Thomas Shoal or in the areas of the Philippines' GSEC101, Area 3, Area 4, or SC58 petroleum blocks;

e. that Article 297(3)(a) of the Convention and the law enforcement exception in Article 298(1)(b) of the Convention are not applicable to this dispute; and

f. that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 8 and 9;

(4) FINDS that China's land reclamation and/or construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef do not constitute "military activities", within the meaning of Article 298(1)(b) of the Convention, and that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 11 and 12(b);

(5) FINDS, with respect to the Philippines' Submissions No. 12(a) and 12(c):

a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;

c. that there are no overlapping entitlements to an exclusive economic zone or continental shelf in the areas of Mischief Reef or Second Thomas Shoal; and

d. that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 12(a) and 12(c);

(6) FINDS with respect to the Philippines' Submission No. 14:

a. that the dispute between China and the Philippines concerning the stand-off between the Philippines' marine detachment on Second Thomas Shoal and Chinese military and paramilitary vessels involves "military activities", within the meaning of Article 298(1)(b) of the Convention, and that the Tribunal had no jurisdiction to consider the Philippines' Submissions No. 14(a) to (c); and

b. that China's land reclamation and/or construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef do not constitute "military activities", within the meaning of Article 298 (1)(b) of the Convention, and that the Tribunal has jurisdiction to consider the Philippines' Submission No. 14(d);

(7) FINDS, with respect to the Philippines' Submission No. 15, that there is not a dispute between the Parties such as would call for the Tribunal to exercise jurisdiction; and

(8) DECLARES that it has jurisdiction to consider the matters raised in the Philippines' Submissions No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 (d) and that such claims are admissible.

**B. In relation to the merits of the Parties' disputes, the Tribunal:**

(1) DECLARES that, as between the Philippines and China, the Convention defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein;

(2) DECLARES that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further DECLARES that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein;

(3) FINDS, with respect to the status of features in the South China Sea:

a. that it has sufficient information concerning tidal conditions in the South China Sea such that the practical considerations concerning the

selection of the vertical datum and tidal model referenced in paragraphs 401 and 403 of the Tribunal's Award on Jurisdiction and Admissibility of 29 October 2015 do not pose an impediment to the identification of the status of features;

b. that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef include, or in their natural condition did include, naturally formed areas of land, surrounded by water, which are above water at high tide, within the meaning of Article 121(1) of the Convention;

c. that Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal, are low-tide elevations, within the meaning of Article 13 of the Convention;

d. that Subi Reef lies within 12 nautical miles of the high-tide feature of Sandy Cay [Note by the author: this term refers to China's Tiexian Jiao] on the reefs to the west of Thitu;

e. that Gaven Reef (South) lies within 12 nautical miles of the high-tide features of Gaven Reef (North) and Namyit Island; and

f. that Hughes Reef lies within 12 nautical miles of the high-tide features of McKennan Reef and Sin Cowe Island;

(4) DECLARES that, as low-tide elevations, Mischief Reef and Second Thomas Shoal do not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf and are not features that are capable of appropriation;

(5) DECLARES that, as low-tide elevations, Subi Reef, Gaven Reef (South), and Hughes Reef do not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf and are not features that are capable of appropriation, but may be used as the baseline for measuring the breadth of the territorial sea of high-tide features situated at a distance not exceeding the breadth of the territorial sea;

(6) DECLARES that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, in their natural condition, are rocks that cannot sustain human habitation or economic life of their own, within the meaning of Article 121(3) of the Convention and accordingly that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

(7) FINDS with respect to the status of other features in the South China Sea:

a. that none of the high-tide features in the Spratly Islands, in their natural condition, are capable of sustaining human habitation or

economic life of their own within the meaning of Article 121(3) of the Convention;

b. that none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf; and

c. that therefore there is no entitlement to an exclusive economic zone or continental shelf generated by any feature claimed by China that would overlap the entitlements of the Philippines in the area of Mischief Reef and Second Thomas Shoal; and

DECLARES that Mischief Reef and Second Thomas Shoal are within the exclusive economic zone and continental shelf of the Philippines;

(8) DECLARES that China has, through the operation of its marine surveillance vessels in relation to M/V Veritas Voyager on 1 and 2 March 2011 breached its obligations under Article 77 of the Convention with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank;

(9) DECLARES that China has, by promulgating its 2012 moratorium on fishing in the South China Sea, without exception for areas of the South China Sea falling within the exclusive economic zone of the Philippines and without limiting the moratorium to Chinese flagged vessels, breached its obligations under Article 56 of the Convention with respect to the Philippines' sovereign rights over the living resources of its exclusive economic zone;

(10) FINDS, with respect to fishing by Chinese vessels at Mischief Reef and Second Thomas Shoal:

a. that, in May 2013, fishermen from Chinese flagged vessels engaged in fishing within the Philippines' exclusive economic zone at Mischief Reef and Second Thomas Shoal; and

b. that China, through the operation of its marine surveillance vessels, was aware of, tolerated, and failed to exercise due diligence to prevent such fishing by Chinese flagged vessels; and

c. that therefore China has failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone; and

DECLARES that China has breached its obligations under Article 58(3) of the Convention;

(11) FINDS that Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities and DECLARES that China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented fishermen from the Philippines from engaging in traditional fishing at Scarborough Shoal;

(12) FINDS, with respect to the protection and preservation of the marine environment in the South China Sea:
   a. that fishermen from Chinese flagged vessels have engaged in the harvesting of endangered species on a significant scale;
   b. that fishermen from Chinese flagged vessels have engaged in the harvesting of giant clams in a manner that is severely destructive of the coral reef ecosystem; and
   c. that China was aware of, tolerated, protected, and failed to prevent the afore-mentioned harmful activities; and

   DECLARES that China has breached its obligations under Articles 192 and 194(5) of the Convention;

(13) FINDS further, with respect to the protection and preservation of the marine environment in the South China Sea:
   a. that China's land reclamation and construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef has caused severe, irreparable harm to the coral reef ecosystem;
   b. that China has not cooperated or coordinated with the other States bordering the South China Sea concerning the protection and preservation of the marine environment concerning such activities; and
   c. that China has failed to communicate an assessment of the potential effects of such activities on the marine environment, within the meaning of Article 206 of the Convention; and

   DECLARES that China has breached its obligations under Articles 123, 192, 194(1), 194(5), 197, and 206 of the Convention;

(14) With respect to China's construction of artificial islands, installations, and structures at Mischief Reef:
   a. FINDS that China has engaged in the construction of artificial islands, installations, and structures at Mischief Reef without the authorization of the Philippines;
   b. RECALLS (i) its finding that Mischief Reef is a low-tide elevation, (ii) its declaration that low-tide elevations are not capable of appropriation, and (iii) its declaration that Mischief Reef is within the exclusive economic zone and continental shelf of the Philippines; and
   c. DECLARES that China has breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its exclusive economic zone and continental shelf;

(15) FINDS, with respect to the operation of Chinese law enforcement vessels in the vicinity of Scarborough Shoal:

a. that China's operation of its law enforcement vessels on 28 April 2012 and 26 May 2012 created serious risk of collision and danger to Philippine ships and personnel; and

b. that China's operation of its law enforcement vessels on 28 April 2012 and 26 May 2012 violated Rules 2, 6, 7, 8, 15, and 16 of the Convention on the International Regulations for Preventing Collisions at Sea, 1972; and

DECLARES that China has breached its obligations under Article 94 of the Convention; and

(16) FINDS that, during the time in which these dispute resolution proceedings were ongoing, China:

a. has built a large artificial island on Mischief Reef, a low-tide elevation located in the exclusive economic zone of the Philippines;

b. has caused—through its land reclamation and construction of artificial islands, installations, and structures—severe, irreparable harm to the coral reef ecosystem at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef; and

c. has permanently destroyed—through its land reclamation and construction of artificial islands, installations, and structures—evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef; and

FINDS further that China:

d. has aggravated the Parties' dispute concerning their respective rights and entitlements in the area of Mischief Reef;

e. has aggravated the Parties' dispute concerning the protection and preservation of the marine environment at Mischief Reef;

f. has extended the scope of the Parties' dispute concerning the protection and preservation of the marine environment to Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef; and

g. has aggravated the Parties' dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones; and

DECLARES that China has breached its obligations pursuant to Articles 279, 296, and 300 of the Convention, as well as pursuant to general international law, to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend

> the dispute during such time as dispute resolution proceedings were ongoing.[11]

## III. The Position of the Chinese Government regarding the Arbitration

29. China has repeatedly made clear its firm opposition to the Philippines' unilateral initiation of the Arbitration and any action or step to push forward the proceedings, and its firm position not to accept or participate in the Arbitration, in various diplomatic notes, letters, statements, position papers, Foreign Ministry spokespersons' remarks and those made at regular press conferences. China returned all the documents from the Tribunal and the Philippines. This clear position has been consistently adhered to.

30. On 19 February 2013, the Embassy of China in the Philippines, presenting a note verbale to the Department of Foreign Affairs of the Philippines, rejected and returned the Philippines' Note Verbale No. 13-0211 dated 22 January 2013 and the attached Notification and Statement of Claim. China stated:

> The Position of China on the South China Sea issues has been consistent and clear. China has indisputable sovereignty over the Nanhai Islands and their adjacent waters. At the core of the disputes between China and the Philippines in the South China Sea are the territorial disputes over some islands and reefs of the Nansha Islands. The two countries also have overlapping jurisdictional claims over parts of the maritime area in the South China Sea. The direct cause of these disputes has been the illegal occupation by the Philippines of some islands and reefs of China's Nansha Islands. China has been firmly opposed to such illegal occupation.
>
> The territorial disputes between China and the Philippines are still pending and unresolved, but both sides have agreed to settle the disputes through bilateral negotiations. By initiating arbitration proceedings, the Philippines runs counter to the agreement between the two countries, and also contravenes the principles and spirit of the Declaration on the Conduct of Parties in the South China Sea (DOC), and particularly "to resolve their territorial and jurisdictional disputes by peaceful means, … through friendly consultations and negotiations by sovereign states directly concerned".
>
> The Notification and Statement of Claim (hereinafter referred to as "Notification") attached to Note Verbale No. 13-0211 contains grave errors both in fact and in law, and includes many false accusations against China. At some places, the Notification even seriously violates the "One China" principle, undermining the political foundation of the bilateral relations between China and the Philippines. China firmly opposes to this.

11 Award of 12 July, para.1203.

> China therefore rejects and returns the Philippines' Note Verbale No. 13-0211 and the attached Notification.
>
> China has been committed to resolving disputes peacefully through bilateral negotiation, and has made every effort to maintain stability and to promote regional cooperation in the South China Sea. In March 2010, China made a formal proposal to the Philippines on establishing a bilateral regular consultation mechanism on maritime issues, and China has also repeatedly proposed to the Philippines to resume the operation of the Confidence Building Measures Mechanism (CBMs) as established between the two countries. The Philippines has failed to respond to the proposals mentioned above. China hopes that the Philippines will revert to the right track of settling the disputes through bilateral negotiations.[12]

31. On 26 April 2013, a Chinese Ministry of Foreign Affairs spokesperson answered questions on the Philippines' moves to push for the establishment of the Arbitral Tribunal in relation to the disputes between China and the Philippines in the South China Sea, as follows:

> Since the 1970s, the Philippines, in violation of the Charter of the United Nations and principles of international law, illegally occupied some islands and reefs of China's Nansha Islands, including Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling Jiao. Firmly and consistently opposed to the illegal occupation by the Philippines, China hereby solemnly reiterates its demand that the Philippines withdraw all its nationals and facilities from China's islands and reefs.
>
> The Philippines professed in the notification of 22 January 2013 that it "does not seek … a determination of which Party enjoys sovereignty over the islands claimed by both of them." On 22 January, however, the Philippines publicly stated that the purpose for initiating the arbitration was to bring to "a durable solution" the Philippines-China disputes in the South China Sea. These statements are simply self-contradictory. In addition, by initiating the arbitration on the basis of its illegal occupation of China's islands and reefs, the Philippines has distorted the basic facts underlying the disputes between China and the Philippines. In so doing, the Philippines attempts to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of "legality". The Philippines' attempt to seek a so-called "durable solution" such as this and the means it has employed to that end are absolutely unacceptable to China.

12 The Note Verbale from the Embassy of the People's Republic of China in the Philippines, No. (13) PG-039.

> In accordance with international law, and especially the principle of the law of the sea that "land dominates the sea", determined territorial sovereignty is the precondition for, and basis of maritime delimitation. The claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines. Moreover, in 2006, the Chinese government made a declaration in pursuance of Article 298 of UNCLOS, excluding disputes regarding such matters as those related to maritime delimitation from the compulsory dispute settlement procedures, including arbitration. Therefore, the request for arbitration by the Philippines is manifestly unfounded. China's rejection of the Philippines' request for arbitration, consequently, has a solid basis in international law.
>
> In the interest of maintaining the Sino-Philippine relations and the peace and stability in the South China Sea, China has been persistent in pursuing bilateral negotiations and consultations with the Philippines to resolve relevant disputes. It is a commitment undertaken by all signatories, the Philippines included, under the Declaration on the Conduct of Parties in the South China Sea (DOC) that disputes relating to territorial and maritime rights and interests be resolved through negotiations by sovereign states directly concerned therewith. The DOC should be implemented in a comprehensive and serious manner. China will adhere to the means of bilateral negotiations to resolve territorial and maritime delimitation disputes both in accordance with applicable rules of international law and in compliance with the spirit of the DOC.[13]

32. On 12 July 2013, the Tribunal issued Administrative Order No. 1, appointing the "Permanent Court of Arbitration"[14] ("PCA") as Registry, providing the Philippines and China with copies of the draft Rules of Procedure and Declarations of Acceptance and Statements of Impartiality and Independence signed by each

13 Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea (26 April 2013), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1035577.shtml.

14 Strictly speaking, it is the International Bureau of the Permanent Court of Arbitration that was appointed, not the Permanent Court of Arbitration itself.

arbitrator, and inviting comments on the draft Rules. By a note verbale dated 29 July 2013, China reiterated "its position that it does not accept the arbitration initiated by the Philippines and therefore returns the letter addressed to the Ambassador of China to the Netherlands dated 12 July 2013 as well as the attached documents". China emphasized that its note verbale "shall not be regarded as China's acceptance of or participation in the arbitration procedure".

33. On 7 December 2014, the Chinese Ministry of Foreign Affairs was authorized to release the 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 ("Position Paper").[15] On 8 December, the Chinese Embassy in the Netherlands delivered the Position Paper to the PCA together with a note verbale, requesting it to forward the Position Paper to Thomas A. Mensah, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H.A. Soons, and Rüdiger Wolfrum. The note verbale included a reminder that, "The forwarding of the aforementioned Position Paper shall not be regarded as China's acceptance of or its participation in the arbitration." The Position Paper reiterates China's position of not accepting or participating in the arbitration, and elaborates on the legal grounds for its position that the Tribunal had no jurisdiction over the Philippines' submissions:

> The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
>
> China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;
>
> Even assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, inter alia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.
>
> Consequently, the Arbitral Tribunal manifestly has no jurisdiction over the present arbitration. Based on the foregoing positions and by virtue of the freedom of every State to choose the means of dispute settlement, China's rejection

15 See 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 (7 December 2014), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm ("China's Position Paper").

> of and non-participation in the present arbitration stand on solid ground in international law.[16]

34. On 6 February 2015, the Ambassador of China to the Netherlands sent a letter to Thomas A. Mensah, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H.A. Soons, and Rüdiger Wolfrum, stating in part:

> The position, already taken by the Chinese Government, of not accepting or participating in the arbitration is clear and consistent. It is supported by sufficient legal evidence, and will not change.
>
> Based on its "non-acceptance and non-participation" position, China does not respond to or comment on any issue raised by the Arbitral Tribunal. This shall not be understood or interpreted by anyone in any sense as China's acquiescence in or non-objection to any and all procedural or substantive matters already or might be raised by the Arbitral Tribunal; nor shall it be capitalized upon as a basis for any and all procedural or substantive arrangements, suggestions, orders, decisions or awards that the Arbitral Tribunal may make. The Chinese Government underlines that China opposes the initiation of the arbitration and any measures to push forward the arbitral proceeding, holds an omnibus objection to all procedural applications or steps that would require some kind of response from China, such as "intervention by other States", "*amicus curiae* submissions" and "site visit". China firmly opposes any attempt to obstinately push forward the arbitral proceeding by taking advantage of its position of not accepting or participating in the arbitration.
>
> Any and all procedural or substantive arrangements, suggestions, orders, decisions or awards relating to China that the Arbitral Tribunal has made or may make in the future are null and void, and have no binding effect on China.
>
> An explicit consent of the parties is the prerequisite for international arbitration which shall also fully respect their will. Under the circumstances that China has stated its "non-acceptance and non-participation" position and elaborated that the Arbitral Tribunal manifestly has no jurisdiction, the relevant actors still continually push forward the arbitral proceeding, and even attempt to apply other procedures which are inconsistent with the general practices of international arbitration, such as "intervention by other States" and "*amicus curiae* submissions". China is seriously concerned about and firmly opposes such moves.[17]

16 Ibid., para.3.

17 Letter from the Ambassador of the People's Republic of China to the Kingdom of the Netherlands to the individual members of the Tribunal (6 February 2015).

35. On 1 July 2015, the Ambassador of China to the Netherlands wrote another letter to Thomas A. Mensah, Stanislaw Pawlak, Jean-Pierre Cot, Alfred H.A. Soons, and Rüdiger Wolfrum, stating that:

> 1. It is the consistent policy and practice of the Chinese Government to resolve the disputes related to territory and maritime rights and interests with States directly concerned through negotiation and consultation. On issues of territorial sovereignty and maritime rights and interests, China will not accept any imposed solution or any unilateral resorting to a third-party settlement. This is the legitimate right bestowed upon China by international law, including the *United Nations Convention on the Law of the Sea* (UNCLOS). The Chinese Government adheres to the position of neither accepting nor participating in the arbitral proceeding with respect to the disputes between China and the Philippines in the South China Sea unilaterally initiated by the Philippines in disregard of China's aforesaid legitimate right and in breach of the agreement that has been repeatedly reaffirmed with China as well as the Philippines' undertakings in the *Declaration on the Conduct of Parties in the South China Sea* (DOC).
>
> 2. The attempt to resolve the disputes in the South China Sea by unilaterally initiating and pushing forward the arbitral proceeding will not only compromise the efforts by States directly concerned to resolve relevant disputes through negotiation and consultation, but also erode the confidence shared by China and ASEAN Member States in jointly safeguarding peace and stability in the South China Sea.
>
> 3. The Chinese Government's position in regard to the arbitration has been clearly elaborated in the *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* released on 7 December 2014 and the letter from me dated 6 February 2015.
>
> 4. Based upon what is stated above, the Chinese Government's relevant statements and documents as well as my letters, among others, shall by no means be interpreted as China's participation in the arbitral proceeding in any form. China opposes any moves to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures.[18]

36. On 14 July 2015, a Chinese Ministry of Foreign Affairs spokesperson made remarks on the conclusion of the hearing on issues relating to jurisdiction and admissibility by the Tribunal as follows:

> The Chinese Government has, on many occasions, expounded its position of neither accepting nor participating in the arbitral proceeding unilaterally

18 Letter from the Ambassador of the People's Republic of China to the Kingdom of the Netherlands to the individual members of the Tribunal (1 July 2015).

> initiated by the Philippines in disregard of China's legitimate rights bestowed upon her by international law, including the United Nations Convention on the Law of the Sea (UNCLOS), and in breach of the agreement that has been repeatedly reaffirmed with China as well as the Philippines' undertakings in the Declaration on the Conduct of Parties in the South China Sea (DOC). This position is supported by sufficient legal evidences. And for more information, please refer to the 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 released last December.
>
> [ … ]
>
> China opposes any move by the Philippines to initiate and push forward the arbitral proceeding. On issues of territorial sovereignty and maritime rights and interests, China will never accept any imposed solution or unilaterally resorting to a third-party settlement. China urges the Philippines to return to the right approach of resolving relevant disputes through negotiation and consultation as soon as possible.[19]

37. On 24 August 2015, a Chinese Ministry of Foreign Affairs spokesperson made remarks on the release of the transcript of the oral hearing on jurisdiction by the Tribunal as follows:

> The Chinese side has consistantly expounded its position of neither accepting nor participating in the South China Sea arbitration unilaterally initiated by the Philippines. This position is solidly grounded in international law and will not change.
>
> [ … ]
>
> The Philippines' unilateral submission of the relevant disputes to compulsory arbitration, in breach of the consensus repeatedly reaffirmed with China as well as its undertaking in the DOC and in disregard of the fact that the core of the disputes between China and Philippines lies in the disputes over territorial sovereignty and the overlapping of maritime rights and interests, constitutes a violation of international law, an abuse of international legal procedure, and a severe infringement upon the legitimate rights that China enjoys as a sovereign state and a State Party to the UNCLOS. The Philippines' unilateral initiation and obstinate pushing forward the arbitral proceeding, in an attempt to negate

19 Foreign Ministry Spokesperson Hua Chunying's Remarks on the Conclusion of the Hearing on Issues Relating to Jurisdiction and Admissibility by the South China Sea Arbitral Tribunal Established at the Request of the Philippines (14 July 2015), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1281250.shtml.

> China's territorial sovereignty and maritime rights and interests in the South China Sea and to pressure China into making compromises regarding the relevant matters, is not only a pipe dream and will lead to nothing, but also will jeopardize the integrity of the UNCLOS and seriously undermine the order of international maritime law.
>
> China urges the Philippines to respect China's right, which is endowed by international law, of choosing means of dispute settlement, and return to the right track of resolving relevant disputes in the South China Sea through negotiations and consultations.[20]

38. On 30 October 2015, a Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines was issued, which emphasized that the Award on Jurisdiction "is null and void, and has no binding effect on China".

39. On 25 November 2015, a Chinese Ministry of Foreign Affairs spokesperson made remarks on the Tribunal's hearing on the merits, reiterating that the Tribunal had no jurisdiction and that China would not accept or participate in the Arbitration. The remarks emphasized:

> With regard to the issues of territorial sovereignty and maritime rights and interests, China will not accept any solution imposed on it or any unilateral resort to a third-party dispute settlement. The Philippines' attempt to negate China's territorial sovereignty and maritime rights and interests in the South China Sea through arbitral proceeding will lead to nothing.[21]

40. On 21 December 2015, a Chinese Ministry of Foreign Affairs spokesperson made remarks on the Tribunal's making public the transcript of its hearing on the merits, reiterating China's position that it would neither accept nor participate in the Arbitration. The spokesperson said:

> In the hearing, the Philippine side attempted to negate China's sovereignty over the Nansha Islands and deny the validity of the Cairo Declaration and the Potsdam Proclamation in disregard of historical facts, international law and international justice. It testifies to the fact that the South China Sea dispute

20 Foreign Ministry Spokesperson Hua Chunying's Remarks on the Release of the Transcript of the Oral Hearing on Jurisdiction by the South China Sea Arbitral Tribunal Established at the Request of the Philippines (24 August 2015), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1290752.shtml.

21 Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 25 November 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1318343.shtml.

> between China and the Philippines is in essence a territorial dispute over which the arbitral tribunal has no jurisdiction. It also shows that the so-called arbitration is a political provocation under the cloak of law aiming at negating China's sovereignty and maritime rights and interests in the South China Sea instead of resolving the dispute.
>
> It is the Chinese people rather than any other individuals or institutions that master China's territorial sovereignty. When it comes to issues concerning territorial sovereignty and maritime delimitation, China will not accept any dispute settlement approach that resorts to a third party. The Chinese side urges the Philippine side to cast aside illusions, change its course and come back to the right track of resolving disputes through negotiations and consultations.[22]

41. On 20 May 2016, a Chinese Ministry of Foreign Affairs spokesperson commented on whether China and the Philippines had held any discussion on items in Philippines' claim as follows:

> [ … ] Before unilaterally initiating the arbitration in January, 2013, the Philippine government failed to have any consultation or negotiation with the Chinese side on relevant items, still less exhaust all the bilateral means for the settlement of disputes. The arbitration initiated by the Philippines falls short of UNCLOS requirement. It won't work and will lead nowhere.
>
> The Chinese side always maintains that disputes between China and the Philippines over the South China Sea could only be resolved through bilateral negotiation and consultation. All parties should encourage the Philippines to peacefully resolve disputes with China through negotiation based on consensus with China, the DOC and international law including UNCLOS.[23]

42. On 3 June 2016, a Chinese Ministry of Foreign Affairs spokesperson made remarks on the relevant issue about Taiping Dao as follows:

> China has indisputable sovereignty over the Nansha Islands and its adjacent waters, including Taiping Dao. China has, based on the Nansha Islands as a whole, territorial sea, exclusive economic zone and continental shelf. Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. The above activities are all manifestly recorded in Geng Lu Bu (Manual of Sea Routes)

22 Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 21 December 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1326449.shtml.

23 Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 20 May 2016, http://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/t1365237.htm.

> which was passed down from generation to generation among Chinese fishermen, as well as in many western navigation logs before the 1930s.
>
> The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an "island" which is completely capable of sustaining human habitation or economic life of its own. The Philippines' attempt to characterize Taiping Dao as a "rock" exposed that its purpose of initiating the arbitration is to deny China's sovereignty over the Nansha Islands and relevant maritime rights and interests. This violates international law, and is totally unacceptable.[24]

43. On 8 June 2016, a Statement of the Ministry of Foreign Affairs of the People's Republic of China on Settling Disputes Between China and the Philippines in the South China Sea Through Bilateral Negotiation was issued, which reiterated that China would not accept or participate in the Arbitration, emphasizing that it is the common agreement and commitment of China and the Philippines to settle their relevant disputes in the South China Sea through bilateral negotiation. The statement reads:

> However, ever since its initiation of the arbitration, the Philippines has unilaterally closed the door of settling the South China Sea issue with China through negotiation, and has, while turning its back on the bilateral consensus regarding managing differences, taken a series of provocative moves that infringed upon China's legitimate rights and interests. This has led to dramatic deterioration of China-Philippines relations as well as of the situation in the South China Sea. China is firmly opposed to the Philippines' unilateral actions. China adheres to the solemn position of non-acceptance of and non-participation in the arbitration, and will stay committed to settling the relevant disputes with the Philippines in the South China Sea through bilateral negotiation.[25]

44. On 10 June 2016, the Ambassador of China to the Netherlands delivered to Thomas A. Mensah, Stanislaw Pawlak, Jean-Pierre Cot, Alfred H.A. Soons, and Rüdiger Wolfrum a document produced by the Chinese Society of International Law, entitled "The Tribunal's Award in the 'South China Sea Arbitration' Initiated by the Philippines is Null and Void". The document reads: "In the present Arbitration, the Tribunal does not have jurisdiction over any of the claims made by

24 Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao (3 June 2016), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1369188.shtml.

25 See Statement of the Ministry of Foreign Affairs of the People's Republic of China on Settling Disputes Between China and the Philippines in the South China Sea Through Bilateral Negotiation (8 June 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1370476.htm.

the Philippines. Its Award on Jurisdiction is groundless both in fact and in law, and is thus null and void. Therefore, any decision that it may make on substantive issues in the ensuing proceedings will equally have no legal effect."[26] The document points out that the Tribunal's decision is full of errors in determination of fact and application of law, at least in the following six respects:

> First, the Tribunal errs in finding that the claims made by the Philippines constitute disputes between China and the Philippines concerning the interpretation or application of the UNCLOS;
>
> Second, the Tribunal errs in taking jurisdiction over claims which in essence are issues of sovereignty over land territory and are beyond the purview of the UNCLOS;
>
> Third, the Tribunal errs in taking jurisdiction over claims concerning maritime delimitation which have been excluded by China from compulsory procedures in line with the UNCLOS;
>
> Fourth, the Tribunal errs in denying that there exists between China and the Philippines an agreement to settle the disputes in question through negotiation;
>
> Fifth, the Tribunal errs in finding that the Philippines had fulfilled the obligation to "exchange views" regarding the means of disputes settlement with respect to the claims it made;
>
> Sixth, the Tribunal's Award deviates from the object and purpose of the dispute settlement mechanism under the UNCLOS, and impairs the integrity and authority of the Convention.[27]

45. On 12 July 2016, a Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines was issued. The statement declares that: "the Philippines' initiation of arbitration breaches the agreement between the two states, violates the United Nations Convention on the Law of the Sea (UNCLOS), and goes against the general practice of international arbitration, and that the Arbitral Tribunal has no jurisdiction [… and] the award is null and void and has no binding force"; "[t]he conduct of the Arbitral Tribunal and its awards seriously contravene the general practice of international arbitration, completely deviate from the object and purpose of UNCLOS to promote peaceful settlement of disputes, substantially impair the integrity and authority of UNCLOS, gravely infringe upon China's legitimate rights as a sovereign state and state party to UNCLOS"; "China's territorial sovereignty and maritime rights and interests in the South China Sea

26 Chinese Society of International Law, the Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines is Null and Void, Beijing: Law Press, 2016, p.48.

27 Ibid., pp.47-48.

shall under no circumstances be affected by those awards. China opposes and will never accept any claim or action based on those awards."[28]

46. On 12 July 2016, the Chinese government also issued a Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea, which reiterates China's territorial sovereignty and maritime rights and interests in the South China Sea.[29]

47. On 13 July 2016, the Chinese government issued a White Paper entitled "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea" ("White Paper"). The White Paper elaborates that Nanhai Zhudao are China's inherent territory, traces the origin of the relevant disputes between China and the Philippines in the South China Sea, demonstrates that China and the Philippines have reached consensus on settling their relevant disputes in the South China Sea, shows that the Philippines has repeatedly taken moves that complicate the relevant disputes, and reiterates China's policy on the South China Sea issue. The White Paper re-emphasizes:

> [T]he Philippines' unilateral initiation of arbitration contravenes international law including the UNCLOS dispute settlement mechanism. The Arbitral Tribunal in the South China Sea Arbitration established at the Philippines' unilateral request has, *ab initio*, no jurisdiction, and awards rendered by it are null and void and have no binding force. China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China does not accept or recognize those awards. China opposes and will never accept any claim or action based on those awards.[30]

28 Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (12 July 2016), paras.1, 3, 4, http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

29 See Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (12 July 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm.

30 China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (13 July 2016), para.120, http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm.

## Chapter Two: Jurisdiction

48. Article 9 of Annex VII to UNCLOS provides: "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case [ … ] Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."

49. It is sovereign equality that underpins the contemporary international system. The principle of consent is the basis of international dispute settlement and the source of its legality. According to this principle, the jurisdiction of an international court or tribunal over an inter-State dispute depends on the consent of the parties to the dispute.[1] This principle has been confirmed in the 1899 Convention for the Pacific Settlement of International Disputes and 1907 Convention for the Pacific Settlement of International Disputes, the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice,[2] as well as in numerous cases.

50. The principle of consent is also reflected in Part XV of the Convention. It was on the basis of this principle that the States participating in the Third United Nations Conference on the Law of the Sea, after arduous and time-consuming negotiations, reached compromise on Part XV as a package deal relating to the settlement of their disputes concerning the interpretation or application of the Convention. Under Article 287 in this Part, States parties may choose, among others, an arbitral tribunal constituted in accordance with Annex VII ("Annex VII tribunal") as the means to settle their disputes. If no choice has been made, or the choices of the parties do not overlap, an Annex VII tribunal will become the default means. The jurisdiction of such a tribunal may not exceed that granted under Part XV of the Convention, otherwise the consent of the States parties would be overstepped.

51. Paragraph 1 of Article 288 of the Convention unmistakably provides: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute

1 See International Court of Justice, "Basis of the Court's Jurisdiction", http://www.icj-cij.org/en/basis-of-jurisdiction#1. In Status of Eastern Carelia, Advisory Opinion of 23 July 1923, P.C.I.J., Series B, No. 5, p.7, at 27, the Permanent Court of International Justice (PCIJ) emphasized "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." In Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p.65, at 71, the International Court of Justice reaffirmed "no judicial proceedings relating to a legal question pending between States can take place without their consent".

2 See 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, Part IV, International Arbitration; Statute of the Permanent Court of International Justice, Article 36; Statute of the International Court of Justice, Article 36.

concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

Paragraph 1 of Article 288 of the Convention expressly provides that the *ratione materiae* jurisdiction of dispute settlement regime is limited to "disputes concerning the interpretation or application of the Convention". Many other articles in Part XV of the Convention also use the words of "concerning the interpretation or application of the Convention" to describe "disputes" to be settled.[3]

Part XV of the Convention contains provisions that specifically address the applicability of compulsory procedures. Section 1 of this Part provides that parties to a dispute have an obligation to settle their dispute peacefully and their own choices as to the means of dispute settlement are respected. Section 2 provides that, where no settlement has been reached by recourse to Section 1, and subject to the limitations and exceptions under Section 3, the dispute shall be submitted to the compulsory procedures entailing binding decisions. Section 3 provides for limitations and exceptions to the applicability of compulsory procedures entailing binding decisions.

52. Pursuant to the above-mentioned provisions of the Convention, in order for the Tribunal to satisfy itself that it has jurisdiction over the Philippines' submissions, the following points have to be considered.

First, the Tribunal has to determine whether the Philippines' submissions represent disputes "concerning the interpretation or application of the Convention" between China and the Philippines. Accordingly, the Tribunal is required to address whether there exist disputes between the two countries as alleged in the Philippines' submissions, and whether the subject-matters involved in the disputes, if any, fall within the scope of the Convention. Where the subject-matter of a dispute is outside the ambit of the Convention, such as land territorial sovereignty, the dispute is not subject to the dispute settlement system under Part XV of the Convention,[4] and the Tribunal had no jurisdiction over it.

Second, the Tribunal should consider whether any limitation or exception under Section 3 of Part XV of the Convention would apply. Paragraph 1 of Article 298 allows a State party to file a written declaration to except from any compulsory dispute settlement procedure provided for in Section 2 disputes concerning maritime delimitations, or those involving historic bays or titles, military activities and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

3 UNCLOS, Articles 279-284, 286-287, and 297.

4 See Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, paras.214-219.

On 25 August 2006, China deposited, pursuant to Article 298 of the Convention, with Secretary-General of the United Nations a written declaration. That declaration states:

> The Government of the People's Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention.[5]

Thus, by this Declaration, China has explicitly excluded all the disputes referred to in Article 298(1) from any of the compulsory dispute settlement procedures, including arbitration laid down in Annex VII of the Convention.[6]

Third, if there exist "disputes concerning the interpretation or application of the Convention" between the two countries, the Tribunal should also consider whether any "settlement has been reached by recourse to section 1"; in other words, before the relevant disputes may be submitted to the compulsory procedures provided for in Section 2, the requirements provided in Section 1 must be satisfied. One such requirement is that, under Article 281, if the parties have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in Part XV apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure. Another such requirement is the obligation to exchange views under Article 283.

53. As a State party to the Convention, China accepts the provisions concerning settlement of disputes in Part XV of the Convention, but this acceptance is set within

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5 Declaration made by China after ratification (25 August 2006), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China after ratification.

6 In addition, the Philippines submitted an understanding upon signature of the Convention, and reaffirmed it upon ratification in 1984. This understanding may be interpreted as excluding from compulsory procedures under the Convention, any disputes the Philippines may have with other countries, which concern sovereignty or the resolution of which may adversely affect its sovereignty. Noteworthy are paragraphs 4 and 8 of the understanding which read:

> 4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto.
>
> 8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.

Understanding made by the Philippines upon signature (10 December 1982) and confirmed upon ratification (8 May 1984), http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

the limit of the aforementioned framework. Although Article 288(4) of the Convention provides that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal", the Tribunal should bear in mind and fully respect the limitations on its jurisdiction imposed by the Convention, when exercising this power, and show genuine concern for the intentions of China in invoking the Convention's explicit right to exclude from binding settlement procedures disputes concerning sea boundary delimitations and historic titles.[7] The Tribunal is not allowed to address matters beyond its jurisdiction, in violation of the Convention. Otherwise, the principle of consent will be transgressed, and the delicate balance embodied in Part XV of the Convention will be broken. Just as the Chinese government pointed out in its Position Paper:

> China highly values the positive role played by the compulsory dispute settlement procedures of the Convention in upholding the international legal order for the oceans. As a State Party to the Convention, China has accepted the provisions of section 2 of Part XV on compulsory dispute settlement procedures. But that acceptance does not mean that those procedures apply to disputes of territorial sovereignty, or disputes which China has agreed with other States Parties to settle by means of their own choice, or disputes already excluded by Article 297 and China's 2006 declaration filed under Article 298. With regard to the Philippines' claims for arbitration, China has never accepted any of the compulsory procedures of section 2 of Part XV.[8]

54. Although fully aware of the afore-mentioned limitations imposed by the Convention,[9] the Tribunal paid no regard to these limitations, and proceeded to transgress them and to issue the Award on Jurisdiction and Award of 12 July, which are of an extreme nature. The Tribunal found that the Philippines' 14 submissions reflect "disputes concerning the interpretation or application of the Convention", and they concern neither territorial sovereignty nor maritime delimitation; that no settlement has been reached by recourse to Section 1; that it has jurisdiction over Submissions No. 3, 4, 6, 7, 10, 11 and 13, to which no limitation or exception in Article 297 or 298 is potentially applicable; and that it has jurisdiction over Submissions No. 1, 2, 5, 8, 9, 12 and 14, except for Submission No. 14(a) to (c) which involve "military activities" within the meaning of Article 298(1)(b) of the Convention and have been excluded by China's 2006 Declaration.[10]

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7 See Abraham D. Sofaer, The Philippine Law of the Sea Action against China: Relearning the Limits of International Adjudication, 15 Chinese Journal of International Law (2016), p.295, at para.9.

8 China's Position Paper, para.79.

9 See Award on Jurisdiction, paras.130-131, 189-192, 356, and 364-365.

10 Ibid., paras.397-412; Award of 12 July, para.1203.A.

55. In making the afore-mentioned findings, the Tribunal exercised jurisdiction over matters which are not regulated by the Convention or those that have been explicitly excluded from compulsory procedures by China's 2006 Declaration; erroneously determined that there exists no agreement between China and the Philippines to settle disputes through negotiation and that the Philippines had fulfilled the obligation to exchange views; and exercised jurisdiction over matters which are not included in the Philippines' submissions. The Tribunal's foregoing findings exceed the scope of its jurisdiction under the Convention and deliberately disregard China's 2006 Declaration. In short, they do violence to the principle of consent.

56. This Chapter aims to expose the errors the Tribunal has committed in matters of jurisdiction and to demonstrate that it manifestly had no jurisdiction over the Philippines' claims.

Section I elaborates that the subject-matter of the Philippines' claims is essentially a matter of territorial sovereignty and maritime delimitation between China and the Philippines in the South China Sea, thus beyond the Tribunal's jurisdiction.

Section II makes clear that the Tribunal erroneously characterized the Philippines' submissions as unrelated to the territorial and maritime delimitation dispute between the two States and then proceeded to exercise jurisdiction *ultra vires*.

Section III analyses the errors in the Tribunal's findings regarding the existence of disputes between China and the Philippines concerning the interpretation or application of the Convention in the Philippines' 14 submissions, showing how the Tribunal had piled errors upon errors.

Section IV shows the errors in the Tribunal's finding that there existed no obstacle under Article 281 to the Tribunal's exercise of jurisdiction.

Section V clarifies that the Tribunal erred in finding that the Philippines had fulfilled its obligation to exchange views under Article 283.

Section VI demonstrates that the Tribunal violated the *non ultra petita* principle by deciding on matters not included in the Philippines' submissions.

## I. The Tribunal had no jurisdiction over the Philippines' submissions which reflect a territorial and maritime delimitation dispute between China and the Philippines

57. It is an indisputable fact that there exists a complex issue between China and the Philippines over territorial sovereignty and maritime delimitation in the South China Sea. This matter is beyond the Tribunal's jurisdiction. On the one hand, the Philippines claimed that the subject-matters of its submissions did not relate to the territorial and maritime delimitation dispute with China. On the other, China considers that the subject-matter of the Philippines' submissions is essentially an issue of territorial sovereignty over certain component features of Nansha Qundao and Huangyan Dao of Zhongsha Qundao, and constitutes an integral part of maritime

delimitation between the two countries. The key to the Tribunal's determining its jurisdiction is thus to ascertain the relationship between the Philippines' submissions and its territorial and maritime delimitation dispute with China.

58. This section traces the origin and development of the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea and clarifies the relationship between this dispute and the Philippines' submissions. The analysis demonstrates that: (1) the dispute between China and the Philippines in the South China Sea involves many issues relating to territorial sovereignty and maritime delimitation, which are intertwined and must be treated as a whole; (2) the Philippines' submissions constitute an integral part and reflect different aspects of this dispute and cannot be addressed separately in isolation from each other.

*I.1. There exists a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea*

59. As mentioned earlier, the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea emerged in the 1970s. At the core of this dispute is the territorial issue resulting from the Philippines' invasion and illegal occupation of certain component features of China's Nansha Qundao. With the development of the international law of the sea, especially the establishment of the regime of exclusive economic zone and of continental shelf, a dispute over maritime delimitation also arose between the two countries in certain areas of the South China Sea.

*I.1.A. Origin and development of the territorial issue between China and the Philippines in the South China Sea*

60. China's sovereignty over Nanhai Zhudao had never been challenged before the 20th century. In the 1930s and the 1940s, Japan invaded and illegally occupied Xisha Qundao and Nansha Qundao during its war of aggression against China. The Chinese people fought heroically against the Japanese aggression. After the end of the Second World War, China recovered and resumed the exercise of sovereignty over Nanhai Zhudao. The Chinese government dispatched military and civil officials to Xisha Qundao and Nansha Qundao to resume the exercise of authority over these islands, with commemorative ceremonies held, sovereignty markers re-erected, and troops garrisoned. The Chinese government conducted a new round of geographical survey and, on the basis of that survey, reviewed and approved a comparison table of the old and the new names of Nanhai Zhudao and their component features in 1947. In 1948 the Chinese government officially published a map which displayed the dotted line in the South China Sea. China's sovereignty over Nanhai Zhudao has been widely recognized in the international community.

61. Since the founding of the People's Republic of China on 1 October 1949, the Chinese government has been consistently and actively maintaining its sovereignty

over Nanhai Zhudao. Both the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provide that the territory of the People's Republic of China includes, among others, Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao. In March 1959, the Chinese government set up, on Yongxing Dao of Xisha Qundao, the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao. In March 1969, the Office was renamed the Revolutionary Committee of Xisha Qundao, Zhongsha Qundao and Nansha Qundao of Guangdong Province. In October 1981, the name of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao was restored. In April 1988, China established Hainan Province with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant maritime areas, among others. In June 2012, China approved the abolition of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the simultaneous establishment of prefecture-level Sansha City with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant waters. All those acts reaffirmed China's territorial sovereignty and maritime rights and interests in the South China Sea.

62. The territory of the Philippines is defined by a series of international treaties, including the 1898 Treaty of Peace between the United States of America and the Kingdom of Spain (the Treaty of Paris), the 1900 Treaty between the United States of America and the Kingdom of Spain for Cession of Outlying Islands of the Philippines (the Treaty of Washington), and the 1930 Convention between His Majesty in Respect of the United Kingdom and the President of the United States regarding the Boundary between the State of North Borneo and the Philippine Archipelago. The Philippines' territory so defined has nothing to do with China's Nanhai Zhudao. The current territorial issue between China and the Philippines in the South China Sea has its roots in the Philippines' invasion and illegal occupation of certain component features of China's Nansha Qundao. In the 1950s, the Philippines attempted to take moves on China's Nansha Qundao but eventually stopped because of China's firm opposition. Starting from the 1970s, the Philippines invaded and illegally occupied Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou, and Siling Jiao of China's Nansha Qundao. In 1978, Philippine President Ferdinand Marcos signed Presidential Decree No. 1596, which designated some component features of China's Nansha Qundao and large areas of their surrounding waters as "Kalayaan Island Group", set up "Municipality of Kalayaan" and illegally included them in the Philippine territory. The Philippines has also enacted a series of national laws to lay its own claims of territorial sea, exclusive economic zone and continental shelf, part of which conflicted with China's maritime rights and interests in the South China Sea.

63. Since the 1980s, the Philippines has repeatedly taken moves that complicate the relevant disputes. For example, by building military facilities on the relevant component features of China's Nansha Qundao it had illegally invaded and occupied, the Philippines attempted not only to establish a *fait accompli* of permanent occupation but also to expand its illegal seizure. The Philippines has repeatedly infringed China's maritime rights and interests in an attempt to expand and entrench its illegal claims in the South China Sea. These moves have grossly violated China's sovereignty as well as its rights and interests in the South China Sea. Since 1997, the Philippines has also harboured territorial pretensions to China's Huangyan Dao and attempted to occupy it illegally.[11]

64. On 17 February 2009, the Philippine Congress passed Republic Act No. 9522. That act illegally includes into the Philippines' territory China's Huangyan Dao and some component features of China's Nansha Qundao. China immediately made representations to the Philippines and issued a statement, reiterating:

> Huangyan Island and Nansha Islands have been part of the territory of China since ancient time. The People's Republic of China has indisputable sovereignty over Huangyan Island and Nansha Islands and their surrounding maritime areas. Any claim to territorial sovereignty over Huangyan Island and Nansha Islands by any other states is, therefore, null and void.[12]

65. On 7 May 2009, the Permanent Mission of the People's Republic of China to the United Nations sent a note verbale addressed to the Secretary-General of the United Nations, stating that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof [ … ]. The above position is consistently held by the Chinese Government, and is widely known by the international community."[13] In this regard, the Permanent Mission of the Republic of the Philippines to the United Nations sent a note verbale addressed to the Secretary-General of the United Nations on 5 April 2011, claiming that "the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological

11 The Chinese government considers Huangyan Dao as its inherent territory. China has been exercising sovereignty and jurisdiction over Huangyan Dao continuously, peacefully and effectively. The Philippines' territorial claim to Huangyan Dao since 1997 is groundless, illegal and invalid.

12 Declaration of the Ministry of Foreign Affairs of the People's Republic of China (February 18 2009), http://www.fmprc.gov.cn/web/ziliao_674904/1179_674909/t537809.shtml.

13 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009), Memorial of the Philippines, Vol. VI, Annex 191.

features in the KIG."[14] Earlier on 4 April 2011, the Department of Foreign Affairs of the Republic of the Philippines sent a note verbale to the Embassy of the People's Republic of China in the Philippines, stating that "the Republic of the Philippines has sovereignty and jurisdiction over the Kalayaan Island Group (KIG)".[15] On 14 April 2011, the Permanent Mission of the People's Republic of China to the United Nations sent another note verbale addressed to the Secretary-General of the United Nations, stressing that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.[16]

66. At the heart of the relevant dispute between China and the Philippines in the South China Sea lies the territorial issue over certain component features. This issue has a significant impact on their claims to maritime rights and interests in the South China Sea. China's claims to maritime rights and interests based on Nanhai Zhudao overlap with the Philippines' claims based on the Philippine Islands. In addition, the Philippines has made claims to China's Huangyan Dao of Zhongsha Qundao and certain component features of Nansha Qundao, and presented various spurious assertions on the legal status of some individual component features, complicating the conflict of their maritime rights and interests and the situation of maritime delimitation.

*I.1.B. The geographical framework between China and the Philippines in the South China Sea and the emergence of their maritime delimitation dispute*

67. China and the Philippines are neighbours facing each other across the sea, and "States with opposite or adjacent coasts" as referred to in Articles 74 and 83 of the Convention. China's Nanhai Zhudao consist of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao. These archipelagos each include, among others, islands, reefs, shoals and cays of various numbers and sizes. China's claims to maritime entitlements have always been based on each archipelago as a unit. Among these archipelagos, Zhongsha Qundao and Nansha Qundao face the Philippines

14 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011), Memorial of the Philippines, Vol. VI, Annex 200.

15 Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No.110885 (4 April 2011), Memorial of the Philippines, Vol. VI, Annex 199.

16 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011), Memorial of the Philippines, Vol. VI, Annex 201.

across the sea, with less than 200 nautical miles to the coast of the Philippine Islands. Obviously this forms a geographical framework of maritime delimitation[17] and gives rise to a maritime delimitation situation between China and the Philippines in the South China Sea, with their claims of continental shelf and exclusive economic zone overlapping. Moreover, from the mainland, Hainan Dao, Xisha Qundao and Dongsha Qundao, China may claim a continental shelf beyond 200 nautical miles in the South China Sea, a possibility acknowledged by an expert hired by the Philippines for this Arbitration.[18]

68. Even proceeding on the logic of the Philippines and taking the nine component features at issue individually and separately, there still exists a geographical framework of maritime delimitation between the two States; a maritime delimitation situation is equally apparent. The coast of the Philippine Islands is only 120 nautical miles from Huangyan Dao of Zhongsha Qundao, between 230 and 260 nautical miles from Zhubi Jiao, Huayang Jiao and Yongshu Jiao of Nansha Qundao, and less than 200 nautical miles from the other component features. Moreover, the eight component features of Nansha Qundao at issue in this case are all located within 200 nautical miles of Taiping Dao and Zhongye Dao of Nansha Qundao, while Huangyan Dao is located within 350 nautical miles of China's Yongxing Dao of Xisha Qundao and Zhongye Dao of Nansha Qundao.

69. China and the Philippines both have claimed their respective maritime rights and entitlements in the South China Sea. On the basis of the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and pursuant to China's national law and under international law, including the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea, the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous

17 For the concept of "geographical framework", see, e.g., Protocol on Environmental Protection to the Antarctic Treaty, Annex V, Article 3.2 ("within a systematic environmental-geographical framework"); Separate Opinion of Judge Luchaire in Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986, p.554, at 652; Keith Highet and George Kahale III, International Decisions, 87 American Journal of International Law (1993), p.452; L.H. Legault and Blair Hankey, From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case, 79 American Journal of International Law (1985), p.961, at 963; Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at Part IV.A.

18 See Supplemental Written Submission of the Philippines, Vol. I, at para.8.9; The potential for China to develop a viable submission for continental shelf area beyond 200 nautical miles in the South China Sea, Expert Report prepared by Lindsay Parson, Maritime Zone Solutions Ltd, March 2015, in Supplemental Written Submission of the Philippines, Vol. IX, Annex 514.

Zone, the 1996 Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea, the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, and the 1982 United Nations Convention on the Law of the Sea, China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. In addition, China has historic rights in the South China Sea.

70. The Philippines proclaimed its internal waters, archipelagic waters, territorial sea, exclusive economic zone and continental shelf according to, among others, the Philippines' Republic Act No. 387 of 1949, Republic Act No. 3046 of 1961, Republic Act No. 5446 and Presidential Proclamation No. 370 of 1968, Presidential Decree No. 1599 of 1978, and Republic Act No. 9522 of 2009. In the South China Sea, the Philippines has claimed exclusive economic zone and continental shelf from the coast of the Philippine Islands.

71. The above-mentioned maritime rights and entitlements claimed by the two States overlap, giving rise to a maritime delimitation dispute. Although China and the Philippines have not yet started substantive negotiations to settle the dispute, they have been working to promote cooperation in the areas in dispute, with a view to creating conditions for the final settlement of the dispute through negotiations. For example, as early as in March 1999, the two sides held the first China-Philippines Experts Group Meeting on Confidence-Building Measures. Subsequently, the Experts Group on Confidence-Building Measures met a number of times. On 3 September 2004, the two sides issued the Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines, stating that, "The two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area."[19] Two days before the issuance of the Joint Press Statement, upon approval by both governments and in the presence of the leaders of the two countries, China National Offshore Oil Corporation (CNOOC) and Philippine National Oil Company (PNOC) signed an Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea, deciding to undertake joint marine seismic exploration in the relevant maritime areas. The "agreement area" as defined therein is within the areas of overlapping maritime claims of the two States and also within the areas involved in the Philippines' submissions. Just as stated in China's Position Paper issued on 7 December 2014:

> China and the Philippines are maritime neighbours and "States with opposite or adjacent coasts" in the sense of Articles 74 and 83 of the Convention. There

19 Joint Press Statement of the Government of the People's Republic of China and the Government of the Republic of the Philippines, 3 September 2004, para.16.

> exists an issue of maritime delimitation between the two States. Given that disputes between China and the Philippines relating to territorial sovereignty over relevant maritime features remain unresolved, the two States have yet to start negotiations on maritime delimitation. They have, however, commenced cooperation to pave the way for an eventual delimitation.[20]

72. In the hearing held in July 2015 on jurisdiction and admissibility, counsel for the Philippines said:

> [T]he dispute between the parties over their respective maritime entitlements is just as apparent in the southern half of the South China Sea. Here, there are two different disputes over entitlements. The Philippines claims a 200-mile EEZ and continental shelf from Palawan. China claims a 200-mile entitlement for the Spratly Islands, over all of which it claims sovereignty. As you can see, almost all of the Philippines' entitlement in this part of the sea is overlapped by China's 200-mile claim in regard to the Spratlys. The Philippines disputes China's claim to a 200-mile entitlement for the Spratly features because, in our view, none of them is entitled to an EEZ or continental shelf under the Convention.[21]

73. This description given by counsel for the Philippines vividly portrays the maritime delimitation situation between China and the Philippines in the South China Sea, and it shows that the Philippines did acknowledge the existence of a maritime delimitation dispute with China. This description does not detail how China's claim based on Nansha Qundao as a unit interacts with that of the Philippines. Nevertheless, it already shows clearly the existence of the maritime delimitation dispute.

*I.1.C. Territorial and maritime delimitation issues between China and the Philippines in the South China Sea are inextricable from each other*

74. The Philippines camouflages its submissions as merely issues of maritime entitlements of relevant component features in the South China Sea, but they cannot bypass issues of territorial sovereignty and maritime delimitation. The determination of maritime entitlements of a feature depends first of all on ascertaining territorial sovereignty over it. Only after the territorial sovereignty is determined can maritime entitlements, as a part of maritime delimitation, be addressed.

20 China's Position Paper, para.59.

21 Jurisdictional Hearing Tr. (Day 1), pp.45-46 (internal footnote omitted).

75. China and the Philippines are fully aware that the territorial issue is inherently related to, and intertwined with, the issue of maritime delimitation. In their interactions, China and ASEAN Member States usually use "territorial and jurisdictional disputes" to describe territorial and maritime delimitation disputes in general, with "jurisdictional dispute" denoting a dispute caused by overlapping maritime claims, that is, a delimitation dispute. In many years of consultations on dispute management and cooperation, the dispute between China and the Philippines in the South China Sea is understood and dealt with as a territorial and maritime delimitation dispute, with all matters to be treated as a whole. This practice has given rise to a set formula which has been followed by the two States in all their discussions of related issues in the South China Sea. The two sides understood, as early as in a 1995 consultation, their dispute in the South China Sea as a territorial and maritime delimitation dispute. As recorded by the Philippines in a document quoted in its Memorial:

> Vice Minister Wang [Yingfan] and Undersecretary Severino agreed that although the dispute over Mischief Reef and other Spratly features was partially a territorial one, it also involved differences regarding the extent of maritime jurisdiction that these features could generate, and which could be resolved through UNCLOS.[22]

Vice Minister Wang was recorded by the Philippines as saying at that time:

> The dispute between China and the Philippines in the Nansha [Spratly] is basically a territorial dispute although it includes to some extent the maritime jurisdiction issue. UNCLOS is mainly a convention concerning the delimitation of maritime jurisdiction areas.
>
> So I think that the legal experts from both of our countries share the view that we cannot rely solely on UNCLOS to fundamentally settle the dispute between us. However, some issues in our dispute can be settled in accordance with UNCLOS.[23]

76. The Philippines' record clearly shows that China and the Philippines both considered that their dispute over Meiji Jiao and other Nansha features is a territorial dispute and Nansha features may give rise to a dispute regarding maritime jurisdiction, and that, therefore, the dispute between China and the Philippines in the South China Sea is a territorial and jurisdictional (maritime delimitation) dispute. The two sides also shared the view that the territorial issues and maritime delimitation issues

22 Memorial of the Philippines, Vol. I, para.3.28.

23 Government of the Republic of the Philippines, Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks (10 Aug. 1995), p.3 (Memorial of the Philippines, Vol. VI, Annex 181), quoted in Memorial of the Philippines, Vol. I, para.3.28.

involved are intertwined. This is the reason why both sides use the singular "dispute" in their consultations to refer to their territorial and maritime delimitation dispute in the South China Sea.

77. This understanding was also reflected in the Declaration on the Conduct of Parties in the South China Sea signed between China and ASEAN Member States in November 2002. The Parties to the DOC undertake in Paragraph 4:

> to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

The use of the phrase "territorial and jurisdictional disputes" in the DOC shows the prevalence of treating relevant disputes in the South China Sea as territorial and maritime delimitation disputes.

78. China and the Philippines have committed themselves to the full and effective implementation of the DOC,[24] thereby affirming the understanding that their dispute in the South China Sea is a territorial and jurisdictional dispute.

79. In 2009, by Republic Act No. 9522, the Philippines applied the regime of islands under Article 121 of the Convention to the so-called "Kalayaan Island Group". However, this law does not affect its claim to exclusive economic zone and continental shelf.

80. In conclusion, China and the Philippines have treated their differences in the South China Sea as constituting an integral whole, all the matters being intertwined with and inseparable from each other, which they have understood as a territorial and maritime delimitation dispute. However, in the course of this arbitral proceeding, the Philippines did its utmost to fragment the dispute into various discrete pieces and camouflage them as mere disputes over maritime entitlements, in order to circumvent the barriers to the Tribunal's jurisdiction presented by the nature of the dispute. Yet the essence of the Philippines' submissions cannot escape those enlightened.

*I.2. The essence of the Philippines' submissions is the territorial and maritime delimitation issue between China and the Philippines*

81. The Philippines knew full well that the Tribunal had no jurisdiction to address the territorial and maritime delimitation dispute between China and the Philippines. In order to circumvent this jurisdictional hurdle, the Philippines had repeatedly

24 See Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines, 3 September 2004; Joint Statement between the People's Republic of China and the Republic of the Philippines, 1 September 2011.

asserted that the subject-matters of the arbitration concerned neither the issue of territorial sovereignty nor that of maritime delimitation. During the hearing on jurisdiction and admissibility held in July 2015, the Philippines claimed that "each and every one of the submissions is indeed the subject of a legal dispute, [ … ] and that it arises under and calls for the interpretation or application of specific identified provisions of the Convention."[25] This is, however, far from the truth.

82. In this case, the Philippines substantially amended its submissions three times. In its "Notification and Statement of Claim" dated 22 January 2013, the Philippines presented 13 requests for relief or submissions. In the "Amended Notification and Statement of Claim" dated 28 February 2014, requests concerning Ren'ai Jiao were added to Submissions No. 4 and 5.[26] In the Memorial filed on 30 March 2014, the Philippines made further amendments and presented 15 submissions, adding two submissions concerning the protection and preservation of the marine environment and the aggravation and extension of disputes, respectively. During the hearing on the merits held in November 2015, the Philippines amended its submissions yet again, changing or adding to the content of some submissions while enlarging the geographic coverage of one submission.[27]

83. The Philippines' three rounds of substantial amendments did not manage to divorce its submissions from the framework of the territorial and maritime delimitation dispute between China and the Philippines, and the nature of its submissions remain unchanged. This section aims to reveal the real nature of the Philippines' submissions, by analysing how they relate to the territorial and maritime delimitation dispute between China and the Philippines. Since the Tribunal found that it had no jurisdiction over the Philippines' Submission No. 15, our analysis will focus on Submissions No. 1 to 14 set out in the 2014 Memorial of the Philippines in combination with the Philippines' Notification and Statement of Claim of 2013, the amendments to its submissions made in 2014 and 2015, and the fact and evidence relevant thereto.

25 Jurisdictional Hearing Tr. (Day 2), p.133, citied in Award on Jurisdiction, para.147.

26 Some scholars hold the view that, from the perspective of jurisdiction, the Tribunal shall not grant the Philippines the requested leave to add the claims regarding Ren'ai Jiao, with China not participating in the proceeding. See, e.g., Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at para.17.

27 For the admissibility of the Philippines' amendments to its submissions, see Chapter Three of this Study on Admissibility.

*I.2.A. The Philippines' submissions cannot be divorced from the issues of territorial sovereignty and maritime delimitation*

84. In order to circumvent the legal barrier that the Tribunal manifestly had no jurisdiction to address the territorial and maritime delimitation dispute, the Philippines, by distorting the geographical facts of, and history of human activities in, the South China Sea, fragmented the dispute into various discrete pieces and camouflaged them as mere disputes over maritime entitlements or activities at sea, to bring them within the Tribunal's jurisdiction. However formulated, the Philippines' submissions present questions either which themselves constitute issues of territorial sovereignty and maritime delimitation, or the addressing of which is premised on a decision on such an issue. In other words, the submissions each reflect different aspects of and are inseparable from the territorial and maritime delimitation dispute, and thus cannot be addressed separately and in isolation.

85. In its Award on Jurisdiction, the Tribunal put the Philippines' Submissions No. 1 to 14 in its Memorial into two categories: Submissions No. 1 to 7 concern the sources and extent of maritime entitlements, and Submissions No. 8 to 14, Chinese activities at sea.[28] These submissions will be reviewed according to this categorization.

*(1) Submissions concerning the sources and extent of maritime entitlements (Submissions No. 1 to 7)*

86. The Philippines' Submissions No. 1 to 7 presented in its Memorial of 30 March 2014 are as follows:

> 1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> 2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
>
> 3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> 4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
>
> 5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

28 Award on Jurisdiction, para.173.

> 6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
>
> 7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf[.][29]

87. China has sovereignty over Zhongsha Qundao and Nansha Qundao. The Philippines has illegally claimed sovereignty over some islands and reefs of these two archipelagos. For instance, Meiji Jiao and Ren'ai Jiao are components of China's Nansha Qundao, but were included by the Philippines in the so-called "Kalayaan Island Group" it illegally established within China's Nansha Qundao. The Philippines' submissions concerning Meiji Jiao and Ren'ai Jiao, which asked the Tribunal to declare these two features as part of its exclusive economic zone and continental shelf, thus taking China's territory and placing it into the Philippines' jurisdiction, reflect in themselves an aspect of the territorial dispute between China and the Philippines.

88. The determination of matters concerning maritime entitlements raised by the Philippines in the above-mentioned 7 submissions relies on a decision on the sovereignty over the maritime features at issue. They are also matters which are to be considered in the delimitation process and which will have a direct impact on the outcome of this process. China's sovereignty over Nanhai Zhudao is solidly established and well-known to the world. This Study will use, where necessary, such wordings as "territorial issue", "issue of territorial sovereignty", and "dispute over territorial sovereignty", for the purpose of illuminating that the Philippines' submissions are not irrelevant to territorial sovereignty as the Tribunal held. This does not imply in any sense that China's sovereignty over Nanhai Zhudao is uncertain.

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29 Ibid., para.101, quoting from Memorial of the Philippines, Vol. I, pp.271-272. In the hearing on the merits held in November 2015, the Philippines amended Submissions No. 1 and 2 to read as follows (see Award of 12 July, para.112):

> (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> (2) China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS [. … ]

89. First, to decide whether or not China's claims to maritime rights and entitlements in the South China Sea have exceeded the extent permitted by the Convention, one cannot bypass a decision on China's territorial sovereignty over Nanhai Zhudao, which is beyond the Tribunal's jurisdiction. The Philippines, in its Submissions No. 1 and 2, requested the Tribunal to decide whether China's claims to maritime entitlements in the South China Sea have extended beyond those permitted by the Convention. A generally applicable principle of international law is that sovereignty over land territory is the basis for maritime rights. As the International Court of Justice ("ICJ") stated, "maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea'".[30] The ICJ also emphasized that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward".[31] In the same vein, scholars have pointed out that "the application of the LOS Convention is premised on the assumption that a particular state has undisputed title over the territory from which the maritime zone is claimed."[32] In addition, States may enjoy historic rights in particular maritime areas based on long-standing practice. Under contemporary law of the sea, the maritime areas to which a State is entitled under the principle of "the land dominates the sea" may overlap with those based on historic rights. Therefore, China maintains in the Position Paper that "without first having determined China's territorial sovereignty over the maritime features in the South China Sea, the Arbitral Tribunal will not be in a position to determine the extent to which China may claim maritime rights in the South China Sea pursuant to the Convention, not to mention whether China's claims exceed the extent allowed under the Convention."[33]

90. Second, to determine the status and maritime entitlements of maritime features, the sovereignty over the relevant features, a matter over which the Tribunal had no jurisdiction, must be firstly decided. The Philippines in its Submissions No. 3

30 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001, p.40, at para.185, citing North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p.3, at para.96; Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p.3, at para.86.

31 North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p.3, at para.96. See also Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.140.

32 Robert W. Smith and Bradford L. Thomas, Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes, 2 Maritime Briefing (1998), p.1, at 16, https://www.dur.ac.uk/ibru/publications/view/?id=235. See also Natalie Klein, Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions, 15 Chinese Journal of International Law (2016), p.403.

33 China's Position Paper, para.13.

through 7 requested the Tribunal to determine the status of some features of China's Zhongsha Qundao and Nansha Qundao, and the maritime entitlements they may generate. As China's Position Paper points out, "The holder of the entitlements to an exclusive economic zone [ … ] and a continental shelf under the Convention is the coastal State with sovereignty over relevant land territory."[34]

Settled sovereignty over a feature is the prerequisite for what maritime entitlements it may generate and what the State having sovereignty over it eventually claims. Only after the issue of sovereignty is addressed, can it be considered whether or not a feature may generate maritime entitlements and, if so, what entitlements it generates. In dealing with disputes relating to maritime features, no international court or tribunal had ever determined their maritime entitlements without having decided on sovereignty over them. During the hearing on jurisdiction and admissibility in July 2015, the Philippines was asked whether there had been any precedent "when entitlements to [*sic*] maritime features were decided separately from sovereignty over them".[35] The Philippines subsequently provided four cases. However, an experienced publicist analysed these cases and came to the conclusion that none of these cases support the view that maritime entitlements of a feature may be decided separately from sovereignty over it,[36] and he pointed out that "there is no sign in the Award that [the Philippines' team] were able to discover a precedent".[37] China's claims to maritime entitlements of Nanhai Zhudao are based on China's sovereignty over them. Only after the sovereignty over relevant features is decided, can one determine what maritime entitlements China has based on these features or archipelagos as the case may be, and whether China's related claims have extended beyond those permitted by the Convention.

Whether a feature is treated as an independent unit or an integral part of an archipelago has a direct impact on the maritime entitlements it may generate. For example, if a feature is a low-tide elevation, it is possible that, in itself, it does not generate any maritime entitlement. But, as an integral part of an archipelago,[38] that feature forms part of the relevant State's territory and may as part of the archipelago affect the entitlements the archipelago generates. Whether a State claims maritime entitlements

34 Ibid., para.17.

35 Written responses of the Philippines to the Tribunal's 13 July 2015 questions (23 July 2015), Judge Pawlak's questions to Professor Sands, p.9.

36 See Chris Whomersley, The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique, 15 Chinese Journal of International Law (2016), p.239, at para.33.

37 Ibid., at para.32.

38 The definition of "archipelago" in Article 46(b) of the Convention reflects customary international law. According to this definition, "other natural features" are an integral part of an archipelago. For more discussions, see Chapter Five of this Study on the legal status of China's Nansha Qundao and Zhongsha Qundao.

based on an individual component feature of its archipelago or on the archipelago as a whole depends on the practice of the State. The features involved in the above-mentioned submissions constitute part of China's Nansha Qundao or Zhongsha Qundao. China has sovereignty over the two archipelagos each as an integral unit, and claims maritime entitlements based on the two archipelagos each as an integral unit rather than based on any features separately.

The question whether or not a low-tide elevation can be appropriated as territory is in itself an issue of territorial sovereignty. In international jurisprudence, international courts or tribunals will address this issue only when they have jurisdiction over territorial sovereignty. This is not the case in the present Arbitration.

91. Third, even proceeding on the logic of the Philippines and taking the relevant features separately in determining their status and maritime entitlements, this issue should be considered within the maritime delimitation framework between China and the Philippines in the South China Sea. As there exists a delimitation situation between China and the Philippines in the South China Sea, the status and maritime entitlements of each single feature must be considered in the process of maritime delimitation. It is neither meaningful nor proper to address the status and maritime entitlements of a feature in isolation from other features or from the delimitation situation. In other words, in the delimitation situation between China and the Philippines in the South China Sea, claims to maritime entitlements are an indivisible part of the maritime delimitation dispute. The determination of the status and maritime entitlements of features is an essential step in a maritime delimitation. In many cases, the determination itself of the status and maritime entitlements of a feature effectively constitutes a maritime delimitation.

Granted, maritime entitlement and maritime delimitation are distinct concepts. However, they are inseparable where two States have overlapping claims for maritime entitlements, i.e. where there exists a delimitation situation between them. In that case, generally speaking, a feature located outside the territorial sea of a State can generate no maritime entitlement if it is a low-tide elevation; a feature may generate maritime zones including territorial sea, exclusive economic zone and continental shelf, if it is an island referred to in Article 121(1) and (2) of the Convention; and an island may generate no exclusive economic zone or continental shelf, if it is a "rock" referred to in Article 121(3) of the Convention.[39] At the same time when the status and maritime entitlements of a feature are determined, so is whether the maritime entitlements of the two or more States overlap and, if so, how much they do. This is no doubt part

39 In accordance with Article 121(2) of the Convention, a coastal State having sovereignty over the "rock" under paragraph 3 is still entitled to the right of control under Article 33 in the contiguous area of the "rock". The right to control is completely different from the nature of the rights enjoyed by coastal States in the EEZ and continental shelf and the Convention does not regulate the disputes arising from the overlapping of jurisdictional areas.

of the process of delimiting the maritime boundary between the two States. The parties' claims regarding the status and maritime entitlements of a feature thus have an important effect on delimitation and constitute part of their maritime delimitation dispute. And the resolution of such claims, i.e. the determination of the status and maritime entitlements of a feature, constitutes the main component of the delimitation, and even the delimitation itself.

If a feature constitutes part of an outlying archipelago of a continental State, that State may claim maritime entitlements based on the archipelago as a unit rather than on individual features of the archipelago separately. The extent of the maritime areas generated by the archipelago as a unit would differ markedly from that generated separately by a single feature or some single features or the sum of those generated by the features separately. The differing scenarios will inevitably have corresponding and significant impact on maritime delimitation if there exists a delimitation situation. Within the maritime delimitation framework between China and the Philippines in the South China Sea, to address these issues constitutes the main component of the maritime delimitation between the two.

92. That maritime entitlements are closely related to maritime delimitation where there exists a delimitation situation has been confirmed by international courts and tribunals. For example, in *Aegean Sea Continental Shelf (Greece v. Turkey, 1978)*, the ICJ stated that "[t]he basic question in dispute is whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own [ … ]. The very essence of the dispute, as formulated in the Application, is thus the entitlement of those Greek islands to a continental shelf, and the delimitation of the [maritime] boundary is a secondary question to be decided after, and in the light of, the decision upon the first basic question"[40] and, therefore, "[a]ny disputed delimitation of a boundary entails some determination of entitlement to the areas to be delimited".[41] Accordingly, the determination of maritime entitlement has an impact on maritime delimitation. In *Continental Shelf (Libyan Arab Jamahiriya/Malta, 1985)*, the ICJ further stated: "That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation."[42] In the *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar, 2012)*, the ITLOS also pointed out that "[w]hile entitlement and delimitation are two distinct

40 Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p.3, at para.83.

41 Ibid., at para.84.

42 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p.13, at para.27.

concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated."[43]

93. Mr. Soons, one of the arbitrators in this Arbitration, and his co-author pointed out in an article that in practice a dispute concerning the legal status and maritime entitlements of a single feature, which usually are an indivisible part of maritime delimitation and usually concern territorial sovereignty disputes over features, may never arise alone. In 1990, Kwiatkowska and Soons wrote:

> [T]he definition of rocks and their entitlement to maritime spaces, like the definition and entitlement of islands in general, forms an inherent part of maritime boundary delimitation between opposite/adjacent States and, as State practice clearly evidences, these issues will not give rise to controversies unless such delimitation is in dispute.[44]

In 2011, they rehashed the same theme:

> In fact, with a single exception of Okinotorishima, the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations, often intertwined with disputes over sovereignty [ … ].[45]

94. Thus, in such a situation as the one between China and the Philippines, addressing maritime entitlement claims must be premised on a determination of sovereignty over maritime features, and these claims are and have to be considered as an integral part of the maritime delimitation dispute between the two States.

*(2) Submissions concerning activities at sea (Submissions No. 8 to 14)*

95. The Philippines' Submissions No. 8 to 14 presented in its Memorial of 30 March 2014 are as follows:

> 8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

43 Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Case No. 16, Judgment of 12 March 2012, para.398.

44 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands Yearbook of International Law (1990), p.139, at 181.

45 Barbara Kwiatkowska and Alfred H.A. Soons, Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3), The Global Community: Yearbook of International Law and Jurisprudence (2011), p.111, at 114 (internal footnote omitted).

> 9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
>
> 10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
>
> 11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;
>
> 12) China's occupation and construction activities on Mischief Reef
>
> (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
>
> (b) violate China's duties to protect and preserve the marine environment under the Convention; and
>
> (c) constitute unlawful acts of attempted appropriation in violation of the Convention;
>
> 13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;
>
> 14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
>
> (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
>
> (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and
>
> (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal [ … ][46]

On 30 November 2015, the Philippines added (d) to Submission No. 14 in its Final Submissions, which read "conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef".

96. Submissions No. 8 and 9 cannot be considered unless and until after sovereignty over relevant features is determined and maritime delimitation completed. The determination of the legality of relevant activities depends on first addressing sovereignty and maritime delimitation. In other words, consideration of the two submissions requires prior or simultaneous consideration of the territorial and maritime delimitation dispute between China and the Philippines and determination of the

46 Award on Jurisdiction, para.101; see also Memorial of the Philippines, Vol. I, pp.271-272.

limits of their respective maritime jurisdiction. In this regard, China's Position Paper points out that "the legality of China's actions in the waters of the Nansha Islands and Huangyan Dao rests on both its sovereignty over relevant maritime features and the maritime rights derived therefrom."[47] The Position Paper further observes that the premise of the Philippines' claims must be that "the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas. The fact is, however, to the contrary. China and the Philippines have not delimited the maritime areas between them. Until and unless the sovereignty over the relevant maritime features is ascertained and maritime delimitation completed, this category of claims of the Philippines cannot be decided upon."[48] In Submissions No. 8 and 9, the Philippines claimed that China had acted unlawfully in the Philippines' exclusive economic zone and continental shelf. The premise for the Philippines' submissions is that, as the Tribunal was fully aware and put in the Award on Jurisdiction, "no overlapping entitlements exist because only the Philippines possesses an entitlement to an exclusive economic zone in the relevant areas" and, further, "[w]hether this is the case depends upon a merits determination on the status of maritime features in the South China Sea".[49] A determination on the status of maritime features, nevertheless, requires in the first place a determination of the extent of China's Nansha Qundao. This concerns the issue of sovereignty, beyond the jurisdiction of the Tribunal.

97. Submissions No. 10, 11,[50] 12, 13, and 14 are directed against China's activities of affirming, exercising and safeguarding its sovereignty. China's activities at the relevant features and in their adjacent maritime areas are based on sovereignty. Therefore, the legality of China's relevant activities cannot be dealt with in isolation from the sovereignty issue. For example, in Submission No. 12, the Philippines alleged that "China's occupation and construction activities on Mischief Reef" had violated a number of provisions of the Convention. In fact, Meiji Jiao is an integral part of China's Nansha Qundao, and China's relevant activities at Meiji Jiao are a matter within its sovereignty.

Another example is the Philippines' Submission No. 14(a), (b) and (c) alleging that China aggravated and extended the dispute by its activities at Ren'ai Jiao. As a matter of fact, China has maintained a clear and consistent position that Ren'ai Jiao forms an integral part of its Nansha Qundao. It is the Philippines that has, since running aground an old naval vessel thereupon in 1999 and failing to clean up and leave until

47 China's Position Paper, para.26.

48 Ibid., para.27.

49 Award on Jurisdiction, paras.405-406.

50 In its Submission No.11, the Philippines claimed that China tolerated and protected Chinese fishermen's harmful harvesting activities at Huangyan Dao and Ren'ai Jiao, the relevant sea areas of which are within and beyond the 12 nm.

now, attempted to stake a territorial claim over it. The excuse that the Philippines gave for this drama has always been "technical difficulties" and it has made to China on numerous occasions explicit undertaking to tow away the stranded vessel. Instead of fulfilling that undertaking, the Philippines lined up, in February 2013, cables around the grounded vessel, making preparations for the construction of permanent facilities on Ren'ai Jiao.[51] Worse yet, in an internal memorandum from the Philippine Secretary of Foreign Affairs to the President of the Philippines dated 23 April 2013, the Secretary noted:

> [ … T]he Philippines has always responded to the Chinese actuations by saying that the case of the stranded vessel is a maritime incident that happened in a shoal which is part of the Philippine territory.
>
> Ayungin Shoal [Ren'ai Jiao] is a Philippine territory and part of the natural extension of the archipelago's land mass in the Palawan area.[52]

In a note verbale dated 10 June 2013 to the Embassy of China in the Philippines, the Philippines stated that "the Philippines has long maintained a peaceful, continuous and effective presence at Ayungin Shoal [Ren'ai Jiao]".[53] The Philippines's accusations against China—"interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal", "preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal", and "endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal"—lay bare its design to stick around illegally on China's territory and provide proof that China's measures to safeguard its territorial sovereignty are legitimate and necessary.

The same applies to the Philippines' accusations against China's activities at sea in Submissions No. 10, 11, 13, and 14(d).

98. The above analysis shows that these submissions of the Philippines are all directed against the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. In *Legality of Use of Force (Yugoslavia v. Belgium, 1999)*, Yugoslavia put forward 13 submissions in the Memorial, and the ICJ determined that all these submissions are "directed, in essence, against the 'bombing

51 See China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea, 13 July 2016, para.97.

52 Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013) (Memorial of the Philippines, Vol. IV, Annex 93), p.2.

53 Note Verbale from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882 (10 June 2013) (Annex 219).

of the territory of the Federal Republic of Yugoslavia'",[54] therefore, the subject matter of the dispute is "the legality of those bombings as such, taken as a whole".[55] Following this logic, the Philippines' submissions in this case, although involving various aspects, are in essence directed against the territorial and maritime delimitation dispute between China and the Philippines. They should be treated as a whole rather than separate disputes.

*I.2.B. The true purpose of the Philippines' initiation of the Arbitration was to have the territorial and maritime delimitation issue between China and the Philippines in the South China Sea effectively resolved in its favor*

99. Upon initiating the arbitration, the Philippines asserted that "[t]he Philippines does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries."[56] Nevertheless, the Philippines' characterization of the disputes and its behavior associated with the Arbitration reveal that the true purpose of its unilateral initiation of this Arbitration was to have the territorial and maritime delimitation issue between China and the Philippines in the South China Sea effectively resolved in its favor.

100. In its note verbale dated 22 January 2013 to the Embassy of China in the Philippines concerning the initiation of arbitration, the Philippines characterized, in paragraph 1, the dispute presented as "the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea" and stated, in paragraph 2, that the purpose of initiating this Arbitration was "to seek a peaceful and durable resolution of the dispute".[57] The use of "dispute" in the singular stands out. It is thus clear that the Philippines characterized the dispute presented as one over maritime jurisdiction, i.e., a "jurisdictional dispute", and the purpose of initiating this Arbitration was to resolve it. As discussed earlier, the dispute over maritime jurisdiction is an important part of the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea.

101. Moreover, in paragraphs 34 and 39 of the Notification and Statement of Claim, the Philippines further used the "dispute" in the singular to describe the case presented. In paragraph 39 the Philippines broke the "dispute" in the singular into four categories of submissions. This description of the dispute and

54 Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p.124, at para.27.

55 Ibid., at para.28.

56 Notification and Statement of Claim of the Philippines (22 January 2013), in Memorial of the Philippines, Vol. III, Annex 1, para.7.

57 Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0211, 22 January 2013, in Memorial of the Philippines, Vol. III, Annex 2.

submissions indicates that although the Philippines put forward 13 submissions, there is only one dispute. Paragraph 34 stated that "the Philippines and China have failed to settle the dispute between them by peaceful means of their own choice"; and paragraph 39 also used the term of "the present dispute concerns".[58] The singular "dispute" was also used in the resolutions adopted by the Philippine Senate[59] and House of Representatives[60] in support of the Philippine government's initiation of arbitration against China, in statements by officials of the Philippine Department of Foreign Affairs to the press[61] and other countries.[62] All these instances show that "the present dispute", which this Arbitration was initiated by the Philippines to solve, is its territorial and maritime delimitation dispute with China in the South China Sea.

102. The claims or submissions presented in the Notification and Statement of Claim also has as the ultimate target the issue of territorial sovereignty and maritime delimitation. For example, in paragraph 31, the Philippines claimed, among others, that "[s]ubmerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and

58 Notification and Statement of Claim of the Philippines (22 January 2013), in Memorial of the Philippines, Vol. III, Annex 1, paras. 34, 39.

59 P.S. RES. No. 931, preambular para. 7 ("settle the dispute"), as cited in Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at n.81.

60 Philippine House Resolution No. 2008, preambular paras. 6 ("settle the dispute") and 7 ("bring the matter"), http://www.dfa.gov.ph/index.php/component/content/article/187-house-supp/7329-resolution-strongly-supporting-the-filing-of-an-arbitration-case-againt-china-under-article-287-and-annex-vii-of-the-united-nations-convention-of-the-law-of-the-seas-by-president-benigno-s-aquino-iii, last visited 25 May 2013.

61 Statement of 22 January 2013, http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7300-statement-by-secretary-of-foreign-affairs-albert-del-rosaro-on-the-uncl os-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps, last visited 25 May 2013; US Congressional Delegation Discusses Veterans1 Welfare, West Phl Sea with Secretary Del Rosario, 21 February 2013, http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7478-us-congressional-delegation-discusses-veterans-welfare-west-phl-sea-with-secretary-del-rosario, last visited 23 May 2013.

62 Statement of the Department of Foreign Affairs (DFA) Undersecretary Erlinda F. Basilio, in: PHL-Israel Meet to Strengthen Relations, Unveil Blueprint of Cooperation, 15 March 2013, as cited in Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at n.82.

cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention."[63] In paragraph 41, the Philippines requested the Tribunal to issue an Award that, in part:

> Declares that Mischief Reef and McKennan Reef are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on them violate the sovereign rights of the Philippines;
>
> Requires that China end its occupation of and activities on Mischief Reef and McKennan Reef;
>
> Declares that Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;
>
> Requires China to terminate its occupation of and activities on Gaven Reef and Subi Reef [ . . . .][64]

The features involved in the above claims and requests for relief are all indivisible part of China's Nansha Qundao. These claims and requests for relief would directly require the Tribunal to decide that China does not have sovereignty over the features and to determine that the maritime areas where the relevant features are located are under the Philippines' jurisdiction. To decide these claims necessitates addressing the issue of territorial sovereignty and maritime delimitation.

103. As the Arbitration proceeded, the Philippines seemed to have realized that it was too obvious that the Arbitration targeted the issue of territorial sovereignty and maritime delimitation, which would make it difficult for the Tribunal to establish its jurisdiction. Apparently in an attempt to cover up its true purpose, the Philippines in the Memorial submitted in March 2014 used "disputes" in the plural form, a reversal of its earlier usage, in order to show that its submissions constituted a number of individual disputes. For instance, in the note verbale dated 22 January 2013 to the Chinese Embassy, the Philippines claimed that it initiated the Arbitration "to seek a peaceful and durable resolution of the dispute in the West Philippine Sea",[65] with "dispute" in the singular. The singular form of "dispute" was also used in paragraphs

63 Notification and Statement of Claim of the Philippines (22 Jan. 2013), in Memorial of the Philippines, Vol. III, Annex 1, para.31.

64 Notification and Statement of Claim of the Philippines (22 Jan. 2013), in Memorial of the Philippines, Vol. III, Annex 1, para.41.

65 Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0211, 22 January 2013, in Memorial of the Philippines, Vol. III, Annex 2.

34, 36 and 39 of the Notification and Statement of Claim. However, in its Memorial, the Philippines described what it had said in that note verbale as:

> [O]n 22 January 2013 the Philippines invoked its rights under Section 2 of Part XV of the Convention to seek a peaceful and durable resolution of these disputes and formally initiated these proceedings by presenting the Chinese Ambassador in Manila with a Note Verbale along with its Notification and Statement of Claim.[66]

In the footnote to this passage, the Philippines cited the above-mentioned note verbale. Here the Philippines simply changed the singular "dispute" in the note verbale into the plural "disputes" without any indication or explanation, although the same sentence was used in both note verbale and the Memorial to describe the purpose of initiating this Arbitration.

This change of wording cannot conceal the true purpose of the Philippines in its unilateral initiation of the Arbitration, nor can such change alter the essence of the Philippines' submissions.

104. In fact, that the Arbitration was obviously aimed at the issue of territorial sovereignty and maritime delimitation is also made clear by what the Philippines has done after initiating the Arbitration.

105. It is the issue of territorial sovereignty that preoccupied Philippine entities and officials when they made statements about the Arbitration. On 23 January 2013, the day after the commencement of the proceeding, the Philippine Department of Foreign Affairs released a Statement of Secretary Albert del Rosario on the UNCLOS Arbitral Proceedings against China to achieve a peaceful and durable solution to the dispute in the West Philippine Sea[67] and a Guide Q & A on the Legal Track of the UNCLOS Arbitral Proceedings.[68] The latter document describes the purpose of initiating this Arbitration as to "protect our national territory and maritime domain" (Question 1) and "defend the Philippine territory and maritime domain" (Question 3), declares that "[a]t this stage, the legal track presents the most durable option to defend the national interest and territory on the basis of international law" (Question 6), talks about not "surrendering our national sovereignty" (Question 15), asks that "all Filipinos should unite to support the President's constitutional mandate to

66 Memorial of the Philippines, Vol. I, para.3.75.

67 Statement of Secretary Albert del Rosario on the UNCLOS Arbitral Proceedings against China to achieve a peaceful and durable solution to the dispute in the West Philippine Sea, http://www.officialgazette.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/.

68 Guide Q & A on the Legal Track of the UNCLOS Arbitral Proceedings, http://www.officialgazette.gov.ph/2013/01/22/dfa-guide-q-a-on-the-legal-track-of-the-unclos-arbitral-proceedings/.

protect Philippine territory and national interest" (Question 19), asserts that "[o]ne cannot put a price in the concerted effort of the Filipino people and government in defending our [ … ] territory [ … ]" (Question 25), and concludes that "[o]ur action is in defence of our national territory and maritime domain" (Question 26).

In its resolution in support of the Arbitration, the Philippine Senate stated:

> [T]he Philippines is left with no other option to peacefully settle the dispute but to proceed with bringing China to arbitration under Part XV of UNCLOS in order to protect Philippine sovereignty, territorial integrity and sovereign rights over its maritime domain.[69]

The Philippine Undersecretary of Foreign Affairs Erlinda F. Basilio also asserted that "the areas under dispute are legally the territory of the Philippines as guaranteed by international law".[70] In the 2014 State of Nation Address (SONA) Technical Report, published by the Office of the President of the Philippines in July 2014, the developments in the South China Sea Arbitration were presented under the heading of "Protected Territorial Integrity through the Promotion of the Rule of Law".[71] In the 2015 SONA Technical Report, published in July 2015, a summary of the further developments in the South China Sea Arbitration were placed under the heading of "Protected our National Territory and Boundaries".[72] Obviously, the above wordings all point to the territorial issue between China and the Philippines in the South China Sea.

106. The issue of maritime delimitation between China and the Philippines in the South China Sea was what the Philippines also attempted to resolve through this Arbitration. In the Notification and Statement of Claim, China was portrayed by the Philippines as a distant water fishing State or a flag State in the South China Sea.

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69 Fifteenth Congress of the Republic of the Philippines, Third Regular Session, P.S. RES. No. 931, Resolution preambular para.7 ("settle the dispute"), http://www.dfa.gov.ph/index.php/component/content/article/188-senate-supp/7336-senate-resolution-strongly-supporting-the-filing-of-an-arbitration-case-against-china-under-article-287-and-annex-vii-of-the-united-nations-convention-of-the-law-of-the-seas-by-president-benigno-s-aquino-iii?tmpl=component&print=1&page=, last visited 25 May 2013.

70 Phl-Israel Top Officials Meet to Strengthen Relations, Unfold Blueprint for New Areas of Cooperation, 04 March 2013, http://www.philippine-embassy.org.il/index.php?option=com_content&view=article&id=236:phl-israel-top-officials-meet-to-strengthen-relations-unfold-blueprint-for-new-areas-of-cooperation&catid=7:news&Itemid=25.

71 The Office of the President of the Philippines, The 2014 SONA Technical Report, pp.64-65, http://www.gov.ph/2014/07/28/2014-sona-technical-report/, last visited 8 June 2016.

72 See The Office of the President of the Philippines, The 2015 SONA Technical Report, pp.61-62, http://www.gov.ph/downloads/2015/2015-SONA-TECHNICAL-REPORT.pdf, last visited 8 June 2016.

Through a misleading description of the geographic framework of the South China Sea, the Philippines attempted to show that there exist no overlapping maritime entitlements therein between China and the Philippines, and that relevant maritime features and areas are part of the Philippines' exclusive economic zone or continental shelf; and, therefore, there is no issue of, and no need for, maritime delimitation. For example, paragraph 1 of the Notification and Statement of Claim asserts:

> The Republic of the Philippines brings this arbitration against the People's Republic of China to challenge China's claims to areas of the South China Sea and the underlying seabed as far as 870 nautical miles from the nearest Chinese coast, to which China has no entitlement under the 1982 United Nations Convention on the Law of the Sea ("UNCLOS", or "the Convention"), and which, under the Convention, constitute the Philippines' exclusive economic zone and continental shelf.[73]

Another example is paragraph 10 of the Notification and Statement of Claim which states:

> The Spratly Islands are a group of approximately 150 small features, many of which are submerged reefs, banks and low tide elevations. They lie between 50 and 350 M from the Philippine island of Palawan, and more than 550 M from the Chinese island of Hainan.[74]

107. In fact, the geographic framework of the South China Sea is far from what the Philippines described. China and the Philippines are maritime neighbours and "States with opposite or adjacent coasts" referred to in Articles 74 and 83 of the Convention. There exists a maritime delimitation situation in the South China Sea between the two States. The Philippines' submissions are closely related to the issue of maritime delimitation in the South China Sea between China and the Philippines. As China's Position Paper has pointed out, "[t]o decide upon any of the Philippines' claims [ … ] would unavoidably produce, in practical terms, the effect of a maritime delimitation [ … ]".[75]

108. The essence and true purpose of the Philippines' submissions are not lost on China. A Chinese Foreign Ministry spokesperson stated on 26 April 2013:

> Since the 1970s, the Philippines, in violation of the Charter of the United Nations and principles of international law, illegally occupied some islands and reefs of China's Nansha Islands, including Mahuan Dao, Feixin Dao, Zhongye

73 Notification and Statement of Claim of the Philippines (22 Jan. 2013), in Memorial of the Philippines, Vol. III, Annex 1, para.1.

74 Ibid., para.10.

75 China's Position Paper, para.29.

> Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling Jiao. [ … ]
>
> [ … ] In addition, by initiating the arbitration on the basis of its illegal occupation of China's islands and reefs, the Philippines has distorted the basic facts underlying the disputes between China and the Philippines. In so doing, the Philippines attempts to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of "legality". [ … ]
>
> [ … ] The claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines. Moreover, in 2006, the Chinese Government made a declaration in pursuance of Article 298 of UNCLOS, excluding disputes regarding such matters as those related to maritime delimitation from the compulsory dispute settlement procedures, including arbitration. [ … ][76]

China further elaborated this point in paragraphs 4-29 and 57-75 of its Position Paper. China emphasized:

> The subject-matter of the Philippines' claims is in essence one of territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention. Consequently, the Arbitral Tribunal has no jurisdiction over the claims of the Philippines for arbitration.[77]

China also pointed out:

> [ … E]ven assuming that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, it would still be an integral part of the dispute of maritime delimitation between the two States.

76 Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea (2013/04/26), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1035577.shtml.

77 China's Position Paper, para.9.

> Having been excluded by China's 2006 declaration, it could not be submitted to compulsory arbitration under the Convention.[78]

109. In conclusion, the essence of the Philippines' submissions is a matter of territorial sovereignty and maritime delimitation between China and the Philippines.[79] Whether the Tribunal has jurisdiction to consider the submissions depends on whether it has jurisdiction to address the territorial and maritime delimitation dispute between the two States. Manifestly having no jurisdiction over this dispute, the Tribunal had no jurisdiction over any of the Philippines' submissions. The Tribunal thus made a fundamental error in determining the nature of the subject matter of the Philippines' submissions. This fundamental error led to its further error in finding it had jurisdiction over this Arbitration.

## II. The Tribunal erroneously found that the Philippines' submissions do not relate to the territorial and maritime delimitation dispute between China and the Philippines and erroneously exercised jurisdiction over these submissions

110. As elaborated in the preceding section, the essence of the Philippines' submissions is the issue of territorial sovereignty and maritime delimitation between China and the Philippines, beyond the Tribunal's jurisdiction. However, the Tribunal in its Award on Jurisdiction found that the dispute concerning maritime entitlements reflected in the Philippines' first 14 submissions concerned neither land sovereignty nor maritime delimitation.[80] At the same time, the Tribunal found that the matters

78 Ibid., para.75.

79 This conclusion finds support in the writings of many international law experts. See, e.g., Chris Whomersley, The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique, 15 Chinese Journal of International Law (2016), p.239, at paras.23-34; Sreenivasa Rao Pemmaraju, The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.265, at paras.37-50; Stefan Talmon, The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.309, at paras.47-81; Chinese Society of International Law, The Tribunal"s Award in the "South China Sea Arbitration" Initiated by the Philippines is Null and Void, 15 Chinese Journal of International Law (2016), p.457, at paras.16-54; Tullio Treves, The South China Sea Dispute: Prospects After the 2016 Award, in Chinese Society of International Law and Hong Kong International Arbitration Centre, Proceedings of Public International Law Colloquium on Maritime Disputes Settlement (Hong Kong International Arbitration Centre, 2016), p.398; Michael Sheng-ti Gau, Issues of Jurisdiction in Cases of Default of Appearance, in Stefan Talmon and Bing Bing Jia (eds.), The South China Sea Arbitration: A Chinese Perspective (Oxford: Hart Publishing, 2014), p.81, at 98-101.

80 Award on Jurisdiction, paras.152-157, 398-411.

raised by the Philippines in Submissions No. 5, 8 and 9 may concern overlapping maritime entitlements, making it necessary to ascertain whether there exist overlapping maritime entitlements between China and the Philippines in the relevant areas before deciding whether it had jurisdiction;[81] and that Meiji Jiao and Ren'ai Jiao referred to in Submissions No. 12 and 14 may constitute land territory ("island" or "rock") and the Tribunal would have jurisdiction to consider the lawfulness of Chinese activities in relevant areas only if Meiji Jiao or Ren'ai Jiao does not constitute land territory.[82] In addition, the Tribunal found that the disputes reflected in Submissions No. 1 and 2 may fall into the category of the "[disputes] involving historic bays or titles" provided for in Article 298.[83] In the Award of 12 July, the Tribunal concluded that there existed no overlapping entitlements between China and the Philippines in the area of Meiji Jiao or Ren'ai Jiao;[84] that Meiji Jiao and Ren'ai Jiao were "low-tide elevations" that did not form part of the land territory of a State in the legal sense;[85] and that China had never claimed any "historic title" to the waters of the South China Sea.[86] Therefore, the Tribunal decided that it had jurisdiction over Submissions No. 1-13 and 14(d).[87]

111. This section addresses: (1) whether the Tribunal objectively and properly ascertained the essence of the Philippines' submissions; (2) whether the Tribunal's finding that the Philippines' submissions do not concern land sovereignty is justified; (3) whether the Tribunal's finding that the Philippines' submissions do not concern maritime delimitation is justified; (4) whether the Tribunal's finding that those Philippines' submissions involving historic rights are not excluded by China's 2006 Declaration is justified.

### *II.1. The Tribunal erred in characterizing the dispute reflected in the Philippines' submissions by adopting a fragmentation approach and failed to objectively and properly identify the territorial sovereignty and maritime delimitation essence of the Philippines' submissions*

112. On the basis of fact and evidence, Section I of this Chapter has objectively analysed the essence of the Philippines' submissions, and demonstrated that they reflect the different aspects of the territorial and maritime delimitation dispute between China and the Philippines and that the issues raised in the Philippines' submissions are intertwined with territorial sovereignty and maritime delimitation, such that they

81 Ibid., paras.157, 402, 405-406.
82 Ibid., paras.409, 411.
83 Ibid., paras.398-399.
84 Award of 12 July, para.633.
85 Ibid., paras.309, 378, 381.
86 Ibid., para.229.
87 Ibid., para.1203.A.(8).

cannot be considered in isolation. As also demonstrated, in order to circumvent the jurisdictional barrier, the Philippines deliberately fragmented the territorial and maritime delimitation dispute between China and the Philippines into various pieces, and camouflaged them as various isolated, free-standing-appearing disputes concerning merely maritime entitlements or activities at sea. The Philippines' fragmentation-camouflaging approach should not have escaped the Tribunal's eyes; it should have examined the Philippines' submissions objectively and identified their real nature. But it failed to perform its duty. The Tribunal found that the Philippines' Submissions No. 1 to 7 concern various aspects of the Parties' dispute over the sources and extent of maritime entitlements in the South China Sea,[88] and the Philippines' Submissions No. 8 to 14 concern a series of disputes concerning Chinese activities in the South China Sea.[89] It further found that "disputes between the Parties concerning the interpretation and application of the Convention exist with respect to the matters raised by the Philippines in all of its Submissions in these proceedings".[90] In so doing, the Tribunal failed to follow international jurisprudence, and accordingly its findings have no basis in fact or law.

113. An international court or tribunal has the duty to properly identify the real dispute in the case it is seized of. To do so, it must objectively characterize the subject-matters raised in the submissions presented and properly determine the nature of the submissions. Where the two parties have different views on the nature of the dispute or submissions and the party initiating the proceeding may camouflage its claims, it is especially important for the court or tribunal to perform this duty with great care. As the ICJ observed in *Nuclear Tests (Australia v. France; New Zealand v. France, 1974)*, "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim".[91] The ICJ reiterated this point with further emphasis in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile, 2015)*: "It is for the Court itself, however, to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim'."[92] The ICJ further said that, to this end, a court or a tribunal should "[examine] the positions of both parties, 'while giving particular attention to

88 Award on Jurisdiction, paras.164, 169, 172.

89 Ibid., para.173.

90 Ibid., para.178.

91 Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at para.29; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.30.

92 Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015, p.592, at para.26; see also Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, para.208.

the formulation of the dispute chosen by the [a]pplicant'."[93] Even the Tribunal acknowledged this point, by quoting from the opinions of the ICJ, and said that while determining the nature of a dispute, "an objective approach is called for, and the Tribunal is required to 'isolate the real issue in the case and to identify the object of the claim'."[94] Therefore, the Tribunal should examine objectively the relationship between the Philippines' claims and the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea on the basis of fact and evidence, so as to identify the real subject-matter and to determine whether it has jurisdiction. This is not only a general duty of the Tribunal but also one provided for in Article 9, Annex VII to the Convention.

114. Unfortunately, the Tribunal failed to follow such an objective approach, despite its express acknowledgement of the duty to do so. The Tribunal did not examine the facts objectively so as to identify the real issue in dispute. Instead, the Tribunal accepted the Philippines' fragmentation and camouflaging approach without considering whether it is proper to do so. Just as the Philippines did, the Tribunal deliberately fragmented the territorial and maritime delimitation dispute between China and the Philippines into various pieces and addressed them in isolation, thus effecting a cover-up of the very essence of the Philippines' submissions, which is the territorial sovereignty and maritime delimitation.

115. The Tribunal acknowledged the existence of a territorial dispute over some islands and reefs between China and the Philippines in the South China Sea, but it denied that the Philippines' submissions concern this dispute.[95] The Tribunal said that it "does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States".[96] The Tribunal did not provide any support for that assessment. In particular, it did not explain why and how such "success" would not detract from China's territorial sovereignty. The analysis below proves just the opposite.

93 Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015, p.592, at para.26; see also Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432, at para.30; Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p.832, at para.38; Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, para.208.

94 Award on Jurisdiction, para.150, citing Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.30, and Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, I.C.J. Reports 1995, p.288, at para.55 (*sic*).

95 See Award on Jurisdiction, para.153.

96 Ibid., para.153, citing Memorial of the Philippines, para.1.34.

116. The Tribunal did not see a maritime delimitation situation between China and the Philippines in the South China Sea, nor did it consider the determination of maritime entitlements in this delimitation situation as part of that delimitation. The Tribunal said,

> While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.[97]

Here the Tribunal did not take notice of the geographical framework for delimitation or the delimitation situation between China and the Philippines in the South China Sea, nor of the possibility that in such a situation, maritime entitlements constitute part of the maritime delimitation and cannot be addressed separately from delimitation. The Tribunal's statement—"a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention"—deals with situations totally different from the geographical framework and delimitation situation in the South China Sea, and is completely irrelevant to this Arbitration.

117. Had it adopted an objective approach to assess the nature of the Philippines' submissions on the basis of fact, and had it taken a quick look at the relevant statements and actions of China and the Philippines after the Arbitration was initiated (even without going into the details of the origin and development of the dispute between the two countries in the South China Sea), the Tribunal would not have any difficulty in reaching a conclusion that the Philippines' submissions reflect a territorial and maritime delimitation dispute and should be dealt with as part of the whole dispute. As China pointed out in its Position Paper:

> To sum up, by requesting the Arbitral Tribunal to apply the Convention to determine the extent of China's maritime rights in the South China Sea, without first having ascertained sovereignty over the relevant maritime features, and by formulating a series of claims for arbitration to that effect, the Philippines contravenes the general principles of international law and international jurisprudence on the settlement of international maritime disputes. To decide upon any of the Philippines' claims, the Arbitral Tribunal would inevitably have to

97 Ibid., para.156.

> determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea. Besides, such a decision would unavoidably produce, in practical terms, the effect of a maritime delimitation, which will be further discussed below in Part IV of this Position Paper.[98]

118. In fact, the awards themselves testify to the correctness of China's position. The Tribunal, in effect, did deal with the territorial and maritime delimitation dispute between China and the Philippines in both awards. For example, the Tribunal treated the eight islands and reefs of Nansha Qundao as separate, individual maritime features. By taking such an approach, the Tribunal disregarded China's position that it has sovereignty over Nansha Qundao as a whole, thus in effect addressing the territorial issue beyond its competence. Another example is that Meiji Jiao and Ren'ai Jiao of China's Nansha Qundao was declared by the Tribunal to constitute part of the Philippines' exclusive economic zone and continental shelf.[99] This actually would chop the two features off China's Nansha Qundao and dismember China's Nansha Qundao. Moreover, the Tribunal found that "none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf".[100] The Tribunal considered certain areas covered in the territorial and maritime delimitation dispute between China and the Philippines to be part of the Philippines' exclusive economic zone and continental shelf, in effect delimiting the maritime area between China and the Philippines. These instances all prove that it is impossible to deal with the Philippines' submissions without considering the territorial and maritime delimitation dispute between China and the Philippines.

119. In cases dealing with territorial and maritime delimitation disputes, an international court or tribunal often takes a holistic view of the dispute in objectively assessing the claims and identifying the real subject-matter. Such a course of action is the usual approach, as we can glean from the titles of a good number of cases at the ICJ, which show territorial and maritime components, such as *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening, 1992),*[101] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain, 1994),*[102] *Land and Maritime Boundary between Cameroon and Nigeria*

98 China's Position Paper, para.29.

99 Award of 12 July, paras.647, 1203.B.(7).

100 Ibid., para.1203.B.(7)b.

101 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p.351.

102 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112.

*(Cameroon v. Nigeria: Equatorial Guinea Intervening, 1996),*[103] and *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012).*[104]

*Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain, 1994)* is an illuminating example. To describe the issues to be submitted to the ICJ, the parties agreed on the "Bahraini formula":

> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters.[105]

In another document, they described the subject-matter of dispute as:

> All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together.[106]

Subsequently in the proceedings, the parties often used "matter",[107] in the singular, to describe the dispute. The ICJ concluded that the parties, as the "authors of the Bahraini formula", conceived of the formula "with a view to enabling the Court to be seized of the whole of those questions".[108] When it was found that Qatar's application contained only some of the elements of the subject-matter intended to be resolved by the Court, the Court decided to suspend the proceedings in order to afford the parties an opportunity to ensure the submission to the Court of the entire dispute, by a joint act or by separate acts.[109]

120. In other types of cases, a holistic, defragmentation approach was also applied by the ICJ to ascertain the real subject-matter presented in the claimant's submissions. For example, in *Legality of Use of Force (Yugoslavia v. Belgium, provisional measures, 1999)*, the Federal Republic of Yugoslavia (FRY) made a long list of claims, 13 in total, based on both *jus ad bellum* and *jus in bello*.[110] After careful examination, the Court found that these submissions were in essence directed against the bombing of

103 Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p.275.

104 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624.

105 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, at para.18.

106 Ibid., at para.37.

107 Ibid.

108 Ibid.

109 Ibid., at para.38.

110 Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p.124, at para.4.

the territory of the FRY. Thus, there was a legal dispute "concerning the legality of those bombings as such, *taken as a whole*".[111]

121. In this Arbitration, pursuant to the Convention and China's 2006 Declaration, the Tribunal manifestly had no jurisdiction over the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. Yet, by taking the fragmentation approach, the Tribunal distorted the subject-matter of the Philippines' submissions as some issues unrelated to territorial sovereignty and maritime delimitation so as to remove the obstacles to its jurisdiction. The Tribunal justified the fragmentation approach by resorting to the *Hostages in Tehran (United States v. Iran, 1980)* case:

> In the Tribunal's view, it is entirely ordinary and expected that two States with a relationship as extensive and multifaceted as that existing between the Philippines and China would have disputes in respect of several distinct matters. Indeed, even within a geographic area such as the South China Sea, the Parties can readily be in dispute regarding multiple aspects of the prevailing factual circumstances or the legal consequences that follow from them. The Tribunal agrees with the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[112]

The *Hostages in Tehran* case, cited by the Tribunal, is inapposite in this context. That case made a distinction between political issues and legal issues. Iran claimed that the Court could not consider the United States' claims separately from what it described as the "overall problem" between the two countries in the past 20 years.[113] In the Court's view, the overall political relationship between the two countries did not affect the Court's jurisdiction over specific legal issues. At issue in this Arbitration is not the relationship between political and legal issues, but the relationship between the Philippines' claims and the two countries' territorial and maritime delimitation dispute in the South China Sea. The Philippines' claims constitute various parts of this dispute between China and the Philippines, such that the Tribunal, having no jurisdiction over this dispute, naturally had no jurisdiction over its various parts, i.e. the Philippines' claims.

122. In any event, the Tribunal must ascertain the subject-matter of the dispute in order to decide its jurisdiction in accordance with the relevant provisions of the

111 Ibid., at para.28 (emphasis added).

112 Award on Jurisdiction, para.152, citing United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980, p.3, para.36.

113 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980, p.3, at para.37.

Convention. The fact that the Tribunal had no jurisdiction over a territorial dispute means that it had no jurisdiction over any part of that dispute. Similarly, the fact that a maritime delimitation dispute is excluded from the Tribunal's jurisdiction means that any part of it is also excluded. Simply fragmenting a dispute over which the Tribunal had no jurisdiction under the Convention into multiple free-standing-appearing issues does not, as result of that, give the Tribunal jurisdiction over these issues. The Tribunal's fragmentation approach goes against not only its basic duty to isolate the real issue in the case and to identify the true object of the claims, but also the consent principle which serves as the basis for international courts and tribunals to establish their jurisdiction.

123. Territorial and boundary matters are of grave importance in modern international relations, as the ICJ emphasizes in a series of cases.[114] The issue of territorial sovereignty and maritime delimitation in the South China Sea is no exception. These are particularly sensitive issues for China, haunted by a history of mistreatment in this regard. As former State Councillor Dai Bingguo put it on 5 July 2016 in Washington, D.C.:

> China suffered enough from hegemonism, power politics and bullying by Western Powers since modern times. The Versailles peace conference at the end of World War I forced a sold-out of Shandong Province. The Lytton Commission, sent by the League of Nations when Japan invaded China's north-east provinces, only served to justify Japan's invasion. Even the US-led negotiations on [the] San Francisco Peace Treaty excluded China. These episodes are still vivid in our memory. That is why China will grip its own future on issues of territorial sovereignty, and will never accept any solution imposed by a third party.[115]

124. Because the subject-matter of the Arbitration concerns territorial sovereignty and maritime delimitation, China has maintained its clear and consistent position of non-acceptance of and non-participation in this Arbitration since its initiation. The Tribunal should have taken a cautious attitude towards ascertaining the subject-matter and objective approach to evaluating fact and evidence. Instead, the Tribunal hastily settled on the nature of the Philippines' claims and distorted the matters constituting parts of the territorial and maritime delimitation dispute as mere disputes

114 See Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014, p.3, at para.91; Territorial and Maritime Dispute (Nicaragua v. Colombia), I.C.J. Reports 2012, p.624, at para.219; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), I.C.J. Reports 2007, p.659, at para.253.

115 Dai Bingguo, China committed to peaceful resolution of disputes, end of Section 2, http://www.china.org.cn/world/2016-07/06/content_38818850.htm.

"concerning the interpretation or application of the Convention", and proceeded to erroneously establish its jurisdiction.

*II.2. The Tribunal, on the basis of subjective assumption instead of fact, erroneously found that the Philippines' submissions do not relate to territorial sovereignty*

125. The Tribunal had no jurisdiction over territorial disputes. In order to decide whether it has jurisdiction over the case, it is necessary to ascertain the relationship between the Philippines' submissions and territorial sovereignty. Although it accepted that a dispute concerning sovereignty over maritime features in the South China Sea exists, the Philippines claimed that "[n]one of [the Philippines'] submissions require the Tribunal to express any view at all as to the extent of China's sovereignty over land territory, or that of any other state", thus the existence of the dispute over sovereignty has no effect on the Tribunal's jurisdiction in this case.[116] With respect to this argument by the Philippines, the Tribunal has a duty to examine it objectively. It failed to do so. As China's Position Paper states, "The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention."[117] The Position Paper also points out: "To decide upon any of the Philippines' claims, the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea."[118] Therefore, the Tribunal manifestly had no jurisdiction over the present case.

126. The Tribunal knows full well that the Convention does not deal with territorial disputes.[119] It put forward two situations in which the Philippines' submissions could be understood to relate to sovereignty, and found that neither was the case here. The Tribunal said:

> The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing. The Tribunal likewise does not see that any of the Philippines' Submissions require an implicit

116 Award on Jurisdiction, para.141, quoting Jurisdictional Hearing Tr. (Day 1), pp.61-62.

117 China's Position Paper, paras.3-29.

118 Ibid., para.29.

119 See Award on Jurisdiction, paras.152-154.

> determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' Submissions from the premise—as the Philippines suggests—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys. The Tribunal is fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines' Submissions, intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea. Nor does the Tribunal understand the Philippines to seek anything further. The Tribunal does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.[120]

For the reasons set out above, the Tribunal concluded that "[it] does not accept the objection set out in China's Position Paper that the disputes presented by the Philippines concern sovereignty over maritime features",[121] and that the disputes reflected in the Philippines' 14 submissions do not concern sovereignty.[122]

127. The Tribunal's findings above were made hastily based on subjective assumption instead of fact and evidence. Most striking is the lack of an objective assessment of the potential effect of the success of the Philippines' submissions on China's territorial sovereignty over Nanhai Zhudao. As is clear from the language quoted above, the two situations put forward by the Tribunal in fact embody two separate criteria for assessing the relationship between the Philippines' submissions and territorial sovereignty. But the Tribunal failed to apply the two criteria and just blindly accepted whatever the Philippines had claimed. The Tribunal also failed to give serious consideration to the positions raised by China, which it recognized as "objections" to its jurisdiction, on the basis that the Philippines' submissions involve territorial sovereignty. Indeed, the Tribunal failed to give proper effect to China's positions. The Tribunal's finding that the Philippines' submissions do not relate to territorial sovereignty is clearly untenable.

*II.2.A. The Tribunal failed to apply its own criteria faithfully to assess whether the Philippines' submissions relate to territorial sovereignty*

128. As discussed above, the Tribunal put forward two separate criteria to assess whether the Philippines' submissions relate to territorial sovereignty: (a) whether the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly ("premise criterion" for convenience); or (b) whether the actual objective of the Philippines' claims was to advance

120 Ibid., para.153 (internal footnotes omitted).

121 Ibid.

122 See ibid., paras.398-411.

its position in the two countries' dispute over sovereignty, or to detract from China's claims in the dispute over territorial sovereignty in the South China Sea ("actual objective and effect criterion" for convenience). The Tribunal simply hoisted the two criteria, but never applied them faithfully. In fact, it simply took at face value whatever the Philippines stated as its purpose in presenting its submissions, without conducting any objective assessment of the Philippines' claims or its real intent. The Tribunal simply asserted its conclusions, failing to provide any real analysis as to whether or not the Philippines' submissions would potentially detract from China's claims to sovereignty. In short, the Tribunal's finding does violence to objectiveness and justice.

*(1) The Tribunal simply took at face value whatever the Philippines stated as its purpose when applying the "premise criterion"*

129. With respect to the "premise criterion", the Tribunal found no situation in which it was convinced that the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly. The Tribunal reasoned as follows. First, "the Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing." Second, "[t]he Tribunal likewise does not see that any of the Philippines' Submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' Submissions from the premise—as the Philippines suggests—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys."[123] Obviously, such reasoning is not tenable.

130. First, the Tribunal failed to distinguish between whether objectively the resolution of the Philippines' claims would require it to first render a decision on sovereignty and whether the Philippines requested it to rule on land sovereignty. The Tribunal was under an obligation to ascertain the nature of the Philippines' claims, on the basis of fact rather than the Philippines' ostensible assertion. The Philippines' ostensible assertion is only one factor which the Tribunal had to take into consideration, but not at all a decisive one. Indeed, the Philippines' submissions ostensibly did not require the Tribunal to first render a decision on territorial sovereignty. However, to find out whether the Philippines' submissions would require the Tribunal to first render a decision on territorial sovereignty expressly or implicitly, it is not sufficient at all for the Tribunal to simply parrot that "the Philippines has not asked [ … ]" and "[t]he Tribunal likewise does not see [it]" in its determination. The Tribunal acknowledged that "it is for the Court itself 'to determine on an objective basis the dispute dividing the parties, by examining the position of both parties'", and that "[s]uch a determination will be based not only on the 'Application and final submissions, but on

123 Ibid., para.153.

diplomatic exchanges, public statements and other pertinent evidence'".[124] Yet, the Tribunal did not point to any fact or evidence at all. In fact, had an objective approach been adopted, the Tribunal would have had no difficulty finding that the resolution of the Philippines' claims regarding maritime entitlements would require it to first render a decision on the sovereignty over relevant islands and reefs; that the resolution of the Philippines' submissions concerning the legality of China's activities in the areas of the islands and reefs would require the Tribunal to first render decisions on both the sovereignty over relevant maritime features and the delimitation in that area.

It should not be neglected, when taking at face value the Philippines' assertions, the Tribunal took a selective approach to presenting those assertions. It cherry-picked for it to accept at face value only those favourable to its establishment of jurisdiction or detracting from China's position, but completely ignored those conducive to revealing the real purpose of the Philippines' claims and therefore unfavourable to its establishment of jurisdiction or supporting China's position, such as the abovementioned statements by the Philippine officials and Congress.

131. Second, the Tribunal maintained that it could approach the Philippines' submissions on the premise that China is correct in its assertion of sovereignty over Huangyan Dao and Nansha Qundao, and proceeded to reach the conclusion that the Philippines' submissions were not related to sovereignty. The Tribunal erred.

It is doubtful whether in a contentious case a tribunal may proceed on an assumed premise. In any event, the fact that the Tribunal found it necessary to assume China's sovereignty as a premise shows that sovereignty is not an irrelevant factor in this Arbitration, and that the Philippines' submissions cannot be divorced from territorial sovereignty.

Furthermore, the Tribunal did not truly proceed on that premise to conduct its analysis. If it had done so, it should have based its analysis on China's view on or how it formulates its sovereignty over the relevant features. China's position is very clear: China has indisputable sovereignty over Zhongsha Qundao, of which Huangyan Dao is a part, and Nansha Qundao, of which the eight features involved in Submissions No. 4, 5, 6 and 7 are a part. China's sovereignty over these two archipelagos each as an integral whole should be the foundation on which the Tribunal built its analysis. It would have found that the Philippines' claims regarding the status of the relevant maritime features and their entitlements (Submissions No. 3 through No. 7) have obviously aimed at China's territorial sovereignty in the South China Sea, and accordingly the Tribunal has no jurisdiction over them. With respect to the features in Nansha Qundao, the Philippines' submissions require the Tribunal to separately determine the status of each of them and their entitlements, which is obviously in contradiction with China's territorial sovereignty over the Nansha Qundao as a whole.

124 Ibid., para.150, quoting Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432, at paras.30-31.

132. Third, the Tribunal said, "the Philippines has not asked the Tribunal to rule on sovereignty". Although the Philippines' statements to the Tribunal gave such an impression, the truth is the opposite. For example, Meiji Jiao, Ren'ai Jiao and Zhubi Jiao are the components of Nansha Qundao over which China fully enjoys territorial sovereignty. The Philippines requested, in its Submissions No. 4 and 5, the Tribunal to determine that Meiji Jiao, Ren'ai Jiao and Zhubi Jiao cannot be appropriated as land territory and that "Mischief Reef [Meiji Jiao] and Second Thomas Shoal [Ren'ai Jiao] are part of the exclusive economic zone and continental shelf of the Philippines". Obviously, by these two submissions, the Philippines in effect has asked the Tribunal to decide on issues of territorial sovereignty, not, as the Tribunal said, "has requested that the Tribunal refrain from so doing". The Tribunal has a duty to take account of this and to decide accordingly that it had no jurisdiction to consider the relevant subject-matters.

133. Fourth, it is impossible for the Tribunal to resolve the Philippines' submissions without first rendering a decision on territorial sovereignty. As China's Position Paper points out in paragraph 18,

> In the present case, the Philippines denies China's sovereignty over the maritime features in question, with a view to completely disqualifying China from making any maritime claims in respect of those features. In light of this, the Philippines is putting the cart before the horse by requesting the Arbitral Tribunal to determine, even before the matter of sovereignty is dealt with, the issue of compatibility of China's maritime claims with the Convention.[125]

For example, in Submission No. 10, the Philippines claimed that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities" at Huangyan Dao. In its Award of July 12, the Tribunal upheld the Philippines' claim by referring to *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom, 2015*), which stated that "Article 2(3) contains an obligation on States to exercise their sovereignty subject to 'other rules of international law'."[126] The Tribunal also said, "Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea."[127] Obviously, the application of "other international law" which is provided in Article 2(3) would require the

125 Subsequently the Tribunal's acceptance of the Philippines' approach was regarded as "putting the status cart before the sovereignty horse". See Chris Whomersley, The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China — A Critique, 15 Chinese Journal of International Law (2016), p.239, at para.36.

126 Award of 12 July, para.808, quoting Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, para.514.

127 Ibid., para.808 (internal footnote omitted).

Tribunal to first rule or deem the area as part of the territorial sea. But Huangyan Dao is part of China's territory and China has not yet announced the basepoints in this region. The limits of China's internal waters and territorial sea in this region are yet to be specified. Given the above, it would be impossible for the Tribunal to determine whether or not the relevant area is within China's territorial sea without dealing with the sovereignty over Huangyan Dao or taking over China's role in exercising sovereignty. As a result, the Tribunal's conclusion that its jurisdiction to resolve the Philippines' submission No. 10 would not require it to first render a decision on the sovereignty over Huangyan Dao is not justified.[128]

Take another example, the Philippines' Submission No. 13, as read by the Tribunal, related principally to China's operation of its law enforcement vessels in the territorial sea of Huangyan Dao. Invoking Articles 21, 24 and 94 of the Convention, the Philippines alleged that "China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal [Huangyan Dao]". The Tribunal noted that "the provisions of the Convention invoked by the Philippines impose duties on both the coastal State and on vessels engaged in innocent passage" and "[t]he Tribunal's jurisdiction is thus not dependent on a prior determination of sovereignty over Scarborough Shoal [Huangyan Dao]."[129] Such a conclusion as made by the Tribunal is flawed. Article 21 of the Convention is entitled "Laws and regulations of the coastal State relating to innocent passage". Article 21(1) and (3) provides that the coastal State may adopt laws and regulations and shall give due publicity to all such laws and regulations. Article 21(4) provides that, "Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea." Article 24 is entitled "Duties of the coastal State" and provides in paragraph 1 that "[t]he coastal State shall not hamper the innocent passage of foreign ships through the territorial sea [ … ]". The above provisions expressly set out the rights and obligations of the coastal State in its territorial sea. As discussed above, the limits of China's internal waters and territorial sea in this region are yet to be specified. The resolution of the Philippines' Submission No. 13 would thus require the Tribunal to first deal with the sovereignty over Huangyan Dao or to take over China's role in exercising sovereignty. Only then would it be possible to tell, between China and the Philippines, which is the coastal State and which is the foreign State whose vessels were conducting innocent passage. But the Tribunal had no jurisdiction to do so.

128 See Award on Jurisdiction, para.407.

129 Ibid., para.410.

*(2) The Tribunal failed to ascertain the actual objective of the Philippines' submissions when applying the "actual objective and effect criterion"*

134. The Tribunal said that the Philippines' submissions could be understood to relate to sovereignty if it were convinced that the actual objective of the Philippines' claims was to advance its position in the two countries' dispute over sovereignty. After noting that the Philippines' submissions did not seek an express or implicit ruling on sovereignty, the Tribunal, without objectively examining the Philippines' submissions, concluded:

> Nor does the Tribunal understand the Philippines to seek anything further. The Tribunal does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.[130]

135. As to whether or not the Philippines intended to "seek anything further", the Tribunal could not simply make a conclusory statement and parade it behind "The Tribunal does not see [ … ]", as if these words alone proved its assertion. The answer should rather be given after a thorough examination of not only the Philippines' written and oral pleadings, but also its diplomatic exchanges, public statements and other pertinent evidence. Therefore, as discussed above in paragraphs 113 and 130, the Tribunal has a duty to examine the positions of both States and give particular attention to the formulation of the dispute chosen by the applicant. However, the Tribunal failed to fulfil this duty. As shown in Section I of Chapter Two, the Philippines' real intention of initiating the Arbitration was to "effectively resolve" the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. The facts and evidence on this point include the note verbale dated 22 January 2013 from the Philippines to China, the Notification and Statement of Claim, the statements regarding the Arbitration by the Government, Senate, House of Representatives and some high-ranking officials of the Philippines, the Philippines' Memorial of 30 March 2014, the documents issued by the Philippines' Government, as well as the statements concerning the Arbitration by spokespersons of the Chinese Ministry of Foreign Affairs, and China's Position Paper of 7 December 2014.[131] All these documents demonstrate that a most important real objective of the Philippines' submissions is to advance its position in the two countries' dispute over territorial sovereignty. The words "The Tribunal does not see [ … ]" simply serve to cover up how groundless the Tribunal's conclusion on the Philippines' real intention was.

130 Ibid., para.153.

131 See Section I of Chapter Two.

136. In *Chagos Marine Protected Area*, Mauritius' Submissions No. 1 and 2 in part asked for a decision on which was the "coastal State" under the Convention. With respect to whether Submission No. 2 constituted a territorial sovereignty dispute, the tribunal there said it "agrees with Mauritius that the issues presented by its First and Second Submissions are distinct, but is nevertheless of the view that Mauritius' Second Submission must be viewed against the backdrop of the Parties' dispute regarding sovereignty over the Chagos Archipelago", and that "[t]he Tribunal evaluates where the weight of the Parties' dispute lies".[132] This logic must be followed by this Tribunal, and the Philippines' submissions should be viewed against the backdrop of the territorial dispute between China and the Philippines in the South China Sea.

To illustrate this point, we may take, as an example the matter of China's activities at Meiji Jiao which was raised by the Philippines in Submission No. 12. With respect to the nature of the dispute, the Philippines presented several internal memoranda as evidence. But, several memoranda dated before 2009 clearly indicate that the Philippines regarded Meiji Jiao as a part of its territory.[133] China maintains that Meiji Jiao is an integral part of Nansha Qundao and emphasizes that "it is the sovereign prerogative of the Chinese Government to undertake repair and renovation works" on Meiji Jiao.[134] Although the Philippines claimed in this case that Meiji Jiao cannot be appropriated and forms part of its continental shelf, such a claim does not change the territorial sovereignty nature of the submission.

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132 See Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, at para.229. Mauritius requested the Tribunal there, in its first two submissions, to adjudge and declare: (1) the United Kingdom is not entitled to declare an "MPA" or other maritime zones because it is not the "coastal State" within the meaning of inter alia Articles 2, 55, 56 and 76 of the Convention; and/or (2) having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an "MPA" or other maritime zones because Mauritius has rights as a "coastal State" within the meaning of inter alia Articles 56(1)(b)(iii) and 76(8) of the Convention. Award on Jurisdiction, para.158.

133 As quoted in Memorandum from the Undersecretary of Foreign Affairs of the Republic of the Philippines to the Ambassador of the People's Republic of China in Manila (6 Feb. 1995), Memorial of the Philippines, Vol. III, Annex 17, Aide Memoire; Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-77-98-S (9 Nov. 1998), Memorial of the Philippines, Vol. III, Annex 34, Points b & e; Memorandum from Lauro L. Baja, Jr., Undersecretary for Policy, Department of Foreign Affairs, Republic of the Philippines [sic] to all Philippine Embassies (11 Nov. 1998), Memorial of the Philippines, Vol. III, Annex 35, p.1.

134 Memorandum from the Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998), Memorial of the Philippines, Vol. III, Annex 33, Point.2.

Another example is the Philippines' Submission No. 14 relating to China's interaction with the Philippine military forces stationed at Ren'ai Jiao. The Philippines provided two pieces of evidence, which were confidential or internal documents produced after the initiation of the Arbitration, to show the claimed nature of the dispute reflected in Submission No. 14. One is a Memorandum from the Secretary of Foreign Affairs to the President dated 23 April 2013,[135] and the other, a letter from a Major General of the Armed Forces of the Philippines (AFP), writing for the Chief of Staff, AFP, to the Secretary of Foreign Affairs dated 10 March 2014.[136] These documents asserted that "Ayungin Shoal is a Philippine territory"[137]. This is in contradiction to China's position that Ren'ai Jiao is part of its Nansha Qundao. Although Submission No. 4 claimed that Ren'ai Jiao is a low-tide elevation and incapable of appropriation, what the Philippines did there, including running a naval ship aground, and the above-mentioned confidential and internal documents all evince the concealed but real intention of the Philippines was to appropriate Ren'ai Jiao as land territory.

137. The Tribunal said that "the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States."[138] This statement is misleading. "Narrowing the issues in dispute between the two States" is no proof that the Philippines' submissions were not made to advance its position in the territorial dispute with China. In fact, the Philippines was trying to narrow down the territorial and maritime delimitation dispute with China, thereby settling it *sub silentio* in part.

*(3) The Tribunal did not take into account the effect that resolving the Philippines' submissions may have on China's sovereignty over Nanhai Zhudao when applying the "actual objective and effect criterion"*

138. The Tribunal declared:

> The Tribunal is fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines' Submissions, intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea. [ … ] The Tribunal

135 Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013), Memorial of the Philippines, Vol. IV, Annex 93.

136 Letter from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 Mar. 2014), Memorial of the Philippines, Vol. IV, Annex 99.

137 Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013), Memorial of the Philippines, Vol. IV, Annex 93, p.2.

138 Award on Jurisdiction, para.153.

> does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims.[139]

Similar to "The Tribunal does not see" discussed above, the same words used again here also serve to cover up the Tribunal's groundless conclusory statement. The Tribunal paid no regard to the fact that addressing the Philippines' claims may advance the Philippines' position in the territorial dispute and detract from China's sovereignty, and supporting the Philippines' claims means detracting from China's sovereignty. The result of the Arbitration proves this. For example, the Philippines singled out eight islands and reefs from Nansha Qundao as independent maritime features in Submissions No. 4 through 7, in disregard of the fact that China has sovereignty over Nansha Qundao as a whole. The Tribunal's addressing these submissions in itself detracts from China's sovereignty over Nansha Qundao as a whole.

139. When establishing its jurisdiction, the Tribunal said that it "intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea". The Tribunal's words "intends to ensure" here are no more than lip service. Instead of fulfilling that promise, the Tribunal did the opposite in the Award of 12 July. For instance, China has sovereignty over Nansha Qundao as a whole; Meiji Jiao, Ren'ai Jiao, Zhubi Jiao, Nanxun Jiao, and Dongmen Jiao are part of Nansha Qundao and, as such, are a part of Chinese territory. But the Tribunal declared that they are incapable of appropriation.[140] Another example is the Tribunal's decision that Meiji Jiao and Ren'ai Jiao, which are part of China's Nansha Qundao, are within the Philippines' exclusive economic zone and continental shelf.[141]

The Tribunal's findings would in effect dissect certain islands and reefs from Nansha Qundao, which would detract from China's sovereignty over Nansha Qundao. The inconsistency between the Tribunal's words and deeds and its ultimate conclusions prove that the Philippines' submissions inevitably relate to sovereignty, which cannot be circumvented by the Tribunal. As China has pointed out in its Position Paper, "To decide upon any of the Philippines' claims, the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea."[142]

*(4) The Tribunal departed from the* Chagos Marine Protected Area *arbitration without providing any particular reasons for doing so*

140. Mauritius' Submissions No. 1 and No. 2 in the *Chagos Marine Protected Area* arbitration and the Philippines' submissions are analogous in nature. The position

139 Ibid., para.153.

140 Award of 12 July, para.1203.B.(4)-(5).

141 Ibid., para.1203.B.(7).

142 China's Position Paper, para.29.

advanced by the United Kingdom and its supporting reasoning and evidence in its objection to jurisdiction are basically of the same nature as those elaborated by China in its public statements and the Position Paper which the Tribunal here took as "effectively" constituting objections to its jurisdiction. In *Chagos Marine Protected Area*, the arbitral tribunal found that Mauritius' first two submissions concerned land sovereignty.[143] In this Arbitration, the Tribunal went to the opposite, finding that the Philippines' submissions do not concern territorial sovereignty. It explained:

> In this respect, the present case is distinct from the recent decision in *Chagos Marine Protected Area*. The Tribunal understands the majority's decision in that case to have been based on the view both that a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims.[144]

141. The Tribunal declared that this Arbitration was distinct from *Chagos Marine Protected Area*, but it failed to provide any particular evidence and reasoning. When departing from earlier cases, a tribunal has a duty to provide particular, cogent reasons for doing so. As stated by the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, 1998)*, "in accordance with Article 59 [of the Statute of the International Court of Justice], the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[145] In another case, the Court put this in slightly different words, "it will not depart from its settled jurisprudence unless it finds very particular reasons to do so".[146] Unfortunately, the Tribunal, when departing from *Chagos Marine Protected Area* and concluding that this Arbitration would not require a decision on sovereignty, simply said the present case was distinct from *Chagos Marine Protected Area*, and gave its reading of that case, without more.

142. In *Chagos Marine Protected Area*, Mauritius argued that its Submissions No. 1 and 2 concerned the interpretation or application of the relevant provisions of the Convention, and that adjudicating them was not premised on a prior decision on

143 See Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, paras.212, 230.

144 Award on Jurisdiction, para.153.

145 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p.292, at para.28.

146 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p.412, at para.53.

sovereignty.[147] The United Kingdom maintained, however, that sovereignty over the Chagos Archipelago constituted the real issue in the two submissions, which issue falls outside the scope of the dispute settlement provisions in Part XV of the Convention.[148] It is worth noting that, in its Counter-Memorial, the United Kingdom referred to the *South China Sea Arbitration*, specifically mentioning the similarity of the two cases and even quoting the statement of a spokesperson of China's Ministry of Foreign Affairs to support its claims:

> [I]n the recent Part XV proceedings brought against China, the Philippines asserts that it "does not in this arbitration seek a determination of which party enjoys sovereignty over the islands claimed by both of them". Thus the Philippines seeks to avoid asking the tribunal in that case to make determinations equivalent to those sought by Mauritius before this Tribunal". However, notwithstanding the formulation of the Philippines' claim, the spokesperson of China's Ministry of Foreign Affairs stated on 26 April 2013:
>
> > "The claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines".[149]

This makes clear that the Philippines' submissions and Mauritius' submissions are similar in nature, whatever phrasing adopted. The tribunal there endorsed the UK's position and held that Mauritius' Submissions No. 1 and 2 did concern territorial sovereignty beyond its jurisdiction. This Tribunal should have followed the holding in *Chagos Marine Protected Area* and found the Philippines' submissions concern territorial sovereignty.

143. In *Chagos Marine Protected Area*, what was the basis for the tribunal there to conclude that "a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty" and that "sovereignty was the true object of Mauritius' claims"? The answer is fact and evidence.

147 Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, paras.175-177, 226-227.

148 Ibid., paras.164, 169-173, 223-225.

149 Chagos Marine Protected Area (Mauritius v. United Kingdom), Counter-Memorial submitted by the United Kingdom, 15 July 2013, para.4.50 (internal footnotes omitted).

144. Although Mauritius already referred to specific provisions of the Convention in each of its submissions, the arbitral tribunal there did not simply take them at face value, but conducted a thorough examination of the facts and evidence. On the basis of that examination, the tribunal decided that the two submissions did concern Chagos' land sovereignty such that it had no jurisdiction. The evidence accepted by the arbitral tribunal included bilateral communications and Mauritius' statements to the United Nation. It noted that there was an extensive record, extending across a range of fora and instruments, documenting the Parties' dispute over sovereignty and, in contrast, prior to the initiation of these proceedings, there was scant evidence that Mauritius was specifically concerned with the United Kingdom's implementation of the Convention on behalf of the British Indian Ocean Territory (BIOT).[150] Accordingly, the tribunal concluded that "the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago" and "[t]he Parties' differing views on the 'coastal State' for the purpose of the Convention are simply one aspect of this larger dispute."[151] With respect to Mauritius' Submission No. 2, the arbitral tribunal agreed with Mauritius that the issues presented in its first and second submissions were distinct, but it was nevertheless of the view that "Mauritius' Second Submission must be viewed against the backdrop of the Parties' dispute regarding sovereignty over the Chagos Archipelago."[152] Eventually, it concluded that the true object of the claim in the submissions is to bolster Mauritius' claim to sovereignty over the Chagos Archipelago.[153]

145. In retrospect, the Tribunal in this Arbitration just asserted a conclusion without giving any reason. It took at face value the Philippines' submissions without examining the relevant fact in an objective way. Had the Tribunal taken an objective approach, to which the Tribunal repeatedly paid lip service, it would have concluded that, as elaborated in Section I, the subject-matter in the Philippines' submissions concern the territorial dispute between China and the Philippines in the South China Sea, beyond its jurisdiction.

*II.2.B. The Tribunal failed to give effect to China's objections to the Tribunal's jurisdiction on the basis of the territorial sovereignty nature of the Philippines' submissions*

146. The Tribunal decided to treat China's Position Paper and the relevant communications as "effectively" constituting preliminary objections to jurisdiction.[154] As

150 Chagos Marine Protected Area (Mauritius v. United Kingdom), Award of 18 March 2015, Arbitral Tribunal under Annex VII of the UNCLOS, para.211.

151 Ibid. para.212.

152 Ibid., para.229.

153 Ibid., para.230.

154 Procedural Order No. 4, para.1.1, cited in Award on Jurisdiction, para.68.

pointed out above, the Tribunal put forward two separate criteria to assess whether the Philippines' submissions relate to territorial sovereignty. But it failed to take an objective approach in analysing the relevant facts. In some instances, it did not take cognizance of China's objections at all. In any event, it did not give proper effect to China's objections to its jurisdiction based on the territorial sovereignty nature of the Philippines' submissions.[155] The Tribunal's approach goes against its obligation to ascertain the facts, departs from international jurisprudence, and does violence to fundamental procedural justice.

147. In the practice of the ICJ, with regard to objections to jurisdiction raised by a State not participating in the proceedings, "the Court not only took into account such extra-procedural communications from the respondent for the purpose of satisfying itself as to whether its jurisdiction was established, but also substantively considered such communications to ascertain the attitude of the respondent with regard to its objection to the jurisdiction of the Court".[156] As has been also pointed out by another scholar, "The rule of law requires not only that a party's arguments be taken cognizance of, but also be given proper effect in the tribunal's decision."[157] In practice, international courts and tribunals always substantively examine one party's objections to jurisdiction, analyse them, and respond to them.

148. Having treated China's extra-procedural objections to jurisdiction as "effectively" constituting a plea on jurisdiction and decided to bifurcate the proceedings to consider jurisdiction first, the Tribunal should have examined China's positions and arguments one by one before reaching any conclusion. Instead, the Tribunal devoted the Award on Jurisdiction to supporting the Philippines' positions. As to China's objections and arguments, the Tribunal merely summarized them in the "China's Position" sections. There is no pertinent or meaningful response to many of China's positions and arguments in the "Tribunal's Decision" sections, which basically reflected the Philippines' and the Tribunal's views. The Tribunal failed to pay proper regard, not to mention give proper effect, to China's forceful objections to jurisdiction because Philippines' submissions relate to territorial sovereignty.

155 The analysis here also applies to the Tribunal's cavalier treatment of China's objections to its jurisdiction because the Philippines' submissions concern maritime delimitation, see II.3 and II.4.

156 Xue Hanqin, Judicial Practice of the International Court of Justice in the Settlement of Territorial and Maritime Disputes and A Few Observations on the Arbitral Awards in the South China Sea Case, in Chinese Society of International Law and Hong Kong International Arbitration Centre, Proceedings of Public International Law Colloquium on Maritime Disputes Settlement (Hong Kong International Arbitration Centre, 2016), p.16, at 22.

157 Sienho Yee, The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns, 15 Chinese Journal of International Law (2016), p.219, at para.17.

149. First, with respect to form, the Tribunal either failed to do justice to or deliberately ignored China's position and arguments. One contrast is striking. China's Position Paper devotes three sections and 72 paragraphs to the argument that the Tribunal had no jurisdiction,[158] of which Section II contains 26 paragraphs elaborating the position that "[t]he essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which does not concern the interpretation or application of the Convention". In response to China's specific positions and detailed arguments, the Tribunal just presented three paragraphs which contain almost nothing that can be regarded as assessment of China's specific points and reasoning.[159] In the end, the Tribunal baldly said that it did not accept China's positions. This defies comprehension.

The Award on Jurisdiction contains about 413 paragraphs in 150 pages. A total of 284 paragraphs (130-413) in 107 pages are devoted to discussing whether or not the Tribunal had jurisdiction. In its Position Paper, China spent as many as 26 paragraphs objecting to the Tribunal's jurisdiction based on the territorial sovereignty nature of the Philippines' submissions, but only 3 paragraphs, lasting merely one and a half pages, are what all the Tribunal used to respond. In contrast, on its effort to respond to China's 27-paragraph-long objection that China and the Philippines have chosen negotiation as the means to settle their territorial and jurisdictional dispute, the Tribunal lavished 43 paragraphs (212-229, 241-251, 265-269, 281-289); 6 further paragraphs (256-258, 274-276) were devoted to speculating on China's "possible objections". With respect to whether or not the dispute settlement arrangement in the Treaty of Amity and Cooperation in Southeast Asia applies so as to exclude the Tribunal's jurisdiction, the treaty itself already expressly states that such an arrangement shall not preclude recourse to other methods. The Chinese government did not consider it necessary to say anything about it. Yet, the Tribunal treated the arrangement in that treaty as one of the bases on which China may object to its jurisdiction, devoted 18 paragraphs (252-269) lasting almost 5 pages to a discussion of the application of Article 281 of the Convention, and finally concluded that that treaty posed no obstacle to its jurisdiction under Article 281 of the Convention. The Tribunal also used 8 paragraphs (303-310) lasting more than one page to discuss the application of Article 282 of the Convention and concluded that that treaty posed no obstacle to its jurisdiction under Article 282.

It is worth noting that Article 282 was not mentioned by China at all. But the Tribunal devoted 7 paragraphs (292-293, 303-304, 311-313) to speculating on China's "possible objections, on the basis of Article 282, to jurisdiction", and dedicated 13 paragraphs (299-302, 307-310, 317-321) to rebutting these "possible

158 See Award on Jurisdiction, paras.4-75.

159 Ibid., paras.152-154.

objections", by considering the "application of Article 282" to various most relevant treaties.

With regard to China's objections to jurisdiction, the Tribunal skirted the pivotal points raised by China, while writing profusely on the trivial issues that China did not raise. The Tribunal pretended to be impartial, ostensibly stumping for China in its absence. What the Tribunal did, in reality, fails to give proper effect to China's sovereignty-based objections to jurisdiction and misleads the public.

150. Secondly, with regard to substance, the Tribunal hardly gave any responsive answers to China's positions and arguments. Instead, it just repeatedly said that the Philippines' claims were well founded, which is equivalent to acting as the Philippines' counsel. As elaborated above, China's argument in its Position Paper is substantial on the close relationship between the Philippines' submissions and the territorial dispute between China and the Philippines in the South China Sea. In considering its jurisdiction, the Tribunal had to examine the facts regarding the relationship between each matter raised by the Philippines and this territorial dispute, in order to ascertain whether China's objections are justified.

In order to properly evaluate China's position, the Tribunal must answer three questions. First, is it the case that the resolution of China's territorial sovereignty in the South China Sea is the premise for deciding whether China's claims of its entitlements in the South China Sea exceed the scope permitted by the Convention? Second, is it the case that the issues concerning the status of some maritime features in the South China Sea and their entitlements cannot be isolated from the issue of sovereignty? Third, is it the case that the resolution of the Philippines' claims concerning activities at sea would require the Tribunal to first settle the issue of territorial sovereignty over relevant maritime features? The Tribunal never gave any responsive answer. Instead, the Tribunal hastily decided that none of the Philippines' submissions relates to territorial sovereignty. For example, although China's Position Paper specifically makes the point that the question whether low-tide elevations can be appropriated as land territory is in itself an issue of territorial sovereignty,[160] the Tribunal simply jumped to the conclusion that it had jurisdiction over the issue without giving any analysis.

With respect to China's sovereignty-based objections to jurisdiction, the Tribunal just gave one "response", which does not even touch upon the issue of territorial sovereignty. China maintains that, the Philippines, by requesting the Tribunal to determine the maritime entitlements of only what it described as the maritime features "occupied or controlled by China", intended to "gainsay China's sovereignty over the whole of the Nansha Islands".[161] The Tribunal simply said that it "does not agree that the Philippines' focus only on the maritime features occupied by China carries

160 China's Position Paper, paras.23-35.

161 Ibid., para.22.

implications for the question of sovereignty and [… it] does, however, consider that this narrow selection may have implications for the merits of the Philippines' claims".[162]

151. So far, where objections are raised to jurisdiction, no court or tribunal has failed to conduct a "substantive" analysis of and give a responsive reply to an objection, except for the situation where it has upheld one or more of the objections, decisive in the case, and considers it unnecessary to deal with any further objections. In *Fisheries Jurisdiction (United Kingdom v. Iceland, 1973)*, the ICJ stressed that "in applying Article 53 of the Statute in this case, the Court has acted with particular circumspection and has taken special care, being faced with the absence of the respondent State."[163] In *Nuclear Test (Australia v. France, 1974)*, France refused to appear before the Court and issued a white paper. As Judge *ad hoc* Sir Garfield Barwick noted, the French objections raised informally to the Court's jurisdiction and the contents of "the French White Paper on Nuclear Tests, published but not communicated to the Court during the hearing of the case, have in fact been *fully* considered".[164] Here, too, China published a position paper. The Tribunal was fully aware of that paper and proclaimed that it would consider it. But the Tribunal in fact failed to meaningfully consider China's objections, not to mention to consider them "fully" or to give them proper effect.

152. *Arctic Sunrise Arbitration (The Netherlands v. Russia, 2013)* is another case initiated under Annex VII of the Convention.[165] In response, Russia delivered to the arbitral tribunal a note verbale, enclosing another note verbale dated 22 October 2013 which Russia sent to the Embassy of the Netherlands in Russia to express its position of non-acceptance of and non-participation in the arbitral proceedings.[166] The arbitral tribunal not only formally treated the note verbale dated 22 October 2013 as

162 Award on Jurisdiction, para.154. Instead, the Tribunal further erred in stating that in order to determine whether there exists overlap of maritime rights between China and the Philippines, it was necessary to consider the marine areas that could be entitled by all the features in the South China Sea.

163 Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p.3, at para.17.

164 Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, Dissenting Opinion of Judge Sir Garfield Barwick, at 401 (emphasis added).

165 The Arctic Sunrise Arbitration (The Netherlands v. Russia) and the present case are the only two cases to the present under the Annex VII of the Convention that one of the Parties neither accept nor participate in the proceedings. The specific circumstances of Arctic Sunrise Arbitration (The Netherlands v. Russia), see https://pcacases.com/web/view/21.

166 In that case, with regard to the detention of the Arctic Sunrise and its crew by Russia in its EEZ, the Netherlands initiated arbitration under Annex VII of the Convention, and requested, before the arbitral tribunal was constituted, the ITLOS to prescribe provisional measures. Russia transmitted a note verbale dated 22

presenting a preliminary objection to its jurisdiction and bifurcated the proceedings to decide on it, but also gave proper effect to the objection substantively. Although it did not accept Russia's views, the arbitral tribunal conducted a full and specific analysis of its objection.[167]

*Arctic Sunrise* and this Arbitration have much in common. For example, two of the five arbitrators (40%) in each case were the same;[168] the proceedings of the two cases coincided partially in time.[169] Both States against whom proceedings were instituted had made optional exceptions declarations under Article 298 of the Convention; each invoked its declaration as the ground for objecting to the arbitral tribunal's jurisdiction; and, for this reason, both decided not to participate in the arbitral proceedings.



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October 2013 to the ITLOS enclosing another one of the same date to the Embassy of the Netherlands in Moscow. In both, Russia stated:

> The actions of the Russian authorities in respect of the vessel "Arctic Sunrise" and its crew have been and continue to be carried out as the exercise of the jurisdiction, including criminal jurisdiction, of the Russian Federation in order to enforce laws and regulations of the Russian Federation as a coastal State in accordance with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea.
>
> Upon ratification of the Convention on 26 February 1997 the Russian Federation made a declaration according to which, inter alia, "it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes … concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".
>
> Accordingly, the Russian Side does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel "Arctic Sunrise" and does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under article 290, paragraph 5, of the Convention.

After the constitution of the arbitral tribunal, Russia transmitted a note verbale dated 27 February 2014 to the tribunal, informing the tribunal of its above-mentioned position.

167 Arctic Sunrise Arbitration (The Netherlands v. Russia), Award on Jurisdiction of 26 November 2014, Arbitral Tribunal under Annex VII of the UNCLOS, paras.65-78.

168 The Tribunal in the South China Sea Arbitration is composed of Thomas A. Mensah, Jean-Pierre Cot, Stanislaw Pawlak, Alfred H.A. Soons and Rüdiger Wolfrum; the tribunal in Artic Sunrise, Thomas A. Mensah, Henry Burmester, Alfred H.A. Soons, Janusz Symonides and Alberto Székely; the President in each is Thomas Mensah. In addition, Alfred H.A. Soons was appointed as Arbitrator in both arbitrations.

169 The South China Sea Arbitration commenced on 22 January 2013, the Award on Jurisdiction and Admissibility was rendered on 29 October 2015, and the Award on Merits and the Remaining Issues of Jurisdiction and Admissibility was rendered on 12 July 2016. Arctic Sunrise commenced on 4 October 2013. The Award on Jurisdiction was rendered on 26 November 2014 and the Award on the Merits, 14 August 2015.

With compelling reasons, China clearly demonstrated the Tribunal's manifest lack of jurisdiction. Similar to what the tribunal did in *Arctic Sunrise*, the Tribunal in this Arbitration also took China's Position Paper and relevant statements as presenting "effectively" China's objections to its jurisdiction and decided to bifurcate the proceedings to address these objections first. But, for reasons only known to itself, the Tribunal failed to provide a full and convincing analysis of the substance of China's objections to jurisdiction, although procedurally it bifurcated the proceedings. The Tribunal's superficial treatment of China's position is hardly convincing. The Tribunal utterly failed to discharge its duty.

*II.3. The Tribunal misconstrued maritime delimitation, misinterpreted Article 298 of the Convention, and erroneously determined that the Philippines' submissions do not relate to maritime delimitation*

153. The Tribunal's jurisdiction is subject to the exceptions provided in Article 298 of the Convention. The Philippines claimed that "none of these exceptions is applicable to the Philippines' claims in this arbitration",[170] and that its "claims do not fall within China's Declaration of 25 August 2006".[171] The Philippines also argued that "[t]he question of maritime delimitation does not arise unless and until it is determined that there are overlapping maritime entitlements",[172] and that "[t]he fact that resolution of delimitation issues may require the prior resolution of entitlement issues does not mean that entitlement issues are an integral part of the delimitation process itself".[173]

154. China maintained: "Even assuming, *arguendo*, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would still be an integral part of maritime delimitation and, having been excluded by the 2006 Declaration filed by China, could not be submitted for arbitration."[174] The Position Paper states:

> [S]uch legal issues as those presented by the Philippines in the present arbitration, including maritime claims, the legal nature of maritime features, the extent of relevant maritime rights, and law enforcement activities at sea, are all fundamental issues dealt with in past cases of maritime delimitation decided by international judicial or arbitral bodies and in State practice concerning maritime delimitation. In short, those issues are part and parcel of maritime delimitation.[175]

170 Amended Notification and Statement of Claim (28 Feb. 2014), para. 42, Memorial of the Philippines, Vol. III, Annex 5.

171 Ibid., para.43.

172 Jurisdictional Hearing Tr. (Day 2), p.44.

173 Ibid., p.46.

174 China's Position Paper, para.4-29, para.57-75.

175 Ibid., para.66.

The Position Paper emphasizes: "Maritime delimitation is an integral, systematic process. [ … ] Both international jurisprudence and State practice have recognized that all relevant factors must be taken into account to achieve an equitable solution."[176] It maintains: "The issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines [ … ] the Philippines' approach of splitting its maritime delimitation dispute with China and selecting some of the issues for arbitration, if permitted, will inevitably destroy the integrity and indivisibility of maritime delimitation [ … ]".[177] The Position Paper further points out:

> Ostensibly, the Philippines is not seeking from the Arbitral Tribunal a ruling regarding maritime delimitation, but instead a decision, inter alia, that certain maritime features are part of the Philippines' EEZ and continental shelf, and that China has unlawfully interfered with the enjoyment and exercise by the Philippines of sovereign rights in its EEZ and continental shelf [ … ]. This is actually a request for maritime delimitation by the Arbitral Tribunal in disguise. The Philippines' claims have in effect covered the main aspects and steps in maritime delimitation. Should the Arbitral Tribunal address substantively the Philippines' claims, it would amount to a de facto maritime delimitation.[178]

Accordingly, China emphasizes that "[t]he exclusionary declarations filed by the States Parties to the Convention under Article 298 of the Convention must be respected",[179] and that the effect of China's 2006 Declaration, "as prescribed under Article 299 of the Convention, is that, without the consent of China, no State Party can unilaterally invoke any of the compulsory procedures specified in section 2 of Part XV against China in respect of the disputes covered by that declaration".[180]

155. The Tribunal was aware that the 2006 Declaration filed by China pursuant to Article 298 of the Convention has excluded the disputes concerning maritime delimitation from the compulsory dispute settlement procedures under the Convention. Nevertheless, it held that "the claims presented by the Philippines do not concern sea boundary delimitation and are not, therefore, subject to the exception to the dispute settlement provisions of the Convention", stressing that "the Philippines has not requested the Tribunal to delimit any overlapping entitlement".[181]

176 Ibid., para.67.

177 Ibid., para.68.

178 Ibid., para.69.

179 Ibid., para.70.

180 Ibid., para.71. Article 299(1) of the Convention provides: "A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute."

181 Award of 12 July, para.155, summarizing Award on Jurisdiction, para.157.

156. First, the Tribunal agreed that "maritime boundary delimitation is an integral and systemic process."[182] But it claimed: "It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself."[183] It considered that "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 entitlements of parties overlap", that "[a] maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements", and further that "[i]n contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention."[184] It concluded: "This is not a dispute over maritime boundaries. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary."[185]

157. Second, the Tribunal acknowledged: "China correctly notes in its Position Paper that certain of the Philippines' Submissions (Submissions No. 5, 8 and 9) request the Tribunal to declare that specific maritime features 'are part of the exclusive economic zone and continental shelf of the Philippines' or that certain Chinese activities interfered with the Philippines' sovereign rights in its exclusive economic zone."[186] Still, it said that, "Because the Tribunal has not been requested to—and will not—delimit a maritime boundary between the Parties, the Tribunal will be able to address those of the Philippines' Submissions based on the premise that certain areas of the South China Sea form part of the Philippines' exclusive economic zone or continental shelf only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area."[187]

158. Finally, in its Award of 12 July, the Tribunal found that in Nansha Qundao there is no maritime feature capable of generating an entitlement to an exclusive economic zone or continental shelf; that the areas at issue in Submissions No. 5, 8 and 9 "are within the exclusive economic zone and continental shelf of the Philippines"; that China cannot possess any potentially overlapping entitlement in those areas; and, thus, the above submissions do not concern maritime delimitation.[188]

159. In the foregoing reasoning, the Tribunal not only erroneously disregarded the fact that the Philippines' submissions concern territorial sovereignty over islands and

182 Award on Jurisdiction, para.155.
183 Ibid., para.155.
184 Ibid., para.156.
185 Ibid., para.157.
186 Ibid.
187 Ibid.
188 See Award of 12 July, paras.628-633, 690-695,733-734,1203.

reefs but also failed to take account of the maritime delimitation situation between China and the Philippines. The Tribunal committed these major errors: First, it misconstrued sea boundary delimitation as drawing the final boundary line in an area with overlapping maritime entitlements; Second, it misinterpreted the term of "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" in Article 298(1)(a)(i) as "disputes over maritime boundary delimitation itself"; Third, the Tribunal erroneously determined the exclusion of its jurisdiction over disputes relating to sea boundary delimitation only applies where there is definitely overlap between the two States' entitlements.

*II.3.A. The Tribunal misconstrued sea boundary delimitation as only drawing the final boundary line in an area with overlapping maritime entitlements*

160. In the two awards, the Tribunal improperly fixated its eyes on the distinction between the determination of maritime entitlements and sea boundary delimitation, and misconstrued sea boundary delimitation as only drawing the final boundary line in an area with overlapping maritime entitlements. Such a logic severs the inherent relationship between, on the one hand, maritime entitlements as well as activities at sea based on them and, on the other, sea boundary delimitation, in the delimitation situation between China and the Philippines which are States with opposite coasts in the South China Sea. As there exists a delimitation situation between China and the Philippines in the South China Sea, the issues of maritime entitlements and activities raised by the Philippines in its submissions are fused into the big issue of maritime delimitation between them, and become integral parts thereof.

161. First, the Tribunal severed the inherent relationship between the determination of maritime entitlements and sea boundary delimitation in a maritime delimitation situation.

As elaborated in Section I, in a maritime delimitation situation, the determination of maritime entitlements is an important issue in and cannot be delinked from maritime delimitation. Under Article 298(1)(a)(i) of the Convention, a State may, by optional declaration, except "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations or those involving historic bays or titles" from applicability of compulsory procedure under the Convention. Article 15 reflects current international law on delimitation of the territorial sea. Articles 74 and 83, whose application is directly relevant in this Arbitration, expressly incorporate all the international law applicable to sea boundary delimitations as referred to in Article 38 of the ICJ Statute, including treaties, customary international law and general principles of law. Pursuant to the relevant provisions of the Convention and customary international law as well as State practice, maritime delimitation is an integral, systematic process. This process includes the ascertainment of the parties' entitlements and the overlap of them and the drawing of a boundary line in the overlapping area, finally delimitating the respective scope of their entitlements.

Generally, the delimitation of exclusive economic zone or continental shelf follows these steps: determining the relevant coasts, relevant area and base points; drawing a provisional boundary line; adjusting the provisional line by taking account of the relevant circumstances to achieve an equitable solution; and finally applying the proportionality test to ensure the result is equitable. As is clear, maritime delimitation "involves a consideration of not only entitlements, effect of maritime features, and principles and methods of delimitation, but also all relevant factors that must be taken into account, in order to attain an equitable solution".[189]

The above-mentioned practice in maritime delimitation has been repeatedly applied and confirmed by the ICJ in a long list of cases such as *Denmark v. Norway (1993)*,[190] *Qatar v. Bahrain (2001)*,[191] *Romania v. Ukraine (2009)*,[192] *Nicaragua v. Colombia (2012)*,[193] and *Peru v. Chile (2014)*,[194] as well as in cases decided by the ITLOS[195] and arbitral tribunals.[196] Veteran members of the ICJ[197] as well as scholars in this field[198] also hold the same view.

The above understanding finds support also in the drafting history of the Convention. During the drafting process, the scope of maritime delimitation dispute that can be excluded from the applicability of compulsory procedures under Article 298 was debated by States. This scope as understood by the States participating in the

189 China's Position Paper, para.67.

190 Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p.38.

191 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001, p.40.

192 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p.61.

193 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624.

194 Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014, p.3.

195 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment, 2012 ITLOS Case No. 16.

196 Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau (1985), Decision of 14 February 1985, RIAA, Vol. XIX, pp.149-196.

197 E.g., Shi Jiuyong, Maritime Delimitation in the Jurisprudence of the International Court of Justice, 9 Chinese Journal of International Law (2010), p.271.

198 Prosper Weil, The Law of Maritime Delimitation—Reflections (Cambridge University Press, 1989), p.203; Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at para. 64; Nuno Marques Antunes, Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process, Durham theses, Durham University, 2002, p.139, http://etheses.dur.ac.uk/4186/, last visited 8 June 2016.

drafting covers all issues relating to maritime delimitations, including the specific situations involved, relevant circumstances, principles and methods.[199]

In short, a maritime delimitation must be taken as including the determination of entitlements, relevant areas and relevant or special circumstances, and drawing the final line, rather than just "delimitation itself" if understood only as the drawing of the final line of delimitation or maritime boundary. As pointed out in China's Position Paper, "[t]he Philippines' claims have in effect covered the main aspects and steps in maritime delimitation."[200]

162. Second, the Tribunal severed the inherent relationship between maritime activities and maritime delimitation in a delimitation situation.

In the Philippines' Submissions No. 8 through 14, Submissions No. 10, 12, 13 and 14 relate to territorial sovereignty, while Submissions No. 8, 9 and 11, issues which cannot be dealt with until after the sovereignty over the relevant islands and reefs and the sea boundary delimitation are settled. In addition, the resolution of the latter three submissions directly depends on the result of the sea boundary delimitation between China and the Philippines in the South China Sea. The resolution of Submissions No. 8, 9 and 11 requires the Tribunal to first consider and render a decision on the sea boundary delimitation between China and the Philippines in the South China Sea, so as to produce clarity on the limits and scope of the respective maritime zones. The Tribunal severed the relationship between the above-mentioned submissions and the sea boundary delimitation between China and the Philippines. For example, the Tribunal's resolution of the issues raised by the Philippines in Submissions No. 8 and 9 can only be based on the premise that the relevant maritime areas are part of the Philippines' exclusive economic zone. In the delimitation situation existing between China and the Philippines, the determination that the relevant maritime areas are part of the Philippines' exclusive economic zone would require the Tribunal to first settle the territorial dispute and delimit the maritime areas between China and the Philippines and then designate the relevant maritime areas as the Philippines' exclusive economic zone. It is clear that the Philippines' submissions inevitably relate to maritime boundary delimitation and have been excluded from the Tribunal's jurisdiction by China's 2006 Declaration.[201]

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199 See Summary of the Chairman of Negotiating Group 7, NG7/26 (1979), quoted in Shabtai Rosenne & Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: Commentary, Vol. V (Martinus Nijhoff Publishers, 1989), pp.124-125. See also A. O. Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary (Martinus Nijhoff, 1987), pp.178-182.

200 China's Position Paper, para.69.

201 Since the Submissions No. 8 and 9 relate to the sovereign rights of biological resources or the exercise of that right, the identification of the relevant sea area as an exclusive economic zone of the Philippines also implies the possible application of Article

163. n the light of international jurisprudence, the jurisdiction of an international court or tribunal over a downstream issue (e.g. maritime activities) will ultimately depend on whether it has jurisdiction over an upstream issue (e.g. maritime delimitation), that is to say, if an international court or tribunal has no jurisdiction over that upstream issue, it will have no jurisdiction over the downstream issue.[202] In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore, 2008)*, the two parties requested the Court to decide in part who has sovereignty over South Ledge. The Court noted that "South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks" so that, in order to decide who has sovereignty over South Ledge, it has to first decide "whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia."[203] However, the Court recalled that it had not been given jurisdiction by the parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question, and did not proceed to decide in whose territorial waters South Ledge was located, i.e. who has sovereignty over it.[204]

The *Pedra Branca* case involves two different issues, namely, the delimitation of waters where the South Ledge is located and the sovereignty dispute over it. The Court was confronted with a dilemma: on the one hand, the sovereignty dispute over South Ledge can only be resolved after the overlapping territorial waters between the parties are delimited, while, on the other hand, the Court had not been mandated by the parties to effect such a delimitation. The resolution of the sovereignty dispute over South Ledge is a "downstream issue", which is premised on the "upstream issue" of the delimitation of the overlapping territorial waters between the parties. The fact that the Court had no jurisdiction over the issue of delimitation thus necessitated the result that the Court neither had jurisdiction over who has sovereignty over South Ledge.

Such reasoning is also applicable to this Arbitration. Here, the issues of territorial sovereignty and sea boundary delimitation both fall into the category of "upstream issues", over which the Tribunal had no jurisdiction. Accordingly, the Philippines'

297. Article 297, once it is applicable, will automatically exclude the Tribunal's jurisdiction.

202 See Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at para.37.

203 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) Judgment, I.C.J. Reports 2008, p.12, at para.297.

204 Ibid., at paras.298-299.

submissions concerning China's activities at sea, as a "downstream issue", are also beyond the Tribunal's jurisdiction.[205]

164. On the basis of the above analysis, the issues concerning maritime entitlements and activities at sea raised in the Philippines' submissions are an integral part of the dispute concerning sea boundary delimitation between China and the Philippines in the South China Sea. The Tribunal erred in establishing its jurisdiction by disregarding the delimitation situation between China and the Philippines in the South China Sea and severing the relationship between maritime entitlements and sea boundary delimitation as well as that between delimitation and the legality of maritime activities.

*II.3.B. The Tribunal misinterpreted the term of "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" in Article 298 (1)(a)(i) as "disputes over maritime boundary delimitation itself"*

165. China has excluded all the disputes that can be excluded in accordance with Article 298 of the Convention from the compulsory procedures provided for in Section 2 of Part XV of the Convention. With respect to the issues relating to sea boundary delimitation, the Tribunal should interpret the "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" (hereinafter referred to as the "disputes concerning [ … ] relating to sea boundary delimitations") under Article 298(1)(a) to ascertain the scope of China's exclusion. In neither of its awards did the Tribunal expressly interpret "disputes concerning [ … ] relating to sea boundary delimitations". But the Tribunal's assertions clearly show that it interpreted, *sub silentio*, "disputes concerning [ … ] relating to sea

205 In a recent case, an ITLOS Special Chamber, after recognizing that the word "concerning" could be understood as including within the scope of the dispute concerning delimitation other issues which are not part of delimitation but are closely related thereto, said that "it would stretch the meaning of the words 'dispute concerning the delimitation of their maritime boundary' too much to interpret it in such a way that it included a dispute on international responsibility". Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire, 2017), ITLOS Case No. 23, Judgment of 23 September 2017, para.548. It is difficult to understand the Chamber's position the relationship between a dispute concerning the delimitation and the dispute on international responsibility. The Chamber later in the same judgment held that "maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States". Ibid., para.592. That is to say, the Chamber itself recognized that delimitation is the precondition for determining responsibility in that context, or, as argued in this Study, is an upstream matter for responsibility.

boundary delimitations" effectively as "disputes over sea boundary delimitation itself", that is to say, as disputes over the final line drawing in an area with overlapping maritime entitlements. Such an interpretation is erroneous. Whether or not "sea boundary delimitation" only refers to drawing a final delimitation line, the terms "concerning", "relating to", and "involving" used in Article 298 give the disputes that can be excluded a scope broader than what the Tribunal understood. The Tribunal deliberately failed to conduct an interpretation exercise, and failed to give accurate meaning and proper effect to these terms.

166. Articles 288, 287 and 298 of the Convention regulate the jurisdiction of a court or tribunal in compulsory procedures. These provisions use the terms "concerning", "relating" or "involving" in several places. These terms have direct implications on the Tribunal's jurisdiction.[206] The Convention does not elaborate on how "concerning" or "relating to" or "involving" is to be interpreted; obviously these are commonplace terms that have clear meanings and seldom give rise to any difficulty in interpretation. The *Merriam-Webster Collegiate Dictionary* defines "concerning" as "relating to" or "regarding";[207] and "related" or "relating" denotes a certain relationship between two things or that, more simply, the two are "connected" for some reason.[208] Thus, terms such as "concerning" and "relating to" are usually considered to have the same meaning. Similarly, other dictionaries also define "involving" as "concerning" or "relating to".[209] Such an understanding also finds support in the Convention's drafting materials.[210]

167. In the Tribunal's view, Article 298 provides for exceptions from compulsory settlement that a State may activate by declaration for disputes concerning (a) sea boundary delimitations, (b) historic bays and titles, (c) law enforcement activities, and (d) military activities.[211] When addressing military activities disputes, the Tribunal

206 Subject to the conditions and exceptions provided for under the Convention, Article 288 provides that "a court or tribunal referred in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it" in accordance with Part XV. Under Article 298(1)(a)(i), a State party, by optional declaration, may except from the applicability of compulsory procedures disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations. Accordingly, "concerning" and / or "relating to" directly delimit the scope of disputes over which a Section 2 court or tribunal may exercise jurisdiction.

207 Marriam-Webster's Collegiate Dictionary, 11st edition, 2001, p.257.

208 Ibid., p.1050.

209 E.g. Oxford Advanced Learner's English-Chinese Dictionary (6th edition, 2004), pp.341, 933, 1458.

210 See Shabtai Rosenne & Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: Commentary, Vol. V (Martinus Nijhoff Publishers, 1989), pp.85-141.

211 Award of 12 July, para.161.

used "concerning military activities" as interchangeable with "relating to military activities".[212] This indicates that the Tribunal was of the view that, at least in this context, "concerning" and "relating to" have the same meaning.

168. Within the context of UNCLOS, the disputes defined by the term "concerning" should not be given a narrow interpretation. With respect to the relationship between different provisions on a certain subject-matter and how a dispute "concerning" that matter in one provision relates to the other provisions, the ITLOS presented an exposition in *Louisa (Saint Vincent and the Grenadines v. Spain, 2013)*. In that case, Saint Vincent and the Grenadines brought an application against Spain regarding Spain's detention of a vessel flying its flag. In accordance with Article 287 of the Convention, Saint Vincent and the Grenadines had declared that "it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels."[213] Spain contended that the jurisdiction of the Tribunal would be limited to disputes concerning the arrest or detention of vessels under the Convention, i.e., disputes falling under any provision of the Convention which expressly contains the term "arrest" or "detention" of vessels. The ITLOS held:

> [T]he use of the term "concerning" in the declaration indicates that the declaration does not extend only to articles which expressly contain the word "arrest" or "detention" but to any provision of the Convention having a bearing on the arrest or detention of vessels. This interpretation is reinforced by taking into account the intention of Saint Vincent and the Grenadines at the time it made the declaration, as evidenced by the submissions made in the Application. From these submissions, it becomes clear that the declaration of Saint Vincent and the Grenadines was meant to cover all claims connected with the arrest or detention of its vessels. On the basis of the foregoing, the Tribunal concludes that the narrow interpretation of the declaration of Saint Vincent and the Grenadines as advanced by Spain is not tenable.[214]

In a recent case concerning delimitation, an ITLOS Special Chamber also recognized that "the word 'concerning' may be understood to include within the scope of the dispute other issues which are not part of delimitation but are closely related thereto".[215] The import of the word "concerning" is thus clear, despite the general nature of this statement.

212 See, e.g., Award on Jurisdiction, paras.396, 409.

213 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, ITLOS Case No.18, para.75.

214 Ibid., para.83.

215 Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire, 2017), ITLOS Case No. 23, Judgment of 23 September 2017, para.548.

169. As it is used throughout Part XV of the Convention and other parts, the term "concerning" must be considered to have the same meaning throughout the entire Convention, including its dispute settlement system, that is to say, the same meaning in Article 287 as that in Article 298. Similarly, a term used in a declaration made under a particular provision should have the same meaning as that used in the provision itself. That is to say, "concerning" has the same meaning in Article 287 as that in a declaration made thereunder as well as the same meaning in Article 298 as that in a declaration made thereunder. Accordingly, the use of the term "concerning" in Article 298 and a declaration made thereunder should be taken to have the same meaning as in the context of Article 287 and a declaration made thereunder, all within Part XV.[216]

170. The ITLOS' ruling in *Louisa* makes it clear that when a dispute concerns the interpretation or application of a particular provision in UNCLOS, the scope of the dispute obviously covers the interpretation or application of not just that particular provision, but also any other provision that has a "bearing" on the interpretation or application of that particular provision, in other words, covering "all claims connected with" that dispute. Of course, "bearing" can manifest itself in different forms. As the term "concerning" has the same meaning as "relating to" and "involving", as discussed above, what *Louisa* says about "concerning" similarly applies to "relating to" and "involving".

171. In practice, sometimes a State may attempt to disregard the broad meaning of "concerning", "relating to" or "involving" by equating a "dispute concerning or relating to a matter" to a "dispute about what that matter is", in order to narrow the scope of permissible exceptions to jurisdiction and expand jurisdiction. The errors in this approach were laid bare by the ICJ in *Aegean Sea Continental Shelf*. In that case, Greece attempted to expand the Court's jurisdiction by giving a narrow scope to its own exclusion from the Court's jurisdiction over "all disputes relating to the territorial status of Greece". The Court observed:

> The question is not, as Greece seems to assume, whether continental shelf rights are territorial rights or are comprised within the expression "territorial status". The real question for decision is, whether the dispute is one which *relates* to the territorial status of Greece.[217]

216 Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese Journal of International Law (2014), p.663, at para.65. Contra, Andreas Zimmermann and Jelena Bräumler, Navigating Through Narrow Jurisdictional Straits: The Philippines–PRC South China Sea Dispute and UNCLOS, 12 Law and Practice of International Courts and Tribunals (2013), p.431, at 458-459, which, without giving a comprehensive analysis, argues for different interpretations of the same term "concerning", simply because it is used in declarations made under different provisions.

217 Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p.3, at para.81.

The Court proceeded to observe, "a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf."[218]

172. Hence, to ascertain the scope of the "disputes concerning [ … ] relating to sea boundary delimitations" in Article 298(1)(a) which have been excluded by China's 2006 Declaration, the issue is not "what is the delimitation itself", but whether or not the dispute relates to or concerns the delimitation at issue. Common sense teaches that what is comprised within "delimitation" is necessarily related to it. But this is only the minimum. The maximum can be much bigger. That is to say, one should not confuse "a dispute of what a matter is" with "a dispute concerning that matter" or with "the dispute relating to that matter". If the former is shorthanded as "M", then the latter two are "M plus". Obviously a dispute on a step in the delimitation operation or process is a delimitation-related dispute. In short, a question whose resolution has a "bearing" or "effect" on the process is "a dispute related to delimitation".

173. In the maritime delimitation situation between China and the Philippines, the issues of maritime entitlements and activities at sea obviously "concern" or "relate to" sea boundary delimitations. It is true, as stated by the Tribunal, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation does not necessarily constitute a dispute over maritime boundary delimitation itself.[219] It is also true, as also stated by the Tribunal, "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 entitlements of parties overlap".[220] However, in a maritime delimitation situation, a dispute which may be considered in the course of a maritime boundary delimitation constitutes a dispute "concerning sea boundary delimitations" under Article 298; "a dispute concerning the existence of an entitlement to maritime zones" and "a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap" both fall within "disputes concerning [ … ] relating to sea boundary delimitation" in Article 298.

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218 Ibid., para.86. Similarly, in Namibia (Advisory Opinion), the ICJ made clear that a "request for the advisory opinion relates to a legal question actually pending between two or more States" (Rule of Court, Article 82, now Article 102(2)) has a broader scope than a request for an advisory opinion "upon a legal question actually pending between two or more States" (Rule of Court, Article 83, now Article 102(3)), in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.16, at para.38.

219 Award on Jurisdiction, para.155.

220 Ibid., para.156.

174. In the Award on Jurisdiction, the Tribunal replaced the terms "concerning" and "relating to" with "over" when it referred to "disputes concerning [ … ] relating to sea boundary delimitations" in Article 298(1)(a)(i) of UNCLOS.[221] Although it did not expressly give an exposition to "concerning" and "relating to", it is evident that the Tribunal effectively adopted the same *modus operandi* as Spain did in *Louisa* and as Greece did in *Aegean Sea Continental Shelf*. It limited "disputes concerning [ … ] relating to sea boundary delimitations" to "disputes over sea boundary delimitations" so that it unlawfully narrowed the scope of the disputes to which compulsory jurisdiction is not applicable, i.e., unlawfully expanded its jurisdiction by reading down the scope of the disputes excluded by China's 2006 Declaration.

175. In the Award of 12 July, the Tribunal emphasized the importance of the term "concerning" in applying Article 298(1)(b) with respect to the military activities exception. The Tribunal said that "Article 298(1)(b) applies to 'disputes concerning military activities' and not to 'military activities' as such".[222] The Tribunal further noted, "the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute."[223] Clearly, the Tribunal was conscious of the implication and effect of the term "concerning" with respect to the scope of disputes excludable from compulsory procedures.

176. In sharp contrast, the Tribunal replaced "concerning" or "relating to" with "over" without any explanation when applying Article 298(1)(a). This is beyond comprehension. The only possible explanation for it to limit "disputes concerning [ … ] relating to sea boundary delimitations" to "disputes over sea boundary delimitations" is its intention to unlawfully expand its jurisdiction, in disregard of State consent.

177. As discussed above, where a dispute "concerns" the interpretation or application of a particular provision (say Article X), the scope of this dispute covers the interpretation or application of not only that provision itself (Article X) but also other provisions of the Convention related to the interpretation or application of that particular provision (Article X). In this Arbitration, with respect to the exclusion of disputes relating to sea boundary delimitations, the real question is not whether the Philippines' submissions require the interpretation or application of Articles 74 and 83, but whether the interpretation or application of other provisions of the Convention (e.g. Articles 13, 76 and 121) involved in the Philippines' claims has any effect on the interpretation or application of Articles 74 and 83. As demonstrated above, because of the maritime delimitation situation between China and the Philippines, the interpretation or application of the provisions relating to maritime

221 See, e.g., ibid., paras.157, 366. The Tribunal did not explain whether it used "over" in the same sense as "concerning" or "relating to".

222 Award of 12 July, para.1158.

223 Ibid.

entitlements or activities at sea will inevitably affect, or depend on, the interpretation or application of Articles 74 and 83. Therefore, the relevant disputes all fall within "the dispute concerning [ … ] relating to maritime delimitations".

*II.3.C. The Tribunal erroneously determined the exclusion of its jurisdiction over disputes relating to sea boundary delimitation only applies where there is definitely overlap between the two States' entitlements*

178. It is a fact that China and the Philippines are countries with opposite coasts and have overlapping claims of entitlement in the South China Sea. The diplomatic practice of China and the Philippines testifies to this. However, the Tribunal disregarded this diplomatic practice, and concluded, on the basis of the Philippines' newly minted position motivated by its litigation strategy, that whether or not China and the Philippines have overlapping maritime entitlements in the South China Sea would be an issue to be settled.

179. The Tribunal, acting on the assumption that disputes relating to sea boundary delimitations as provided for in Article 298 of the Convention are equivalent to disputes over sea boundary delimitations in areas with overlapping entitlements, concluded that China's 2006 Declaration excludes its jurisdiction only where there exist overlapping entitlements between China and the Philippines and, therefore, it needed to determine whether there definitely exist overlapping entitlements between the two States in order to ascertain its jurisdiction. It is utterly wrong for the Tribunal to conclude that the existence of a dispute relating to sea boundary delimitation is premised on the definite existence of overlapping maritime entitlements.

180. The Tribunal considered that "a maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements."[224] For jurisdictional purposes, if there is a delimitation geographical framework between two States with opposite or adjacent coasts and they claim entitlements which overlap or may overlap, a dispute relating to sea boundary delimitation comes into existence. The situation between China and the Philippines is just such a case. In other words, under a delimitation geographical framework, if the entitlements claimed by the two States do overlap or may potentially overlap, a dispute comes into existence within the meaning of "disputes concerning [ … ] relating to sea boundary delimitation" referred to in Article 298(1)(a)(i), sufficient to trigger the application of the optional exception provided for in Article 298 if a declaration has been made.[225] China and the

224 Award on Jurisdiction, para.156.

225 Of course, a State's claim for maritime entitlement must be prima facie reasonable. If there does not exist a delimitation geographical framework, the argument on an overlap of maritime entitlements does not appear to be prima facie reasonable, and it can be concluded straightforwardly that such an overlap is impossible. For example, if Japan claims that its maritime entitlements overlap with those of the United States in the area of Hawaii, such a claimed overlap is impossible, because, although Japan

Philippines are precisely such two States with opposite coasts and overlapping or potentially overlapping entitlements. This is sufficient to trigger the application of China's 2006 Declaration to exclude the Tribunal's jurisdiction over the issues relating to sea boundary delimitation between the two States.

181. In *Oil Platforms (Iran v. United States, 1996)*, the parties differed on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1995 and whether the Court had jurisdiction over the dispute.[226] Article X of the Treaty of 1995 reads: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."[227] The Court pointed out that "the question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the *potential to affect* 'freedom of commerce' as guaranteed by the provision quoted above".[228] In the same case, the Court also used "capable of affecting" to express the same idea.[229] This phrasing was also used in subsequent cases, such as *Legality of Use of Force (Yugoslavia v. Belgium)* in the provisional measures order (1999)[230] as well as in the judgment on preliminary objections (2004).[231]

182. With respect to the Philippines' Submissions No. 5, 8 and 9, the Tribunal stated, "[it] will be able [*sic*] address those of the Philippines' Submissions based on the premise that certain areas of the South China Sea form part of the Philippines' exclusive economic zone or continental shelf only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area."[232] The Tribunal is wrong. With respect to the question whether China's 2006 Declaration can exclude the Tribunal's jurisdiction, the Tribunal only needed to ascertain whether

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and the United States are States with opposite coasts, there does not exist a delimitation geographical framework between them. However, within such a framework, the claim on an overlap of entitlements is prima facie reasonable.

226 Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p.803, at para.16.

227 Ibid., at para.37.

228 Ibid., at para.38 (emphasis added).

229 Ibid., at paras.50-51.

230 Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p.124, at paras.38-41. In this Order, the Court made its decision on the basis of whether it prima facie has jurisdiction. Because the Court there did not find such a prima facie existence of the conditions for indication of provisional measures, its decision on this point has important consequence for deciding definitely whether it has jurisdiction.

231 Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p.279, at para.48.

232 Award on Jurisdiction, para.157.

the maritime entitlements between China and the Philippines in the South China Sea *potentially* overlap.

Such a potential overlap does exist between the two States in the South China Sea; indeed, the two States have acknowledged the actual, not just potential, overlap of their entitlements. China possesses sovereignty over Nansha Qundao and claims entitlements based on Nansha Qundao as a whole. As a result of the maritime delimitation geographical framework between the two States, as elaborated in Section I of this Chapter, there exist actual instead of potential overlapping claims of maritime entitlements between China and the Philippines, which is definitely sufficient to trigger the application of the China's maritime delimitation exclusion so as to oust the Tribunal's jurisdiction.

The relevant individual islands and reefs in the South China Sea, even on the Tribunal's fragmentation approach, no doubt rise to the level of having the kind of potential capacity to generate maritime entitlements to have an effect on the final delimitation. In accordance with international jurisprudence, no court or tribunal requires a high level of potential capacity or effect when deciding on jurisdiction.[233] By the standard States generally apply in claiming maritime entitlements for islands and reefs, relevant islands and reefs in the South China Sea can generate full entitlements, which more than potentially overlap with those of the Philippines.

183. The Tribunal said it has jurisdiction if it "determines that China could not possess any potentially overlapping entitlement" in the relevant area. This is in effect equivalent to examining the compatibility of China's claims of maritime entitlements in the South China Sea with the substantive law. The Tribunal's approach was to address the merits of the dispute relating to maritime delimitation so as to establish its jurisdiction, thus overstepping its jurisdiction in order to establish its jurisdiction. At this stage, the power of an international court or tribunal to apply the law relating to jurisdiction should not be confused with the power to apply the substantive law.[234] It

233 Indeed, none other than Christian Tomuschat observes on the ICJ cases on this point: "In sum, it may be concluded that concerning the legal aspects of a compromissory clause, the Court will proceed to an exhaustive examination. As far as the factual aspects are concerned, the Court will generally abstain from ascertaining the veracity of the facts invoked. On the other hand, it could not blindly follow allegations which are clearly at variance with the real situation." Tomuschat, Article 36, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.633, at 675.

234 As the ICJ stated, "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties." See Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432, at para.45.

has no power to examine the compatibility of a State's claims with the substantive law in the jurisdictional phase. In establishing its jurisdiction, the Tribunal has no power to decide whether "China could not possess any potentially overlapping entitlement" in the relevant area. As soon as a potential overlap becomes an issue to be decided, the Tribunal's power ceases.

184. As a matter of fact, it is because a dispute concerning the relevant claims under substantive law may arise that exceptions to an international court or tribunal's jurisdiction assume particular importance.[235]

185. Given the fact that China and the Philippines have opposite coasts and overlapping claims of maritime entitlements in the South China Sea, which they have acknowledged repeatedly, the Tribunal should have found that there exists a dispute relating to sea boundary delimitation between the two States and applied Article 298 of the Convention and China's 2006 optional exceptions declaration to find that it had no jurisdiction over the Philippines' submissions.

186. Yet, instead of staying its hand, the Tribunal moved in reverse to conduct an exercise to determine the definite non-existence of overlapping entitlements in the South China Sea between China and the Philippines, which is a substantive issue, and, on that basis, established its jurisdiction. The Tribunal said that it needed to eliminate all possibilities of potential overlapping maritime entitlements between China and the Philippines to establish its jurisdiction over the Philippines' submissions. In doing so, the Tribunal in effect conducted a substantive examination of the Philippines' relevant claims, precisely: first reaching a conclusion on whether there exist overlapping entitlements, and then assessing whether its jurisdiction is excluded based on that conclusion. This would rob any proper effect off China's 2006 Declaration and, by extension, all the similar declarations made by other contracting States pursuant to Article 298 of the Convention.

If the Tribunal's logic were to be followed, an optional exceptions declaration made pursuant to Article 298, instead of excluding jurisdiction, would "empower" a tribunal to examine substantive issues before and for the purposes of establishing its jurisdiction, thereby bypassing any jurisdictional obstacle. The absurdity in this lies in that a court or tribunal first decides on the merits of claims, and then finds, based on that decision, that its jurisdiction is not excluded because of the non-existence of any potentially overlapping maritime entitlements. In the practice of international courts and tribunals, there is no precedent to support this approach. This does violence to the consent principle.

235 As the ICJ stated, "reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy. Nowhere in the Court's case-law has it been suggested that interpretation in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations". Ibid., at para.54.

*II.4. The Tribunal erred in finding that the Philippines' Submissions No. 1 and 2 did not involve "historic title" and failed to consider whether "historic rights" constitute relevant circumstances of maritime delimitation*

187. The Tribunal considered that the Philippines' Submissions No. 1 and 2 reflected a dispute concerning the source of maritime entitlements and did not relate to maritime delimitation,[236] and further that "the exception to jurisdiction in Article 298(1)(a)(i) is limited to disputes involving historic titles and that China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title."[237] As a result, the Tribunal found that the dispute reflected in the Philippines' Submissions No. 1 and 2 did not fall within the category of excludable disputes within the meaning of Article 298(1)(a)(i) and China's 2006 Declaration.

The Tribunal committed two obvious errors: first, it gave short shrift to the possibility that China's historic rights may partake of "historic title"; second, it ignored the possibility that China's historic rights may be relevant circumstances which should be considered in maritime delimitation.

*II.4.A. The Tribunal gave short shrift to the possibility that China's historic rights may partake of "historic title"*

188. The Tribunal acknowledged that its jurisdiction to consider the Philippines' submissions involving China's historic rights in the South China Sea depended on whether the matters raised in the submissions were covered by historic titles within the meaning of Article 298.[238] In its subsequent assessment, the Tribunal used materials in a selective and biased manner, failed to complete the necessary legal analysis, and erred in concluding that China's historic rights in the South China Sea could not be "historic title".[239] The Tribunal noted, "China's commitment to respect both freedom of navigation and overflight to establish that China does not consider the sea areas within the 'nine-dash line' to be equivalent to its territorial sea or internal waters". It further noted that China would presumably not have declared baselines for the territorial sea surrounding Hainan and Xisha Qundao "if the waters both within and beyond 12 nautical miles of those islands already formed part of China's territorial sea (or internal waters) by virtue of a claim to historic right through the 'nine-dash line'".[240] Simply from the above, the Tribunal hastily proceeded to decide that China's historic rights are not of a sovereignty type, without giving any consideration to the *sui generis* nature of China's rights.

236 Award on Jurisdiction, para.164.

237 Award of 12 July, para.229.

238 Award on Jurisdiction, paras.393, 398-399.

239 Award of 12 July, paras.202-229.

240 Ibid., para.213.

189. In so doing, the Tribunal overlooked two most important cases, namely *Continental Shelf (Tunisia/Libyan Arab Jamahiriya, 1982)* and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening, 1992)*. In these cases, the ICJ confirmed the *sui generis* nature of historic rights/title. In *Continental Shelf*, the ICJ noted that the 1958 Conference on the Law of the Sea did not address the régime of historic waters substantively and that the ILC was requested to study it but had not done so, and proceeded to observe:

> Nor does the draft convention of the Third Conference on the Law of the Sea contain any detailed provisions on the "régime" of historic waters: there is neither a definition of the concept nor an elaboration of the juridical régime of "historic waters" or "historic bays". There are, however, references to "historic bays" or "historic titles" or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law which does not provide for a *single* "régime" for "historic waters" or "historic bays", but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays".[241]

Subsequently in *Land, Island and Maritime Frontier Dispute*, the Chamber of the ICJ clarified the *sui generis* nature of the historic waters of the Gulf of Fonseca which has been regarded as a historic bay:

> 393. [ … ] [T]he Gulf being a bay with three coastal States, there is a need for shipping to have access to any of the coastal States through the main channels between the bay and the ocean. That rights of innocent passage are not inconsistent with a régime of historic waters is clear, for that is precisely now the position in archipelagic internal waters and indeed in former high seas enclosed as internal waters by straight baselines. Furthermore, there is another practical point, for since these waters were outside the 3-mile maritime belts of exclusive jurisdiction in which innocent passage was nevertheless recognized in practice, it would have been absurd not to recognize passage rights in these waters, which had to be crossed in order to reach these maritime belts.
>
> [ … ]
>
> 412. [ … ] The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage. It might, therefore, be sensible, to regard the waters of the Gulf,

241 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p.18, at para.100. The sui generis nature of historic title/rights was already elaborated earlier in UN Secretariat, Historic Bays, A/Conf.13/1 (1957), UNCLOS I (1958) Official Documents, Vol. 1, pp.1-39; UN Secretariat, Juridical Régime of Historic Waters, including Historic Bays, A/CN.4/143 (1962), Yearbook of International Law Commission, 1962, Vol. II, pp.1-26.

> insofar as they are the subject of the condominium or co-ownership, as *sui generis*. No doubt, if the waters were delimited, they would then become "internal" waters of each of the States; but even so presumably they would need to be subject to the historic and necessary rights of innocent passage, so they would still be internal waters in a qualified sense. Nevertheless, the essential juridical status of these waters is the same as that of internal waters, since they are claimed *à titre de souverain* and, though subject to certain rights of passage, they are not territorial sea.[242]

190. In waters of a similar sovereignty nature such as archipelagic waters and historic waters, there may exist regimes of passage and overflight in some derogation from full sovereignty. This does not strip these waters of their sovereignty nature. In fact, the beauty of this *sui generis* regime lies in its ability to uphold the sovereign State's sovereignty while accommodating the need for international navigation.

191. Unfortunately, when dealing with the issue of historic rights, the Tribunal failed to take judicial notice, for reasons unknown to us, of some important publicly available materials, which would present obstacles to its exercise of jurisdiction. The Tribunal completely disregarded the fact that all relevant maps published in China since 1948 all display the dotted line in the South China Sea, marked with the symbol of a national boundary line yet to be finalized.

192. In fact, some professionals have already taken note of the meaning of this symbology. The United States Department of State, in its Report No. 143 in the *Limits in the Seas* series, analysed the dotted line in the South China Sea, and considered that there exists a possibility that the dotted line, based on its symbology and placement, is intended to indicate a "national boundary".[243] Viewed this way, the line was considered by the United States as unilateral and inconsistent with "State practice and international jurisprudence on maritime boundary delimitation".[244] However, whether or not the dotted line as a national boundary is consistent with "State practice and international jurisprudence on maritime boundary delimitation" is a question separate from what it symbolizes. Given that the dotted line indicates a national boundary, the Tribunal should have recognized the possibility that the waters within the line may partake of a sovereignty nature. In such a case, the Tribunal should have decided that it had no jurisdiction. According to international jurisprudence, at the jurisdictional phase, a court or tribunal shall not let a prejudgment on

242 Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992, p.351, at paras.393, 412.

243 See United States Department of States, Bureau of Oceans and International Environmental and Scientific Affairs, Limits of the Sea, No. 143, China: Maritime Claims in the South China Sea, pp.14-15, https://www.state.gov/documents/organization/234936.pdf.

244 Ibid., p.15.

the merits colour its view on jurisdiction,[245] or, worse, deliberately use such a prejudgment to sweep away obstacles to its jurisdiction.

193. The Tribunal failed to take judicial notice of important publicly available documents, such as a note of 1932 from the Legation of the Republic of China in France to the French Ministry of Foreign Affairs. That note states, in part, Xisha Qundao (the Paracels)

> se trouvent dans la mer territoriale de la Province du Kouang Tong (South China Sea); elles forment un des groupes de l'ensemble des Iles de la Mer de Chine du Sud qui font partie intégrante de la mer territorial de la province du Kouang-Tong.[246]

The English translation found in a book published in 2000 by a French writer reads, Xisha Qundao (the Paracels)

> lie in the territorial sea of Kwangtung Province (South China Sea); [… they] form one group among all the islands in the South China Sea which are an integral part of the territorial sea of Kwangtung Province.[247]

The Tribunal gave an impression that it had performed due diligence in securing documentary evidence, saying that it had sought documents from the French Archives.[248] However, it just managed to fail to take judicial notice of those important and publicly available. These materials clearly indicate that, the Tribunal's jurisdiction over the Philippines' relevant submissions is likely to have been excluded by China's 2006 Declaration.

*II.4.B The Tribunal ignored the possibility that China's historic rights may be relevant circumstances to be considered in maritime delimitation*

194. The Tribunal found that China's claims to historic rights in the South China Sea were not of a sovereignty type, and did not involve "historic title" within the meaning of Article 298(1)(a)(i) of the Convention, and thus the Tribunal's jurisdiction over the Philippines Submissions No. 1 and 2 was not excluded by China's 2006 Declaration. Even in such a case, due to the existence of a delimitation situation between China and the Philippines in the South China Sea, the Tribunal should have

245 See Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432, at paras.54-55.

246 Wai Jiao Bu Nan Hai Zhu Dao Dang An Hui Bian ["Ministry of Foreign Affairs" Collected Documents on the South China Sea Islands], First Part (1995), p.203. The Chinese original for the French "original" reads: [西沙与东沙相对峙], "为我国广东省领海, South China Sea二大群岛之一", ibid., p.187.

247 Monique Chemillier-Gendreau, Sovereignty over the Paracel and Spratly Islands (Springer, 2000), p.184.

248 See Award of 12 July, para.141.

considered whether China's historic rights constitute relevant circumstances, which should be taken into account in a maritime delimitation between the two States, and thus part of "the disputes concerning [ … ] relating to sea boundary delimitations" referred to in Article 298(1)(a)(i) of the Convention. But it did not.

195. Historic rights are generally regarded as a revelant circumstance which should be taken into account in maritime delimitation. This is not only envisioned in the Convention but also confirmed by international jurisprudence. For example, Article 15 of the Convention expressly provides that, generally the median line is applied when delimiting territorial seas between States with opposite or adjacent coasts, "however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith". It is true that Articles 74 and 83 of the Convention do not expressly indicate that historic rights are a relevant circumstance for the delimitation of the exclusive economic zone and the continental shelf. But those two provisions provide that the delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". "International law" referred to in Articles 74 and 83, through Article 38 of the Statute of the International Court of Justice, obviously includes customary international law. Under customary international law, historic rights manifestly constitute a relevant circumstance of delimitation. This is corroborated by the drafting history of the Convention. All States, whether they were supporters of the equitable principle or equidistance/median line as the method of delimitation, referred to "relevant/special circumstances" which should be taken into account in maritime delimitations.[249] Some States expressly listed historic rights[250] or historic sovereign

249 For example, the proposal submitted by 19 States expressely stated that special circumstances should be taken into account when applying equidistance/median line. See Bahamas, Barbados, Colombia, Costa Rica, Cyprus, Democratic Yemen, Denmark, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, Tunisia, United Arab Emirates and United Kingdom (1977, mimeo), reproduced in Renate Platzöder (ed.), Third United Nations Conference on Law of the Sea: Documents, Vol. IV, p.467; the propsal submitted by 11 States stated that all methods should be applied to reach an equitable solution. See Algeria, France, Iraq, Ireland, Libyan Arab Jamahiriya, Morocco, Nicaragua, Papua New Guinea, Poland, Romania and Turkey, (1977, mimeo.), reproduced in Renate Platzöder (ed.), ibid., p.468; and the proposals submitted by some States synthesized above two views. For example, Morocco proposed that equidistance/median line, if appropriate, should be applied, but all relevant circumsatnces, especially natural resources and geological factors, should be considered. See Morocco (1977, mimeo.), reproduced in Renate Platzöder (ed.), ibid., pp.389-390.

250 Such as the proposals submitted by Malta. See A/AC.138/SC.II/L.28, reproduced in III SBC Report 1973, pp.35-43.

rights over natural resources[251] in their proposals as a circumstance which should be taken into account. Documents such as 1975 ISNT, 1976 RSNT and 1977 ICNT, which include synthesized opinions of all the States, expressly indicate that the delimitation of the exclusive economic zone "shall take into account all the relevant circumstances".[252] Regarding the fact that historic rights were not mentioned in connection with the delimitation of the continental shelf in the 1958 Convention on the Continental Shelf or the 1982 Convention, Judge Jiménez de Aréchaga pointed out:

> It is not that historic rights are irrelevant or unimportant for shelf delimitation, but that there are, in this case, besides the historic factor, other special circumstances equally relevant. Consequently, the historic factor is included in the wider formula of "special circumstances" [ … ].[253]

Andrea Gioia also observed that "[i]t cannot be denied [ … ] that [ … ] 'historic rights' could operate as an important factor when negotiating delimitation agreements with the interested states."[254]

196. International jurisprudence also confirms that historic rights constitute a relevant circumstance to be taken into account in maritime delimitation. International courts or tribunals have always discussed the issue of historic rights in the framework of maritime delimitation, where such rights are claimed to exist in the relevant areas.

197. The Tribunal in *Grisbådarna (Norway/Sweden, 1909)* considered that one of circumstances which must be taken into account when assigning the Grisbådarna banks to Sweden was the Swedish fishermen's activities of lobster fishing in the shoals of Grisbådarna.[255] It also observed that "it is a well established principle of law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible" and that "this [lobster] fishing is the very thing that gives the banks of Grisbådarna their value as a fishing area".[256] The Swedes exploited the banks in question much ealier and much more effectively than the

251 The proposal submitted by Australia and Norway. See A/AC.138/SC. II/L.36, reproduced in III SBC Report 1973, pp.77-78.

252 See A/CONF.62/WP.8/Part II (ISNT, 1975), UNCLOS III Official Records, Vol. IV, p.162; A/CONF. 62/WP.8/Rev.1/Part II (RSNT, 1976), UNCLOS III Official Records, Vol. V, p.164; A/CONF. 62/WP.10 (ICNT, 1977), UNCLOS III Official Records, Vol. VIII, p.16.

253 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Separate Opinion of Judge Jimenez De Aréchaga, I.C.J. Reports 1982, p.100, at para.80.

254 Andrea Gioia, Tunisia's Claims over Adjacent Seas and the Doctrine of "Historic Rights", 11 Syracuse Journal of International Law and Commerce (1984), p.327, at p.373.

255 See The Grisbådarna Case (Norway/Sweden), Arbitral Award Rendered on October 23, 1909, p.6 (unofficial English translation on the website of the Permanent Court of Arbitration).

256 Ibid.

Norwegians. Therefore, the Tribunal assigned the Grisbådarna banks to Sweden.[257] It follows that historic rights have a significant impact on the delimitation of the territorial sea.

198. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya, 1982)*, the ICJ observed that: "[t]he 'relevant circumstances which characterize the area' are not limited to the facts of geography or geomorphology [ … ] It has further to give due consideration to the historic rights claimed by Tunisia [ … ]".[258] It then proceeded to give the historic rights claims of Tunisia thorough consideration.

199. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States, 1984)*, both the United States and Canada respectively established both a continental shelf and a 200-mile exclusive fishery zone off their shores, thereby generating overlapping claims of maritime entitlements and giving rise to a dispute concerning maritime delimitation. In that case, the issue given to the Chamber of the ICJ was maritime delimitation, and both Parties proposed that fishing practices be considered as a relevant circumstance to achieve equitable delimitation. The US fishermen's predominance in the disputed maritime areas was not given decisive weight by the Chamber in its Judgment of 1984.[259] The Chamber found that the US argument was "somewhat akin to invocation of historic rights, though that expression has not been used", and did not deny that historic rights constitute a relevant circumstance in maritime delimitation; the Chamber seemed to consider that the US fishermen's predominance did not rise to the level of historic rights.

In this Arbitration, the Tribunal cited *Gulf of Maine* and argued that China, through the Convention, gained additional rights in the areas adjacent to its coasts that became part of its exclusive economic zone, and, at the same time, also relinquished the rights it may have held in the waters allocated by the Convention to the exclusive economic zones of other States.[260] The invocation of *Gulf of Maine* is inapposite. The fishing activities at issue in *Gulf of Maine* could not compare to China's long-standing historic rights in the South China Sea. "Mere factual predominance" was what the Chamber said could no longer be relied upon, not historic rights. In any case, the Chamber did not say that historic rights do not constitute a relevant circumstance in maritime delimitation.

200. In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway, 1993)*, the ICJ considered fishing activities as a relevant factor in adjusting the median line, and gave "the traditional character of the different types

257 Ibid., pp.6-8.

258 See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p.18, at para.81.

259 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J Report 1984, p.246, at paras.233-237.

260 See Award of 12 July, paras.256-257.

of fishing carried out by the populations concerned"[261] some effect in the maritime delimitation. In this case, both Parties emphasized the importance of this factor with respect to the rights and interests to maritime resources in the disputed maritime areas. The ICJ pointed out that "[a]s has happened in a number of earlier maritime delimitation disputes, the Parties are essentially in conflict over access to fishery resources: this explains the emphasis laid on the importance of fishing activities for their respective economies and on the traditional character of the different types of fishing [ … ]".[262] Thus, "the Court has to consider whether any shifting or adjustment of the median line [ … ] would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned".[263]

201. The Tribunal in *Arbitration between Barbados and the Republic of Trinidad and Tobago (2006)*, after drawing a provisional equidistance line, considered whether the historic fishing activities claimed by Barbados constituted an element that would necessitate an adjustment to the provisional equidistance line. It eventually held that the fishing activities claimed by Barbados did not amount to "traditional fishing rights", and did not support Barbados' claim.[264]

202. In State practice, historic rights are always regarded as a circumstance to be taken into account in maritime delimitation. In the maritime delimitation between Sri Lanka and India, Sri Lanka claimed that it had historic fishing rights in the area of the Wadge Bank, located some 25 nautical miles southwest of the Comorin Cape, the southernmost tip of India. India recognized such historic rights of Sri Lanka. During the negotiation, the two sides discussed the effect the historic fishing rights of Sri Lanka may have on the delimitation. Although the two States ultimately agreed that the historic fishing rights would not require any adjustment to the provisional equidistance line, they made special arrangements for the historic fishing rights alongside their maritime delimitation.[265]

203. As can be seen from the above, historic rights constitute a relevant circumstance in maritime delimitation, and should be considered as part of such delimitation. In international jurisprudence, courts and tribunals have, in varying degrees, considered the potential effect of historic rights on the ultimate delimitation in the merits phase. Whatever weight one may give to historic rights will not prejudice the status of historic rights as a relevant circumstance in maritime delimitation, nor does

261 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p.38, at para.75.

262 Ibid.

263 Ibid.

264 Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at paras.266, 293.

265 See Jonathan I. Charney and Lewis M. Alexander (eds.), International Maritime Boundaries, Vol. II (Martinus Nijhoff, 1993), pp.1419-1431.

it affect the inherent relationship between historic rights and delimitation. As far as jurisdiction is concerned, where there exist a geographic framework of maritime delimitation and a situation of overlapping maritime entitlements claimed by relevant States, the issue of historic rights is undoubtedly a relevant circumstance in maritime delimitation, and any dispute regarding that issue is part of a "dispute concerning [ … ] relating to sea boundary delimitations", sufficient to trigger the application of the exceptions provided in Article 298(1)(a) of the Convention. This is exactly the situation between China and the Philippines.

204. In sum, the Tribunal manifestly had no jurisdiction over this case. The Tribunal made an erroneous determination on the relationship between the Philippines' submissions and the territorial sovereignty and maritime delimitation dispute between China and the Philippines and found that they were distinct and unrelated to each other. The Tribunal: (1) adopted a fragmentation approach rather than a holistic one to appreciate the territorial and maritime delimitation dispute between the Philippines and China in the South China Sea, and to assess and characterize the Philippines' submissions, and turned a blind eye to the territorial sovereignty and maritime delimitation nature of these claims; (2) made an erroneous determination on the relationship between the Philippines' submissions and the territorial dispute based on subjective assumption rather than fact; (3) made an erroneous determination on the relationship between the Philippines' submissions and the maritime delimitation dispute based on a misunderstanding of maritime delimitation and an incorrect interpretation of Article 298 of the Convention; and (4) made improper findings regarding historic rights by ignoring the possibility that China's historic rights may involve historic title and ignoring the well established principle that historic rights constitute a relevant circumstance in maritime delimitation. Having made the above erroneous determinations, the Tribunal proceeded to erroneously find that it has jurisdiction over the Philippines' submissions.

## III. The Tribunal erred in finding that the Philippines' submissions reflected the disputes as it identified between China and the Philippines concerning the interpretation or application of the Convention

205. As elaborated in Section II of this Chapter, the essence of the Philippines' submissions is the territorial issue between China and the Philippines over certain islands and reefs in the South China Sea, and the relevant submissions also constitute an integral part of the dispute relating to maritime delimitation between China and the Philippines in the South China Sea. The Tribunal should have found it had no jurisdiction over the Philippines' submissions, but it failed to do so. Instead, it erroneously decided that the Philippines' submissions concerned neither territorial sovereignty nor maritime delimitation. After that, the Tribunal, in order to establish its jurisdiction, proceeded to analyse whether the Philippines' submissions reflected the disputes as it identified between China

and the Philippines concerning the interpretation or application of the Convention. Two questions are at issue: first, whether there exists a dispute between China and the Philippines with respect to each of the Philippines' submissions, and, second, if so, whether the dispute concerns the interpretation or application of the Convention.[266]

206. In the Award on Jurisdiction, the Tribunal concluded that, with respect to Submissions No. 1 to 14, "disputes between the Parties concerning the interpretation and application of the Convention exist with respect to the matters raised by the Philippines in all of its Submissions [ … ]".[267] This decision is flawed. This Section aims to demonstrate: Even if it could apply the approach it had, the Tribunal did not adhere to the basic conditions and requirements well established in international law regarding how to determine the existence and nature of a dispute. The Tribunal's decisions and its reasoning are untenable in law and fact.

*III.1. International judicial practice in respect of determining the existence and nature of a dispute*

207. To first determine the existence and nature of a dispute is an essential step for the Tribunal to decide whether it has jurisdiction. The ICJ said, "the existence of a dispute is the primary condition [for a court or tribunal] to exercise its judicial function".[268] The Tribunal in this Arbitration itself also recognized that "the Tribunal is not empowered to act except in respect of one or more actual disputes between the Parties".[269] After finding the existence of a dispute, it should proceed to determine the nature of the dispute so as to assess whether it is one falling within its jurisdiction. For an international court or tribunal to determine the existence and nature of a dispute, some basic conditions must exist and requirements be met. These conditions and requirements are clearly established in international judicial practice. The Tribunal should have ascertained whether or not these conditions did exist and requirements met, but did not.

*III.1.A. Basic requirements for determining the existence of a dispute*

208. As the Permanent Court of International Justice (PCIJ) observed long ago, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[270] This point has been widely followed,[271] and was quoted by

266 See Award on Jurisdiction, para.131.

267 Ibid., para.178. See also, paras.398-412.

268 Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at para.55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.58.

269 Award on Jurisdiction, para.148.

270 Mavrommatis Palestine Concessions, Jurisdiction, Judgment of 30 August 1924, P.C.I.J. Series A, No.2, p.6, at 11.

271 See, e.g., South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p.319, at 328;

the Tribunal in this case.[272] As the ICJ has said, the determination of the existence of a dispute is "a matter of substance, and not a question of form or procedure",[273] and "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence."[274] After examining the relevant facts, including the position of the parties, an international court or tribunal needs to make an "objective determination" on whether a dispute exists.[275] To ascertain whether a dispute exists between the parties, three elements are important: first, the disagreements or points of contention must be concrete, not abstract; second, the claim of one party must be positively opposed by the other; and third, the date for determining the existence of a dispute is the date on which the application was submitted.

*(1) The disagreements or points of contention must be concrete, not abstract*

209. The function of an international court or tribunal is not to clarify abstract legal questions, and they have no jurisdiction over the disagreements on theoretical issues between the parties.[276] In the view of the ICJ, the "function of the Court is to state

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Cases Nos 3 & 4, para.44; Maffezini v. Spain, Decision on Jurisdiction, 25 January 2000, 40 International Legal Materials 1129 (2001), 5 ICSID Reports 396, para.96.

272 Award on Jurisdiction, para.149.

273 Obligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction of the Court and Admissibility of the Application, Judgment of 5 October 2016, I.C.J., at para.35. See also cases cited therein.

274 Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p.832, at para.138, citing South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p.319, at 328.

275 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, I. C.J., at para.50; see also Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at para.55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 457, at para.58; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.70, at para.30.

276 See Christoph Schreuer, What is a Legal Dispute?, in I. Buffard, J. Crawford, A. Pellet and S. Wittich (eds.), International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (Martinus Nijhoff Publishers, 2008), p.970; See Robert Jennings, Reflections on the Term "Dispute", in R. St. J. Macdonald (ed.), Essays in Honour of Wang Tieya (Martinus Nijhoff Publishers, 1994), p.404.

the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties".[277] International arbitral practice also confirms that, the function of international arbitral tribunals "is to determine disputes between the parties, not to make abstract rulings".[278]

*(2) The claim of one party must be positively opposed by the other*

210. As the ICJ pointed out, to ascertain the existence of a dispute, "[it is not] adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other".[279] In other words, as the ICJ said in another case, "'the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations".[280] One side's unilateral claim is insufficient for finding the existence of a dispute. It is necessary to ascertain that the parties have taken opposite attitudes or views on the same matter or claim. On this point, the ICJ has repeatedly said, "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant".[281]

277 Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963, p.15, at 33-34; see also Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaragua Coast (Nicaragua v. Colombia), Preliminary Objects, Judgment of 17 March 2016, I.C.J., at para.123.

278 Larsen v. Hawaii Kingdom, Award of 5 February 2001, P.C.A. Case No. 1999-01, para.11.3.

279 South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p.319, at 328.

280 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, I. C.J., at para.50, quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p.74.

281 bligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2016, at para.38; see also Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016, at para.73; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.70, at paras.61, 87, 104.

*(3) The date for determining the existence of a dispute is the date on which the application was submitted*

211. In principle, the date for determining the existence of a dispute is the date on which the application was submitted.[282] The ICJ observed that "neither the application [*sic*] nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings".[283] It means that the applicant State should at least have expressed to the other party in a certain manner its views relating to the subject-matter of its claim before filing the application, so that the other party is not completely left in the dark and would have an opportunity to respond to the applicant's views. The PCIJ stated:

> It would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome.[284]

212. If the applicant State has not conducted a certain degree of communications with the respondent State on the relevant matters before institution of the

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282 See, e.g., The Electricity Company of Sofia and Bulgaria, Preliminary Objection, Judgment, P.C.I.J., Series A/B, No. 77, 1939, p.64, at 83; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.70, at para.30; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p.442, at para.46; Obligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction of the Court and Admissibility of the Application, Judgment of 5 October 2016, I.C.J., at para.39; The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, ITLOS Case No. 18, para.151.

283 See Obligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction of the Court and Admissibility of the Application, Judgment of 5 October 2016, I.C.J., at para.40; Obligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction of the Court and Admissibility of the Application, Judgment of 5 October 2016, I. C.J., at para.40; Obligation concerning Negotiation relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment of 5 October 2016, I.C.J., at para.43; see also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p.422, at paras.53-55.

284 Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory) (Germany v. Poland), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, pp.10-11.

proceedings, this may lead an international court or tribunal to decide that no dispute exists. This is the case in *Question relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal, 2012)* as well as *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia, 2016)*. In the former, with regard to Belgium's claim on Senegal's breach of an obligation against torture under customary international law, the ICJ held that there was no dispute, because the diplomatic correspondence before the filing of the application did not state or imply that Senegal had such an obligation under customary international law and the only obligations indicated in their exchanges were those under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[285] In the latter, with regard to Nicaragua's second claim on Colombia's illegal threat or use of force, the ICJ held that no dispute existed, because Nicaragua had never indicated before filing the application that Colombia had violated its obligation under the UN Charter or customary international law regarding the threat or use of force.[286]

213. The Tribunal in this Arbitration accepted the above criteria for determining the existence of a dispute, quoting and citing relevant cases. The Tribunal also acknowledged that, the dispute must have existed on 22 January 2013, the date on which the Philippines presented the Notification and Statement of Claim.[287]

214. The Tribunal further indicated that, considering that "China has not elaborated on certain significant aspects of its claimed rights and entitlements in the South China Sea",[288] "the position or the attitude of a party can be established by inference, whatever the professed view of that party",[289] for the purposes of determining the existence of a dispute. It held, "The existence of a dispute may also 'be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.'"[290] And it further emphasized, "The Tribunal is obliged not to permit an overly technical evaluation of the Parties' communications or deliberate ambiguity in a Party's expression of its position to frustrate the resolution of a genuine dispute through arbitration."[291]

285 See Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p.422, at paras.53-55.

286 See Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, at paras.75-78.

287 See Award on Jurisdiction, para.149.

288 Ibid., para.160.

289 Ibid., para.161, citing Land and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p.275, at para.89.

290 Award on Jurisdiction, para.161 (internal citation omitted).

291 Ibid., para.163.

*III.1.B. Basic requirements for determining whether a dispute concerns the interpretation or application of a treaty*

215. The Tribunal acknowledged that it is required to determine "whether such a dispute concerns the interpretation or application of the Convention",[292] apart from determining whether there is a dispute between China and the Philippines concerning the matters raised by the Philippines. It further acknowledged that it is also required to "isolate the real issue in the case and to identify the object of the claim",[293] and considered that "it is not only entitled to interpret the submissions of the parties, but bound to do so".[294]

216. With regard to whether a dispute concerns the interpretation or application of a treaty, three elements can be identified from international jurisprudence: the dispute falls within the scope of the treaty's subject-matter; there exists a reasonable connection between the dispute and the treaty provisions; and the applicant State assumes the duty to demonstrate the nature of the dispute.

*(1) The dispute must fall within the scope of the treaty's subject-matter*

217. In *Oil Platforms (Iran v. United States, 1996)*, the Parties differed on whether the actions carried out by the United States against Iranian oil platforms was a dispute as to the interpretation or application of the 1955 Treaty of Amity, Economic Relations and Consular Rights.[295] The ICJ observed that:

> In order to answer that question, the Court [ … ] must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.[296]

218. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation, 2011),* when considering the dispute with respect to the submissions concerned the interpretation or application of the Convention on the Elimination of Racial Discrimination, the Court observed that:

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292 Ibid., para.131.

293 Ibid., para.150, citing Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.30; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, I.C.J. Reports 1995, p.288, at para.55.

294 Award on Jurisdiction, para.150.

295 See Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p.803, at para.16.

296 Ibid.

> While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court [ … ], the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.[297]

It is clear from this observation that, to determine whether a dispute concerns the interpretation or application of a treaty, an international court or tribunal should examine whether it is related to the subject-matter of the treaty.

219. In this Arbitration, to determine that a dispute concerns "the interpretation or application of the Convention", the Tribunal has to ascertain that this dispute falls within the scope of the subject-matter of the Convention. Given that the preamble of the Convention affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law", it is clear that not all maritime disputes concern "the interpretation or application of the Convention". This is to say, a matter not regulated by the Convention does not give rise to disputes concerning the interpretation or application of the Convention.[298]

*(2) There must exist a reasonable connection between the dispute and the treaty provisions*

220. Whether the subject-matter of a dispute is regulated by a treaty "depends on the relationship between the claim and the treaty on which the claim is sought to be based".[299] International jurisprudence clearly shows that it is not enough for the claimant State to establish a "remote connection" between the facts of the claim and the treaty on which it depends;[300] "a reasonable connection between the treaty and the claims submitted to the Court" is necessary.[301] The ICJ elaborated: the arguments advanced by the Applicant in respect of the treaty provisions on which its claim is said to be based must be "of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty";[302] or the interpretation given by the Applicant to

297 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.85, at para.30.

298 See Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Separate Opinion of Judge Shahabuddeen, I.C.J. Reports 1996, p.822, at 824.

299 Ibid.

300 See Ambatielos Case (Greece v. United Kingdom), Merits, Judgment of May 19th, I.C.J. Reports 1953, p.10, at 18.

301 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United State of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p.392, at para.81.

302 Ambatielos Case (Greece v. United Kingdom), Merits, Judgment of May 19th, I.C.J. Reports 1953, p.10, at 18.

any of the provisions relied upon "appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one";[303] or the Applicant is "relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails";[304] or the complaint should "indicate some genuine relationship between the complaint and the provisions invoked";[305] or the provisions invoked "appear to have a substantial and not merely an artificial connexion" with the alleged action.[306]

221. A similar approach is followed by the ITLOS. In *Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain, 2013)*, the ITLOS, citing the ICJ's observation in *Oil Platforms*, pointed out that "[t]o enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by [… the applicant State] and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by [… the applicant State]."[307] In that case, Saint Vincent and the Grenadines invoked Articles 73, 87, 226, 227, 245 and 303 of the Convention as the basis for its claims. After a thorough examination of each provision, the ITLOS determined that none of the provisions can serve as a basis for the claims submitted by Saint Vincent and the Grenadines,[308] and concluded that "no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it has no jurisdiction *ratione materiae* to entertain the present case".[309]

222. In *Norstar (Panama v. Italy, 2016)*, the ITLOS pointed out that "it is not sufficient for an application to make a general statement without invoking particular provisions of the Convention that allegedly have been violated."[310] Panama, the applicant State, invoked Articles 33, 87, 58, 111 and 300 of the Convention as the basis for its claims against Italy. The ITLOS considered that, in order to ascertain that the dispute between the Parties "concerns the interpretation or applications of the Convention", "the Tribunal must establish a link between the facts advanced by

303 Ibid.

304 Ibid.

305 Judgments of the Administrative Tribunal of the ILO upon Complaints Made against U.N.E.S.C.O., Advisory Opinion, I.C.J. Reports 1956, p.77, at 89.

306 Ibid.

307 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, ITLOS Case No. 18, para.99.

308 See ibid., paras.100-150.

309 Ibid., para.151.

310 The M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment of 4 November 2016, ITLOS Case No. 25, para.109.

Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama".[311]

223. In its decisions on provisional measures, the ITLOS indicated that "it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded".[312] The ITLOS also expressed that, before prescribing provisional measures, "the Tribunal must satisfy itself that any of the provisions [of the Convention] invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII tribunal might be founded."[313]

224. The Annex VII arbitral tribunal in *Southern Bluefin Tuna (Australia and New Zealand v. Japan, 2004)* likewise followed this approach. The arbitral tribunal cited *Oil Platforms* and then indicated that the dispute concerning the interpretation or application of the Convention requires that "the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point."[314]

*(3) The applicant State bears the duty to demonstrate the nature of the dispute*

225. With regard to the duty of the applicant State, Cot said in *Louisa* that "[t]he Applicant must also base its arguments on a specific provision of the United Nations Convention on the Law of the Sea",[315] "[b]ut offering a handful of articles of the Convention does not amount to establishing *prima facie* jurisdiction [of the ITLOS]",[316] not to mention its jurisdiction on the merits. Wolfrum and Cot also said in *ARA Libertad*, "It is for the Applicant [ … ] to invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the

311 Ibid., para.110.

312 The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Case No. 2, para.29.

313 The "Enrica Lexie" Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Case No. 24, para.52; see also The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Case No. 20, para.60; Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Cases Nos 3 and 4, paras.40, 52; The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22, paras.58, 70.

314 Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, RIAA, Vol. XXIII, p.1, at para.48.

315 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, ITLOS Case No. 18, Order of 23 December 2010, Dissenting Opinion of Judge Cot, para.12.

316 Ibid., para.19.

views on the interpretation of these provisions are positively opposed by the Respondent",[317] and "it is not sufficient that an applicant merely invokes provisions [of the Convention] which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question."[318] Wolfrum and Attard stressed in *Norstar* that, in the jurisdictional phase, "[the Applicant] must [ … ] establish that the facts advanced can sustain its claim or claims based upon rights under the Convention. It is not sufficient just to mention provisions of the Convention or to claim compensation for damages suffered."[319]

226. Therefore, in this Arbitration, it is the Philippines that bears the duty to demonstrate that its claims constitute disputes concerning the interpretation or application of the Convention. For this purpose, the Philippines should not only invoke specific provisions of the Convention, but also prove the existence of a reasonable connection between the subject-matter of its claims and the provisions of the Convention. The Tribunal shall not act on behalf of or help the Philippines to perform such a duty.

227. To sum up, to determine whether the Philippines' claims constitute disputes concerning the interpretation or application of the Convention, the Tribunal must ascertain whether the subject-matter of the Philippines' submissions is regulated by the Convention, and if so, whether it has a reasonable connection with provisions of the Convention. To this end, the Tribunal is expected to examine the provisions invoked by the Philippines in support of its claims, so as to determine whether these provisions can serve as the basis for the claims.

*III.2. The Tribunal erred in identifying and characterizing a dispute with respect to the Philippines' Submissions No. 1 and 2*

228. The Philippines' Submissions No. 1 and 2 as stated in its Memorial of 30 March 2014 read:

> 1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> 2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the

317 The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures, ITLOS Case No. 20, Order of 15 December 2012, Joint Separate Opinion of Judge Wolfrum and Judge Cot, para.35.

318 Ibid., para.16.

319 The M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, ITLOS Case No. 25, Joint Separate Opinion of Judges Wolfrum and Attard, para.23.

> so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS.[320]

229. The Philippines argued that, the disputes reflected in the two submissions are: "China's claim that its maritime entitlements in the South China Sea extend beyond those permitted by UNCLOS (in opposition to our submission 1), and its claim to 'historic rights', including sovereign rights and jurisdiction, within the maritime area encompassed by the nine-dash line beyond the limits of its UNCLOS entitlements (in opposition to our submission 2)."[321] With respect to the relationship between the two submissions and the Convention, the Philippines referred to Articles 55 and 56 of the Convention (the coastal State's rights and obligations in an exclusive economic zone), Articles 76 and 77 (the coastal State's entitlement to a continental shelf), and Article 121 (the Regime of islands).[322]

230. In the Award on Jurisdiction, the Tribunal found, on the basis of the exchange of notes verbales between China and the Philippines, that there existed a dispute between China and the Philippines concerning the interpretation and application of the Convention with respect to the Philippines' Submissions No. 1 and 2. However, this finding is not well founded in fact or law.

231. The Tribunal concluded that "the Philippines' Submissions No. 1 and 2 reflect a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed 'historic rights' with the provisions of the Convention."[323] The Tribunal also said that, "This dispute is evident from the diplomatic exchange between the Parties that followed China's Notes Verbales of 7 May 2009 [ … ]".[324]

232. After describing the relevant contents of the four notes verbales between China and the Philippines between 7 May 2009 and 14 April 2011, the Tribunal decided on the existence of dispute only with the following paragraph:

> In the Tribunal's view, a dispute is readily apparent in the text and context of this exchange: from the map depicting a seemingly expansive claim to maritime entitlements, to the Philippines' argument that maritime entitlements are to be derived from "geological features" and based solely on the Convention, to China's invocation of "abundant historical and legal evidence" and rejection of the

320 Memorial of the Philippines, Vol. I, p.271.

321 Jurisdictional Hearing Tr. (Day 3), pp.5-6, as cited in Award on Jurisdiction, para.147.

322 Memorial of the Philippines, Vol. I, paras.4.38-4.54.

323 Award on Jurisdiction, para.164.

324 Ibid.

> contents of the Philippines' Note as "totally unacceptable". The existence of a dispute over these issues is not diminished by the fact that China has not clarified the meaning of the nine-dash line or elaborated on its claim to historic rights.[325]

233. The Tribunal proceeded to characterize the dispute as follows:

> Nor is the existence of a dispute concerning the interpretation and application of the Convention vitiated by the fact China's claimed entitlements appear to be based on an understanding of historic rights existing independently of, and allegedly preserved by, the Convention. The Philippines' position, apparent both in its diplomatic correspondence and in its submissions in these proceedings, is that "UNCLOS supersedes and nullifies any 'historic rights' that may have existed prior to the Convention."[326]

The Tribunal further stated:

> This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.[327]

234. As shown above, it was based on the four notes verbales between China and the Philippines that the Tribunal decided that the Philippines' Submissions No. 1 and 2 constituted a dispute concerning the interpretation or application of the Convention. However, what the Tribunal did here is just to refer to the content of the notes verbales and to assert that the notes verbales reflect a certain dispute. It did not provide an analysis on the link between facts referred to and its assertion. When deciding on the existence of a dispute and its characterization, the Tribunal failed to follow relevant requirements and criteria established in international jurisprudence.

235. China's notes verbales dated 7 May 2009 referred to by the Tribunal are (1) that addressed to the Secretary-General of the United Nations with regard to the Joint Submission of 6 May 2009 by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (CLCS) on the limits of the continental shelf beyond 200 nautical miles in the South China Sea,[328] and (2) that addressed to the Secretary-General of the United Nations with regard to the Submission of 7 May

325 Ibid., para.167.

326 Ibid., para.168.

327 Ibid.

328 For more details, see Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

2009 by Viet Nam to the CLCS on the limits of the continental shelf beyond 200 nautical miles in the South China Sea.[329] In these two notes verbales, China objected to the two submissions and reiterated China's sovereignty over Nanhai Zhudao and its relevant maritime rights and entitlements in the South China Sea. A map of the South China Sea displaying the dotted line was attached to both notes verbales. The main content of the two notes verbales is identical, which reads:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.
>
> The continental shelf beyond 200 nautical miles as contained in [ … ] has seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider [ … ]. The Chinese Government has informed [ … ] of the above position.[330]

236. "[T]he diplomatic exchange between the Parties that followed China's Notes Verbales of 7 May 2009"[331] referred to by the Tribunal include two notes verbales: the first is the Philippines' Note Verbale of 5 April 2011 to the Secretary-General of the United Nations in response to China's Note Verbale of 7 May 2009; the second is China's Note Verbale of 14 April 2011 to the Secretary-General of the United Nations in response to the Philippines' Note Verbale of 5 April 2011.

237. The Philippines' Note Verbale of 5 April 2011 reads in part:

> The Philippine Permanent Mission notes that the said Notes Verbales were reactions specifically on the Unilateral and Joint Submission for the extended continental shelves (ECS) in the South China Sea (SCS) by the Socialist Republic of Vietnam and Malaysia. However, since the justification invoked by the People's Republic of China in registering its reaction to the said submissions touched upon not only on the sovereignty of the islands *per se* and "*the adjacent*

329 For more details, see Submissions to the Commission: Submission by the Socialist Republic of Viet Nam, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

330 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009).

331 Award on Jurisdiction, para.164.

> *waters*" in the South China Sea, but also on the other "*relevant waters as well as the seabed and subsoil thereof*" as indicated in the map attached thereat, with an indication that the said claims are "*widely known by the international community*", the Government of the Republic of the Philippines is constrained to respectfully express its views on the matter.
>
> On the Islands and other Geological Features
>
> First, the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG.
>
> On the "Waters Adjacent" to the Islands and other Geological Features
>
> Second, the Philippines, under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS).
>
> At any rate, the extent of the waters that are "adjacent" to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.
>
> On the Other "Relevant Waters, Seabed and Subsoil" in the SCS
>
> Third, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the "*relevant waters as well as the seabed and subsoil thereof*" (as reflected in the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their "adjacent waters" would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state-the Philippines-to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.[332]

238. In the Note Verbale of 14 April 2011, China rejected the Philippines' sovereignty claim over certain islands and reefs of Nansha Qundao, and reiterated China's territorial sovereignty, rights and jurisdiction in the South China Sea. In this note verbale, China pointed out:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the

332 Memorial of the Philippines, Vol. VI, Annex 200.

relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The contents of the Note Verbale No. 000228 of the Republic of Philippines are totally unacceptable to the Chinese Government.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of Philippines is in fact part of China's Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of Philippines and the domestic legislation of the Republic of Philippines prior to 1970s, the Republic of Philippines had never made any claims to Nansha Islands or any of its components. Since 1970s, the Republic of Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*", the Republic of Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.

Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the *1982 United Nations Convention on the Law of the Sea*, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992)* and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[333]

239. An examination of the content of the notes verbales and the positions of the Tribunal reveals that the Tribunal's decision is fraught with errors concerning the existence of dispute and its characterization with respect to the Philippines' Submissions No. 1 and 2.

240. First, the Tribunal failed to demonstrate sufficiently that Submissions No. 1 and 2 reflect the dispute as characterized by the Tribunal. The above-mentioned four notes verbales of China and the Philippines were the sole basis on which the Tribunal attempted to build its case that "the Philippines' Submissions No. 1 and 2 reflect a

333 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011).

dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed 'historic rights' with the provisions of the Convention."[334] However, the Tribunal provided no concrete analysis on any of the notes verbales, but threw out a summary, conclusory statement that there existed "unequivocally" such a dispute between China and the Philippines. The hasty way in which the Tribunal reached this conclusion defies the judicial character of its function.

241. Regarding whether the "positively opposed" requirement was met, the Tribunal inferred four elements from the notes verbales between China and the Philippines: first, the map attached to China's notes verbales depicts a seemingly expansive claim to maritime entitlements; second, the Philippines argued that maritime entitlements are to be derived from "geological features" and claimed based solely on the Convention; third, China indicated that China's sovereignty, sovereign rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence; fourth, China rejected the contents of the Philippines' Note Verbale of 5 April 2011. It is difficult for one to see how the Tribunal could move from solely the above four elements to the conclusion that there "unequivocally" existed "a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed 'historic rights' with the provisions of the Convention". Simply on the basis of the above four elements, one cannot come to such a conclusion.

242. With regard to the dispute concerning "the source of maritime entitlements in the South China Sea", even if the Philippines' position is correctly construed, namely that maritime entitlements are based solely on the Convention and only derived from "geological features", the Tribunal failed to point to any specific content in China's notes verbales that positively opposed the Philippines' claim that maritime entitlements are based solely on the Convention.

243. With regard to the dispute "concerning the interaction of China's claimed 'historic rights' with the provisions of the Convention", no mention of "historic rights" or any expression concerning the interaction of "historic rights" with the Convention can be found throughout the four notes verbales, whether China's or the Philippines'. The Tribunal failed to provide any analytical link between the four notes verbales and its conclusion.

244. Second, the Tribunal failed to demonstrate sufficiently that the dispute reflected in the two submissions, even if there were, concerned the interpretation or application of the Convention. As stated above, the Tribunal failed to make it clear as to how the Philippines' Submissions No. 1 and 2 reflect the dispute as characterized by the Tribunal, namely "a dispute concerning the source of maritime entitlements in

334 Award on Jurisdiction, para.164.

the South China Sea and the interaction of historic rights with the provisions of the Convention".[335]

245. To consider a dispute as concerning the interpretation or application of the Convention, the Tribunal must find the provisions of the Convention invoked by the Philippines afford a sufficient legal basis for its submissions, i.e., there must be a reasonable connection between the submissions and those provisions invoked.

246. With respect to its Submissions No. 1 and 2, although the Philippines invoked as the basis for its claim some provisions of the Convention concerning exclusive economic zone, continental shelf and the regime of islands, the Tribunal completely left aside those provisions when considering whether the dispute reflected in the Philippines' submissions concerned the interpretation or application of the Convention. It only quoted the Philippines' position that "UNCLOS supersedes and nullifies any 'historic rights' that may have existed prior to the Convention".[336]

247. To decide that the Philippines' Submissions No. 1 and 2 constitute "a dispute concerning the interaction of historic rights with the provisions of the Convention", or that the relevant dispute concerns "the interaction of the Convention with another instrument or body of law",[337] the Tribunal should ascertain that there exists a reasonable connection between the Philippines' submissions and the specific provisions of the Convention. But the Tribunal failed to do so.

248. In contrast, the ITLOS in *Norstar* provided a detailed examination of the connection between the subject-matter of the submissions and the provisions of the Convention invoked by the applicant, and pointed to specific provisions in its conclusion on that point.[338] Even so, Judge Wolfrum was still not satisfied there, and criticized that the standard applied by ITLOS was too loose; in his words, that standard "does not even meet the *prima facie* standard of appreciation in provisional measures proceedings".[339] However, even this very low standard is obviously higher than that applied by the Tribunal in this Arbitration. The ITLOS in that case at least established a formal link between the applicant's submissions and the specific provisions of the Convention. In the light of the above, the Tribunal's decision that the Philippines' Submission No. 1 and 2 reflected a dispute concerning the interpretation or application of the Convention is unconvincing.

335 Ibid., para.151.

336 Ibid., para.168, quoting Memorial of the Philippines, Vol. I, para.4.96(2).

337 Ibid.

338 See The M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment of 4 November 2016, ITLOS Case No. 25, paras.112-132.

339 The M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, ITLOS Case No. 25, Joint Separate Opinion of Judges Wolfrum and Attard, para.5.

*III.3 The Tribunal's identification and characterization of disputes with respect to the Philippines' Submissions No. 3 through 7 are not well founded in fact or law*

249. The Philippines' Submissions No. 3 through 7 in its Memorial of 30 March 2014 are as follows:

> 3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> 4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
>
> 5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
>
> 6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
>
> 7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf.[340]

As summarized by the Tribunal, the Philippines claimed that the disputes with respect to each of the above submissions were:

> Submission No. 3 relates to the Philippines' position that Scarborough Shoal is a rock under Article 121(3), opposed by China's position that it "is not a sand bank but rather an island."
>
> Submission No. 4 relates to the Philippines' position that Mischief Reef, Second Thomas Shoal, and Subi Reef are low tide elevations that do not generate entitlements to maritime zones, opposed by China's view that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."
>
> Submission No. 5 relates to a dispute over whether "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines or, as China puts it, of 'China's Nansha Islands'." "[T]he dispute turns on whether the Spratly Islands can generate an EEZ and continental shelf."
>
> Submission No. 6 relates to a dispute over whether Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations "that do not generate any maritime entitlements of their own."

340 Memorial of the Philippines, Vol. I, p.271.

> Submission No. 7 relates to a dispute "on whether these three reefs [Johnson Reef, Cuarteron Reef, and Fiery Cross Reef] do or do not generate an entitlement to an exclusive economic zone or continental shelf."[341]

250. The Tribunal decided that the Philippines' above five submissions reflected disputes concerning the interpretation and application of the Convention. In the opinion of the Tribunal:

- "[T]he Philippines' Submissions No. 3, 4, 6, and 7 reflect a dispute concerning the status of the maritime features and the source of maritime entitlements in the South China Sea".[342]
- China and the Philippines "appear to have only rarely exchanged views concerning the status of specific individual features".[343]
- China has set out its view on the status of features in the Spratly Islands [the Nansha Islands] as a group, and has expressed its position as to the status of Spratly Islands, namely that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[344]
- The Philippines has likewise made general claims, namely that "the extent of the waters that are 'adjacent' to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention."[345]
- "[T]he Philippines has, however, also underlined its view that the features in the Spratly Islands [the Nansha Islands] are entitled to at most a 12 nautical mile territorial sea and that any claim to an exclusive economic zone or to a continental shelf in the South China Sea must emanate from one of the surrounding coastal or archipelagic States".[346]

251. The Tribunal seized upon as an important piece of evidence the Note Verbale of 4 April 2011, concerning the Reed Bank Incident [Liyue Tan Incident], from the Department of Foreign Affairs of the Philippines to the Embassy of China in the Philippines. This note verbale reads in part:

> [E]ven while the Republic of the Philippines has sovereignty and jurisdiction over the [Kalayaan Island Group], the Reed Bank [Liyue Tan] where [service contract] CSEC 101 is situated does not form part of the "adjacent waters", specifically the 12 M territorial waters of any relevant geological features in the

341 Award on Jurisdiction, para.147.
342 Ibid., para.169.
343 Ibid.
344 Ibid.
345 Ibid.
346 Ibid.

> [Kalayaan Island Group] either under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS);
>
> [ … ] Reed Bank is not an island, a rock, or a low tide elevation. Rather, Reed Bank is a completely submerged bank that is part of the continental margin of Palawan. Accordingly, Reed Bank [ … ] forms part of the 200 M continental shelf of the Philippine archipelago under UNCLOS.[347]

252. Then the Tribunal simply concluded that "viewed objectively, a dispute exists between the Parties concerning the maritime entitlements generated in the South China Sea".[348]

253. With respect to the Philippines' Submission No. 5, the Tribunal said, this submission in fact reflected "another aspect of the same general dispute between the Parties concerning the sources of maritime entitlements in the South China Sea".[349] The Tribunal further stated that, "the Philippines has asked not for a determination of the status of a particular feature, but for a declaration that Mischief Reef and Second Thomas Shoal as low-tide elevations 'are part of the exclusive economic zone and continental shelf of the Philippines'".[350]

254. In the conclusion part, the Tribunal set out the disputes reflected in the aforementioned five submissions, item by item:

> The Philippines' Submission No. 3 reflects a dispute concerning the status of Scarborough Shoal [Huangyan Dao] as an "island" or "rock" within the meaning of Article 121 of the Convention [ … ]
>
> The Philippines' Submission No. 4 reflects a dispute concerning the status of Mischief Reef [Meiji Jiao], Second Thomas Shoal [Ren'ai Jiao], and Subi Reef [Zhubi Jiao] as "low-tide elevations" within the meaning of Article 13 of the Convention [ … ]
>
> The Philippines' Submission No. 5 reflects a dispute concerning the source of maritime entitlements in the South China Sea and whether a situation of overlapping entitlements to an exclusive economic zone or to a continental shelf exists in the area of Mischief Reef [Meiji Jiao] and Second Thomas Shoal [Ren'ai Jiao] [ … ]
>
> The Philippines' Submission No. 6 reflects a dispute concerning the status of Gaven Reef [Nanxun Jiao] and McKennan Reef [Ximen Jiao] (including Hughes Reef [Dongmen Jiao]) as "low-tide elevations" within the meaning of Article 13 of the Convention [ … ]

347 Ibid.

348 Ibid., para.170.

349 Ibid., para.172.

350 Ibid.

> The Philippines' Submission No. 7 reflects a dispute concerning the status of Johnson Reef [Chigua Jiao], Cuarteron Reef [Huayang Jiao] and Fiery Cross Reef [Yongshu Jiao] as "islands" or "rocks" within the meaning of Article 121 of the Convention [ … ][351]

255. The errors in the Tribunal's above analysis and conclusion are four-fold.

256. First, there existed no real disagreements or points of contention between China and the Philippines with regard to the matters as raised and formulated in the Philippines' relevant submissions. As elaborated above, to determine that the Philippines' submissions reflect disputes between China and the Philippines, the Tribunal must ascertain, on the basis of the facts, that the Philippines had raised the relevant claims of its submissions against China before the institution of the Arbitration, and the claims had been positively opposed by China. However, the Tribunal failed to do so.

The Philippines' Submissions No. 3, 4, 6 and 7 are related to the status of the nine individual features in the South China Sea, and to the maritime entitlements generated by them separately. China has always enjoyed territorial sovereignty over and maritime entitlements based on Zhongsha Qundao (including Huangyan Dao) as well as Nansha Qundao (including the other eight features mentioned in the Philippines' submissions), each as an integral unit. China has never claimed maritime entitlements based on the nine individual features separately, nor exchanged views with the Philippines concerning the issue of the maritime entitlements generated by the individual features separately. It is clear that there had existed no positive opposition between China and the Philippines on this issue and, thus, no dispute had arisen.

257. Second, the Tribunal morphed the Philippines' submissions concerning the nine features into a dispute regarding maritime entitlements, shuffling aside the standards for determining the existence of dispute, which the Tribunal itself had earlier presented. According to the Philippines, "each and every one of the submissions is indeed the subject of a legal dispute".[352] However, the Tribunal failed to analyse these submissions one by one, but made a general assertion that the Philippines' four submissions "reflect a dispute concerning the status of the maritime features and the source of maritime entitlements in the South China Sea".[353]

The Philippines' Submission No. 5 is related to whether Meiji Jiao and Ren'ai Jiao are part of the Philippines' exclusive economic zone and continental shelf. The Tribunal determined that it reflected a dispute between China and the Philippines with respect to the source of maritime entitlements in the South China Sea, in

351 Ibid., paras.400-404.

352 Ibid., para.147.

353 Ibid., para.169.

disregard of the effect of its decision on China's sovereignty over Nansha Qundao of which the two features are an integral part. It thus disregarded the real nature of the Philippines' submission, which is about sovereignty in the first place.

258. Third, the Tribunal doctored China's position on the integral status of Nansha Qundao, and found out of thin air disagreements or points of contention between China and the Philippines on maritime entitlements. The Tribunal generalized the Philippines' submissions as relating to "the status of the maritime features and the source of maritime entitlements in the South China Sea", and attempted to interpret China's and the Philippines' positions on this question, in order to find that there exists a dispute. On the one hand, the Tribunal described the Philippines' general position as that "the features in the Spratly Islands [Nansha Qundao] are entitled to at most a 12 nautical mile territorial sea and that any claim to an exclusive economic zone or to a continental shelf in the South China Sea must emanate from one of the surrounding coastal or archipelagic States". On the other hand, the Tribunal quoted part of the text of China's Note Verbale of 14 April 2011 as "China's Nansha Islands [are] fully entitled to a Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf",[354] and considered this as China's position. By so doing, the Tribunal attempted to show that the positions of the two countries were positively opposed.

It must be emphasized that, the Tribunal doctored the wording of China's note verbale just quoted. China used the singular "is" in "China's Nansha Islands is fully entitled to Territory Sea, Exclusive Economic Zone (EEZ) and Continental Shelf". But the Tribunal deliberately changed the singular "is" to the plural "are", and used "[are]" to indicate its deliberate change. By this small change of a single word, the Tribunal effected a massive distortion of China's position: the singular "is" indicates China's claim of maritime entitlements based on Nansha Qundao as an integral unit; the plural "are" shows the Tribunal's misconstruction of China's claim as based on each individual feature of Nansha Qundao separately. In this way, the Tribunal fabricated a dispute between China and the Philippines.

In the Award of 12 July, the Tribunal returned to China's Note Verbale of 14 April 2011. This time, the Tribunal quoted several times[355] the above sentence correctly, without making any change to the text. The Tribunal further addressed whether substantively China can claim maritime entitlements based on Nansha Qundao as a whole, but did not go back to consider whether what it did here would present any jurisdictional issue. This shows that the Tribunal knew full well China's claim of maritime entitlements based on Nansha Qundao as a whole, and that it deliberately doctored the text of China's note verbale and distorted China's position in

354 Ibid.

355 See, e.g., Award of 12 July, paras.185, 301, 470.

order to circumvent obstacles to its jurisdiction posed by the sovereignty and maritime delimitation nature of the Philippines' submissions.

259. Fourth, regarding whether the Philippines' submissions constitute a dispute between China and the Philippines, the Tribunal's analysis does not stand on its own terms. The Tribunal acknowledged that China and the Philippines "appear to have only rarely exchanged views concerning the status of specific individual features".[356] But it asserted that "[s]uch a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature",[357] and proceeded to find that the disputes existed. Whether or not "granular", exchanges between the two States must be sufficient to show that their claims are positively opposed with respect to each and every individual feature. The Tribunal failed to point to such sufficient exchanges.

260. There does exist a dispute between China and the Philippines in the South China Sea. But this dispute is not the one, as determined by the Tribunal, that concerns the status of and maritime entitlements generated by the individual features, but the territorial and maritime delimitation dispute. China enjoys sovereignty over Nanhai Zhudao, and claims maritime entitlements based on the archipelagos each as a whole. The Philippines unlawfully occupies some of China's islands and reefs, stakes illegal claims to some others, and makes various claims on maritime entitlements. The Philippines' relevant submissions constitute part of this territorial and maritime delimitation dispute and reflect its different aspects.

### *III.4. The Tribunal failed to ascertain there exist disputes between China and the Philippines concerning the interpretation or application of the Convention with respect to the Philippines' Submissions No. 8 to 14*

261. The Philippines' Submissions No. 8 to 14 presented in its Memorial of 30 March 2014 are:

> 8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;
>
> 9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
>
> 10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

356 Award on Jurisdiction, para.169.

357 Ibid., para.170.

> 11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;
>
> 12) China's occupation of and construction activities on Mischief Reef
>
> (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
>
> (b) violate China's duties to protect and preserve the marine environment under the Convention; and
>
> (c) constitute unlawful acts of attempted appropriation in violation of the Convention;
>
> 13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;
>
> 14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
>
> (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
>
> (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and
>
> (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal.[358]

As the Tribunal summarized, the Philippines claimed that the disputes related to Submissions No. 8 to 14 are:

> Submission No. 8 relates to a dispute that arises because "China has interfered with lawful activity of the Philippines—petroleum exploration, seismic surveys and fishing—within 200 miles of the Philippines' mainland coast, as a consequence of China's erroneous belief that it is entitled to claim sovereign rights beyond its entitlements under UNCLOS".
>
> Submission No. 9 relates to a dispute over "the legality under UNCLOS of China's purported grant of rights to nationals and vessels in areas over which the Philippines exercises sovereign rights".
>
> Submission No. 10 relates to a dispute "premised on [the] fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal".
>
> Submission No. 11 relates to a dispute concerning "China's failure to protect and preserve the marine environment at these two shoals [Scarborough Shoal and Second Thomas Shoal]".

358 Memorial of the Philippines, Vol. I, pp.271-272.

> Submission No. 12 relates to a dispute "premised on the characterization of Mischief Reef as a low-tide elevation that is part of the seabed and subsoil and located in the Philippines' EEZ and continental shelf" and on "China's construction and other activities".
>
> Submission No. 13 relates to the Philippines' protest against China's "purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS" and China's rejection of those protests.
>
> Submission No. 14 relates to a dispute concerning China's "activities at Second Thomas Shoal … after these proceedings were commenced".[359]

262. The Tribunal declared that:

> [T]he Philippines' Submissions No. 8 through 14 concern a series of disputes regarding Chinese activities in the South China Sea. The incidents giving rise to these Submissions are well documented in the record of the Parties' diplomatic correspondence and the Tribunal concludes that disputes implicating provisions of the Convention exist concerning the Parties' respective petroleum and survey activities, fishing (including both Chinese fishing activities and China's alleged interference with Philippine fisheries), Chinese installations on Mischief Reef [Meiji Jiao], the actions of Chinese law enforcement vessels, and the Philippines' military presence on Second Thomas Shoal [Ren'ai Jiao].[360]

No further analysis on this point were provided by the Tribunal. In the conclusion section on its jurisdiction, the Tribunal stated:

> The Philippines' Submission No. 8 reflects a dispute concerning China's actions that allegedly interfere with the Philippines' petroleum exploration, seismic surveys, and fishing in what the Philippines claims as its exclusive economic zone. [ … ]
>
> The Philippines' Submission No. 9 reflects a dispute concerning Chinese fishing activities in what the Philippines claims as its exclusive economic zone. [ … ]
>
> The Philippines' Submission No. 10 reflects a dispute concerning China's actions that allegedly interfere with the traditional fishing activities of Philippine nationals at Scarborough Shoal [Huangyan Dao]. [ … ]
>
> The Philippines' Submission No. 11 reflects a dispute concerning the protection and preservation of the marine environment at Scarborough Shoal [Huangyan Dao] and Second Thomas Shoal [Ren'ai Jiao] and the application of Articles 192 and 194 of the Convention. [ … ]

359 Award on Jurisdiction, para.147.

360 Ibid., para.173 (internal citation omitted).

> The Philippines' Submission No. 12 reflects a dispute concerning China's activities on Mischief Reef [Meiji Jiao] and their effects on the marine environment. [ … ]
>
> The Philippines' Submission No. 13 reflects a dispute concerning the operation of China's law enforcement activities in the vicinity of Scarborough Shoal [Huangyan Dao] and the application of Articles 21, 24 and 94 of the Convention. [ … ]
>
> The Philippines' Submission No. 14 reflects a dispute concerning China's activities in and around Second Thomas Shoal [Ren'ai Jiao] and China's interaction with the Philippine military forces stationed on the Shoal. [ … ][361]

263. After the Award on Jurisdiction was issued, the Philippines amended its Submissions No. 11 and 14 in its "Final Submissions" submitted at the end of oral hearings on the merits and remaining issues of jurisdiction and admissibility on 30 November 2015.

The amended Submission No. 11 reads: "China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal [Huangyan Dao], Second Thomas Shoal [Ren'ai Jiao], Cuarteron Reef [Huayang Jiao], Fiery Cross Reef [Yongshu Jiao], Gaven Reef [Nanxun Jiao], Johnson Reef [Chigua Jiao], Hughes Reef [Dongmen Jiao] and Subi Reef [Zhubi jiao]."[362] The latter six features were newly added.

To Submission No. 14, regarding aggravation and extension of disputes, the Philippines added: "(d) conducting dredging, artificial island-building and construction activities at Mischief Reef [Meiji Jiao], Cuarteron Reef [Huayang Jiao], Fiery Cross Reef [Yongshu Jiao], Gaven Reef [Nanxun Jiao], Johnson Reef [Chigua Jiao], Hughes Reef [Dongmen Jiao] and Subi Reef [Zhubi Jiao]".[363]

264. With respect to the amendment to Submission No. 11, the Tribunal said that "the amendments were related to, or incidental to the Submissions originally made by the Philippines, and did not involve the introduction of a new dispute between the Parties".[364] With respect to the amendment to Submission No. 14(d), the Tribunal also said that, for the purpose of jurisdiction, "the Tribunal need not engage with the question of whether the Philippines' Submission No. 14(d) constitutes a distinct dispute from those the Philippines alleges to have been aggravated or extended".[365]

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361 Ibid., paras.405-411.

362 See Award of 12 July, paras.78, 112.

363 See ibid.

364 Ibid., para.933, citing Letter from the Tribunal to the Parties (16 December 2015).

365 Ibid., para.1164.

265. What the Tribunal did in determining the existence and nature of disputes with respect to the Philippines' Submissions No. 8 to 14 deviated from international judicial practice.

266. The Philippines alleged that Submissions No. 8 to 14 constituted seven distinct disputes between China and the Philippines. The Tribunal should have analyzed these submissions one by one, and ascertained whether there exist positive opposition between China and the Philippines with respect to each, so as to determine whether or not there exists a dispute with respect to each. However, apart from declaring that "the incidents giving rise to these submissions are well documented in the record of the Parties' diplomatic correspondence", the Tribunal merely referred to the activities or actions at sea as described by the Philippines in its submissions, and jumped to the conclusion that the disputes reflected in the submissions "implicat[ed]" the interpretation and application of the Convention. It failed to carry out a concrete analysis to ascertain there exist positively opposed views between the two countries regarding each of the relevant matters.[366] The idea of due diligence was not on the mind of the Tribunal.

267. Take, for example, the Philippines' Submission No. 10. The Tribunal said, "The Philippines' Submission No. 10 reflects a dispute concerning China's actions that allegedly interfere with the traditional fishing activities of the Philippine nationals" at Huangyan Dao. To prove its claim, the Philippines submitted a number of documents including its fishermen's affidavits, internal memoranda and reports, diplomatic exchanges.

268. The fishermen's affidavits[367] could only represent the opinions of relevant fishermen at most, which could not be considered as representing allegations of the Philippine government that China violated its obligations under the Convention. In any event, these affidavits were made after the initiation of this Arbitration and specially for litigation purposes. They could not have been known by China before the initiation of the Arbitration and therefore were of no value in proving the existence of dispute. The internal memoranda and reports of the Philippine governmental agencies, such as its military, its fishery agency and its Department of Foreign Affairs,[368]

366 See Award on Jurisdiction, para.173.

367 Affidavit of R.Z. Comandante (12 November 2015) (Annex 693); Affidavit of T.D. Forones (12 November 2015) (Annex 694); Affidavit of M.C. Lanog (12 November 2015) (Annex 695); Affidavit of J.P. Legaspi (12 November 2015) (Annex 696); Affidavit of Crispen Talatagod (12 November 2015) (Annex 697); Affidavit of C.O. Taneo (12 November 2015) (Annex 698).

368 Memorandum from Colonel, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. N2E-0412-008 (April 2012) (Annex 77); Report from the Commanding Officer, SARV-003, Philippine Coast Guard to the Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard (28 April 2012) (Annex 78); Memorandum from the Commander, Naval Forces Northern Luzon,

were just internal documents, not known to outsiders. Even if they contained contents alleging China's violation of traditional fishing rights, China in no way could have been aware of these documents, let alone positively opposed those allegations. The notes verbales submitted by the Philippines[369] did not mention traditional fishing activities or traditional fishing rights at all. From all these documents, no dispute regarding traditional fishing rights could be identified. The Tribunal erred in finding that it had jurisdiction.

269. In sum, with respect to whether there exist disputes between China and the Philippines concerning the Philippines' submissions and, if so, whether they concern the interpretation or application of the Convention, the Tribunal failed to conduct the necessary analysis on the relevant questions, and hastily found the existence of disputes concerning the interpretation or application of the Convention. The Tribunal failed to discharge its duty to satisfy itself that it has jurisdiction.

## IV. The Tribunal erred in its decision on the choice of means made by China and the Philippines for the settlement of disputes and its effect

270. Article 288(1) of the Convention provides: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with [Part XV]." Article 286 of the Convention provides: "Subject to section 3 [of Part XV], any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [section 2]." Accordingly, to make sure that it has jurisdiction, a court or tribunal referred to in Article 287, must ascertain that, even if there exists a dispute concerning the

Philippine Navy to the Flag Officer in Command, Philippine Navy, No. CNFNL Rad Msg Cite NFCC-0612-001 (2 June 2012) (Annex 83); Memorandum from the FRPLEU/QRT Chief, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to the Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012) (Annex 79); Report from FRPLEU/QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012) (Annex 80); Report from FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to the Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012) (Annex 82); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S (24 May 2012) (Annex 81); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S (26 July 2012) (Annex 84).

369 See footnotes 784, 785, in Award of 12 July, para.764.

interpretation or application of the Convention, "no settlement [of that dispute] has been reached by recourse to Section 1" or, in other words, the submission of the dispute conforms to the provisions of Section 1 of Part XV of the Convention.

Among others, Article 281(1) sets out the preconditions for State Parties' submission of disputes to the compulsory procedures of Section 2 of Part XV of the Convention:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

271. The Philippines argued that there existed no agreement between China and the Philippines which excludes the application of procedures provided in Part XV (including arbitration under Annex VII), referred to in Article 281 of the Convention ("Article 281 exclusion agreement").[370] China maintained that such an agreement does exist.[371]

272. The Tribunal determined that the requirements of Article 281 had been met and that there existed no Article 281 exclusion agreement between China and the Philippines. The Tribunal considered that, first, the multilateral and bilateral instruments between China and the Philippines, including the DOC, were political documents which could not create legal rights or obligations for the parties, instead of legally binding agreements within the meaning of Article 281;[372] second, even if the DOC and other instruments were legally binding agreements, China and the Philippines had engaged in years of discussions aimed at resolving the parties' disputes, but no settlement had been reached;[373] third, even if the DOC and other multilateral and bilateral instruments were legally binding agreements, they contained no "express" exclusion of other compulsory procedures.[374]

273. The Tribunal's conclusions above are wrong. First, the Tribunal misinterpreted Article 281 regarding exclusion agreements and the agreement between China and the Philippines referred to by China, which led to its erroneous finding that there existed no Article 281 exclusion agreement between China and the Philippines.

370 Memorial of the Philippines, Vol. I, paras.7.50-7.58; The Philippines' Supplemental Written Submissions, Vol. I, paras.26.27-26.39; Jurisdictional Hearing Tr. (Day 2), pp.7-11.

371 See China's Position Paper, para.39.

372 See Award on Jurisdiction, paras.212-218, 241-245.

373 See ibid., paras.219-220.

374 See ibid., paras.221-228, 246-247, 265-269, 281-289.

Second, the Tribunal disregarded the fact that China and the Philippines had been in an on-going process of negotiation and consultation concerning the territorial and jurisdictional dispute between them in the South China Sea, with the aim of gradually and progressively achieving the final settlement of the dispute, and erroneously determined that "no settlement has been reached by recourse to such means". Third, the Tribunal outrageously rewrote "exclude" in Article 281 as "expressly exclude", and applied this ill-founded, revised standard to erroneously find that the agreement between China and the Philippines, even if it existed, "does not exclude any further procedure". These errors of the Tribunal lowered the threshold for initiating the compulsory dispute settlement procedures of Section 2 of Part XV of the Convention.

*IV.1. The Tribunal erred in finding no agreement between China and the Philippines to settle their dispute through negotiations*

274. The Tribunal determined that DOC was a political document without binding force and so were the six bilateral instruments between China and the Philippines, referred to in China's Position Paper.[375] Therefore, there existed no Article 281 exclusion agreement between China and the Philippines.

*IV.1.A. The Tribunal erroneously construed the relationship between (1) the form of an instrument and its overall effect and (2) the effect of certain particular obligations therein*

275. Article 281 only specifies the substance of the agreement, i.e., "to seek settlement of the dispute by a peaceful means of their own choice", while imposing no particular form. An agreement is reached between the parties as soon as the parties to a dispute agree upon certain peaceful means aimed at resolving the dispute. It does not matter whether the agreement is embodied in one or several instrument(s), or in parts of one or more instrument(s); nor does it matter whether the instrument itself is binding in its entirety. In other words, Article 281 does not require the instrument embodying the agreement to be legally binding. But the Tribunal erroneously took the binding-force of the whole instrument as a necessary condition for an agreement to be found in part of that instrument.

276. The Tribunal's aforementioned position on the relationship between (1) the form of an instrument and (2) its overall effect and the effect of certain particular obligations therein finds no support in the jurisprudence of the ICJ. In *Aegean Sea Continental Shelf (Greece v. Turkey, 1978)*, Greece and Turkey differed on whether a Joint Communiqué constituted an agreement between the parties to submit relevant disputes to the ICJ. The Court held:

> On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from

375 See ibid., paras.217, 231-233, 241-251.

> constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.[376]

277. The Court examined in detail the relevant terms of the Brussels Communiqué and the circumstances in which it was drawn up, and determined that the two sides had not reached agreement as to the submission of the relevant dispute to the ICJ.[377] This approach was followed by the ICJ in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain, 1994)*[378] and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening, 2002)*[379].

278. Therefore, whether there exists an agreement between China and the Philippines to settle the relevant dispute through negotiations does not depend on the form of the bilateral instruments between China and the Philippines and the DOC or, in other words, the binding force of them as such, but on whether there are any specific provisions in these instruments which reflect that China and the Philippines have reached agreement on the choice of means of dispute settlement. Thus, the relevant terms used in the instruments and the circumstances of drawing up these provisions, especially those that may reflect the real intention of the parties, must be taken into consideration.

279. In international law, regardless of its designation or form, as long as an instrument is intended to create rights and obligations for the parties, these rights and

376 Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports, 1978, p.3, at para.96.

377 See ibid., at paras.97-107. See also Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p.3, at para. 28-29; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p.49, at para.28.

378 See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, at paras.21-30.

379 See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p.303, at paras.258, 262, 263.

obligations are binding on them.[380] Even oral agreements or unilateral declarations can create such binding rights and obligations. The source of binding force is not the form that an instrument may take, such as oral agreement, unilateral declaration or political document, but the intention of the parties to establish rights and obligations with respect to certain matters. As the ICJ stated in *Temple of Preah Vihear (Cambodia v. Thailand, 1961)*:

> Where [ … ] as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.[381]

280. Subsequently, the ICJ emphasized:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[382]

281. The Tribunal acknowledged that "[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties",[383] referring to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain, 1994)*. However, in that case, the ICJ pointed out that not only instruments such as international treaties and agreements but also diplomatic documents such as memoranda and exchange of notes can create rights and obligations legally binding on the parties. There, at issue was whether certain minutes

380 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, at paras.22-26; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p.303, at paras.258, 262, 263.

381 Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, I.C.J. Reports 1961, p.17, at 31.

382 Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at para.46; Nuclear Tests Case (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.49.

383 Award on Jurisdiction, para.213.

recording the understanding of parties were sufficient to constitute an agreement referring that case to the Court. The ICJ held:

> [The Minutes] enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.[384]

282. Even the unilateral declaration, which is commonly seen as a weaker form, can create rights and obligations under international law. For example, in *Nuclear Tests (Australia v. France; New Zealand v. France, 1974)*, the ICJ affirmed that the unilateral declarations made by the French President were legally binding. The Court stated: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."[385]

283. In the light of the above analyses, it does not matter from what source an obligation derives or in what form that source comes. What does matter is the States' intention to undertake international obligations in good faith. As the Chinese Society of International Law pointed out earlier, "[t]he parties would have an 'agreement' within the meaning of Article 281 in so far as they have a consensus on their own will, be it expressed in oral or written form, embodied in a treaty or another international instrument, in the form of one or multiple instruments, or in specific provision(s) in one or more instruments."[386]

284. The Tribunal in this Arbitration only discussed whether the DOC and the bilateral instruments between China and the Philippines *per se* are binding instruments. However, as the ICJ pointed out in *Aegean Sea Continental Shelf (Greece v. Turkey, 1978)*, such a discussion "does not settle the question"; what is important are the actual terms of the "act or transaction" embodied in such an instrument and the particular circumstances in which such an instrument is drawn up.[387] The Tribunal thus should have considered the actual terms of above-mentioned instruments and the particular circumstances of the adoption of relevant provisions so as to ascertain whether the two sides have a clear intention to create the obligation to settle the relevant disputes through negotiations. Only after that could the Tribunal decide whether there

384 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, at paras.25.

385 Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at para.43; Nuclear Tests Case (New Zealand v. France), Judgment, I.C.J. Reports 1974, p.457, at para.46.

386 Chinese Society of International Law, The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void, Law Press·China, 2016, p.80.

387 See Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, I.C.J. Reports, 1978, p.3, at para.96.

exists an agreement between China and the Philippines to settle the relevant disputes through negotiations. It was groundless for the Tribunal to determine the existence of an agreement on the basis of the form in which the agreement is embodied.

*IV.1.B. The Tribunal erroneously construed the agreement between China and the Philippines concerning the means of dispute settlement*

285. In addition to its misinterpretation of "agreement" in Article 281 as discussed above, the Tribunal also erroneously construed the agreement between China and the Philippines concerning the means for the settlement of their dispute.

286. On this issue, China's position is clear:

> 38. The bilateral instruments between China and the Philippines repeatedly employ the term "agree" when referring to settlement of their disputes through negotiations. This evinces a clear intention to establish an obligation between the two countries in this regard. Paragraph 4 of the DOC employs the term "undertake", which is also frequently used in international agreements to commit the parties to their obligations. [ … ]
>
> 39. The relevant provisions in the aforementioned bilateral instruments and the DOC are mutually reinforcing and form an agreement between China and the Philippines. On that basis, they have undertaken a mutual obligation to settle their relevant disputes through negotiations.[388]

In other words, China has never claimed that the DOC itself as a whole constitutes an agreement between China and the Philippines or that the six bilateral instruments individually or collectively constitute an agreement; what China maintains is that the content relating to the settlement of disputes through negotiations found in the bilateral instruments and the DOC constitutes an agreement.

287. The Tribunal should have examined whether the content relating to the settlement of disputes in the bilateral instruments and the DOC reflect a clear intention of the two States to create rights and obligations so as to determine whether there exists an agreement within the meaning of Article 281.

288. The Tribunal considered that there were three elements in determining whether there exists a clear intention in an instrument to establish rights and obligations: the actual terms, the particular circumstances of its adoption and the subsequent conduct of the parties.[389] Based on these elements, one can easily see that China and the Philippines have a clear intention in these instruments to establish rights and obligations regarding the recourse to negotiation as the only means of dispute settlement. The Tribunal erred in finding no such agreement.

388 China's Position Paper, paras.38-39.

389 See Award on Jurisdiction, para.213.

*(1) Actual terms used in the bilateral instruments between China and the Philippines and the DOC*

289. "Agree" and "reaffirm" are the terms commonly used in international law to establish rights and obligations for the parties. For example, in *Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v. Bahrain, 1994)*, the ICJ pointed out:

> The 1990 Minutes refer to the consultations between the two Foreign Ministers of Bahrain and Qatar, in the presence of the Foreign Minister of Saudi Arabia, and state what had been "agreed" between the Parties. In paragraph 1 the commitments previously entered into are reaffirmed (which includes, at the least, the agreement constituted by the exchanges of letters of December 1987).[390]

290. The terms "agree" and "undertake" are repeatedly used to refer to choosing negotiation as the means to settle the disputes in the bilateral instruments between China and the Philippines and the DOC to which both China and the Philippines are parties, thus evincing a clear intention to establish rights and obligations for the parties.

291. One of the bilateral instruments, the Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation of 10 August 1995, states: that the two sides "agreed to abide by" the principles that "[r]elevant disputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect" (Point 1); that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes" (Point 3); and that "[d]isputes shall be settled by the countries directly concerned without prejudice to the freedom of navigation in the South China Sea" (Point 8). The expressions "agreed to abide by" and "with a view to eventually negotiating a settlement of the bilateral disputes" used in this context clearly show that there exists an agreement between China and the Philippines to resolve disputes through negotiations, and only through negotiations. Just as China's Position Paper rightly points out, "'negotiations' is the only means the parties have chosen for dispute settlement".[391]

292. The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures of 23 March 1999 states in Paragraph 12, "The two sides believe that the channels of consultation between China and the Philippines are

390 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, at para.24.

391 China's Position Paper, para.40.

unobstructed. They have agreed that the dispute should be peacefully settled through consultation."

293. The Joint Statement between China and the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century of 16 May 2000 provides in Point 9:

> The two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 joint statement between the two countries on the South China Sea [ … ].

294. The Joint Press Statement of the Third China-Philippines Experts' Group Meeting on Confidence-Building Measures of 4 April 2001 states in Point 4:

> The two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound development of China-Philippines relations and peace and stability of the South China Sea area.

295. In addition to the bilateral instruments mentioned above, the DOC in Paragraphs 4 and 5 employs the term "undertake", which is usually used to denote the assumption of obligations in an agreement. In fact, the Tribunal also acknowledged this term as "suggestive of the existence of an agreement".[392] Paragraphs 4 and 5 of the DOC provide in full:

> 4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
>
> 5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner. Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including: a. holding dialogues and

392 Award on Jurisdiction, para.216.

> exchange of views as appropriate between their defense and military officials; b. ensuring just and humane treatment of all persons who are either in danger or in distress; c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and d. exchanging, on a voluntary basis, relevant information.

The term "undertake" and other parts of the text of Paragraph 4 and 5 are more than "suggestive of the existence of an agreement"; they clearly embody one.

296. From the terms used in the above instruments, such as "agree" and "undertake", it is clear that there exists an intention of China and the Philippines to settle their territorial and maritime delimitation dispute through negotiation. They constitute an "agreement" within the meaning of Article 281 of the Convention.

*(2) Particular circumstances of adoption of the bilateral instruments between China and the Philippines and the DOC*

297. The particular circumstances of drawing up the bilateral instruments between China and the Philippines and the DOC make it clear that their intention was to create an obligation in the relevant provisions to settle relevant disputes through consultations and negotiations.

298. First, China and the Philippines since long ago have had the consensus and commitment to resolve disputes in the South China Sea through negotiations. As early as in June 1975, when China and the Philippines normalized bilateral relations, the two governments agreed to settle all disputes by peaceful means without resorting to the threat or use of force.[393] The Joint Statement between the People's Republic of China and the Republic of the Philippines Concerning Consultations on the South China Sea and on Other Areas of Cooperation of August 1995 states that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes". Since then, China and the Philippines have confirmed the consensus to resolve relevant issues in the South China Sea through bilateral negotiations and consultations in a series of bilateral instruments, e. g., the Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures of March 1999, and the Joint Statement between China and the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century of May 2000.[394]

299. Second, the DOC is an important instrument adopted after years of arduous negotiations between China and ASEAN Member States based on mutual respect and equality. In the process of negotiation, ASEAN Member States, especially the

393 See China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea, 13 July 2016, para.75.

394 See ibid., para.79.

Philippines, insisted on the DOC having binding force. China proposed to incorporate into Paragraph 4 "to resolve their territorial and jurisdictional disputes by peaceful means through friendly consultations and negotiations by sovereign states directly concerned". The Tribunal acknowledged, in the light of its signature, preamble and terms, "the DOC shares some hallmarks of an international treaty."[395] In paragraph 4, with its clear terms spelling out obligations of the parties, one finds not only the "hallmarks" of an agreement but an actual agreement to settle disputes through consultations and negotiations. As one of the principal drafters of the DOC, Surakiart Sathirathai, former Deputy Prime Minister and Foreign Minister of Thailand, said that the DOC is "[t]he ASEAN way of dealing with obligations without any regard to the label or format of the document at issue".[396] Therefore, both ASEAN Member States and China intended the undertaking provided for in Paragraph 4 as a binding one.

300. The Philippines, as an ASEAN Member State which has participated in the whole negotiating process of the DOC, knows full well the importance of the DOC for the peaceful settlement of disputes in the South China Sea. With regard to territorial and jurisdictional issues, China has consistently maintained that they should be resolved through negotiations between the countries directly concerned, and has objected to any third-party involvement or intervention. The Philippines knows full well, too, this fundamental position that China has consistently held since long ago, and could not have expected that the wording at issue in Paragraph 4, formulated at China's insistence, would embody an approach that would depart from that fundamental position. The DOC has played a positive role in helping to stabilize the situation in the South China Sea and promote maritime cooperation between China and ASEAN Member States. To read down the DOC and therefore downplay its role in settling relevant disputes peacefully in the South China Sea would jeopardize the cooperative relationship in the South China Sea between China and ASEAN Member States, the Philippines included.

*(3) Subsequent conduct of the parties*

301. Since the adoption of a series of bilateral instruments and the DOC, China and the Philippines have repeatedly stated in a number of bilateral instruments that they "agree" and "reaffirm" the provisions in earlier instruments concerning the settlement of disputes in the South China Sea through negotiations. China and the Philippines'

395 Award on Jurisdiction, para.214.

396 Remarks of Surakiart Sathirathai, former Deputy Prime Minister and Foreign Minister of Thailand, as summarized in his presence by a speaker in an academic conference in Hong Kong, in: Chinese Society of International Law and Hong Kong International Arbitration Centre, Proceedings of Public International Law Colloquium on Maritime Disputes Settlement (Hong Kong International Arbitration Centre, 2016), p.418.

"subsequent conducts" since the agreement was reached clearly confirm the intention of the parties to establish relevant rights and obligations in those provisions.

302. For example, on 3 September 2004, during a State visit to China by the then Philippine President Gloria Macapagal-Arroyo, the two governments issued the Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines, which stresses that "[t]hey agreed that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation."[397]

303. Another example is the Joint Statement between the People's Republic of China and the Republic of the Philippines issued during a State visit to China by the then President Benigno S. Aquino III of the Philippines from 30 August to 3 September 2011. The joint statement of the two States "reiterated their commitment to addressing the disputes through peaceful dialogue", and "reaffirmed their commitments to respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002".

304. The conduct of the Philippines since the initiation of the Arbitration also shows that it recognizes the obligations under Paragraphs 4 and 5. For example, in a statement dated 1 August 2014 issued by its Department of Foreign Affairs, the Philippines "called on the parties to the DOC to comply with Paragraph 5 of the DOC and to provide 'the full and effective implementation of the DOC'".[398]

305. The subsequent conduct of other signatories to the DOC also shows that the parties have clear intention to establish a binding obligation to settle the disputes in the South China Sea through consultations and negotiations. For example, on 18 August 2009, Viet Nam stated in its note verbale addressed to the UN Secretary-General that:

> It is firmly held by Viet Nam that all disputes relating to the Eastern Sea (South China Sea) must be settled through peaceful negotiations, in accordance with international law, especially the 1982 United Nations Convention on the Law of the Sea and the Declaration on the Conducts [*sic*] of Parties in the South China Sea (Eastern Sea)-DOC.[399]

306. In sum, the key point is not whether the six bilateral instruments between China and the Philippines and the DOC each as a whole are legally binding, but whether these instruments contain specific provisions reflecting that China and the

397 China's Position Paper, para.36.

398 Ibid., para.52.

399 Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, No. 240HC-2009, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf.

Philippines have reached agreement regarding the means of dispute settlement. As elaborated above, the above-mentioned series of bilateral instruments and the DOC do contain such provisions. The terms used in these provisions, the circumstances of their adoption and the subsequent conduct of the parties show that the parties have the clear intention to create obligations relating to the settlement through negotiations of disputes in the South China Sea. They constitute an agreement within the meaning of Article 281, binding upon both China and the Philippines.

*IV.2. The Tribunal erred in determining that China and the Philippines had resorted to negotiation but reached no settlement*

307. After erroneously finding there existed no agreement between China and the Philippines within the meaning of Article 281 regarding the settlement of disputes through negotiation, the Tribunal further asserted that even if there existed such an agreement, no settlement had been reached by recourse to negotiation. The Tribunal said:

> [ … ] despite years of discussions aimed at resolving the Parties' disputes, no settlement has been reached. If anything, the disputes have intensified. Article 281 does not require parties to pursue any agreed means of settlement indefinitely.[400]

308. The above statement of the Tribunal did not objectively reflect the efforts of China and the Philippines in pursuing a settlement of the dispute in the South China Sea, and misconstrued the meaning and implications of these efforts.

309. The Tribunal mismatched negotiations and disputes: on the one hand, it did not admit that the Philippines' submissions constitute part of the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea; on the other hand, it treated the consultations on the territorial and maritime delimitation issues between China and the Philippines in the South China Sea as consultations on disputes as identified by the Tribunal in the Philippines' submissions. The Tribunal's approach is paradoxical and is intended to mislead the unwary.

310. Indeed, as China's Position Paper points out, "disputes between China and the Philippines relating to territorial sovereignty over relevant maritime features remain unresolved, [and] the two States have yet to start negotiations on maritime delimitation."[401] As elaborated above, the 14 submissions of the Philippines actually constitute part of the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and reflect different aspects of the dispute. However, the Tribunal found that those submissions had no relevance to this dispute. Given this no-relevance finding, the Tribunal should not have treated the

400 Award on Jurisdiction, para.220 (internal citation omitted).

401 China's Position Paper, para.59.

consultations on the territorial and maritime delimitation issues between China and the Philippines in the South China Sea as consultations on disputes as identified by the Tribunal in the Philippines' submissions. It is wrong for the Tribunal to use such a mismatch to reach the conclusion that the two States had yet to settle the Philippines' claims after years of consultation.

311. There is no evidence showing that China and the Philippines have ever discussed any of the disputes as identified by the Tribunal in the Philippines' submissions. As China's Position Paper correctly points out, "the truth is that the two countries have never engaged in negotiations with regard to the subject-matter of the arbitration."[402] The discussions between China and the Philippines either addressed issues relating to the territorial and maritime delimitation dispute in the South China Sea, or dealt with managing situations, building confidence and promoting cooperation in the relevant sea areas, without touching upon matters raised in the Philippines' submissions. Even in the note verbale presented by the Philippines to China during bilateral consultations on 26 April 2012, which the Tribunal took as a most important piece of evidence showing the two States "have unequivocally exchanged views regarding the possible means of settling the disputes",[403] the issue of Huangyan Dao was raised by the Philippines within the framework of the territorial and maritime delimitation issue, not in the sense as the Tribunal had it. In that note verbale, the Philippines "calls on China to respect the Philippines' sovereignty and sovereign rights".[404]

312. If the Tribunal had made an objective assessment, it would have found that China and the Philippines had never conducted any negotiations on the matters raised in the Philippines' submissions, not to mention having exhausted endeavours to settle such "disputes" through negotiations.

313. The Tribunal considered that China and the Philippines had exhausted negotiations as the means to settle their disputes. This conclusion is hasty and inconsistent with not only the practice of China and the Philippines but also the general practice of States in settling international disputes. The process of employing negotiations and consultations to settle disputes involving maritime matters, especially one as sensitive and important as the territorial and maritime delimitation dispute between China and the Philippines, is usually arduous and lengthy.

314. The parties to a dispute may choose to settle the dispute permanently once and for all through, for example, concluding a treaty of maritime delimitation. One example is the Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay signed by China and Viet Nam

402 Ibid., para.45.

403 Award on Jurisdiction, para.342.

404 Memorial of the Philippines, Vol. VI, Annex 207.

on 25 December 2000. They may also choose a step-by-step approach by making temporary arrangements with a view to gradually and progressively achieving a final settlement of the dispute, such as the temporary arrangements prior to maritime delimitation concerning the utilization, conservation and management of the fishery resources in the fisheries agreements as those between China and Japan and that between China and the Republic of Korea.

315. China and the Philippines have held many rounds of consultations on the management of their differences at sea, and agreed that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes".

316. Over the past years before the Arbitration, many rounds of consultations had been held between China and the Philippines on the issues of territorial sovereignty and maritime delimitation in the South China Sea, with a focus on managing differences and enhancing mutual trust so as to pave the way for eventually negotiating a final settlement of the dispute. However, China and the Philippines have not yet engaged in substantive negotiations of the dispute, nor have they set any deadline for such negotiations. It is true that, as the Tribunal said, "Article 281 does not require parties to pursue any agreed means of settlement indefinitely", but it does not specify a time limit for the parties to pursue such a means, either. Negotiations on territorial issues and maritime delimitation are usually lengthy. For example, 27 years passed before China and Viet Nam managed to complete their negotiations on delimiting Beibu Bay.

317. China and the Philippines have on the whole maintained stability in the South China Sea through those consultations, despite the intermittent nature of the negotiations and consultations because of the situation in the South China Sea and the changing political situations in the Philippines. These consultations have progressively cultivated favourable conditions for settling the dispute, giving no sign that further negotiations would be fruitless.

### *IV.3. The Tribunal erred in finding that China and the Philippines had not excluded the compulsory dispute settlement procedures even if there existed an agreement*

318. The Tribunal argued that even if an agreement existed in the instruments pointed by China, whereby China and the Philippines have chosen negotiation as the means to settle disputes, this agreement "does not exclude any further procedure" within the meaning of Article 281, and the Philippines, therefore, could still resort to the arbitration under Annex VII. The Tribunal's conclusion is based on its erroneous interpretation of "exclude" and is also erroneous.

#### *IV.3.A. The Tribunal rewrote "exclude" in Article 281 as "expressly exclude"*

319. The Tribunal considered that the relevant contents of the bilateral instruments between China and the Philippines and the DOC do not exclude other dispute

settlement procedures within the meaning of Article 281, because they do not provide for "expressly exclusion" of such procedures. Here the Tribunal took "exclude" in "exclude any further procedure" of Article 281 as "expressly exclude".[405] In so doing, the Tribunal committed a cardinal error in treaty interpretation: it rewrote "exclude" as "expressly exclude".

320. The Tribunal relied as the basis for this interpretation of "exclude" on the separate opinion of Justice Sir Kenneth Keith from New Zealand in *Southern Bluefin Tuna (Australia and New Zealand v. Japan, 2004)*.[406] That case concerned whether Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) excluded other procedures within the meaning of Article 281 of the UNCLOS. Nowhere in his separate opinion did Keith use "expressly exclude" in place of "exclude" under Article 281. His opinion therefore is not straightforward support for the Tribunal's "expressly exclude" position. Keith did argue that "clear wording" may be required for an agreement to effect an exclusion under Article 281, and disagreed with the tribunal's decision in that case.[407] The Tribunal in this Arbitration confused "clear wording exclusion" with "express exclusion".

On the same issue, the decision of the tribunal in that case is as follows:

> The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.
>
> Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive. [ … ]
>
> [ … A] significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures [ … ] by negotiation [ … ].[408]

321. It can be seen that the tribunal in *Southern Bluefin Tuna* did not consider "exclude" in Article 281 of the Convention means "expressly exclude", nor does it set any uniform standard for the degree of explicitness of the exclusion. Even if an agreement merely requires that the dispute be settled by procedures agreed by the parties,

405 Ibid., paras.225, 246.

406 Ibid., para.223.

407 See Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, RIAA, Vol. XXIII, Separate Opinion of Justice Sir Kenneth Keith, p.49, at paras.19, 22.

408 Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, RIAA, Vol. XXIII, p.1, at paras.56, 57, 63.

it can effect an exclusion of other procedures. The interpretation of "exclude" in Article 281 by the Tribunal of this Arbitration obviously departed from the observation in *Southern Bluefin Tuna*. The Tribunal offered only this explanation:

> [ … ] The Tribunal considers that the better view is that Article 281 requires some clear statement of exclusion of further procedures. This is supported by the text and context of Article 281 and by the structure and overall purpose of the Convention. The Tribunal thus shares the views of ITLOS in its provisional measures orders in the *Southern Bluefin Tuna* and *MOX Plant* cases, as well as the separate opinion of Judge Keith in *Southern Bluefin Tuna* that the majority's statement in that matter that "the absence of an express exclusion of any procedure … is not decisive" is not in line with the intended meaning of Article 281.[409]

322. The Tribunal should have followed *Southern Bluefin Tuna* rather than its reading of the separate opinion of an individual arbitrator.[410] The Tribunal argued that "[t]his is supported by the text and context of Article 281 and by the structure and overall purpose of the Convention".[411] This is untenable. *Southern Bluefin Tuna* has already correctly interpreted Article 281 of the Convention, that is, the term "exclude" in Article 281 does not require "express exclusion". The alleged justification for this Tribunal's decision based on a treaty interpretation exercise was already considered and rejected by the tribunal in *Southern Bluefin Tuna*, and repeating it or rehashing a minority view, even if it said what the Tribunal read it as saying, is not good reason for departing from previous international jurisprudence.[412]

323. In any event, the Tribunal actually did not properly interpret "exclude" in the light of the text and context of Article 281 and the structure and overall purpose of the Convention, despite its protestation to do so. It rewrote "exclude" as "expressly exclude". The Tribunal's interpretation goes against the general rule of treaty interpretation reflected in Article 31(1) of the Vienna Convention on the Law of Treaties, namely: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The language of Article 281 of the Convention is clear. "Expressly exclude" cannot be found in any of the authentic language versions. Nor

409 Award on Jurisdiction, para.223 (internal citation omitted).

410 The applicable standard in the provisional measures orders in the Southern Bluefin Tuna and MOX Plant cases cited by the Tribunal is only prima facie "non-exclusion". Therefore, those decisions do not deal with definite situations and are distinguishable from this case.

411 Award of Jurisdiction, para.223.

412 See Sienho Yee, The South China Sea Arbitration Decision on Jurisdiction and Rule of Law Concerns, 15 Chinese Journal of International Law (2016), p.219, at para.28.

can we find anything in the context or what can be considered the object and purpose of this provision that could justify such a dramatic revision of the text of this provision, i.e. from "exclude" to "expressly exclude". Similarly, no support for such a revision can be found in the drafting history. If anything, the strong respect for the parties' own choice of means of dispute settlement embodied in the whole Convention militates against what the Tribunal did.

324. On the Tribunal's mode of operation, Sreenivasa Rao Pemmaraju pointed out:

> But it is not correct for it to insist that for the compulsory settlement of dispute procedures under UNCLOS would continue to apply unless the parties excluded the same in express terms. In this regard, China is correct in taking the view, similar to the one taken by the majority opinion in the SBT Tribunal, that lack of an express exclusion is not "decisive"; what is decisive is the clear intent and the existence of consensus or the lack thereof among the parties.[413]

325. In sum, "exclude" in Article 281, properly interpreted, is not "expressly exclude". An exclusion within the meaning of Article 281 exists as long as relevant documents imply such an exclusion and embody the parties' intention to effect such an exclusion. The Tribunal misinterpreted "exclude" as "expressly exclude" so as to lower the threshold for resorting to compulsory dispute settlement procedures in Section 2 of Part XV of the Convention. What the Tribunal did undermines the *raison d'être* of the restrictions on the initiation of compulsory procedures provided for in Articles 281 and 286.

*IV.3.B. China and the Philippines have agreed to exclude "any further procedure"*

326. The agreement to settle the relevant dispute through negotiations between China and the Philippines embodies an exclusion, within the meaning of Article 281 as properly interpreted, of other procedures. As far as "exclusion" is concerned, this agreement between China and the Philippines is similar to Article 16 of CCSBT at issue in *Southern Bluefin Tuna*. As China's Position Paper pointed out,

> By repeatedly reaffirming negotiations as the means for settling relevant disputes, and by emphasizing that negotiations be conducted by sovereign States directly concerned, the above-quoted provisions of the bilateral instruments and Paragraph 4 of the DOC obviously have produced the effect of excluding any means of third-party settlement.[414]

413 Sreenivasa Rao Pemmaraju, The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.265, at para.27.

414 China's Position Paper, para.40.

The agreement between China and the Philippines to resolve relevant disputes through negotiations shows the intention to exclude any other procedures. For example, Paragraph 4 of the DOC provides:

> The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

This paragraph reflects that the Parties concerned, including China and the Philippines, have reached agreement not only on using friendly negotiations and consultations as the means of settling their disputes, but also on using that as the only means, to the exclusion of other means.

In the aforementioned note verbale dated 18 August 2009, Viet Nam insisted that "all disputes relating to the South China Sea must be settled through peaceful negotiations, in accordance with international law".[415] Viet Nam's position lends support to reading Paragraph 4 of the DOC as having the meaning of excluding procedures other than negotiations.

327. By the bilateral instruments highlighted above, China and the Philippines also expressly commit themselves to using negotiations and consultations as the only means of resolving their disputes in the South China Sea. For example, Point 3 of the Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation of 10 August 1995 provides that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes." As China's Position Paper points out, "The term 'eventually' in this context clearly serves to emphasize that 'negotiation' is the only means the parties have chosen for dispute settlement, to the exclusion of any other means including third-party settlement procedures."[416] This falls clearly within the meaning of "exclude" in Article 281 of the Convention.

328. This 1995 joint statement was reaffirmed by the two States in a 2000 joint statement.[417] These joint statements, read together with other bilateral instruments as

415 Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, No. 240HC-2009, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_re_phl_2009re_mys_vnm_e.pdf.

416 China's Position Paper, para.40.

417 As mentioned earlier, the Joint Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century, issued on 16 May 2000, states in Point 9 that, "The two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful

highlighted above and the DOC and against the background of China's widely-known strong and consistent insistence on using direct negotiations as the only means to settle territorial and maritime delimitation disputes, leave no doubt that the agreement between China and the Philippines excludes other means of dispute settlement.

329. Pursuant to Article 279 of the Convention, States Parties are obliged to settle their disputes peacefully. But this obligation does not mean that States Parties must have their disputes settled; rather, the obligation goes only to the means of settlement. That is to say, a dispute can only be settled by a peaceful means. Article 281(1) of the Convention indicates that if parties to a dispute have reached an agreement on the means of resolving the dispute and the agreement excludes the application of other procedures, then "even in certain circumstances they prefer to have it unsettled rather than to submit it to the procedures of Part XV. As long as all parties accept this result, the Convention is not trying to force them, against their will, to resort to procedures under Part XV."[418]

330. China consistently upholds and adheres to the principle of peaceful settlement of international disputes. And just as other States, China enjoys the right to seek a settlement of disputes by the peaceful means of its own choice. With regard to issues of territorial sovereignty and maritime rights and entitlements, China insists on peacefully settling disputes through negotiations and consultations and does not accept compulsory third-party procedures. This is China's long-standing foreign policy, inspired by the hard lessons it learned from its modern history.[419] China has an abundance of successful practices in implementing this foreign policy. Since its founding, the People's Republic of China has signed boundary treaties with 12 of its 14 land neighbours through bilateral negotiations and consultations in a spirit of equality and mutual understanding, and about 90% of China's land boundaries have been delimited and demarcated. China and Viet Nam have delimited through negotiations the boundary between their territorial seas, exclusive economic zones and continental shelves in Beibu Bay.[420] China's sincerity in settling disputes through negotiation and its unremitting efforts made in this respect are known to all.

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settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 joint statement between the two countries on the South China Sea … ".

418 Shabtai Rosenne & Louis B. Sohn (eds.), Virginia Commentary, Vol. V (Martinus Nijihoff Publishers, 1989), at p.24, para.281.5.

419 See Dai Bingguo, China committed to peaceful resolution of disputes, http://www.china.org.cn/world/2016-07/06/content_38818850.htm.

420 China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea, 13 July 2016, para.131.

## V. The Tribunal erred in finding that the Philippines and China had exchanged views as required by Article 283

331. Article 283 of the Convention provides:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

332. The obligation to exchange views is compulsory under Article 283. For purposes of Article 283, only the exchange of views which occurs after a dispute has arisen and which is aimed at the subject-matter of the dispute counts. A dispute arising before the entry into force of the Convention cannot be one "concerning the interpretation or application of the Convention". Any exchange of views regarding such a dispute does not count as exchange of views under Article 283. If the parties to a dispute conduct consultations on a dispute which does not concern the interpretation or application of the Convention, such consultations do not fall within the meaning of exchange of views in Article 283. Expressly set out in the Convention, the obligation to exchange views must be fulfilled in good faith.

333. The Philippines claimed that it had faithfully fulfilled the obligation to exchange views. China maintained, however, that the two sides had never exchanged views on the matters raised in the Philippines' submissions. In its Award on Jurisdiction, the Tribunal found that the Philippines and China had exchanged views as required by Article 283 on the following basis: first, China and the Philippines exchanged views on the means of resolving the dispute between them in the two rounds of bilateral consultations held in 1995 and 1998;[421] second, the DOC itself, along with discussions on the creation of a further Code of Conduct, represented an exchange of views on the means of settling the Parties' dispute;[422] third, China and the Philippines held a bilateral consultation on 14 January 2012 to address a range of issues, including the South China Sea;[423] and, fourth, in late April 2012, the notes verbales communicated between the Philippines and China showed that the two sides had exchanged views on the means of settling the dispute concerning Huangyan Dao.[424] Based on the above, the Tribunal said it was "convinced that the Parties have

421 See Award on Jurisdiction, paras.330, 334.

422 Ibid., para.335.

423 Ibid., para.337.

424 See ibid., paras.340-341.

unequivocally exchanged views regarding the possible means of settling the disputes between them that the Philippines has presented in these proceedings".[425]

334. The Tribunal's finding is not well-founded in fact or law. First, the Tribunal failed to ascertain whether the Philippines had fulfilled the obligation to exchange views regarding the means of settling the disputes involved in the submissions. Second, the Tribunal erroneously took the consultations between China and the Philippines concerning the issues of territorial sovereignty and maritime delimitation as the exchange of views regarding matters raised in the Philippines' submissions. Third, the Tribunal erroneously narrowed the obligation to exchange views under the Convention to that concerning merely the means of dispute settlement.

*V.1 The Tribunal failed to ascertain whether the Philippines had fulfilled the obligation to exchange views on relevant "disputes"*

335. The obligation to exchange views under Article 283 is a procedural one to be fulfilled before a State's submission of disputes to the compulsory procedures under Section 2 of Part XV and a precondition for the Tribunal's jurisdiction. The Tribunal is obliged to ascertain whether there exists a dispute concerning the interpretation or application of the Convention and whether the parties to the dispute have exchanged views concerning its settlement by negotiation or other peaceful means. As the ITLOS pointed out in the provisional measures order in *Land Reclamation (Malaysia v. Singapore, 2003)*, "article 283 of the Convention applies 'when a dispute arises' and there is no controversy between the parties that a dispute exists."[426]

336. The Tribunal found that the Philippines' 14 submissions reflected disputes concerning the interpretation or application of the Convention between China and the Philippines. Even if this finding were correct, the Tribunal still needed to have ascertained that China and the Philippines had exchanged views on the disputes as identified and the means of their settlement. The Tribunal's conclusion that the Philippines had fulfilled the obligation to exchange views is groundless in fact and wrong in law.

337. The 1995 and 1998 consultations, the DOC and the consultations on a Code of Conduct in the implementation of the DOC between China and ASEAN Member States, including the Philippines, are irrelevant to the disputes as identified by the Tribunal in the 14 submissions and means of their settlement. None of these consultations constitute the exchange of views within the meaning of Article 283.

425 Ibid., para.342.

426 Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Case No. 12, para.36.

The Convention did not enter into force for China until 7 July 1996, so in 1995 there could be no dispute between China and the Philippines concerning the interpretation or application of the Convention. Only the exchange of views regarding disputes concerning the interpretation or application of the Convention falls within the meaning of Article 283. Therefore, the 1995 consultation could not be regarded as the exchange of views set out in Article 283 of the Convention, which had not entered into force for China at that time.

The 1998 consultation is also irrelevant to the disputes as identified by the Tribunal. According to the Tribunal's finding, only after China presented a note verbale on 7 May 2009 with a map which displayed the dotted line in the South China Sea did a dispute reflected in the Philippines' Submissions No. 1 and 2 become clear. By this logic, the 1998 consultation could not be regarded as exchange of views on the dispute reflected in the Philippines' Submissions No. 1 and 2. Meanwhile, before amending its national laws in 2009, the Philippines had claimed sovereignty over and maritime entitlements regarding "Kalayaan Island Group" as a whole, and had never raised claims regarding the status of and maritime entitlements based on any of individual islands and reefs. Disagreement between China and the Philippines regarding the status of and maritime entitlements based on any of individual islands and reefs would not have existed before 2009. Therefore, the two States could not have exchanged views regarding the disputes as identified by the Tribunal in the Philippines' Submissions No. 3 to 7 and means of their settlement in the 1998 discussion. The activities involved in the Philippines' Submissions No. 8 to 14 mostly happened after 2011. In the 1998 consultations, China and the Philippines could not have exchanged views regarding "disputes" arising from those activities which did not exist at that time. By the same logic, the DOC, signed in 2002, could not prove that the two sides had exchanged views regarding "disputes" arising after 2009 and the means of their settlement.

It is clear that, the 1995 and 1998 consultations and the DOC of 2002 and the related consultations are not evidence on the exchange of views between China and the Philippines concerning the disputes as identified by the Tribunal in the Philippines' 14 submissions and the means of their settlement.

338. In order to cover up the self-contradiction, the Tribunal philosophized:

> The Tribunal recognizes that the various disputes between the Parties concerning the South China Sea are related and accepts that it may occur that parties will comprehensively exchange views on the settlement of a dispute only to have that dispute develop further, or other related disputes arise, prior to the commencement of arbitral proceedings. But the Tribunal need not definitively determine the application of Article 283 to such a situation, because the record indicates that the Parties continued to exchange views on the means to settle the disputes between them until shortly before the Philippines initiated this

> arbitration. In particular, the Parties held a bilateral consultation on 14 January 2012 to address a range of issues, including the South China Sea.[427]

339. This statement is ambiguous. The Tribunal seemed to say that if the parties have fully exchanged views regarding the settlement of a dispute and if other relevant disputes arise before the dispute is submitted to arbitration, there is no need to exchange views regarding those other "relevant disputes". Such a point finds no support in the Convention. Article 283 uses "[w]hen a dispute arises". The provision thus has a single dispute in mind for the obligation to exchange views to come into play. This clearly shows that when there exist several disputes in a case the parties must exchange views concerning the means of settlement of each of them regardless of whether they are interrelated. In addition, pursuant to Article 283(1), the exchange of views regarding a dispute should take place after the dispute arises. Although the parties might have had general discussions on the relevant issues of a dispute, these discussions cannot absolve them from fulfilling the obligation of exchange of views when the relevant issues ripen into a "dispute".[428]

340. In addition, the bilateral consultation held on 14 January 2012 between China and the Philippines has no relevance to the disputes as identified by the Tribunal in the Philippines' 14 submissions and the means of their settlement. This consultation covered issues in the South China Sea and whether to settle disputes through negotiation or legal procedures. Even according to the minutes the Philippines unilaterally kept, although China mentioned "this dispute", while the Philippines, "disputes in the West Philippine Sea", neither of them mentioned the matters involved in the Philippines' 14 submissions, as such.[429] In this regard, the Tribunal failed in its fact-finding.

### *V.2 The Tribunal mismatched consultations between China and the Philippines concerning issues of territorial sovereignty and maritime delimitation with exchange of views regarding "disputes" identified by the Tribunal in the Philippines' submissions and means of their settlement*

341. On the one hand, the Tribunal considered that the 14 "disputes" as identified by itself in the Philippines' submissions did not relate to territorial sovereignty or maritime delimitation; yet, on the other hand, for the purpose of the exchange of views, the Tribunal contradicted itself and in effect considered consultations on issues concerning territorial sovereignty and maritime delimitation the same as those on the 14

427 Award on Jurisdiction, para.337.

428 See Gao Jianjun, The Interpretation and Application of Article 283 of UNCLOS by the Tribunal in the Philippines v. China Case, 1 Bianjie Yu Haiyang Yanjiu [Journal of Boundary and Ocean Studies] (in Chinese) (2016), p.45, at 48.

429 Award on Jurisdiction, paras.337-339.

"disputes" identified. It took the former as evidence of the Philippines' fulfilment of its obligations on the latter.

342. The evidence accepted by the Tribunal to find the Philippines' fulfilment of its obligation to exchange views includes the 1995 and 1998 consultations, the DOC and related consultations, the consultation of 14 January 2012, and the diplomatic exchanges in April 2012. These materials mostly dealt with issues of territorial sovereignty and maritime delimitation between the two countries. And none of them related to the disputes as identified by the Tribunal in the Philippines' submissions and means of their settlement.

343. First, the 1995 and 1998 consultations covered the territorial issue over some islands and reefs (including Meiji Jiao) of Nansha Qundao, rather than "the interpretation or application of the Convention". The Tribunal admitted:

> The consultations highlighted by the Philippines took place in 1995 and 1998. At that time, the dispute between the Parties that appears from the record of the Parties' exchanges concerned sovereignty over the Spratly Islands and certain activities at Mischief Reef. Critical elements of the disputes that the Philippines has put before the Tribunal had not yet occurred. In particular, China had not yet issued its Notes Verbales of 7 May 2009, nor had it taken the majority of the actions complained of in the Philippines' Submissions No. 8 to 14.[430]

Regarding the 1995 consultation, the Tribunal accepted the meeting record kept by the Philippines as evidence to prove that the consultation "do[es] include the exchange of views on the means of resolving the dispute between the Parties at that time". According to paragraph 36 of the Philippines' record, the then Chinese Vice-Foreign Minister Tang Jiaxuan stated:

> China's consistent position was to discuss this through bilateral channels, and not let in countries irrelevant to the dispute. The Vice-Minister stated that the situation in the situation in the Nanshas [*sic*] has become very complicated, and there are some countries who want to further aggravate the situation.[431]

The Tribunal considered that these records "clearly indicate that the Parties discussed the manner in which their dispute [ … ] could be settled".[432] But the dispute mentioned by Vice-Minister Tang Jiaxuan concerned the territorial issue of some islands and reefs in Nansha Qundao. Paragraphs 26 to 32 of that record are clear on this point:

> 26. Vice-Minister Tang Jiaxuan responded by saying that, when talking about Mischief Reef, it is unavoidable to talk about Nansha. He said that it was not

430 Ibid., para.336.

431 Ibid., para.334.

432 Ibid.

difficult to solve the Mischief Reef problem, and that the situation there was not complex, nor was there tension and crisis. However, he said, the key to resolving this lay in how to deal with the Nansha problem.

27. He reiterated China's basic position as follows: (1) From the international legal and historical perspective, China has indisputable sovereignty over Nansha, "of course including Mischief Reef"; (2) China prefers to solve disputes through bilateral negotiations, and hopes for a peaceful settlement through patient negotiations; and (3) if, for the time being, there is no solution, China is prepared to shelve the dispute and instead explore ways to carry out cooperative activities and joint development.

28. Vice-Minister Tang said the Philippine claim could be traced to the 1950s. He asserted that China, however, was the first country to discover and exercise sovereignty. Japan occupied the islands during World War II, but was instructed by the Cairo Declaration and the Potsdam Proclamation to return these to China, then to be administered by the government of Kaohsiung on Taiwan, together with Manchuria and Formosa and the Pescadores.

28.1 Vice-Minister Tang asserted that, after World War II, between September 1946 and March 1947, China took over the islands from Japan and underwent legal procedures. He said that troops were sent, maps drawn up, names determined, and books compiled and published.

28.2 In the early 1950s, he said, the Philippines claimed sovereignty over the area, and the Chinese Government made public statements about the claim.

[ . . . ]

32. Undersecretary Severino responded by reiterating Philippine claims to sovereignty over the Kalayaan islands.[433]

The above record of the Philippines clearly shows that the issue discussed between China and the Philippines was by no means a dispute "concerning the interpretation or application of the Convention". As China pointed out in its Position Paper, "given that the Philippines itself considers that only in 2009 did it start to abandon its former maritime claims in conflict with the Convention, how could it have started in 1995 to exchange views with China on matters concerning the interpretation or application of the Convention that are related to the present arbitration?"[434]

344. Second, in the DOC and the related consultations on a possible Code of Conduct in the South China Sea, China and the ASEAN Member States addressed "territorial and jurisdictional disputes" (i.e. territorial and maritime delimitation disputes as elaborated above) rather than the kind of disputes concerning the interpretation or application of the Convention as identified by the Tribunal. The Tribunal

433 Summary of Proceedings: Philippine-China Bilateral Consultations (20-22 Mar. 1995), paras.26-32, Memorial of the Philippines, Vol. VI, Annex 177.

434 China's Position Paper, para.50.

considered that "the DOC itself, along with discussions on the creation of a further Code of Conduct, represents an exchange of views on the means of settling the Parties' dispute."[435] But just as the Tribunal acknowledged:

> The DOC was signed in 2002. [ … ] Critical elements of the disputes that the Philippines has put before the Tribunal had not yet occurred. In particular, China had not yet issued its Notes Verbales of 7 May 2009, nor had it taken the majority of the actions complained of in the Philippines' Submissions No. 8 to 14.[436]

Given that, when signing the DOC, the critical elements involved in the 14 "disputes" as identified by the Tribunal had not yet occurred, the "disputes" could not have arisen, and any exchange of views by China and ASEAN Member States, including the Philippines, could not have been related to these 14 "disputes" and means of their settlement. If the DOC were considered as evidence of the exchange of views, it could only prove that China and ASEAN Member States had exchanged views on the "territorial and jurisdictional disputes" and the means of their settlement referred to in Paragraph 4 of the DOC, and reached consensus on the means of settlement, namely "to resolve their territorial and jurisdictional disputes by peaceful means through friendly consultations and negotiations by sovereign states directly concerned".

345. Third, the consultation of 14 January 2012 was a general discussion between China and the Philippines of their dispute in the South China Sea, and the Notes Verbales in April 2012 were related to the sovereignty issue over Huangyan Dao. Neither the consultation nor any of the notes verbales involved the "disputes" identified by the Tribunal, which it considered as irrelevant to territorial sovereignty or maritime delimitation. The Tribunal, however, said:

> Taking the exchanges in 2012 together, the Tribunal is convinced that the Parties have unequivocally exchanged views regarding the possible means of settling the disputes between them that the Philippines has presented in these proceedings. These exchanges did not, of course, result in agreement. The Philippines favored either multilateral negotiations involving other ASEAN Member States or the submission of the Parties' disputes to one of the third-party mechanisms contemplated in the Convention. China, in turn, was adamant that only bilateral talks could be considered. The same difference in approach is also evident in the Parties' earlier exchanges.[437]

435 Award on Jurisdiction, para.335.

436 Ibid., para.336 (internal citation omitted).

437 Ibid., para.342.

According to the Philippines' record, in the bilateral consultations held on 14 January 2012, "the dispute", "the disputes in the West Philippine Sea", "the other claimants" and "competing claims" mentioned here by the Philippines, as well as "this dispute", "the matter" and "the dispute in the South China Sea" mentioned by China in response, all referred to the "territorial and jurisdictional disputes" between the two countries in the South China Sea under Paragraph 4 of the DOC, rather than the kind of disputes concerning the interpretation or application of the Convention as identified by the Tribunal. The Tribunal did not show how the aforementioned consultations were related to the matters raised in the Philippines' 14 submissions. Accordingly, the consultation of 14 January 2012 should not be regarded as the exchange of views under Article 283.

Among the notes verbales between China and the Philippines on Huangyan Dao issue in late April 2012, the Philippines' Note Verbale of 26 April 2012, which the Tribunal cited, stated:

> [The Philippines] calls on China to respect the Philippines' sovereignty and sovereign rights under international law including UNCLOS, over the Scarborough Shoal and its EEZ, respectively.
>
> However, if China believes otherwise, it would be good—as a parallel track to the on-going efforts to settle matter peacefully—for the two countries to bring the matter before an appropriate third-party adjudication body under international law, specifically the International Tribunal on the Law of the Sea (ITLOS) with respect to the rights and obligations of the two countries in the Philippines' EEZ under international law, specifically UNCLOS. In inviting China to join the Philippines in bringing the issue before any of the dispute settlement mechanism under international law, the Department believes that this approach would resolve on a long-term basis any differences of position on the matter, and thus ensure a peaceful, stable, and lasting bilateral relationship between the two countries.[438]

In this note verbale, the Philippines claimed sovereignty and sovereign rights over Huangyan Dao and its exclusive economic zone. In response, China expressly denied the Philippines' claim in its Note Verbale dated 29 April 2012, and urged the Philippines to respect China's sovereignty over Huangyan Dao:

> Huangyan Islands [*sic*] is China's inherent territory. The proposal from the DFA of the Philippines to bring the so-called "Huangyan island issue" to a third-party arbitration body has none ground. The Chinese side urges the Philippine side to pay due respect to and refrain from any infringement on China's territorial sovereignty.[439]

438 Ibid., para.340.

439 As quoted in Award on Jurisdiction, para.341.

Therefore, China and the Philippines did discuss the means of resolving the territorial issue of Huangyan Dao in the notes verbales between China and the Philippines, not one concerning the interpretation or application of the Convention as identified by the Tribunal.

*V.3. The Tribunal erroneously narrowed the obligation to exchange views under the Convention to that concerning merely the means of dispute settlement*

346. The obligation to exchange views is not only procedural but also substantive. This is inherent in the requirement that the obligation to exchange views must be performed in good faith.

347. However, in this Arbitration, the Tribunal treated the mere existence of the bilateral consultations and exchange of notes as fulfilment of the obligation, without meaningfully examining their substantive contents. It only listed consultations and notes verbales between China and the Philippines, but failed to ascertain whether the matters involved in them directly relate to "disputes" concerning the interpretation or application of the Convention as identified by the Tribunal, and whether a meaningful and substantive exchange of views had been conducted on these "disputes". By this approach, the Tribunal deliberately lowered the threshold for fulfilment of the obligation to exchange views under Article 283, diluting that obligation.

348. In *Chagos Marine Protected Area (Mauritius v. United Kingdom, 2015)*, the tribunal considered that Article 283 "was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings".[440] At the same time, international scholars are of the opinion that this article reaffirms the importance of resolving disputes through negotiations.[441] Judge Wolfrum observed in his dissenting opinion in *Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain, 2010)* that "[t]hese negotiations have a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention".[442] The term "these negotiations" used here, in the context of his opinion, refers to "exchange of views" under Article 283. In the same case, Judge Treves said, "the claimant State has the burden to state its claims and to invite the other party to an exchange of views, which, in order to constitute a good-faith request, must be open to the possibility of a settlement 'by negotiation or

440 In the Matter of the Chagos Marine Protected Area Arbitration between Mauritius and the United Kingdom, before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award of 18 March 2015, para.382.

441 See, e.g., Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge University Press, 2005), p.33.

442 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spanish), Request for Provisional Measures, ITLOS No. 18, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum, para.27.

other peaceful means'."[443] It is thus clear that such an exchange of views will inevitably involve the merits of the dispute. But in the present arbitration, Wolfrum forgot his aforementioned opinion and took a different position.

349. The exchange of views under Article 283 should be a meaningful and substantive one concerning the settlement of disputes. As Judge Rao pointed out in his separate opinion in *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore, 2003)*,

> The requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.[444]

350. In *Southern Bluefin Tuna*, the Tribunal noted that the parties had engaged in "prolonged, intense and serious" negotiations and determined that the parties had fulfilled the obligation to exchange views under Article 283.[445] The "prolonged, intense and serious" nature of those negotiations is in stark contrast to what one can see in this Arbitration.

351. Regarding the content of exchange of views, the Tribunal repeatedly emphasized that China and the Philippines had exchanged views regarding "the means of dispute settlement". The Tribunal, in effect, considered that the obligation only requires the parties to exchange views regarding the means of dispute settlement. It is groundless for the Tribunal to narrow the obligation to exchange views under the Convention in this way. In this regard, the *Virginia Commentary* correctly points out that the drafting history of Article 283 shows that State Parties originally wanted to establish a primary obligation "that the parties to a dispute should make every effort to settle the dispute through negotiation", the text of the finalized Article 283 "refers to this obligation in an indirect fashion, making it the main objective of the basic duty 'to exchange views' regarding the peaceful means by which the dispute should be settled".[446] An obligation to negotiate, even if referred to "in an indirect fashion", must

443 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spanish), Request for Provisional Measures, ITLOS No. 18, Order of 23 December 2010, Dissenting Opinion of Judge Treves, para.13.

444 Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Case No. 12, Separate Opinion of Judge Chandrasekhara Rao, para.11.

445 See Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, para.55.

446 Shabtai Rosenne & Louis B. Sohn (eds.), Virginia Commentary, Vol. V (1989), at p.29, para.283.1.

have some substantive content and this cannot be met by simply disregarding the need to discuss the merits of the dispute in good faith, as far as possible with a view to settling the dispute by negotiation.[447]

352. Provided in Section 1 of Part XV of the Convention, the obligation to exchange views under Article 283 is a mandatory procedural obligation. In addition, this obligation requires first and foremost a good faith resort to negotiation and consultation as the means for the final settlement of disputes. This obligation constitutes one of the preconditions for application of the compulsory procedures of Section 2.[448] In this Arbitration, the Tribunal deliberately lowered the threshold for fulfilment of the obligation to exchange views under Article 283. In so doing, the tribunal diluted that obligation.

## VI. The Tribunal violated the *non ultra petita* rule and/or Article 10 of Annex VII

353. The Tribunal made findings or rulings in the *dispositif* and in other parts of the Award of 12 July 2016 that go beyond what the Philippines asked of it in its Final Submissions. In the entire Award, the Tribunal betrayed no trace of either consideration or even notice of the issue whether it has the power to do so. The well-established *non ultra petita* rule on judicial or arbitral decision-making and/or Article 10 of Annex VII prohibits the Tribunal from doing what it has done, on pain of having its awards assessed as invalid for "*excès de pouvoir*", or as made without jurisdiction.

### *VI.1. The* non ultra petita *rule*

354. The *non ultra petita* rule was well established in arbitral practice in the nineteenth and twentieth centuries, with invalidity of the award for "*excès de pouvoir*" as the sanction for transgression.[449] It has been applied in inter-State dispute settlement

447 See ibid.

448 See Mariano J. Aznar, The Obligation to Exchange Views before the International Tribunal for the Law of the Sea: A Critical Appraisal, 47 Revue Belge de Droit International (2014), p.237, at 245-246.

449 See, e.g., Robert Kolb, General Principles of Procedural Law, in Andreas Zimmermann, et al. (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), pp.893-894, MN33; Shabtai Rosenne, The Law and Practice and the International Court 1920-2005, Vol. II, 4th edition (Martinus Nijhoff Publishers, 2006), pp.576-578; Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure, 34 British Year Book of International Law (1958), p.1, at 98-107.

at the World Court (PCIJ and ICJ) since the very beginning. The rule was stated concisely by the ICJ in *Asylum (Interpretation) (Colombia v. Peru, 1950)*:

> [I]t is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.[450]

355. That case presented an issue as to whether a particular question was decided in an earlier judgment to be interpreted in a subsequent case. The ICJ said, "The Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so. It was for the Parties to present their respective claims on this point. The Court finds that they did nothing of the kind."[451]

356. This rule has caused the ICJ to decline to award more compensation, though recommended by the experts, to the United Kingdom than it had asked for in *Corfu Channel (United Kingdom v. Albania, 1949)*[452]; to refuse to decide the existence of violations of general international law, points not presented in the application or the final submissions in *Right of Passage over Indian Territory (Portugal v. India, 1960)*[453]; and to refuse to examine a rationale or theory for a claim that the applicant did not present in *Barcelona Traction (Belgium v. Spain, 1970)*.[454] In this latter case:

> The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claims as formulated by the Belgian Government and it will not pursue its examination of this point any further.[455]

357. Rosenne observed that, "The *non ultra petita* rule supplies a possible limiting feature on the general scope of the Court's final decision. In essence it prevents the Court from awarding to the winning party more than it requested in its formal

450 Request for interpretation of the Judgment of November 20th, 1950 in the Asylum Case, Judgment of November 27th, 1950, I.C.J. Reports 1950, p.395, at 402.

451 Ibid., at 403.

452 Corfu Channel case, Judgment of December 15th, 1949, I.C.J. Reports 1949, p.244, at 249.

453 Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960, p.6, at 29-31.

454 Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p.3, at para.49.

455 Ibid.

submissions."[456] Furthermore, while there is a certain procedural component in the rule, at its core the rule is a jurisdictional one. As Fitzmaurice observed:

> A case may have been duly referred to a tribunal either by a *compromis* or special agreement, or other form of *ad hoc* consent; or the tribunal may have an inherent jurisdiction in respect of it, under a treaty or according to the optional clause declarations of the parties. But none of this means that the tribunal acquires a sort of roving commission in respect of the case. It is still confined not only to deciding that particular case and no other, but also to deciding the points (and no others) actually submitted to it by the parties, or necessarily covered by the scope of the dispute, as was made clear by the Court in [*Asylum (Interpretation)*].[457]

That is to say, the jurisdiction of a court or tribunal is fixed finally by the actual submissions of the parties, notwithstanding an existing theoretical or abstract grant of jurisdiction that is broader than what has been in fact submitted for decision.

358. This rule may not apply to objections to jurisdiction in some circumstances, as argued by Fitzmaurice.[458] But it clearly applies to the presentation of bases for jurisdiction; that is to say, it is for the applicant to present a proper basis to found the ICJ's jurisdiction in a particular case, not for the Court to hunt for such a basis on its own. The whole point of *non ultra petita* as a jurisdictional principle would be gone if the Court could supplement the claimed basis for jurisdiction. Such supplementing would indeed be on a "roving commission" in Fitzmaurice's terms. The above was also made clear in the *Asylum (Interpretation)* case where the Court applied this principle in assessing its jurisdiction under Article 60.[459]

359. Furthermore, as the ICJ observed in *Arrest Warrant (Democratic Republic of the Congo v. Belgium, 2002)*,

> While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and

456 Shabtai Rosenne, The Law and Practice of the International Court, 1920-2005, Vol. II, 4th edition (Martinus Nijhoff, 2006), pp.576-577.

457 Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure, 34 British Year Book of International Law (1958), p.1, at 99.

458 See ibid., p.104.

459 Request for interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950, I.C.J. Reports 1950, p. 395, at 402-403.

> principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.[460]

While this may present some uncertainty as to the scope of application of the *non ultra petita* rule, it is also clear from that statement that, to be addressed in the reasoning part, the points must be "legal points", not those that can be considered properly claims or part of a claim. With respect to the latter points, the Court's cases make no distinction between the operative part or the reasoning part of its judgments.

*VI.2. The "confinement requirement" under Article 10 of Annex VII*

360. Additionally, the terms of Article 10 of Annex VII are broader than the traditional *non ultra petita* rule. That article states that "[t]he award of the arbitral tribunal shall be confined to the subject-matter of the dispute". These terms show that this requirement in Article 10, abbreviated here as the "confinement requirement", reaches not just the *dispositif* but also all other parts of the award. The learned editors of the *Virginia Commentary* comment on this article as follows:

> The award is to be confined to the subject matter of the dispute. As a formal statement in a title of jurisdiction, this may be regarded as innovation, and it is not clear whether it applies to the whole text of the decision or only to its operative clauses. It was inserted after the discussion in the Informal Plenary in 1976, but its bearing on the validity of an award containing apparent *obiter dicta* cannot be assessed [ … ].[461]

The editors continue that this confinement requirement "may introduce substantive requirements that thus open the way to a possible challenge to the validity of the award".[462] First of all, the language of Article 10 makes it clear that Article 10 definitely contains the classic *non ultra petita* rule, and these observations reflect this conclusion. Second, while the editors appear to lament the lack of more specific delineation of the scope of its application, their comments tend to favour applying this requirement to the entire text of the award. In any event, the editors do not find present any material that would go against such an application.

361. More importantly, the terms of this article and the circumstances of its adoption make clear that this confinement requirement applies to the entire text of the award. The clear terms of the article make no distinction between the *dispositif* and

460 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p.3, at para.43.

461 Shabtai Rosenne & Louis B. Sohn (eds.), Virginia Commentary, Vol. V (1989), p.434.

462 Ibid., p.435.

the other parts of the award. The term "[t]he award", read in its ordinary meaning, obviously covers the entire award. Second, as already mentioned, the confinement requirement is an innovation, and at the time of the drafting of the UNCLOS, the *non ultra petita* rule—with the possible uncertainty as to the scope of its application—had already been a well-established one on judicial or arbitral decision-making, and this should have some implications. Given this as the background rule, if no new substantive content were added, there would be no need to mention this rule in Annex VII, just as there was no need to mention it in Article 56 of the Statute of the ICJ or the proposed Article 30 of the ITLOS Statute, on which Article 10 of Annex VII is based.[463] Moreover, if no new substantive content is added, i.e., if the traditional *non ultra petita* rule is contemplated, the drafters could have used specific and precise language to describe that well-known rule. They did not; they have chosen to use the current wording in Article 10 of Annex VII. In the light of these considerations, this confinement requirement, so worded, can be deemed to be intended to remove the *uncertainty* regarding the scope of its application, and is to be construed as applying to the entire text of the award.

### *VI.3. The violation of the* non ultra petita *rule and Article 10 of Annex VII in this Arbitration*

362. In this Arbitration, the Tribunal violated multiple times the *non ultra petita* rule and/or the confinement requirement under Article 10 of Annex VII. The following are among the more significant examples.

363. The first is a most glaring violation that the Tribunal clearly committed in the *dispositif* and the discussion part of the Award of 12 July, with respect to the status of the features not named in the Philippines' Final Submissions. Although nowhere in its Final Submissions did the Philippines ask the Tribunal to rule on the status of the features that it had not named in these submissions, yet the Tribunal devoted many paragraphs in the reasoning part of its award to this matter (paras.577-626). And in the *dispositif* (para.1203):

> **A. In relation to its jurisdiction, the Tribunal:**
>
> [ . . . ]
>
> (2) FINDS, with respect to the Philippines' Submission No. 5:
>
> a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second

463 Cf. A.O. Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary (Martinus Nijhoff Publishers, 1987), pp.228-229.

Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

[ … ]

(3) FINDS, with respect to the Philippines' Submissions No. 8 and 9:

a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

[ … ]

(5) FINDS, with respect to the Philippines' Submissions No. 12(a) and 12(c):

a. that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal constitutes a fully entitled island for the purposes of Article 121 of the Convention and therefore that no maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal has the capacity to generate an entitlement to an exclusive economic zone or continental shelf;

[ … ]

**B. In relation to the merits of the Parties' disputes, the Tribunal:**

[ … ]

(7) FINDS with respect to the status of other features in the South China Sea:

a. that none of the high-tide features in the Spratly Islands, in their natural condition, are capable of sustaining human habitation or economic life of their own within the meaning of Article 121 (3) of the Convention;

b. that none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf;

[ … ]

Worded broadly in the *dispositif* itself as "no maritime feature claimed by China within 200 nautical miles of" the named features—Mischief Reef or Second Thomas Shoal in the Philippines' Final Submissions, or even more so as "none of the high-tide features in the Spratly Islands [ … ]", obviously these findings go well beyond determining the status of the several features named in the Final Submissions (para.112). And the Tribunal was not making such findings in the context of finding objections

to jurisdiction, where, according to Fitzmaurice, the *non ultra petita* rule would not reach; rather, it was doing so in the *dispositif* on the merits in order to supplement claims, not made in the Philippines' Final Submissions, that would perfect the Tribunal's jurisdiction over the matter. What the Tribunal did epitomizes how a tribunal assumes the role of the applicant, in violation of the *non ultra petita* rule; it is for an applicant to perfect the tribunal's jurisdiction, not the tribunal to do it on its own. These findings are not on mere legal questions, the discussion of which in the reasoning part of the award would not be precluded by the rule; they are labelled by the Tribunal itself as "findings", and made in the *dispositif* itself, and discussed in detail in other parts of the award. Indeed, the Tribunal was here operating on a "roving commission", to use Fitzmaurice's phrase, to add to the Final Submissions. By any standards, the Tribunal violated the *non ultra petita* rule and/or the confinement requirement under Article 10 of Annex VII.

364. The second is a violation in the reasoning part of the Award of 12 July with respect to the fishing activities part of Submissions No. 11 and 12(b). These submissions alleged certain environmental violations and had undergone several transmogrifications—putting aside for now whether that would be allowed—and contained a part alleging harmful fishing practices and harvesting of endangered species. The Philippines gave Huangyan Dao and Ren'ai Jiao as the geographical areas where these alleged practices took place. Nowhere in its submissions did the Philippines specify any other areas as the place where such fishing practices occurred, although it did name other areas as places where there were general environmental concerns. Yet, the Award of 12 July 2016 in paragraph 992 added "other features in the Spratly Islands" to the areas where "harmful fishing practices" were found, stating that "the Tribunal finds that China has, through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at Scarborough Shoal, Second Thomas Shoal and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention". In so doing, the Tribunal violated the *non ultra petita* rule and/or the confinement requirement under Article 10 of Annex VII, as such an addition was never asked for by the Philippines and could not have been considered to be part of any legal reasoning process. Indeed, the Tribunal seems to be acting like a fast-food seller doling out freebie side dishes.

365. The third is the violation in the reasoning part of the Award regarding China's historic rights. Nowhere in the Final Submissions did the Philippines ask the Tribunal to find or rule that China did not enjoy historic rights in the waters of the South China Sea; rather, in Final Submission No. 2 it asked the Tribunal to find "China's claims to sovereign rights and jurisdiction, and to 'historic rights', with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime

entitlements expressly permitted under UNCLOS". The Tribunal also found, in paragraph 168 of the Award on Jurisdiction, that, "This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention." But the Tribunal expended a great deal of energy (Award of 12 July, paras.263-272) on discussing the existence or otherwise of such a historic right, and concluded that no such right existed. Clearly, this decision on whether such a historic right exists or not is not a simple legal point to be dealt with in the reasoning process, but one based on legal and factual points combined as well as on a particular legal theory for the Philippines' claims, which the Tribunal had no power to add, on behalf of the Philippines, to its Final Submissions. In so doing, the Tribunal violated the confinement requirement under Article 10 of Annex VII and the *non ultra petita* rule.

366. The fourth is a violation in the reasoning part of the Award of 12 July with respect to the treatment of Nansha Qundao as an integral unit. Nowhere in the Final Submissions did the Philippines ask the Tribunal to make a finding or ruling on China's claims on its archipelagos in the South China Sea each as a unit for sovereignty and for maritime entitlement and delimitation purposes. Yet, the Tribunal devoted several paragraphs in the discussion of the merits (Award of 12 July, paras.572-576) to this issue, and found that China could not fit the definition of an archipelagic State, that Article 47 of the UNCLOS could not be applied to Nansha Qundao, that Article 7 could not be applied either, and that no new rule of customary international law on this issue had been formed. Similar to the historic rights decision, clearly a decision on Nansha Qundao as a unit is not a simple legal point to be dealt with in the reasoning process but a decision based on legal and factual points combined as well as on a particular legal theory for the Philippines' claims, which the Tribunal had no power to add, on behalf of the Philippines, to its Final Submissions. In so doing, the Tribunal had also violated the confinement requirement in Article 10 of Annex VII and the *non ultra petita* rule.

What is noteworthy is that in its determination on jurisdiction the Tribunal did not take notice of the fact that Nansha Qundao is a unit. Duly taking notice of this fact would have obliged the Tribunal to conclude that there existed a delimitation situation and that it had no jurisdiction over the Arbitration. Nor did it reconsider jurisdiction, after it decided to deal with Nansha Qundao as a unit as part of the merits discussion. Thus, the Tribunal took jurisdiction on the basis of submissions regarding separate individual islands and reefs, as shown by its altering of China's use of terms from "is" (to indicate the singular) to "[are]" (to indicate the plural) in paragraphs 160 and 169 of the Award on Jurisdiction, but reached a merits conclusion on the status of the integral unit archipelago claims. This is a clear violation of the jurisdictional rules. Such a *modus operandi* of the Tribunal defies the judicial or arbitral character of its function.

367. It is clear from the above discussion that in the *dispositif* and in other parts of the Award of 12 July the Tribunal had gone beyond what the Philippines asked of it in the Final Submissions in violation of the *non ultra petita* rule and/or the confinement requirement in Article 10 of Annex VII, with respect to its decisions and/or discussion of the status of the features which the Philippines did not ask the Tribunal to decide, the additional geographical areas for harmful fishing practices, the existence or otherwise of historic rights in the South China Sea, and China's treatment of its archipelagos each as a unit. As a result, the Tribunal had transgressed the bounds of consent to its jurisdiction in this Arbitration, rendering invalid these conclusions at issue and even the entire award.

## Conclusion

368. The foregoing analyses lead to the conclusion that the Tribunal manifestly had no jurisdiction over the present case. The Tribunal's errors are as follows.

369. First, the Tribunal manifestly had no jurisdiction over the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, or the Philippines' submissions which constitute part of and reflect different aspects of this dispute. Pursuant to the Convention and China's 2006 Declaration, the Tribunal had no jurisdiction over any of the Philippines' submissions. The Tribunal: (1) adopted a fragmentation approach rather than a holistic one to appreciate the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and to assess and characterize the Philippines' submissions, and turned a blind eye to the territorial sovereignty and maritime delimitation nature of these claims; (2) made, based on subjective assumption rather than fact, an erroneous determination that the Philippines' submissions were not related to territorial sovereignty; (3) made, based on a misunderstanding of maritime delimitation and an incorrect interpretation of Article 298 of the Convention, an erroneous determination that the Philippines' submissions did not concern maritime delimitation; and (4) made improper findings regarding historic rights by ignoring the possibility that China's historic rights may involve historic title and ignoring the well-established principle that historic rights constitute a relevant circumstance in maritime delimitation.

370. Second, the Tribunal erroneously found that the Philippines' Submissions No. 1 to 14 constitute disputes as it identified between China and the Philippines concerning the interpretation or application of the Convention. The Tribunal did not follow the basic requirements of international law in addressing the existence and characterization of the disputes allegedly reflected in the Philippines' submissions. Its finding in this respect is not well founded in fact or law, regarding determining the existence and character of disputes.

371. Third, the Tribunal erred in its decision on the choice of means made by China and the Philippines for the settlement of disputes and its effects: (1) the

Tribunal erroneously interpreted the meaning of "agreement" in Article 281 and the agreement between China and the Philippines referred by China, therefore erroneously determined that there existed no "agreement" between China and the Philippines within the meaning of Article 281; (2) the Tribunal disregarded the fact that China and the Philippines are in the midst of trying, by negotiations and consultations, to achieve a final settlement of the territorial and maritime delimitation dispute in the South China Sea, and erroneously determined that "no settlement has been reached by recourse to such means"; and (3) the Tribunal erroneously rewrote "exclude" in Article 281 as "expressly exclude", and determined that the agreement between China and the Philippines "does not exclude any further procedure". These errors lower the threshold for the resorting to the compulsory settlement procedures under Section 2 of Part XV of the Convention.

372. Fourth, the Tribunal erred in finding that the Philippines had fulfilled the obligation to exchange views: (1) the Tribunal failed to properly ascertain whether the Philippines had fulfilled its obligation to exchange views with regard to matters involved in each of its submissions; (2) the Tribunal erroneously took the relevant consultations between China and the Philippines concerning the issue of territorial sovereignty and maritime delimitation as the evidence of the exchange of views regarding the disputes identified by the Tribunal in the Philippines' submissions; and (3) the Tribunal erroneously narrowed the obligation to exchange views under the Convention to that concerning merely the means of dispute settlement.

373. Fifth, the Tribunal erroneously went beyond what the Philippines asked of it in the Final Submissions, in violation of the *non ultra petita* rule and/or the confinement requirement in Article 10 of Annex VII, with respect to its decisions and/or discussion of the status of the features which the Philippines did not ask the Tribunal to decide, the additional geographical areas for harmful fishing practices, the existence or otherwise of historic rights in the South China Sea, and China's treatment of its archipelagos each as a unit.

374. As a result, the Tribunal erroneously assumed jurisdiction over the Philippines' submissions. In so doing, it trampled on the relevant provisions of the Convention adopted on the basis of the consent principle. The awards made *ultra vires* by the Tribunal have no binding force.

## Chapter Three: Admissibility

375. In international jurisprudence, jurisdiction and admissibility are matters that an international court or tribunal must address before reaching the merits. Having established jurisdiction, it may proceed to an examination of the merits only when it finds the application and submissions admissible.[1] In practice, admissibility issues may arise from amendments to claims,[2] standing of the applicant to act in the proceedings,[3] possible mootness of the disputes,[4] and etc. These issues vary from one case to another, depending on the specific circumstances of each case.

376. In this Arbitration, the Philippines requested the Tribunal to adjudge and declare that its submissions "are entirely within its jurisdiction and are fully admissible" during the hearing on jurisdiction and admissibility.[5] In its Award on Jurisdiction, the Tribunal did not decide on the admissibility of those of the Philippines' submissions which it found to be within its jurisdiction. In its Award of 12 July, it found "it has jurisdiction to consider the matters raised in the Philippines' Submissions No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14(d) and that such claims are admissible".[6] As elaborated in Chapter Two, the Tribunal manifestly had no jurisdiction over any of the Philippines' submissions. It is thus unnecessary to consider the admissibility of the submissions. However, the Tribunal erred in deciding that it had jurisdiction over the Philippines' submissions. It further decided that the submissions were admissible. The Tribunal did so without conducting any analysis on admissibility issues. This is beyond belief, because the relevant law and fact all pointed to the direction that the admissibility of some of the submissions was obviously doubtful, and any diligent tribunal would have been prompted to make an inquiry into the potential admissibility issues. The Tribunal failed to exercise due diligence.

377. The most striking dereliction of duty is the Tribunal's treatment of the Philippines' amendments to its claims. As the substance of claims plays a central role in international adjudication and arbitration, international courts and tribunals have taken a very cautious attitude toward such amendments. Even where such

1 See Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004, p.1307, at para.83; Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p.161, at para.29.

2 See e.g. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p.240, at paras.62-71.

3 See e.g. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p.582, at paras.50-67.

4 See e.g. Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, 4 August 2000, paras.45-46.

5 Jurisdictional Hearing Tr. (Day 3), p.80.

6 Award of 12 July, para.1203.A.(8).

amendments are not objected to by the respondent, courts and tribunals are inclined to examine the admissibility issues which such amendments may give rise to. It has become a well-established rule that no amendment to claims is admissible if it would change the nature of the dispute. In this Arbitration, China stated in clear terms that it would not accept or participate in the proceedings, and explicitly objected to the proceedings and any step to push them forward. Under such circumstances, the Tribunal was obliged to take a more prudent attitude towards the Philippines' amendments to its claims. Despite all this, the Tribunal granted leave three times to the Philippines, and even guided it, to amend its submissions in a substantial fashion, which transformed the character of Submissions No. 11, 12(b) and 14. Yet, the Tribunal made no reference to the standards established in international jurisprudence, and hastily and categorically declared that the claims were admissible.

## I. The Philippines made three rounds of major amendments to its submissions

378. The clarity and stability of claims is important for legal security and good administration of justice in the whole arbitral proceedings, as well as for the rights of the other party and even those of third parties. Still, the Philippines were permitted to make three rounds of major amendments to its submissions presented in the Statement of Claim dated 22 January 2013 initiating this Arbitration.

### *I.1. The first round of major amendments were made prior to the submission of the Philippines' Memorial*

379. In the Statement of Claim enclosed in its Notification dated 22 January 2013, the Philippines requested the Tribunal to issue an Award that:

> [1] Declares that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;
>
> [2] Declares that China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to UNCLOS and invalid;
>
> [3] Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS;
>
> [4] Declares that Mischief Reef and McKennan Reef are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on them violate the sovereign rights of the Philippines;
>
> [5] Requires that China end its occupation of and activities on Mischief Reef and McKennan Reef;

[6] Declares that Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;

[7] Requires China to terminate its occupation of and activities on Gaven Reef and Subi Reef;

[8] Declares that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 M; and that China has unlawfully claimed maritime entitlements beyond 12 M from these features;

[9] Requires that China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with the Convention at or in the vicinity of these features;

[10] Declares that the Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;

[11] Declares that China has unlawfully claimed, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting living and non-living resources within its Exclusive Economic Zone and Continental Shelf;

[12] Declares that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under the Convention in areas within and beyond 200 M of the Philippines' archipelagic baselines; and

[13] Requires that China desist from these unlawful activities.[7]

380. In the Statement of Claim, the Philippines stated that it "reserves the right to supplement and/or amend its claims and the relief sought as necessary".[8] On 28 February 2014, it applied for leave to amend its January 2013 Statement of Claim by adding a new claim regarding the status of Ren'ai Jiao under the UNCLOS and as a part of the Philippines' continental shelf, and the consequential unlawfulness of China's relevant activities on Ren'ai Jiao, as well as a new request for relief regarding those activities. By that time, over thirteen months had elapsed since the Philippines' initiation of the Arbitration, and it was only one month before the date fixed for the

7 Notification and Statement of Claim of the Philippines (22 Jan. 2013), in Memorial of the Philippines, Vol. III, Annex 1, para.41.

8 Ibid., at para.43.

submission of its Memorial. The Philippines' amendments regarding Ren'ai Jiao are scattered in the sections entitled "Factual Background",[9] "the Philippines' Claims",[10] and "Relief Sought". In the amended requests for relief, the Philippines asked the Tribunal to issue an award that, in part:

> [4] Declares that Mischief Reef, McKennan Reef and Second Thomas Shoal are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on Mischief and McKennan Reefs, and its exclusion of Philippine vessels from Second Thomas Shoal, violate the sovereign rights of the Philippines;
>
> [5] Requires that China end its occupation of and activities on Mischief Reef and McKennan Reef and at Second Thomas Shoal; [ … ][11]

381. On 11 March 2014, the Tribunal granted leave and accepted the Philippines' Amended Statement of Claim. It asserted that it had "sought and received no comments from China".[12] The fact is that, however, China had stated, in clear terms, its position of non-acceptance of and non-participation in the Arbitration, which must be regarded as an omnibus objection to any procedural requests from the Tribunal.

*I.2. The second round of major amendments were made in the Philippines' Memorial*

382. On 30 March 2014, the deadline fixed by the Tribunal, the Philippines submitted its Memorial, which set out fifteen submissions:

> 1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> 2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
>
> 3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> 4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic

9 Amended Notification and Statement of Claim of the Philippines (28 Feb. 2014), in Memorial of the Philippines, Vol. III, Annex 5, paras.20-22.

10 Ibid., at para.34.

11 Ibid., at para.44.

12 Award on Jurisdiction, paras.42-43.

zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

12) China's occupation and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

(b) violate China's duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and

(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and

15) China shall desist from further unlawful claims and activities.[13]

383. Apparently these submissions corresponded to the requests for relief stated in the 2013 Statement of Claim and the 2014 Amended Statement of Claim, but have effected major modifications in substance. In particular, these submissions added allegations that China violated its obligation under the Convention to "protect and preserve the marine environment" at Huangyan Dao, Ren'ai Jiao and Meiji Jiao (Submissions No. 11 and 12(b)), and that China "aggravated and extended the dispute" by engaging in relevant activities at Ren'ai Jiao (Submission No. 14). These amendments to its submissions were made by the Philippines less than three weeks after the Tribunal's acceptance of its first round of major amendments.

*I.3. The third round of major amendments were made at the end of the merits hearing*

384. The Tribunal issued the Award on Jurisdiction on 29 October 2015, and held hearings on the merits and remaining issues of jurisdiction and admissibility on 24, 25, 26 and 30 November 2015. At the end of the hearing on 30 November, which was just about a month after the Tribunal rendered the Award on Jurisdiction, the Philippines presented its fifteen Final Submissions, requesting the Tribunal to adjudge and declare that:

> A. The Tribunal has jurisdiction over the claims set out in Section B of these submissions, which are fully admissible, to the extent not already determined to be within the Tribunal's jurisdiction and admissible in the Award on Jurisdiction and Admissibility of 29 October 2015.
>
> B. (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> (2) China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS;
>
> (3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> (4) Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

13 Award on Jurisdiction, para.101, quoting Memorial of the Philippines, Vol. I, pp.271-272.

(5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

(6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

(7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

(8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

(10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

(11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;

(12) China's occupation of and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

(b) violate China's duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

(13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

(14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;

(c) endangering the health and wellbeing of Philippine personnel stationed at Second Thomas Shoal; and

(d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and

(15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.[14]

385. At least four major modifications stood out in the Philippines' Final Submissions of 2015, as compared to those stated in the 2014 Memorial:

First, adding the term "expressly", the Philippines revised "those permitted by UNCLOS", its former description of entitlements under UNCLOS in Submissions No. 1 and No. 2, to now read "those expressly permitted by UNCLOS", thus attempting to read down the entitlements;

Second, with respect to Submission No. 11 alleging that China had violated its obligations under the Convention to protect and preserve the marine environment, the Philippines extended the geographical scope to now cover also Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao;

Third, with respect to Submission No. 14 alleging that China had unlawfully aggravated and extended the dispute, the Philippines added China's "dredging, artificial island-building and construction activities" at Meiji Jiao, Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao, as conduct that caused the aggravation and extension; and

Fourth, the Philippines amended Submission No. 15, as directed by the Tribunal in paragraph 413(I) of its Award on Jurisdiction.

386. The Tribunal summarized the Philippines' amendments in its Submissions No. 11, 14 and 15, but did not mention those in Submissions No. 1 and 2.[15] On 16 December 2015, the Tribunal granted leave to the Philippines to make the amendments incorporated in its Final Submissions.[16]

387. The Philippines' submissions set out in its 2013 Statement of Claim underwent major amendments in the subsequent procedures. Some submissions were rephrased, which has important implications for the consideration of substantive issues. In particular, the Philippines added submissions concerning the status of Ren'ai Jiao and its being part of its exclusive economic zone and continental shelf,

14 Award of 12 July, para.112, quoting Letter from the Philippines to the Tribunal (30 November 2015).

15 Ibid., at para.78.

16 Ibid., at para.80.

China's violation of its obligations under the UNCLOS to protect and preserve the marine environment, and China's aggravation and extension of the dispute by its relevant activities in the South China Sea.

## II. The Tribunal failed to properly address the admissibility issues arising from the Philippines' amendments to its submissions

388. Admissibility issues arising from amendments to submissions have been addressed in international cases. This jurisprudence recognizes the necessity of examining such admissibility issues and provides for fairly consistent standards for evaluating the admissibility of amended or new submissions against the original claims stated in the instrument initiating proceedings. In this Arbitration, the Tribunal failed to follow this jurisprudence to properly address the admissibility issues arising from the Philippines' amendments to its submissions, and rashly declared that the amended or new submissions were fully admissible.

### *II.1. The Tribunal failed to properly address the admissibility issues arising from the Philippines' amendments to its submissions, and even guided the Philippines to make amendments*

389. The formulation and substance of the submissions play a central role in a case. International courts and tribunals often take a cautious attitude toward amendments to submissions. Even when the respondent does not object to the amendments, the court or tribunal is inclined to examine any potential admissibility issues. This duty, instead of being lessened, takes on greater importance in the case of non-participation of the other State, not to mention the situation in which the non-participating State explicitly objects to the proceeding.

390. The respondent participating in the proceedings may object to or keep silent on the applicant's amendments to its submissions. In the event that an objection is made, the court or tribunal has to address the admissibility issues, although the objection does not automatically make the new submissions inadmissible. This practice is well established.

391. The international court or tribunal would consider the admissibility of amended or new submissions even if the participating respondent does not raise any jurisdictional or admissibility objection to the applicant's amended claims. In *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 2007)*, Nicaragua requested the ICJ, in its application, to determine the course of the single maritime boundary between the areas of the territorial sea, continental shelf and exclusive economic zone appertaining respectively to the two States, and then requested the Court, in its final submissions at the end of the oral proceedings, to decide the question of sovereignty over certain islands and cays

within the area in dispute.[17] The Court considered this sovereignty claim a new claim from the formal point of view.[18] Although Honduras contested neither the jurisdiction of the Court to entertain Nicaragua's new claim nor its admissibility,[19] the Court addressed the admissibility issues in the light of the standards established in international jurisprudence and concluded that the new claim "is admissible as it is inherent in the original claim relating to the maritime delimitation between Nicaragua and Honduras in the Caribbean Sea".[20]

392. It is only natural that, once a respondent decides not to participate in the proceedings, it would refrain from voicing objections to procedural matters, such as amendments to the submissions. However, given that the formulation and substance of claims play a central role in international cases, the non-participating respondent's position on the other party's amendments to its submissions can only be considered to be an objection. It is observed that as soon as the absent party has committed a default, the submissions of the active party are frozen and can no longer be modified.[21] According to a more modest view,

> It is reasonable to suppose that the 'absence of objection' of a party is of less weight when that party is wholly absent from the proceedings than when it is participating but chooses not to object; in the latter case, it is permissible to interpret the isolated non-reaction as acquiescence, but in the former case this is not merely not the only interpretation possible, it is also the least likely.[22]

393. Even if no objection is inferred from the non-participating respondent's silence, it remains important for international courts or tribunals to examine the admissibility issues arising from the applicant's amendments to its submissions. The necessity to examine the admissibility was not lessened by "silence inside the court" in the above-mentioned case, and, similarly, should not be considered lessened by "silence outside the court" in this Arbitration. Because international courts and tribunals

17 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at paras.104-107.

18 Ibid., at para.109.

19 Ibid., at para.116.

20 Ibid., at paras.108-115.

21 Geneviève Guyomar, Le défaut des parties à un différend devant les juridictions internationales (Paris: Librairie générale de droit et de jurisprudence, R. Pichon et R. Durand-Auzias, 1960), p.194, as cited in H.W.A. Thirlway, Non-Appearance before the International Court of Justice (Cambridge: Cambridge University Press, 1985), p.101.

22 H.W.A. Thirlway, Non-Appearance before the International Court of Justice (Cambridge University Press, 1985), p.102.

should endeavour to ensure the non-participating respondent's legitimate rights are safeguarded, it is no less important for the court or tribunal to examine the admissibility of amended or new claims in the case of non-participation.

394. In any event, China has stated in clear terms its position of non-acceptance of and non-participation in the Arbitration and its opposition to any measures, including certainly the Philippines' amendments to its submissions, to push forward the Arbitration. At the very beginning, China made it loud and clear that it did not accept and would not participate in the Arbitration. China expressly stated on 6 February 2015 that it "holds an omnibus objection to all procedural applications or steps that would require some kind of response from China",[23] and reiterated on 1 July 2015 that it "opposes any moves to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures".[24] Therefore, regarding any matter on which the Tribunal sought comments from China, China's position should be read as objection.

395. The Tribunal should have conducted an evaluation of the admissibility of the Philippines' amended or new submissions in the light of the standards established in international jurisprudence. However, the Tribunal failed to do that in its Award on Jurisdiction and Award of 12 July, which betray no trace of its cognizance of the importance of this question.

396. Its wholesale acceptance of the Philippines' amendments aside, the Tribunal even proactively guided and assisted the Philippines in making its amendments. For instance, the Philippines' amendments incorporated in Final Submission No. 11, expanding the geographical coverage of the alleged violation by China of its obligation under the Convention to protect and preserve the maritime environment, was owed to the Tribunal's direction. During the merits hearings in November 2015, the Tribunal, in its questions to the Philippines, instigated the Philippines to consider amending its Submissions No. 11 and 12(b), so as to include issues of maritime environment in areas beyond Huangyan Dao and Ren'ai Jiao. The Tribunal asked if the Philippines wished to do so; the Philippines immediately responded by saying "yes, we do", and amended its Submission No. 11 to include issues of the maritime environment at Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao.[25] This interaction between the Tribunal and the Philippines showcases the Tribunal's partiality toward the Philippines. The Tribunal was in effect playing the role of counsel and litigation strategist for the Philippines. It showed no objectivity or impartiality.

23 Award on Jurisdiction, para.64.

24 Award of 12 July, para.51.

25 Merits Hearing Tr. (Day 4), pp.169-170.

*II.2. The Tribunal disregarded well-established standards of admissibility, invented a loose and ambiguous criterion and in any event did not apply them faithfully*

397. Article 19 of the Rules of Procedure, made by the Tribunal, provides that "[d]uring the course of the arbitral proceedings a Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its written pleadings". The Philippines may, pursuant to this article, amend its submissions. However, it does not follow that the Philippines' amendments are automatically or necessarily admissible. On this issue, international jurisprudence has established fairly consistent standards, which the Tribunal should have applied in examining the admissibility of the Philippines' amended or new submissions, but it did not.

398. It is not unusual in international cases that the amendments made by one party to its submissions give rise to new claims at least in the formal sense. The ICJ held that "the mere fact that a claim is new is not in itself decisive for the issue of admissibility",[26] rather, "the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings".[27]

399. In *Certain Phosphate Lands in Nauru (Nauru v. Australia, 1992),* the ICJ pronounced that in order to decide whether a new claim added in the proceedings is admissible, it has to consider "whether, although formally a new claim, the claim in question can be considered as included in the original claim in substance".[28] It also emphasized that for a new claim to be held to have been included in the original claim, "it is not sufficient that there should be links between them of a general nature".[29] What links would be sufficient? The Court reaffirmed its view in *Temple of Preah Vihear (Cambodia v. Thailand, 1962)* that "[a]n additional claim must have been implicit in the application",[30] and its view in *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland, 1974)* that it must arise "directly out of the question which is the subject-matter of that Application".[31]

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26 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.109, citing Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.110.

27 Ibid., citing Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p.639, at para.41.

28 Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p.240, at para.65.

29 Ibid., at para.67. See also, e.g. Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.110.

30 Ibid., citing Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I. C.J. Reports 1962, p.6, at 36. See also, e.g. Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.110.

31 Ibid., citing Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p.175, at para.72. See also, e.g. Territorial and

The PCIJ held very early in *The Société Commerciale de Belgique (Belgium v. Greece, 1939)* that "the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character".[32] In *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 2007),* the ICJ emphasized that additional claims formulated in the course of proceedings are inadmissible if they would result in transforming the subject of the dispute originally brought before it under the terms of the Application.[33]

400. In *Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain, 2013)*, the ITLOS applied the jurisprudence developed at the ICJ and held that "any new claim to be admitted must arise directly out of the application or be implicit in it",[34] and that "while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character."[35]

401. In this Arbitration, the Tribunal made no reference, in its awards, to the above standards established in international cases. Instead, the Tribunal invented its own criterion that "the proposed amendment was related to or incidental to the Philippines' original Submissions".[36] This criterion was not explained by the Tribunal. Apparently, this new criterion only requires a link of a general nature between new claims and original claims. The link of a general nature is far looser than the requirement well established in international jurisprudence, namely that new claims must be "implicit in" the application or "arise directly out of" the subject-matter of the application. As mentioned before, the ICJ has emphasized that for a new claim to be held to have been included in the original claim, it is not sufficient that there should be links between them of a general nature.

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Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.110.

32 The "Société Commerciale de Belgique", Judgment of 15 June 1939, PCIJ, Series A/B, No.78, p.160, at 173.

33 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.108. See also, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p.639, at para.39.

34 The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p.4, para.142, citing Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p.240, at para.67.

35 Ibid., at para.143.

36 Award of 12 July, para.820.

402. In practice, where the applicant's new claims are considered inadmissible on certain grounds, an international court or tribunal may still consider them in the reasoning part, but cannot, in any event, include them in the *dispositif*, if it must address them while dealing with other admissible claims. In *Temple of Preah Vihear (Cambodia v. Thailand, 1962),* Cambodia included in its Application and Memorial two claims regarding the territorial sovereignty over the Temple of Preah Vihear,[37] and, during the hearing and in the Final Submissions, added requests regarding the legal effect of relevant maps, the frontier line between Cambodia and Thailand in the region, and the obligation of Thailand to return relevant properties.[38] The ICJ held that "the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear [ … ]. The Court will have regard to each of these [, namely the frontier line between the two States and the legal effect of relevant maps,] only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it [ … ]".[39] The Court only addressed the two issues in the part of reasoning, rather than in the *dispositif*.[40] As regards the new claim concerning restitution, the Court considered that it did not represent any extension of Cambodia's original claim, rather it is "implicit in" and "consequential on" the claim of sovereignty itself, and decided upon it.[41]

403. It is noteworthy that international courts and tribunals are more wary of the amendments to submissions made subsequent to their decision on jurisdiction, because such amendments may affect jurisdiction. In this regard, the PCIJ pointed out in *The Société Commerciale de Belgique* that "a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction".[42] Likewise, the ICJ stated in *Ahmadou Sadio Diallo* that the respondent's fundamental procedural right will be infringed if, after it has submitted its counter-memorial, the applicant asserts a substantively new claim. In that case, the respondent raised preliminary objections to admissibility of the applicant's submissions in the application, which were decided upon by the Court in its judgment of 2007. The applicant made a new claim at the reply stage, i.e. in the reply to the counter-memorial. With respect to the admissibility of the new claim, the Court stated in its judgment on merits:

37 Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, p.6, at 9.

38 Ibid., at 10-11.

39 Ibid., at 14.

40 Ibid., at 36.

41 Ibid., at 36.

42 The "Société Commerciale de Belgique", Judgment of 15 June 1939, PCIJ, Series A/B, No. 78, p.160, at 173.

> Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it [ … ] A Respondent's right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins [ … ] is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections.[43]

404. This reason, in conjunction with other factors, caused the ICJ to ultimately find the applicant's above-mentioned new claim inadmissible.[44] In *SAIGA (No. 2) (Saint Vincent and the Grenadines v. Guinea, Provisional Measures, 1998)*, the ITLOS also emphasized that "a modification of the submissions of a party is permissible provided that it does not prejudice the right of the other party to respond".[45]

405. In this Arbitration, the Tribunal found, in its Award on Jurisdiction, that it had jurisdiction to consider seven of the Philippines' submissions, and that a determination of whether it had jurisdiction to consider other submissions would involve consideration of issues that did not possess an exclusively preliminary character, and accordingly reserved consideration of its jurisdiction over them to the merits phase. After making the above jurisdictional decisions—to be precise, at the end of the merits hearing, the Tribunal accepted the Philippines' final submissions which included major amendments to its submissions and new claims. The Tribunal did so despite the fact that it had already established its jurisdiction over some of the submissions and reserved consideration of its jurisdiction over others to the merits phase. Several illustrations are instructive.

With respect to the Philippines' Submission No. 11, the Tribunal found in its Award on Jurisdiction that it had jurisdiction. Acknowledging that "[p]rior to 30 November 2015, the Philippines' Submission No. 11 had been limited to 'the marine environment at Scarborough Shoal and Second Thomas Shoal'",[46] the Tribunal nevertheless granted the requested leave to the Philippines to amend this submission to extend its geographical coverage to other areas.

With respect to the Philippines' Submission No. 14, the Tribunal reserved consideration of its jurisdiction to the merits phase, as "the Tribunal's jurisdiction to address these questions may depend on the status of Second Thomas Shoal" and "the specifics of China's activities in and around Second Thomas Shoal and whether such activities

43 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p.639, at para.44.

44 Ibid., at para.47.

45 The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, para.33.

46 Award of 12 July, para.818.

are military in nature [are] a matter best assessed in conjunction with the merits".[47] However, the Philippines' amendment to its Submission No. 14 at the end of the merits hearing added new substance, which clearly exceeded the scope of the claim as recognized by the Tribunal in the Award on Jurisdiction.

With regard to the Philippines' Submissions No. 1 and 2, the Tribunal held in the Award on Jurisdiction that Submission No. 1 required the Tribunal to consider the interaction of historic rights claimed by China with the provisions of the Convention.[48] In the Final Submissions, the Philippines, adding the term "expressly", revised "those permitted by UNCLOS" to read "those expressly permitted by UNCLOS". There is a clear distinction between the two formulations, which have different impact on the scope and nature of the Philippines' submissions, and have different implications for the scope of the Tribunal's jurisdiction and its consideration of the merits. The Tribunal did not say a word about this amendment. In the Award of 12 July, the Tribunal ostensibly did not adopt the phrasing "expressly permitted by UNCLOS", but in essence applied it.

406. By allowing the amendments to the Philippines' submissions after the jurisdiction was decided upon, and by failing to properly address the admissibility of the Philippines' amendments to its submissions, the Tribunal infringed the legitimate rights of China.

*II.3. The Tribunal erroneously regarded the Philippines' claims in its 2014 Amended Statement of Claims as its original claims*

407. To determine the admissibility of amended or new claims, it is necessary to compare them with original claims. In international jurisprudence, original claims should be the claims contained in the instrument submitted when the proceedings were initiated.

408. In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom, 1998)*, the ICJ pointed out that the date on which Libya filed its application "is in fact the only relevant date for determining the admissibility of the Application".[49] In other cases, such as *Ahmadou Sadio Diallo*, the Court stated that to determine the admissibility of a new claim, it should be compared with claims set out in the application initiating the proceedings;[50] and "though it may elucidate the terms

47 Award on Jurisdiction, para.411.

48 Ibid., para.398.

49 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p.9, at para.44.

50 See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p.639, at para.39; Territorial and

of the Application, [the Memorial] must not go beyond the limits of the claim as set out therein".[51] The Court further said, "*A fortiori*, a claim formulated subsequent to the Memorial [ … ] cannot transform the subject of the dispute as delimited by the terms of the Application".[52]

409. The proceeding-initiating instrument and date are as vital to the consideration of jurisdiction as to admissibility, to ensure legal certainty and good administration of justice. The ICJ has repeatedly emphasized that "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings".[53] The Court pointed out:

> it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.[54]

410. This Arbitration was initiated by the Philippines on 22 January 2013, by its Notification and Statement of Claim. Therefore, this date should be regarded as the date on which the Philippines instituted proceedings, and its Notification and Statement of Claim as the instrument instituting proceedings, defining the dispute to be addressed by the Tribunal and the scope of the subject-matters of the dispute. It was erroneous for the Tribunal to, without China's consent, grant leave to the Philippines to expand disputes set out in its Statement of Claim and the scope of the subject-matters of the disputes.[55] The Philippines' claims set out in its Statement of

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Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p.659, at para.108.

51 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p.639, at para.39.

52 Ibid.

53 Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996, p.595, at para.26; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p.9, at para.44; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p.412, at para.79.

54 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p.412, at para.80.

55 See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p.303, at

Claim should be regarded as its original claims. However, the Tribunal erroneously took the Philippines' claims in its Amended Statement of Claim of 28 February 2014 as its original claims and improperly held that these claims were "refined and encapsulated" in the Memorial of 30 March 2014.[56] This error started a chain of errors in its consideration of jurisdiction and admissibility, as well as the identification and characterization of disputes. For instance, the Philippines added new claims regarding Ren'ai Jiao in its Amended Statement of Claim, whereby it requested the Tribunal to declare that Ren'ai Jiao forms part of its continental shelf under Part VI of the Convention, that China's exclusion of Philippine vessels from Ren'ai Jiao violated its sovereign rights, and that China should end its activities at Ren'ai Jiao. These amendments had obviously expanded the scope of its original claims.

## III. The Tribunal erred in allowing the Philippines' amendments to its Submissions No. 11, 12(b) and 14 and finding them as formulated in the Final Submissions admissible

411. The Philippines' Final Submissions of 2015 contained a number of new claims that were not found in its Statement of Claim of 2013, which included Submissions No. 11 and 12(b) accusing China of violating its obligation to protect and preserve the marine environment, and Submission No. 14 accusing China of aggravating and extending the dispute. These amendments, in the light of the standards established in international jurisprudence, should not have been allowed.

### *III.1. The Tribunal erred in allowing the Philippines' amendments to its Submissions No. 11 and 12(b) and finding them as formulated in the Final Submissions admissible*

412. The Philippines did not mention "marine environment" in its 2013 Statement of Claim or 2014 Amended Statement of Claim. This matter was first introduced into the Philippines' submissions in its Memorial of 2014. Submission No. 11 presented in the Memorial alleged that "China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal"; and Submission No. 12(b) alleged that "China's occupation and construction activities on Mischief Reef [ … ] violate China's duties to protect and preserve the marine environment under the Convention". In its Final Submissions of 2015, the Philippines extended the geographical coverage of China's relevant activities by adding Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao. Therefore, the Philippines' Final Submissions

paras.3-5. In that case, the applicant filed an additional application designed as an amendment to the original one, to expand the geographical scope of the dispute to be settled by the Court. The respondent said that it did not object to the amendment and the Court accepted it.

56 Award on Jurisdiction, para.19.

regarding the alleged China's violation of its obligation to protect and preserve the marine environment were new claims.[57] They were inadmissible in the light of the well-established standards.

413. The Philippines' Final Submissions No. 11 and 12(b) were not found in its original submissions, i.e. those presented in its 2013 Statement of Claim. Its final submissions regarding the marine environment were related to two categories of activities, namely fishing and construction activities. Before its third round of amendments were made, the Philippines' Submission No. 11 in its Memorial addressed fishing activities, and Submission No. 12(b), construction activities. On 30 November 2015, at the end of the merits hearing, the Philippines requested the Tribunal's permission to amend its Submission No. 11 to cover the marine environment at Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao, claiming that "evidence relevant to those features had not been available at the time of drafting the Memorial".[58] The Tribunal maintained that "the proposed amendment was related to or incidental to the Philippines' original Submissions (which included the environmental effects of island building at Mischief Reef)".[59] Putting this in context the Tribunal must be referring to Submission No. 12(b) presented in the Memorial. It did not give any explanation for its position. But it is clear that such a "link" falls short of the well-established requirement that a new claim must be implicit in or arise directly out of the original claim to be admissible. Even this very loose standard that the Tribunal invented was not applied faithfully. It merely asserted that the amendment "did not involve the introduction of a new dispute between the Parties", and allowed the amendment rashly.[60]

414. The Philippines' Submission No. 12(b) related to alleged environmental harm from China's construction activities at Meiji Jiao. The Tribunal erroneously took this submission first presented in its Memorial as one of its original submissions. Presented as late as in the Memorial, Submission No. 12(b) was a new claim not found in either the 2013 Statement of Claim or the 2014 Amended Statement of Claim, and was thus inadmissible. Since Submission No. 12(b) is inadmissible in itself, a further new claim made based upon it is naturally inadmissible, too.

415. The Tribunal considered that the Philippines' "initial" claims were those presented in its Amended Statement of Claim, and those "initial" claims were simply "refined and encapsulated" in the submissions of its Memorial.[61] But this was not the

57 See also Stefan Talmon, The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.309, at para.133.

58 Award of 12 July, para.820.

59 Ibid.

60 Ibid.

61 Award on Jurisdiction, para.19.

case. The Philippines' submissions regarding Meiji Jiao in the two versions of its Statement of Claim were that Meiji Jiao is a submerged feature that forms part of the continental shelf of the Philippines under Part VI of the Convention, that China's occupation of and construction activities on it violate the sovereign rights of the Philippines, and that China should end its occupation of and activities on it. Obviously, here what the Philippines alleged was that the activities violated the Philippines' sovereign rights, not the obligation to protect and preserve the marine environment.

416. In the two versions of its Statement of Claim, the Philippines made no attempt to establish a link between China's construction activities and the protection and preservation of the marine environment. Thus the Philippines' Submission No. 12(b) first presented in its Memorial was very likely inadmissible. It follows that it is groundless for the Tribunal to assert that the Philippines' new claims regarding China's construction activities at Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao were "related to or incidental to" Submission No. 12(b) in its Memorial.

417. The Philippines' Submission No. 11 as presented in its Memorial is not "related to or incidental to" its original submission in the Statement of Claim either. Submission No. 11 in the Memorial concerned the marine environment at Huangyan Dao and Ren'ai Jiao, and the Philippines claimed that China had tolerated and even supported environmentally harmful fishing activities conducted by vessels flying its flag at the two features. As far as activities at Ren'ai Jiao were concerned, the submission in the Memorial was new compared to the Philippines' original submissions in its 2013 Statement of Claim. Even in its 2014 Amended Statement of Claim, the Philippines did not raise the issue of the marine environment at Ren'ai Jiao. At that time, the Philippines' submission regarding Ren'ai Jiao was based on the allegation that China interfered with the exercise of its right of navigation and rights to living and non-living resources, irrelevant to marine environment protection and preservation.

418. With regard to Chinese fishermen's fishing activities in the vicinity of Huangyan Dao, the Philippines demanded, in its 2013 Statement of Claim, that "China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal [ … ] and from undertaking other activities inconsistent with the Convention at or in the vicinity of these features". It is unclear what the Philippines referred to by "other activities inconsistent with the Convention at or in the vicinity of these features". But the context in the Statement of Claim makes clear that it was not intended to cover the marine environment issue.

419. The Philippines' introduction of new claims regarding marine environment protection and preservation into its Final Submissions No. 11 and 12(b) changed the nature of its relevant original submissions. In its 2013 Notification and Statement of

Claim, the Philippines characterized the dispute at issue in this Arbitration as one with China "over the maritime jurisdiction of the Philippines in the West Philippine Sea", and its object as "to clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea". The Philippines divided the dispute into four aspects: the first three concerned issues of maritime entitlements between China and the Philippines, and the fourth concerned "whether China has violated the right of navigation of the Philippines in the waters of the South China Sea, and the rights of the Philippines in regard to the living and non-living resources within its exclusive economic zone and continental shelf".[62] No mention was made of China's obligation to protect and preserve the marine environment.[63]

420. Violation of the right of navigation and violation of the obligation to protect and preserve the marine environment, of which the Philippines accused China, are essentially issues of different nature and involve different rights and obligations. The Philippines' Submissions No. 11 and 12(b) regarding China's violation of its obligation to protect and preserve the marine environment were not included in its original submissions in the 2013 Statement of Claim, or even those in the 2014 Amended Statement of Claim. The introduction of these new claims changed the nature of the dispute as defined in its original submissions. These amended submissions are thus inadmissible in the light of the standard established in international jurisprudence.

*III.2. The Tribunal erred in allowing the Philippines' amendment to its Submission No. 14 and finding it as formulated in the Final Submissions admissible*

421. The Philippines' amendments in its final Submission No. 14 are also new claims, as no submission in the 2013 Statement of Claim or 2014 Amended Statement of Claim was "related to or incidental to" aggravation and extension of the dispute. The Philippines' claim in its Submission No. 14 first appeared in its Memorial of 2014, alleging that, "Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things [ … ]", with China's activities all relating to Ren'ai Jiao. As pointed out above, issues relating to Ren'ai Jiao were not included in the 2013 Statement of Claim.

422. When the Philippines made the first mention of China's activities at Ren'ai Jiao in its 2014 Amended Statement of Claim, it did not refer to aggravation and extension of the dispute, which made its debut only in the Memorial of 30 March 2014. A scholar observed that the Philippines' modification of its claim in this regard

62 Notification and Statement of Claim of the Philippines (22 Jan. 2013), in Memorial of the Philippines, Vol. III, Annex 1, p.16, para.39.

63 Stefan Talmon, The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.309, at para.125.

"amounted to an abuse of a procedural right – an abuse of process – which should have led the Tribunal to rule that Submission No. 14 was inadmissible".[64]

423. In its Final Submissions presented at the end of the merits hearing in November 2015, the Philippines added to its Submission No. 14 a new paragraph (d), which read "conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef". This amendment was accepted by the Tribunal on 16 December 2015. This new claim parasited on an already inadmissible new submission, and can only be inadmissible too.

## Conclusion

424. The Philippines' major amendments to its submissions flashed a warning light to any reasonable mind on the admissibility of its Final Submissions No. 11, 12(b) and 14. Rather than conducting a serious evaluation on the admissibility issues, the Tribunal either showed evasion or took a cursory look at best. One has good reasons to question its professionalism.

425. The Philippines' three rounds of major amendments to its submissions, accepted by the Tribunal wholesale, not only impaired the integrity of the arbitral procedure, but also eroded the very basis of the Tribunal's decision on jurisdiction. The Tribunal disregarded the well-established standard in international jurisprudence, put forward a vague but clearly loose criterion, and did not even apply it faithfully. The Philippines' amendments in its Final Submissions No. 11, 12(b) and 14, evaluated pursuant to the established standard, are clearly not allowable, and these submissions not admissible.

426. With China maintaining a firm position of non-acceptance of and non-participation in the Arbitration, the Tribunal's errors take on a greater dimension. It should have taken a cautious approach so as to ensure that China's legitimate rights were safeguarded. But it did the opposite. The words it uttered on safeguarding China's rights were manifestly contradicted by its deeds on the issue of admissibility, rendering them no more than lip service. The Tribunal not only failed to discharge its duties in good faith, but also abused its power by guiding the Philippines to amend its submissions. It acted, in effect, as the counsel and litigation strategist for the Philippines, instead of an objective and impartial arbitral body.

64 Ibid., at para.116.

## Chapter Four: Historic Rights (Submissions No. 1 and 2)

427. The Philippines' Submissions No. 1 and 2 stated:

> (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea [ … ];
>
> (2) China's claims to sovereign rights[,] jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS[.][1]

428. With respect to the merits of these two submissions, the Tribunal essentially asked and answered three questions:

> (a) First, does the Convention, and in particular its rules for the exclusive economic zone and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions of the Convention and which may have been established prior to the Convention's entry into force by agreement or unilateral act?
>
> (b) Second, prior to the entry into force of the Convention, did China have historic rights and jurisdiction over living and non-living resources in the waters of the South China Sea beyond the limits of the territorial sea?
>
> (c) Third, and independently of the first two considerations, has China in the years since the conclusion of the Convention established rights and jurisdiction over living and non-living resources in the waters of the South China Sea that are at variance with the provisions of the Convention? If so, would such establishment of rights and jurisdiction be compatible with the Convention?[2]

429. The Tribunal held that "upon China's accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded".[3] It also concluded that China had never acquired or enjoyed historic rights in the South China Sea, whether before or since the Convention's entry into force.[4]

1 Award of 12 July, para.112.
2 Ibid., para 234.
3 Ibid., para.262.
4 See ibid., paras.263-275.

430. The Tribunal said that the Convention defined the scope of China's maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein.[5] It proceeded:

> [A]s between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. [… T]he Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.[6]

431. Chapter Two has demonstrated that the Tribunal manifestly had no jurisdiction over the Philippines' Submissions No. 1 and 2. This Chapter will proceed from that basis and elaborate that the issue of China's historic rights in the South China Sea raised in the Philippines' Submissions No. 1 and 2 is an integral part of the territorial and maritime delimitation dispute between China and the Philippines; that there exists no premise for the Tribunal's musings that China was claiming historic rights in the exclusive economic zone and continental shelf of the Philippines; that the Tribunal erred in addressing the relationship between the Convention and general international law and that between the Convention and historic rights; and that the Tribunal turned a blind eye to China's longstanding practice in working and living and exercising jurisdiction in the South China Sea, and made an erroneous determination on the nature and existence of China's historic rights in the South China Sea.

## I. The Tribunal erred in addressing the issue of China's historic rights in the South China Sea separately from the territorial and maritime delimitation dispute between China and the Philippines

432. In this Arbitration, the Tribunal turned a blind eye to the existence of the territorial issue and maritime delimitation situation between China and the Philippines, and proceeded on the premise that relevant maritime areas were already part of the Philippines' exclusive economic zone and continental shelf in making its analyses and arriving at its decisions. The Tribunal's findings are based on a false premise and thus invalid.

5 Ibid., para.277.

6 Ibid., para.278.

*I.1. The issue of China's historic rights in the South China Sea raised in the Philippines' claims forms an integral part of the territorial and maritime delimitation dispute between China and the Philippines*

433. China's sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea have been established in the long course of history, and solidly grounded in history and law. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them.

434. The Tribunal admitted that it had no jurisdiction to address issues concerning territorial sovereignty and maritime delimitation. But it held that the issue of China's historic rights in the South China Sea raised in the Philippines' Submissions No. 1 and 2 had nothing to do with the issue of territorial sovereignty and maritime delimitation, and assumed jurisdiction over the issue of China's historic rights in the South China Sea in isolation from the territorial and maritime delimitation dispute between China and the Philippines.

435. As stated in Chapter Two, there exists a territorial and maritime delimitation dispute between China and the Philippines. This fact has been recognized by both sides. China's historic rights in the South China Sea raised in the Philippines' claims should not be addressed outside the context of the territorial and maritime delimitation dispute.

First, in terms of geographical areas, the issue of China's historic rights in the South China Sea raised in the Philippines' claims cannot be separated from the territorial issue between China and the Philippines and their overlapping maritime jurisdiction claims in the South China Sea. Regarding the territorial issue, the Philippines has laid unlawful territorial claims to some islands and reefs of China's Nansha Qundao and Huangyan Dao. Regarding the issue of maritime delimitation, China's claims to exclusive economic zone and continental shelf based on Nansha Qundao and Zhongsha Qundao overlap to a large extent with those of the Philippines based on the Philippine Islands. Thus, the area where China's historic rights exist as claimed by the Philippines overlaps with the area to be delimited between the two States. Therefore, the historic rights at issue cannot be addressed separately from the issue of territorial sovereignty and maritime delimitation. As stated in Chapter Two, in international judicial practice, where there exists a maritime delimitation situation, international courts or tribunals have never addressed the issue of historic rights in isolation from the issue of maritime delimitation.

Second, the emergence and development of China's historic rights in the South China Sea has gone hand in hand with the establishment of China's sovereignty over Nanhai Zhudao. China's sovereignty over Nanhai Zhudao and historic rights in the South China Sea have been established in the long course of history. Since long ago, China has exercised jurisdiction over Nanhai Zhudao and relevant waters, and placed under its jurisdiction its archipelagos together with relevant waters, without

distinguishing between land and water (for details, see Section III of this Chapter). Therefore, it is wrong for the Tribunal to discuss the issue of China's historic rights in the South China Sea separately from China's sovereignty over Nanhai Zhudao.

Third, the Tribunal said that the historic rights China appeared to claim in the South China Sea were the exclusive rights to living and non-living resources.[7] So viewed, China's historic rights in the South China Sea may be regarded as having zonal implications, and can only be properly addressed within the framework of maritime delimitation between the two States.

436. In sum, the issue of China's historic rights raised in the Philippines' claims is inseparable from the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. The Tribunal erred in addressing China's historic rights in the South China Sea in isolation from this dispute.

*I.2. The issue of maritime delimitation between China and the Philippines not having been resolved, the premise for applying Articles 56, 58, 62 and 77 of the Convention does not exist*

437. The Tribunal found that China's historic rights to resources in the South China Sea were incompatible with the Philippines' sovereign rights in its exclusive economic zone and continental shelf. Through an interpretation of Articles 56(1), 58 and 62 of the Convention, the Tribunal came to the conclusion that "the Convention is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone",[8] and that the rights of other States in the exclusive economic zone are limited to navigation, overflight, and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms set out in Article 58;[9] and further that "coastal States are only obliged to permit fishing in the exclusive economic zone by foreign nationals in the event that the coastal State lacks the capacity to harvest the entire allowable catch."[10] For the Tribunal, "The notion of *sovereign* rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular if such historic rights are considered exclusive, as China's claim to historic rights appears to be."[11] Regarding the continental shelf, the Tribunal came to the same conclusion through an interpretation of Article 77 on the basis of the same considerations, emphasizing that exclusivity in favour of the coastal State is more explicit here.[12]

7 Ibid., para.270.
8 Ibid., para.243.
9 Ibid., para.241.
10 Ibid., para.242.
11 Ibid., para.243.
12 Award of 12 July, para.244.

438. Article 56 of the Convention provides for the sovereign rights, jurisdiction and duties of the "coastal State" in the exclusive economic zone, and states that "[i]n exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."[13]

Article 58 of the Convention sets out the rights and duties of other States in the exclusive economic zone, including:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.[14]

Article 62 of the Convention stipulates that the "costal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone", and for this purpose shall give other States access to the surplus of the allowable catch of fisheries resources in the exclusive economic zone, subject to certain terms and conditions.[15]

Article 77 of the Convention provides that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[16]

The text of Articles 56, 58, 62 and 77 of the Convention makes it clear that the premise for their application is that the exclusive economic zone and continental shelf of the "coastal State" referred to in these articles are established and undisputed. More specifically in this Arbitration, the Tribunal must first find that the maritime areas involved in the Philippines' claims are the exclusive economic zone and continental shelf of the Philippines, and that China is an "other State" in respect of these areas. But, in fact, China is a coastal State in respect of these areas in the South China Sea. The relevant maritime areas are claimed by China, pursuant to international law including the Convention, as under its jurisdiction. The maritime areas claimed by the Philippines in its Submissions No. 1 and 2 are within the overlapping areas of maritime entitlements claimed by China and the Philippines, not the undisputed exclusive economic zone and continental shelf of the Philippines alone.

439. The Tribunal's application of the above-mentioned articles of the Convention in addressing the Philippines' Submissions No. 1 and 2 is based on the

13 UNCLOS, Article 58(2).

14 UNCLOS, Article 58(3).

15 See UNCLOS, Article 62(1) and (2).

16 UNCLOS, Article 77(1).

premise, though not stated as such, that the relevant maritime areas are the established and undisputed exclusive economic zone and continental shelf of the Philippines. This would have in effect delimited the overlapping maritime areas between China and the Philippines, going beyond the Tribunal's jurisdiction.

## II. The Tribunal erred in its decision on the relationship between historic rights and the Convention

440. The Tribunal erred in its findings regarding whether the Convention provides comprehensive norms for maritime rights and entitlements, the relationship between the Convention and other rules of international law, and the relationship between historic rights and the Convention.

### *II.1 The Tribunal erroneously found that the Convention provided norms for settling all issues relating to the law of the sea*

441. In this Arbitration, the Philippines argued that Articles 56, 57, 62, 76, 77 and 121 of the Convention are the rules establishing the extent and nature of the maritime rights and jurisdictions of individual States, and that they resulted from decades of dedicated international effort to achieve global agreement on a comprehensive legal order governing the world's oceans and seas.[17] During the hearing on the merits, the Philippines argued, in response to a question from one of the Arbitrators, that the Convention excludes all claims to control the sea that are not permitted by the Convention, and that the Convention aims to settle all issues of the law of the sea, and establish through this Convention a legal order for the seas and oceans.[18]

442. The Tribunal accepted the Philippines' arguments in a wholesale fashion and used them as a starting point for its reasoning in the Award of 12 July. With a simple reference to all the provisions of the Convention governing various maritime zones, the Tribunal concluded that "[t]he Convention thus provides—and defines limits within—a comprehensive system of maritime zones that is capable of encompassing any area of sea or seabed."[19] The Tribunal said:

> [T]he system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea or seabed. The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasizes the desirability of establishing "a legal order for the seas." The same objective of limiting exceptions to the Convention to the greatest extent possible is also evident in Article 309,

17 Memorial of the Philippines, Vol. I, para.4.38-4.43.

18 Merits Hearing Tr. (Day 4), pp.90-91.

19 Award of 12 July, para.231.

> which provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."[20]

The Tribunal also said:

> [T]he negotiating history of the Convention [is] instructive for the light it sheds on the intent for the Convention to serve as a comprehensive text and the importance to that goal of the prohibition on reservations enshrined in Article 309. The Convention was negotiated on the basis of consensus and the final text represented a package deal. A prohibition on reservations was seen as essential to prevent States from clawing back through reservations those portions of the final compromise that they had opposed in negotiations.[21]

443. Based on the above, the Tribunal found that the Convention is the only basis for deciding on the rights and duties of States Parties in the seas. But the assertion that the Convention provides comprehensive rules for maritime rights and entitlements is completely wrong.

*II.1.A. Matters not regulated by the Convention continue to be governed by general international law*

444. The preamble to the Convention states:

> *The States Parties to this Convention*,
>
> *Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all the peoples of the world,
>
> *Noting* that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea,
>
> *Conscious* that the problems of ocean space are closely interrelated and need to be considered as a whole,
>
> *Recognizing* the desirability of establishing, through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment,
>
> [ . . . ]

20 Ibid., para.245.

21 Ibid., para.253.

> Affirming *that matters not regulated by this Convention continue to be governed by the rules and principles of general international law*, [ … ][22]

445. By quoting a part of the preamble to the Convention in the Award of 12 July and emphasizing the intention of the States Parties to settle "all issues relating to the law of the sea" and their desirability of establishing "a legal order for the seas", the Tribunal attempted to create an impression that the Convention has provided comprehensive rules of the law of the sea.[23] This is misleading. As Paragraph 8 of the preamble to the Convention clearly states, "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Thus it is unmistakable that there are still matters not covered by the Convention, and the Convention therefore cannot be considered as containing comprehensive rules of the law of the sea. In fact, to settle "all issues relating to the law of the sea" was only the *desire* of the negotiating States, and remains just a desire of the States parties to the Convention. Noble though it is, this desire does not translate the Convention, as a package deal, into a comprehensive basket of rules to settle all issues relating to the law of the sea.

446. Desire can desire what it likes, but reality has its own life and logic. Here the reality is: while the negotiating States reached compromise on many issues of the law of the sea, quite a number of others remain unregulated under the Convention. The Convention is the product of consultations and compromises among the negotiating States. Some matters are left unregulated by the Convention, because negotiating States either failed to reach compromise on them or did not even put them on the negotiating agenda. The States parties were fully aware of this reality and affirmed in Paragraph 8 of the preamble the role of general international law in this area.

447. Even though the Convention has established the legal framework of the contemporary international order for the oceans, it has not exhausted all matters concerning maritime rights and duties. International law of the sea is not a closed legal system; on many issues, the law of the sea still needs to resort to general international law, including customary international law. In other words, the Convention is neither the whole of, nor equal to, the international law of the sea. As has been observed by a scholar, the Convention "is not exhaustive of the rights and jurisdiction that a State may have respecting waters and resources".[24]

448. It is the general consensus of the international community that the Convention has not exhausted all matters concerning maritime rights and duties. For

22 The Convention, preamble (emphasis added).

23 Award of 12 July, para.245.

24 Ted L. McDorman, Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the "Nine-dash Line", in S. Jayakumar, Tommy Koh and Robert Beckman (eds.), The South China Sea Disputes and the Law of the Sea (Edward Elgar, 2012), p.144, at 153.

example, in the 1990s, alarmed by overfishing in the high seas, the international community appealed for measures to manage and conserve straddling fish stocks and highly migratory fish stock in areas beyond national jurisdiction and for concluding a new agreement to supplement the Convention. It was in this context that we have witnessed the birth of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. As the Chinese government pointed out, this agreement "is an important development of the United Nations Convention on the Law of the Sea".[25] To take another example, the issue of marine biological diversity beyond areas of national jurisdiction was not well understood, nor given sufficient attention during the negotiation of the Convention, and consequently was not regulated in the Convention. To address this issue, the United Nations General Assembly decided in 2004 to establish an Ad Hoc Open-ended Informal Working Group to study possible options.[26] In June 2015, the General Assembly adopted Resolution 69/292, deciding to "develop an international legally binding instrument",[27] which would address topics such as marine genetic resources and marine protected areas,[28] complementing the Convention. As of December 2017, progress had been made in the work of the preparatory committee established to negotiate such an international instrument.

449. This reality has also been recognized by experts in the law of the sea. Treves pointed out that the provisions of the Convention "do not envisage every problem that may arise and do not solve every problem these provisions envisage".[29] Freestone and Mangone also observed that "there are still important issues that require further work—either because they were simply unfinished or because of new expectations and demands. The innovatory 'consensus' procedure and the 'package deal' approach

25 Declaration of the Government of the People's Republic of China on Certain Provisions of Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (6 November 1996), http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_declarations.htm#CHINA.

26 A/RES/59/24-Oceans and the Law of the Sea, Resolution adopted by the General Assembly on 17 November 2004, para.73.

27 A/RES/69/292-Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national diversity, Resolution adopted by the General Assembly on 19 June 2015, para.1.

28 Ibid., para.2.

29 Tullio Treves, The Law of the Sea "System" of Institutions, 2 Max Planck Y.B. U. N. L. (1998), p.325.

adopted at the Conference which have been widely commented upon necessitated a large number of compromises, and, as a direct result, a significant number of issues were not fully resolved."[30] These comments serve as supporting footnotes to Paragraph 8 of the preamble to the Convention, confirming that the Convention does not regulate all issues in the law of the sea.

450. The aforementioned subsequent developments and publicists' comments fully demonstrate that the Convention does not provide comprehensive rules for all issues of the law of the sea. The Tribunal took the "desire" clause in the preamble out of its context and misread it, confusing the desire of States parties with the actual contents of the Convention.

*II.1.B. Article 309 of the Convention does not prove the comprehensiveness of the Convention*

451. With regard to the question whether the Convention provides comprehensive rules for settling all matters relating to the law of the sea, the Tribunal also cited Article 309 of the Convention, arguing that this article reflected "the same objective of limiting exceptions to the Convention to the greatest extent possible".[31] Article 309 of the Convention deals with the issue of the integrity of the Convention rather than the comprehensiveness of the Convention. The Tribunal confused those two different issues.

452. Article 309 of the Convention provides: "No reservations or exceptions may be made to the Convention unless expressly permitted by other articles of this Convention." It is a provision on reservations, aimed at preserving the integrity of the Convention. Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, said:

> Although the Convention consists of a series of compromises and many packages, I have to emphasize that they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and to disregard what they do not like. In international law as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the corollary duties.[32]

30 David Freestone and Gerard J. Mangone, The Law of the Sea Convention: Unfinished Agendas and Future Challenges, 10 The International Journal of Marine and Coastal Law (1995), p.x (internal footnote omitted). See also David Freestone, The Law of the Sea Convention at 30: Successes, Challenges and New Agendas, 27 The International Journal of Marine and Coastal Law (2012), p.675.

31 Award of 12 July, para.245.

32 185th plenary meeting, UNCLOS III Official Records, Vol. XVII, p.21, at para.53.

These remarks make clear that the objective of Article 309 is to maintain the integrity of the Convention, not to ensure the comprehensiveness of the Convention. President Tommy Koh spoke the minds of the negotiating States.[33]

453. To achieve universal participation of States as the Third United Nations Conference on the Law of the Sea had hoped,[34] the consensus procedure and the package deal approach were adopted as the main decision-making methods in the negotiation of the Convention.[35] A package deal will inevitably necessitate trade-offs with States yielding perceived advantages by accepting certain provisions while gaining advantages from other provisions. This process may generate many mini-packages in particular areas, which would then form a big composite package deal across issues. In view of this, the provisions of the Convention are closely interrelated and form an integral package.[36] The Convention as a whole reflects the preferences and interests of different States and their trade-offs and compromises, embodying a subtle, delicate balance of interests among negotiating States. The objective of Article 309 is to preserve this balance and ensure the acceptance by States Parties of the Convention as a whole.

454. It is clear that the integrity and the comprehensiveness of the Convention are two entirely different matters. That no reservation to a treaty is allowed only evinces the intent of States Parties to ensure the integrity of the treaty, i.e., its full compliance, not its comprehensiveness, i.e., that the treaty is designed to settle all issues concerning its subject-matter. Thus, Article 309 has nothing to offer to the argument that the Convention has exhausted all situations of the law of the sea and excluded the application of general international law including customary international law.

*II.2. The Tribunal erred in deciding on the relationship between the Convention and rules of general international law*

455. After finding that the Convention provided comprehensive rules for settling all issues of the law of the sea, the Tribunal said that it also needed to decide on the

33 See Shabtai Rosenne & Louis B. Sohn (eds.), Virginia Commentary, Vol. V (1989), p.223.

34 See D.H. Anderson, Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea, 44 International and Comparative Law Quarterly (1995), p.313; Alan Boyle, Further Development of the Law of the Sea Convention: Mechanisms for Change, 54 International and Comparative Law Quarterly (2005), p.563.

35 See B. Buzan, Negotiating by Consensus: Developments in Technique at the UN Conference on the Law of the Sea, 75 American Journal of International Law (1981), p.324; H. Caminos and M. Molitor, Progressive Development of International Law and the Package Deal, 79 American Journal of International Law (1985), p.871.

36 See Myron H. Nordquist (ed.), Virginia Commentary, Vol. I (1985), p.15.

relationship between the Convention and rules of general international law. In the merits phrase, the Tribunal considered it important to answer the question "whether the Convention allows the preservation of rights to resources which are at variance with the Convention and established anterior to its entry into force".[37] The Tribunal proceeded:

> To answer this, it is necessary to examine the relationship between the Convention and other possible sources of rights under international law. The relationship between the Convention and other international agreements is set out in Article 311 of the Convention [ … ] this provision applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement.[38]

The Tribunal held that the relationship between the Convention and other rules of international law is made clear in Article 293(1).[39] This article provides: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention." The Tribunal continued:

> These provisions mirror the general rules of international law concerning the interaction of different bodies of law, which provide that the intent of the parties to a convention will control its relationship with other instruments. This can be seen, in the case of conflicts between treaties, in Article 30 of the Vienna Convention on the Law of Treaties. Articles 30(2) and 30(3) of the Vienna Convention provide that, as between treaties, the later treaty will prevail to the extent of any incompatibility, unless either treaty specifies that it is subject to the other, in which case the intent of the parties will prevail.[40]

456. From the above, the Tribunal arrived at four propositions regarding the relationship between the Convention and rules of general international law:

> (a) Where the Convention expressly permits or preserves other international agreements, Article 311(5) provides that such agreements shall remain unaffected. The Tribunal considers that this provision applies equally where historic rights, which may not strictly take the form of an agreement, are expressly permitted or preserved, such as in Articles 10 and 15, which expressly refer to historic bays and historic titles.
>
> (b) Where the Convention does not expressly permit or preserve a prior agreement, rule of customary international law, or historic right, such prior

37 Award of 12 July, para.235.

38 Ibid.

39 Ibid., para.236.

40 Ibid., para.237.

> norms will not be incompatible with the Convention where their operation does not conflict with any provision of the Convention or to the extent that interpretation indicates that the Convention intended the prior agreements, rules, or rights to continue in operation.
>
> (c) Where rights and obligations arising independently of the Convention are not incompatible with its provisions, Article 311(2) provides that their operation will remain unaltered.
>
> (d) Where independent rights and obligations have arisen prior to the entry into force of the Convention and are incompatible with its provisions, the principles set out in Article 30(3) of the Vienna Convention and Article 293 of the Convention provide that the Convention will prevail over the earlier, incompatible rights or obligations.[41]

*II.2.A. Articles 311 and 293(1) are no support to the Tribunal's decision on the relationship between the Convention and general international law*

457. The Tribunal said that Article 311 concerning the relationship between the Convention and other treaties "applies equally to the interaction of the Convention with other norms of international law". Here the Tribunal erroneously extended the application of Article 311 beyond its intended scope. For such an extension to be proper, the Tribunal should have proved that Article 311 itself on its terms governs or is intended to govern the interaction of the Convention with general international law. However, the Tribunal made no effort in this regard, only chanting "applies equally".

458. Article 311 of the Convention by its terms does not govern the relationship between the Convention and general international law. Naturally then one has to rely on the intent of the parties to decide upon this relationship. The Tribunal also acknowledged that "the intent of the parties to a convention will control its relationship with other instruments".[42] Therefore, in order to determine whether Article 311 governs the relationship between the Convention and other legal rules, it is necessary to ascertain the true intent of the Parties to the Convention.

459. Article 311 is entitled "Relation to other conventions and international agreements". It is true that "international agreements" may assume a variety of forms. But whatever form it may be in, an international agreement contains only conventional rules, which cannot be taken as general rules of international law including customary international law. The text of Article 311 also indicates that it is intended only to govern possible conflicts between the Convention and other treaties. Neither the text nor

41 Ibid., para.238.

42 Ibid., para.237.

the title of Article 311 evinces an intent to govern the relationship between the Convention and rules of general international law.

460. The negotiating history of the Convention also indicates clearly that Article 311 was intended to govern only the relationship between the Convention and other treaties. During the diplomatic conference, this article was discussed under the question "Relation to Other Conventions".[43] During the discussions, Article 30 ("Application of Successive Treaties Relating to the Same Subject Matter") of the Vienna Convention on the Law of Treaties was cited many times,[44] but no mention was made of other rules of international law, let alone any attempt to settle the relationship between the Convention and general international law including customary international law. Leading experts in the law of the sea wrote that "article 311 in its final form addresses a number of separate issues, their common feature being the actual or potential existence of another treaty impinging upon a matter for which this Convention also provides".[45]

461. In fact, clauses similar to Article 311 of the Convention are often found in other bilateral and multilateral treaties. These clauses are aimed at governing the relationship between the treaty in which such a clause is found and other international agreements, and cannot be interpreted as regulating the relationship between that treaty and general international law.

462. The Tribunal also invoked Article 293(1) to support its view on the relationship between the Convention and other rules of international law. As mentioned earlier, Article 293(1) provides for the law to be applied by a competent court or tribunal in a case. For it to apply Article 293, the Tribunal should have first determined whether there existed any specific conflicts between the Convention and rules of general international law governing historic rights, rather than confusing "rules" with "rights" and substituting, without giving any reason, a conflict between rules for that between specific rights.

*II.2.B. The Convention does not have the status of a "constitution", in the legal sense, in the law of the sea*

463. In its Memorial and the hearing on jurisdiction, the Philippines, quoting Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, described the Convention as the "constitution for the oceans",[46] insinuating that the Convention prevails over all other rules in the legal order for the oceans. In the

43 Shabtai Rosenne and Louis B. Sohn (eds.), Virginia Commentary, Vol. V (1989), pp.233-234.

44 Ibid., pp.232, 236.

45 Ibid., p.242.

46 Memorial of the Philippines, Vol. I, para.4.46; Jurisdictional Hearing Tr. (Day 1), pp.53, 56.

Award of 12 July, the Tribunal also wrote that "[t]he Convention was adopted as a 'constitution for the oceans', in order to 'settle all issues relating to the law of the sea', and has been ratified by 168 parties."[47] Although it did not *explicitly* give priority, on the basis of this "constitution for the oceans" idea, to the Convention over other rules of international law, the Tribunal did give effect to such a priority status of the Convention throughout its awards.

464. During the Third United Nations Conference on the Law of the Sea, the negotiating States never granted the Convention the status of a "constitution" in the legal order of the law of sea. At its final session in 1982, Tommy Koh said that the Conference achieved its "fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time".[48] The "constitution for the oceans" in the words of Tommy Koh is only a metaphor or figure of speech, not an indication of the status of the Convention in the legal sense; this phrasing does not mean that the Convention is a "constitution" in the legal sense, nor does it have the effect of giving the Convention such a status. In other words, "constitution for the oceans" is an inspiring slogan, issuing a clarion call to States to attach great importance to the Convention. In any event, the Conference President does not have the power to fix the legal status of a conference document.

465. The text of the Convention and its negotiating history show that States parties did not give priority to the Convention over general international law. In the Convention, only Paragraph 8 of the preamble refers to the relationship between the Convention and general international law; there is no provision prohibiting the preservation of historic rights under general international law or nullifying them.[49] Yet the Tribunal, without inquiring into the intent of the States parties, jumped to the conclusion that any rights or duties not rooted in the Convention cannot be preserved if they conflict with the Convention.

466. During the Third United Nations Conference on the Law of the Sea, the discussion on the draft preamble of the Convention started from the 4th plenary meeting. The plenary meeting listed as important issues the draft preamble and final clauses, including how to deal with matters not regulated by the Convention. The negotiating texts of the preamble underwent marked changes, reflecting the

47 Award of 12 July, para.4.

48 185th Plenary meeting, UNCLOS III Official Records, Vol. XVII, p.13, para.47; A Constitution for the Ocean, Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, 10 December 1982, http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

49 See Sophia Kopela, Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration, 48 Ocean Development & International Law (2017), p.181, at 184.

development and gradual crystallization of the understanding of negotiating States on the relationship between the Convention and rules of general international law.

467. An early draft in 1976 of the corresponding paragraph read: "Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention."[50] Later, Fiji on behalf of the Group of 77 proposed another text which read: "*Affirming* that other generally acceptable rules of international law not incompatible with the present Convention continue to govern matters not expressly regulated by the provisions of the present Convention."[51] During the discussions that followed, the text was adjusted as: "*Affirming* that the rules of international law not incompatible with the provisions of the present Convention shall continue to govern matters not expressly regulated by the present Convention."[52] That draft did grant a priority status to the Convention in the legal order of the oceans and rules of general international law would continue to govern matters not regulated by the Convention only when they were not incompatible with the Convention.

468. However, the negotiating States did not accept that formulation; they eventually finalized it to read: "*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." This text deleted the phrase "not incompatible". The final text of the preamble confirms that matters not regulated by the Convention continue to be governed by the rules and principles of general international law, and does not give priority to the Convention over general international law.

469. It is commonly believed that Paragraph 8 of the preamble to the Convention was inspired by Paragraph 8 of the preamble to the Vienna Convention on the Law of Treaties, and there are similar expressions in the preambles of other treaties.[53] As scholars comment on Paragraph 8 of the preamble to the Vienna Convention on the Law of Treaties, "[t]he eighth recital cannot be taken as evidence for a *hierarchical structure* between the different sources of treaty law, *eg* by giving the Convention

50 A/CONF.62/L.13, UNCLOS III Official Records, Vol. VI (1976); Myron H. Nordquist (ed.), Virginia Commentary, Vol. I (1985), p.457.

51 A/CONF.62/L.33, UNCLOS III Official Records, Vol. IX, p.188.

52 Myron H. Nordquist (ed.), Virginia Commentary, Vol. I (1985), p.465.

53 Ibid., p.457. Paragraph 8 of the preamble of the 1969 Vienna Convention on the Law of Treaties: "Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". See also e.g. Paragraph 5 of the Preamble of the 1961 Vienna Convention on Diplomatic Relations: "Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

superiority over customary treaty law."[54] Such understanding is also applicable to Paragraph 8 of the preamble to the Convention, which similarly cannot be taken as having given priority to the Convention over rules of general international law.

*II.3. The Tribunal failed to properly appreciate the continued viability of historic rights after the Convention's entry into force*

470. The Tribunal held that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.[55] The Tribunal further found that historic rights to resources in the exclusive economic zone or continental shelf of another State conflict with the sovereign rights of that State and thus have been superseded by the Convention. The Tribunal disregarded the fact that the nature of historic rights and many other related issues are not regulated by the Convention, including the relationship between historic rights and the regimes of exclusive economic zone and continental shelf. The Tribunal paid no attention to the fact that historic rights under general international law are diverse in character and there is no single regime for such rights, each regime being *sui generis*.

*II.3.A. The overall tenor of the Convention's attitude toward historic rights is that of respect*

471. The Convention provides no rules on the constituent elements and nature of historic rights. Nor does it provide any general rules on the relationship between historic rights and the Convention. But the overall tenor of its attitude toward historic rights is that of respect.

472. Articles 10(6), 15, 51(1) and 298(1) of the Convention respectively refer to such historic rights as "historic bays", "historic title(s)", and "traditional fishing" in a way that these rights amount to exceptions to the relevant rules of the Convention or, in the case of Article 51(1), should be recognized. The implications of such a structure are clear; it is meant to maintain historic rights. As pointed out in the 1962 *Juridical Régime of Historic Waters, Including Historic Bays* by the UN Secretariat ("1962 Secretariat Study"), the whole purpose of making the historic title an exception from the general rules contained in relevant articles of the Convention on the Territorial Sea and the Contiguous Zone is not "to subject the historic title to stricter requirements but to maintain the *status quo ante* with respect to the title".[56]

54 Oliver Dörr & Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (Springer, 2012), p.16 (emphasis in original); see also M. E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publishers, 2009), p.51.

55 Award of 12 July, para.238.

56 Juridical régime of historic waters, including historic bays – Study Prepared by the Secretariat, Yearbook of the International Law Commission, Vol. II (1962), p.1, at para.78

473. The negotiating history of the Convention shows that the negotiating States did not have the intention to address the specific regimes of historic rights including historic bay and historic title. In the First United Nations Conference on the Law of the Sea, Japan proposed a definition of historic bays, which would read, "[ … ] those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States".[57] But the proposal failed to garner sufficient support. The Third United Nations Conference on the Law of the Sea did not touch upon the specific regimes of historic titles or historic waters, but, rather, focused its attention on whether historic titles and historic waters should function as an exception to the application of the equidistance rule.[58] Thus, as Rao pointed out, "resolution of disputes over historic titles and rights is a matter governed by general international law, relevant treaties and customary practices. Above all, these are matters that are dependent upon the relevant evidence, as noted, concerning long, continuous and peaceful exercise of sovereign functions. These are matters that are clearly outside the scope of UNCLOS."[59]

474. The Tribunal considered that the inclusion of "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone" as one of the factors to be taken into account by the coastal State in giving access to any surplus in the allowable catch in Article 62(3) of the Convention indicated that the Convention had fixed the relationship between the exclusive economic zone and traditional fishing rights, in such a way so that the traditional fishing rights were extinguished.[60] This finding is not in line with the Convention. In fact, the Convention deals with only "habitually fished" rather than the relationship between the Convention and traditional fishing rights. "Habitually fished" is distinct from traditional fishing rights in nature and content; the former, usually carried out by *individuals*, while Article 51(1) of the Convention speaks of traditional fishing rights of *States*.

57 A/CONF.13/C.1/L.104, UNCLOS I Official Records, Vol. III, 1958, p.241.

58 See, e.g., A/CONF.62/SR.34, UNCLOS III Official Records, Vol. I, p.141; Provision 21 Formula A, A/CONF.62/L.8/Rev.1, ibid., Vol. III, p.111; Article 13, A/CONF.62/WP.8/Part II, ibid., Vol. IV, p.154; Article 15, A/CONF.62/WP.8/Rev.1/Part II, ibid., Vol. V, p.155; Article 15, A/CONF.62/WP.10, ibid., Vol. VIII, p.7; Article 15, A/CONF.62/WP.10/Rev.1, ibid., Vol. VIII, p.26; Article 15, A/CONF.62/WP.10/Rev.2, ibid., Vol. VIII, p.28; Article 13, A/CONF.62/WP.10/Rev.3, ibid., Vol. VIII, p.5; Article 15, A/CONF.62/L.78, ibid., Vol. XV, p.178.

59 Sreenivasa Rao Pemmaraju, The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility, 15 Chinese Journal of International Law (2016), p.265, at para.61.

60 Award of 12 July, para.804.

475. According to the Convention, the phenomenon of "have habitually fished in the zone" and historic rights are two distinct concepts; they should not be confused with each other. During the negotiation, the idea that is finally expressed in the Convention as "have habitually fished in the zone" has undergone many formulations in different proposals, and none of them mentioned historic rights. Before the Third United Nations Conference on the Law of the Sea, the issue was discussed to some extent in the Sea-Bed Committee. In a proposal submitted by the United States to the Sea-Bed Committee, the phrase used was "existing fishing".[61] In a proposal that Bulgaria, Belarus, the German Democratic Republic, Poland, Ukraine, and the USSR submitted to the second session of the Third United Nations Conference on the Law of the Sea, the phrase used was "have been fishing in the region involved".[62] In the third session, the phrase "habitually fished" was used in the proposal submitted by the Evensen Group.[63] Although these different proposals deployed different formulations, they had one thing in common: historic rights was absent from all of them.

Moreover, Article 51(1) of the Convention explicitly provides for the preservation of "traditional fishing rights" within archipelagic waters. If "habitually fished" as used in Article 62(3) were meant to be the same as "traditional fishing rights" or "historic fishing rights", the negotiating States had no reason not to use the phrase "rights" here. That is to say, if the negotiating States had wanted to treat "habitually fished" as a right, they knew how to put it properly in the Convention. But they did not do it.

476. Relevant international cases also confirm that the phenomenon of "have habitually fished" differs from historic rights. In *Barbados v. Trinidad and Tobago (2006)*, when discussing whether historic rights claimed by Barbados constituted a relevant circumstance that would necessitate adjusting the equidistance line, the tribunal observed that the evidence supporting the historic fishing rights claimed by Barbados was thin. The tribunal found that Barbadian fishing started only in the period 1978-1980, some six to eight years before Trinidad and Tobago had established exclusive economic zone by enacting its Archipelagic Waters Act in 1986, and therefore did not suffice to support a historic fishing right. The tribunal pointed out that:

61 Satya N. Nandan & Shabtai Rosenne (eds.), Virginia Commentary, Vol. II (1993), p.617.

62 Bulgaria, Byelorussian Soviet Socialist Republic, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic, and Union of Soviet Socialist Republics: draft articles on the economic zone, A/CONF.62/C.2/L.38, Art.16, UNCLOS III Official Records, Vol. III, p.216.

63 The Economic Zone (1975, mimeo.), Article 6 (Informal Group of Juridical Experts, i.e., the Evensen Group). Reproduced in Renate Platzöder (ed.), Third United Nations Conference on Law of the Sea: Documents, IV, 209, 213, quoting from Satya N. Nandan & Shabtai Rosenne (eds.), Virginia Commentary, Vol. II (1993), Vol. II. p.628.

> Those short years are not sufficient to give rise to a tradition. Once the EEZ of Trinidad and Tobago was established, fishing in it by Barbados fisherfolk, whether authorized by agreement with Barbados or not, could not give rise either to a non-exclusive fishing right of Barbados fisherfolk or, *a fortiori*, to entitlement of Barbados to adjustment of the equidistance line.[64]

477. The tribunal in that case considered that fishing by Barbados fisherfolk did not constitute a tradition and was no basis for adjusting the equidistance line. After drawing the boundary line, the tribunal held that it did not have jurisdiction, because of the limitation set out in Article 297(3)(a) of the Convention, to rule on whether or not Barbadian fishermen, by virtue of its claimed "traditional fishing" activities, had a right of access to flying fish within the EEZ of Trinidad and Tobago.[65] It then reminded the Parties of their undertaking to negotiate an agreement on this issue.[66] The difference between historic rights and what appeared to be habitual fishing was apparent in that case.

478. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America, 1984)*, a chamber of the ICJ refused to adopt the position of both Parties that fishing practices were a major relevant circumstance for the purpose of equitable delimitation. The United States had claimed a certain predominance of its fishing activities in the relevant area. The chamber held, "whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada's."[67] The United States did not claim that it had historic rights to fishing in the relevant area, thus historic rights as such was not decided upon, nor was its relationship with the regime comparable to the EEZ under the Convention.[68] Clearly, historic rights is different from predominance as claimed by the United States, which appeared to be a state of habitual fishing activities.

479. The negotiating history of the Convention indicates that the negotiating States did not intend to settle the relationship between historic rights and the regimes of exclusive economic zone and continental shelf. During the Second United Nations Conference on the Law of the Sea, some States realized that the establishment of the exclusive rights of coastal States could possibly conflict with historic rights of other

64 Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at para.266.

65 Ibid., paras.276-277, 384.

66 Ibid, paras.258, 287-288, 385.

67 See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J Report 1984, p.246, at para.235.

68 See ibid.

States, and they had some preliminary discussions on this issue.[69] Some States, including Yugoslavia,[70] Sierra Leone,[71] and Mexico,[72] considered that such a dispute should be solved by regional mechanisms or bilateral treaties. No further discussion followed. In the Third United Nations Conference on the Law of the Sea, States did not reach an agreement on the relationship. States such as Iran proposed that coastal States might set up fishery zones based on their historic rights in coastal waters.[73] However, States did not discuss any substantive rules regarding historic rights, nor the relationship between historic rights and the impending Convention.

480. International jurisprudence also shows that the regimes of exclusive economic zone and continental shelf set forth in the Convention do not necessarily supersede historic rights already established under customary international law. In *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya, 1982)*, Tunisia claimed historic rights over sedentary and other fisheries in a certain zone since time immemorial. The ICJ observed:

> [ … ] the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law. The first régime is based on acquisition and occupation, while the second is based on the existence of rights "*ipso facto* and *ab initio*". No doubt both may sometimes coincide in part or in whole, but such coincidence can only be fortuitous [ … ].[74]

481. In his separate opinion, Judge Jiménez de Aréchaga pointed out that it is fallacious that historic rights acquired from occupation before the Truman proclamation should be set aside by continental shelf rights which were owned "*ab initio*". He maintained, "A new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or '*ab initio*', cannot by itself have the effect of abolishing or denying acquired and existing rights."[75] For Judge Jiménez de Aréchaga, historic rights were acquired and existing rights under customary international law, and were not automatically abolished or disregarded by the regime of continental shelf, a recently established legal regime. Historic rights and continental shelf rights differ in nature, substance and origin; they may overlap or conflict with each

69 See A/CONF.19/C.1/SR.2, UNCLOS II Official Records, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, pp.40-41, at paras.12-22.

70 See A/CONF.19/C.1/SR.8, ibid., p.70, para.41.

71 See A/CONF.19/C.1/SR.15, ibid., p.99, para.29.

72 See A/CONF.19/C.1/SR.24, ibid., p.113, para.7.

73 23rd Plenary Meeting, UNCLOS III Official Records, Vol. I, p.72, para.22.

74 Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p.18, at para.100.

75 Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), Separate Opinion of Judge Jiménez de Aréchaga, I.C.J. Reports 1982, para.82.

other in the same geographical area. But such overlap or conflict does not result in any automatic override. The relationship between the two shall be addressed on a case-by-case basis, taking into account the specific circumstances.

482. The Tribunal maintained that during the Third United Nations Conference on the Law of the Sea, China "was resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had historically fished in those waters",[76] and that this position "is incompatible with a claim that China would be entitled to historic rights to living and non-living resources in the South China Sea that would take precedence over the exclusive economic zone rights of the other littoral States."[77] The Tribunal quoted the summary record of the remarks of Mr. Ling Ching, a representative of China:

> On the question whether the coastal State should exercise full sovereignty over the renewable and non-renewable resources in its economic zone or merely have preferential rights to them, he said that such resources in the off-shore sea areas of a coastal State were an integral part of its natural resources. The super-Powers had for years wantonly plundered the offshore resources of developing coastal States, thereby seriously damaging their interests. Declaration of permanent sovereignty over such resources was a legitimate right, which should be respected by other countries. The super-Powers, however, while giving verbal recognition to the economic zone, were advocating the placing of restrictions on the sovereignty of coastal States over their resources. For example, one of them had proposed that the coastal State should allow foreign fishermen the right to fish within that zone in cases where the State did not harvest 100 per cent of the allowable catch. Such logic made no sense. The suggestion in fact harked back to that super-Power's well-known proposal that coastal States should be allowed only "preferential rights" when fishing their own off-shore areas. Yet, the establishment of exclusive economic zones over the resources of which coastal States would exercise permanent sovereignty simply meant that the developing countries were regaining their long-lost rights and in no way implied a sacrifice on the part of the super-Powers. The coastal State should be permitted to decide whether foreign fishermen were allowed to fish in the areas under its jurisdiction by virtue of bilateral or regional agreements, but it should not be obliged to grant other States any such rights.[78]

76 Award of 12 July, para.251.

77 Ibid., para.252.

78 Ibid., para.251, quoting A/CONF.62/C.2/SR.24, Summary records of meetings of the Second Committee 24th meeting, para.2, UNCLOS III Official Records, Vol. II, p.187.

The Tribunal's understanding and interpretation of the remarks of China's representative is wrong. As a coastal State of the South China Sea, China has not only the rights of a coastal State under the Convention but also historic rights. The above remarks did mention a coastal State's right to resources in its exclusive economic zone, but they were intended to express the resolute opposition of China, as a developing State, to the superpowers' intention to plunder resources in the exclusive economic zone of coastal States by invoking the proposed provision that would give other States access to the surplus of the allowable catch, and to defend the exclusive rights of coastal States to resources in their exclusive economic zones. The remarks of China's representative did not address the relationship between the exclusive economic zone and historic rights and are thus irrelevant in this Arbitration.

483. In conclusion, the Convention does regulate habitual fishing. However, as regards historic rights, three points can be noted: first, the formation and nature of historic rights are governed by general international law; second, in Articles 10, 15, 51 and 298 of the Convention, the relationship between specific historic rights and the Convention is regulated in a way that shows respect for historic rights; third, the Convention does not fix the relationship between historic rights and the regimes of exclusive economic zone and continental shelf. Therefore, the relevant provisions and regimes of the Convention have not superseded historic rights as such established under general international law. As McDorman pointed out, "the historic waters concept was seen as 'necessary in order to maintain a State's title to some areas of water which might escape the codification formula'", and that "historic claims to waters (historic waters and historic rights) exist in international law";[79] "UNCLOS is not exhaustive of the rights and jurisdiction that a State may have respecting waters and resources"; and "there is flexibility in the rights exercisable by a State that successfully maintains a claim to historic waters".[80]

*II.3.B. Under general international law each regime of historic rights is* sui generis

484. Historic rights have long been established under general international law. Usually, the term historic rights "denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation."[81] There is no single definition for all historic rights in international law. The Tribunal also recognized, "The term 'historic rights'

79 Ted L. McDorman, Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the Nine-Dash Line, in S. Jayakumar, Tommy Koh and Robert Beckman (eds.), The South China Sea Disputes and Law of the Sea (Edward Elgar, 2014), p.144, at 150, quoting D.P. O'Connell.

80 Ibid., at 152-153.

81 Yehuda Z. Blum, Historic Rights, in Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 7 (North-Holland Publishing Co., 1984), p.120.

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."[82] Gioia wrote, "The concept originated in the State practice at the end of the 19th century in order to justify the survival of territorial sovereignty over certain bays and gulfs ('historic bays') or other arms of the sea ('historic waters') [ … ] Later, however, a tendency emerged in the legal literature to develop a general category of historic rights [ … ]."[83]

485. Historic rights are governed by general international law. In *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya, 1982)*, the ICJ observed:

> Historic titles must enjoy respect and be preserved as they have always been by long usage. [ … ] Nor does the draft convention of the Third Conference on the Law of the Sea contain any detailed provisions on the "régime" of historic waters: there is neither a definition of the concept nor an elaboration of the juridical régime of "historic waters" or "historic bays". There are, however, references to "historic bays" or "historic titles" or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law [ … ].[84]

486. An examination on relevant State practice and international jurisprudence reveals that historic rights have the following features.

*(1) Historic rights may be of a sovereignty type or a non-sovereignty type*

487. As is well established in State practice and international jurisprudence, historic rights may be of a sovereignty type or a non-sovereignty type. This the Tribunal acknowledged.[85] Historic rights of a sovereignty type may be subject to certain restrictions while historic rights of a non-sovereignty type may be exclusive or non-exclusive.

488. There is no lack of State practice of claims to historic rights of a sovereignty type. Article 7(2) of the 1976 Territorial Waters and Maritime Zones Act of Pakistan provides: "The sovereignty of Pakistan extends, and has always extended, to the historic waters of Pakistan and to the seabed and subsoil underlying, and the airspace over, such waters."[86] Sri Lanka, through a 1977 presidential proclamation, claims

82 Award of 12 July, para.225.

83 Andrea Gioia, Historical Titles, Max Planck Encyclopedia of Public International Law, May 2013, para.1, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e705?rskey=7gh5sm&result=1&prd=EPIL.

84 Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p.18, at para.100.

85 Award of 12 July, para.225.

86 Territorial Waters and Maritime Zones Act of Pakistan, 1976 (of 22 December 1976), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PAK_1976_Act.pdf.

that "the historic waters in the Palk Bay and Palk Strait shall form part of the internal waters of Sri Lanka", and "the historic waters in the Gulf of Mannar shall form part of the territorial sea of Sri Lanka".[87] Canada has also claimed historic rights. Article 5(3) of Canada Oceans Act of 1996 specifies "Baselines where historic title" [*sic*], stating: "In respect of any area not referred to in subsection (2), the baselines are the outer limits of any area, other than the territorial sea of Canada, over which Canada has a historic or other title of sovereignty."[88]

489. Some States have yet to clarify the nature of the historic rights they claim. In its submission to the Commission on the Limits of the Continental Shelf in May 2009, Tonga stated that it "applies the concept of historic title in international law to all those maritime spaces established under its national jurisdiction in agreement with the Convention that can be included within the geographical limits defined in the Royal Proclamation of 24 August 1887."[89] Tonga asserted that "The Royal Proclamation of 24 August 1887 has resulted in the exercise of continuous jurisdiction and authority by the Kingdom of Tonga over the land territory and the maritime spaces defined in accordance with the claim for over one hundred and twenty years [ … ]. This claim has never been reacted against or objected to by any State".[90] Tonga stated that "the implementation of the Convention is consistent with the decision of the Kingdom of Tonga to maintain its claim of historic title over the land and maritime spaces [ … ]."[91]

490. Some States claim non-exclusive historic rights, such as historic fishing right or right of access. In *Eritrea-Yemen Arbitration (Territorial Sovereignty and Scope of the Dispute) (1998)*, the tribunal discussed "international servitude", a non-exclusive historic right of a non-sovereignty type:

> [ … ] the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain "historic rights" which accrued in favour of

87 Sri Lanka Presidential Proclamation of 15 January 1977 in pursuance of Maritime Zones Law No. 22 of 1 September 1976, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA_1977_Proclamation.pdf.

88 Canada Oceans Act, 1996, http://laws-lois.justice.gc.ca/PDF/O-2.4.pdf.

89 See the Kingdom of Tonga, Executive Summary: A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Kingdom of Tonga Pursuant to Part VI of and Annex II to the UNCLOS Part I, 11 May 2009, http://www.un.org/Depts/los/clcs_new/submissions_files/ton46_09/ton2009executive_summary.pdf.

90 See ibid., p.1.

91 See ibid., p.2.

> both parties through a process of historical consolidation as a sort of "*servitude international*" falling short of territorial sovereignty. Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea.[92]

In the subsequent phase on maritime delimitation, the tribunal emphasized the importance of the protection of traditional fishing in the Red Sea and held that "[t]he traditional fishing regime is not limited to the territorial waters of specified islands",[93] that is, it may also extend to areas beyond the territorial sea.

491. With respect to the relationship between national jurisdiction and historic waters, the 1962 Secretariat Study pointed out that the legal status of historic waters depends on "the sovereignty" actually exercised.[94] Scholars also recognize that different State practice gives rise to corresponding historic rights. Obregon observed that: "if the sovereign rights exercised were sovereign rights corresponding to those over the EEZ, the claimed area would be EEZ. This way the sovereignty or sovereign rights to be acquired would be commensurate with the actual exercise by the claimant State."[95] Gioia also pointed out that: "there is in principle no reason why an historic title could not be invoked in order to acquire sovereignty over a wider belt of territorial sea, or even special sovereign rights falling short of full territorial sovereignty beyond the territorial sea."[96]

*(2) Historic rights exist in different maritime zones and areas*

492. Historic rights exist in different maritime geographic areas. According to the Historic Bays – Memorandum by the Secretariat of the United Nations (1957), "[h]istoric rights are claimed not only in respect of bays, but also in respect of maritime

92 Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), October 9 of 1998, RIAA, Vol. XXII, p.209, at para.126 (internal footnote omitted).

93 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, RIAA, Vol. XXII, p.335, at para.109.

94 Juridical régime of historic waters, including historic bays – Study Prepared by the Secretariat, Yearbook of the International Law Commission, Vol. II (1962), p.1, at para.189.

95 Edgardo Sobenes Obregon, Historic Waters Regime: A Potential Legal Solution to Sea Level Rise, 7 KMI International Journal of Maritime Affairs and Fisheries (2015), p.17, at 26.

96 Andrea Gioia, Historical Titles, Max Planck Encyclopedia of Public International Law, May 2013, para.17, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e705?rskey=7gh5sm&result=1&prd=EPIL.

areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water."[97] The 1962 Secretariat Study stated that "historic title can apply also to waters other than bays, i.e., to straits, archipelagos and generally to all those waters which can be included in the maritime domain of a State."[98] That study also pointed out, "it would in any case be extremely difficult, not to say impossible, to arrive at a list [of historic waters] which would be really final."[99]

493. Historic rights exist in different maritime geographic areas and States concerned have laid claims to zones of different nature based on historic rights. Canada has laid historic claims to Hudson Bay, Hudson Strait and the waters of the Arctic Archipelago. In 1976, Sri Lanka declared through legislation: "The Republic of Sri Lanka shall exercise sovereignty, exclusive jurisdiction and control in and over the historic waters, as well as in and over the islands and the continental shelf and the seabed and subsoil thereof within such historic waters."[100] In *Continental Shelf (Tunisia/Libya, 1982)*, Tunisia claimed the Gulf of Tunis and the Gulf of Gabes as its historic bays and claimed historic rights, especially historic fishing right, over the waters beyond the territorial sea. As understood by a scholar, Tunisia contended that historic rights could "extend over areas of sea or sea-bed which can nowadays be qualified as internal waters, territorial waters, a fishery zone, or the continental shelf".[101] Russia has always persisted in its claim of historic rights. After ratifying the Convention, Russia affirmed its historic rights claims in relevant national laws and bilateral treaties. For example, Article 1(2) of the 1998 Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation provides, "The internal maritime waters include the waters of: [ … ] The bays, inlets, firths, estuaries, seas and straits whose mouths are broader than 24 nautical miles, and which have historically belonged to the Russian Federation, a list of which is drawn up by the Government of the Russian

97 Historic Bays: Memorandum by the Secretariat of the United Nations, A/CONF.13/1, 1957, para.8.

98 Juridical régime of historic waters, including historic bays – Study Prepared by the Secretariat, Yearbook of the International Law Commission, Vol. II (1962), p.1, at para.34.

99 Ibid., para. 190.

100 Sri Lanka Maritime Zones Law, No. 22 of 1 September 1976, Section 9(2), https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA_1976_Law.pdf.

101 Andrea Gioia, Tunisia's Claim over Adjacent Seas and the Doctrine of "Historic Rights", 11 Syracuse Journal of International and Comparative Law (1984), p.327, at 346.

Federation and published in *Notices to Mariners*."[102] As is well-known, Russia claims historic rights to Kara Sea, Laptev Sea, East Siberian Sea, and Chukchi Sea in the Northern Sea Route.[103]

494. The legal status of a State's historic waters should be determined on a case-by-case basis, with a focus on the jurisdiction actually exercised by the State. In *Fisheries Case (United Kingdom v. Norway, 1951)*, the ICJ observed that, "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."[104] With respect to the relationship between the jurisdiction exercised by a State and historic waters, the 1962 Secretariat Study observed:

> The legal status of "historic waters", i.e., the question whether they are to be considered as internal waters or as part of the territorial sea, would in principle depend on whether the sovereignty exercised in the particular case over the area by the claiming State and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea. It seems logical that the sovereignty to be acquired should be commensurate with the sovereignty actually exercised.[105]

*(3) Each regime of historic rights is* sui generis

495. There are no one-size-fits-all rules regulating the nature, content and scope of historic rights in international law. In order to determine the content and scope of the historic rights claimed by a State, it is necessary to study the regimes of historic rights on a case-by-case basis, taking into account relevant State practice and historical and geographic circumstances of relevant areas.

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102 Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, 17 July 1998, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf.

103 Russia's above claims on historic rights were discussed as typical State practice in the 1957 Historic Bays: Memorandum by the Secretariat of the United Nations, see A/CONF.13/1, UNCLOS I Official Records, Vol. I, p.8. See also D. W. Nixon, A Comparative Analysis of Historic Bay Claims: Technical Annexes to the Libyan Reply, in Pleadings (Tunisia/Libya), Vol. 4, I.C.J. Reports 1982, p.321; Clive Symmons, Historic Waters in the Law of the Sea: A Modern Re-Appraisal, Martinus Nijhoff Publishers, 2008, pp.301-304.

104 Fisheries case, Judgment of December 18th, 1951, I.C. J. Reports 1951, p. 116, at 130.

105 Juridical régime of historic waters, including historic bays – Study Prepared by the Secretariat, Yearbook of the International Law Commission, Vol. II (1962), p.1, at para.189.

496. The 1962 Secretariat Study pointed out:

> In determining whether or not a title to "historic waters" exists, there are three factors which have to be taken into consideration, namely,
>
> (i) The authority exercised over the area by the State claiming it as "historic waters";
>
> (ii) The continuity of such exercise of authority;
>
> (iii) The attitude of foreign States.[106]

Although this observation addresses historic waters, it equally applies to historic rights in general. Blum held that "[h]istoric rights are the product of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law."[107]

497. As international jurisprudence shows, historic rights are governed by customary international law. Each regime has its particularity, and thus is a specific, *sui generis* one. In *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya, 1982)*, the ICJ pointed out:

> It seems clear that the matter continues to be governed by general international law which does not provide for a *single* "régime" for "historic waters" or "historic bays", but only for a particular régime for each of the concrete, recognized cases of "historic waters" or "historic bays".[108]

In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening, 1992)*, based on the "historic character of the Gulf waters, the consistent claims of the three coastal States, and the absence of protest from other States",[109] the ICJ found that "the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal States."[110] As to the character of the Gulf waters, the Court pointed out that:

> [T]hose waters were waters of a single-State bay during the greater part of their known history. They were, during the colonial period, and even during the

106 Ibid., para.185.

107 Yehuda Z. Blum, Historic Rights, in Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 7 (North-Holland Publishing Co., 1984), p.120, at 121.

108 Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p.18, at para.100.

109 Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992, p.351, at para. 405.

110 Ibid., at para.404.

> period of the Federal Republic of Central America not divided or apportioned between the different administrative units which at that date became the three coastal States of El Salvador, Honduras and Nicaragua. There was no attempt to divide and delimit those waters according to the principle of *uti possidetis juris*.[111]

The ICJ discussed the special, *sui generis* status of the waters of the Gulf of Fonseca:

> Since the practice of the three coastal States still accepts that there are the littoral maritime belts subject to the single sovereignty of each of the coastal States, but with mutual rights of innocent passage, there must also be rights of passage through the remaining waters of the Gulf, not only for historical reasons but because of the practical necessities of a situation where those narrow Gulf waters comprise the channels used by vessels seeking access to any one of the three coastal States. Accordingly, these rights of passage must be available to vessels of third States seeking access to a port in any one of the three coastal States; such rights of passage being essential in a three-State bay with entrance channels that must be common to all three States. The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage. It might, therefore, be sensible, to regard the waters of the Gulf, insofar as they are the subject of the condominium or co-ownership, as *sui generis*.[112]

498. In sum, historic rights result from State practice and historical facts. There exist diverse types of historic rights in diverse maritime zones and areas. To determine the nature, content and scope of a particular regime of historic rights, it is necessary to consider that regime on the basis of relevant State practice and the related specific historical and geographical situation.

## III. The Tribunal erred in finding that China enjoyed no historic rights in the South China Sea

499. The Tribunal's error in addressing the issues concerning China's historic rights is threefold: first, it mischaracterized China's historic rights in the South China Sea; second, it erroneously found that China did not have any historic rights in the South China Sea; and third, the Tribunal disingenuously put up a straw man—whether China's relevant practice after the Convention's entry into force had established historic rights—and shot it down.

111 Ibid., at para.405.

112 Ibid., at para.412.

*III.1. The Tribunal mischaracterized China's historic rights in the South China Sea*

500. The Tribunal considered that China appeared to claim "exclusive historic right to living and non-living resources within the 'nine-dash line'", and that China did not claim the whole area as its territorial sea or internal waters.[113] In an attempt to support its assertion, the Tribunal picked and examined the following, which had all occurred since 2009: the issuance of a notice of open blocks including BS16 for petroleum exploration by China National Offshore Oil Corporation ("CNOOC") in June 2012; China's objection to the Philippines' Geophysical Survey and Exploration Contract 101 petroleum block ("GSEC101") in 2011; China's declaration of "Summer Ban on Marine Fishing in the South China Sea Maritime Space" in May 2012; and China's statements on respecting freedom of navigation and overflight. In an arbitrary manner, the Tribunal misread the nature and meaning of China's historic rights. And it is beyond all belief that the Tribunal based its determination of China's historic rights only on post-2009 evidence.

501. The Tribunal cherry-picked only post-2009 evidence to represent the whole of the nature and meaning of China's historic rights in the South China Sea. This is wrong.

The determination and characterization of particular historic rights should be based on the totality of all relevant State practice. Over the years, China has claimed and enjoyed maritime rights in the South China Sea under international law including the Convention, and has never relinquished any of its established historic rights. In its Law on the Exclusive Economic Zone and the Continental Shelf (1998), China affirmed its rights to the exclusive economic zone and continental shelf, and stated that no provisions of this Law can prejudice historic rights of China.[114] Accordingly, China's historic rights and its rights to the exclusive economic zone and continental shelf can co-exist; they are cumulative when they overlap. The Tribunal took it for granted that China's historic rights were just rights to resources, not to maritime zones. Such an understanding is erroneous. The Tribunal disregarded China's rich and longstanding practice regarding historic rights in the South China Sea. The events and statements used by the Tribunal as evidence all took place or were issued after 2009; they do not, either in time or in content, paint a full picture of the whole of China's historic rights in the South China Sea. They are not a sufficient basis for the Tribunal to draw its conclusion on the nature and content of the whole of China's historic rights in the South China Sea.

113 Award of 12 July, paras.207-214, 270.

114 See Law on the Exclusive Economic Zone and the Continental Shelf of People's Republic of China (26 June 1998), Article 14.

502. The Tribunal erroneously inferred the nature of relevant maritime zones claimed by China from China's commitment to respect the freedom of navigation and overflight of other States in the South China Sea. The Tribunal said:

> Within the territorial sea, the Convention does not provide for freedom of overflight or for freedom of navigation, beyond a right of innocent passage. Accordingly, the Tribunal considers China's commitment to respect both freedom of navigation and overflight to establish that China does not consider the sea areas within the 'nine-dash line' to be equivalent to its territorial sea or internal waters.[115]

China consistently respects the freedom of navigation and overflight enjoyed by all States in the South China Sea in accordance with international law. This "freedom of navigation and overflight" is not in the sense of high seas freedom, but a general description of the rights of navigation and overflight enjoyed by all States in accordance with international law. After all, "freedom of navigation and overflight", not "freedom of high seas", is used. In fact, under certain circumstances, a coastal State, based on self-restraint or custom, may allow other States to enjoy the right of navigation and overflight in its own maritime zones to an extent greater than they can under normal rules of the law of the sea. As a result, it is incorrect to make an automatic reverse inference from the rights enjoyed by other States in a coastal State's maritime zones to the nature of those zones, without considering concrete circumstances. Even in internal waters or territorial seas over which coastal States have sovereignty, coastal States may still, based on self-restraint or custom, allow other States to navigate or overfly in such zones. Under international law, maritime areas open for navigation to all States are not all high seas; some of them are under national jurisdiction. Those maritime areas under national jurisdiction and open for navigation to all States are not all exclusive economic zones; some may be a State's territorial seas or internal waters. The rights of navigation in a certain maritime zone enjoyed by other States may be based on a variety of sources including the Convention, general international law, other special treaties or customs, and even self-restraint of coastal States.

In sum, logically speaking, the fact that China respects other States' rights of navigation and overflight in the South China Sea does not constitute a basis for the Tribunal to infer inversely that the relevant maritime areas in the South China Sea are not China's internal waters or territorial sea.

503. The Tribunal erroneously inferred the nature of China's historic rights from China's declaration of baselines surrounding Hainan Dao and Xisha Qundao. The Tribunal noted that China declared these baselines for its territorial sea, and said:

> In the view of the Tribunal, China would presumably not have done so if the waters both within and beyond 12 nautical miles of those islands already formed

115 Award of 12 July, para.213 (internal footnote omitted).

> part of China's territorial sea (or internal waters) by virtue of a claim to historic rights through the "nine-dash line".[116]

China promulgated the Law on the Territorial Sea and the Contiguous Zone in 1992, and issued the Declaration on the Baseline of the Territorial Sea in 1996. In accordance with relevant laws, China employs straight baselines in determining the territorial sea of Xisha Qundao. China promulgated the Law on the Exclusive Economic Zone and the Continental Shelf in 1998, establishing the regimes of its exclusive economic zone and continental shelf. Article 14 of this Law provides that, "No provisions of this Law can prejudice historic rights of the People's Republic of China." Pursuant to these national laws, China's rights to territorial sea, contiguous zone, exclusive economic zone and continental shelf based on its land territory including Xisha Qundao do not prejudice the continuing viability of historic rights that China enjoys under customary international law. Moreover, China's historic rights and entitlements to exclusive economic zone and continental shelf co-exist and are cumulative. The Tribunal failed to appreciate these issues, and made an erroneous categorical inference in reverse.

504. Here, the Tribunal was addressing China's historic rights. These rights are *sui generis* and regulated by general international law. The general provisions on maritime zones and related rights under the Convention, alone, cannot be the basis for the Tribunal to deduce the nature of China's historic rights, in disregard of China's relevant practice.

505. The Tribunal applied tunnel vision to its interpretation of China's position on activities of oil and gas exploration and exploitation and management of living resources in the South China Sea. The Tribunal relied on two events to infer that China was claiming historic rights to the non-living resources: one is the issuance of notice of open block of BS16 for petroleum exploration within the dotted line by the CNOOC, the other, China's objection to the Philippines' award of petroleum blocks within the dotted line in the area of Liyue Tan.

506. The Tribunal held that the open blocks for petroleum exploration in the CNOOC's 2012 notice were located beyond "the maximum possible claim to entitlements that China could make under the Convention".[117] As a matter of fact, these blocks are located in the western part of the South China Sea, and have nothing to do with the Philippines. The Tribunal also noted this and acknowledged that the relevant area "is not of direct relevance to the Philippines' own maritime claims", but it argued that "China's 2012 notice assists in understanding the nature of China's claims within the 'nine-dash line'".[118]

116 Ibid.

117 Ibid., para.208.

118 Ibid.

The Tribunal's above finding did not provide any analysis on China's notice of petroleum blocks and its basis. It failed to consider in this context the implication of China's treatment of Nansha Qundao as a unit for the purposes of sovereignty and maritime entitlements together with historic rights. Thus, the Tribunal's finding that "China considers its rights with respect to petroleum resources stem from historic rights"[119] is deeply flawed, and fails to take cognizance of other possible bases.

507. With respect to the petroleum exploration and exploitation activities in the area of Liyue Tan, the Tribunal said:

> The area of the Philippines' petroleum blocks could be almost covered by entitlements claimed by China under the Convention, if China were understood to claim an exclusive economic zone from all high-tide features in the Spratly Islands, no matter how small, and from Scarborough Shoal. The fact of China's objection is thus not necessarily indicative of the source of China's claimed rights.[120]

However, the Tribunal cited a note verbale from the Embassy of China in the Philippines to the Department of Foreign Affairs of the Philippines as evidence showing that China's claimed rights with respect to petroleum resources in the area of Liyue Tan stemmed from historic rights. The relevant part of China's note verbale cited by the Tribunal reads: "AREA 3 and AREA 4 are situated in the waters of which China has historic titles including sovereign rights and jurisdiction."[121] China enjoys sovereignty over Nansha Qundao, and Liyue Tan constitutes a part of this archipelago. On 28 January 2013, a spokesperson of the Ministry of Foreign Affairs of China stated in a press conference that "China's position with respect to Liyue Tan is clear that it forms a part of Nansha Qundao, and China has indisputable sovereignty over Nansha Qundao and its adjacent waters."[122] It is clear from the above that China's objection to the Philippines' award of petroleum blocks is based on its sovereignty over Liyue Tan and its adjacent waters.

508. With respect to the living resources, the Tribunal cited China's Fishing Ban in the South China Sea announced in May 2012 as evidence helping to show that China claimed historic rights to these resources in the relevant areas. The Tribunal acknowledged that the ban was not entirely clear with respect to the source of China's claimed right to restrict fishing in the South China Sea areas and its geographical area

119 Ibid., para.209.

120 Ibid.

121 Note Verbale from the Embassy of the People's Republic of China in the Philippines to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202 (6 July 2011), cited in the Award of 12 July, para.209.

122 Spokesperson of Ministry of Foreign Affairs: Huangyan Dao is an indisputable territory of China (28 January 2013), http://www.gov.cn/jrzg/2013-01/28/content_2321377.htm.

of application could be almost entirely covered by entitlements claimed from the Convention.[123] Thus it was clear to the Tribunal that the fishing ban alone could not prove that China was claiming historic rights to the living resources in the South China Sea. However, the Tribunal considered that its evidential power was boosted if "taken together with the conclusion above about the grant of petroleum blocks and China's frequent references to historic rights without further specification", and, together, they led the Tribunal to the plunge: "China does claim rights to petroleum resources and fisheries within the 'nine-dash line' on the basis of historic rights existing independently of the Convention."[124] Given the Tribunal's acknowledgement that the geographical area of application of the fishing ban "almost entirely" overlapped with those claimed from the Convention, it is beyond our ken how other evidence necessarily precludes the possibility that the fishing ban was based on the Convention alone, or how the Tribunal could infer from the evidence it mentioned that China claimed historic rights to the living resources.

509. The Tribunal, by cherry-picking events and statements that occurred or were issued after 2009 and without examining China's longstanding practice in the South China Sea, deliberately misinterpreted out of context the nature and content of China's historic rights in the South China Sea. This is wrong.

*III.2. The Tribunal erroneously found that China did not have any historic rights in the South China Sea*

510. The Tribunal should have based its assessment of the nature and content of China's historic rights on an evaluation of the Chinese people's working and living activities and the Chinese governments' exercise of jurisdiction therein. However, the Tribunal failed to do so; it provided no meaningful evaluation at all. Rather, it first decided arbitrarily on the nature and content of China's historic rights in the South China Sea, and then used the so-called "nature" and "content" as the criteria for selecting and analysing corresponding data from China's practice to interpret its so called "nature" and "meaning" in order to prove the non-existence of China's historic rights, and, while doing so, disregarded evidence contrary to its predetermined nature. Here, the Tribunal first predetermined the result and then pretended to ascertain that result accordingly, doing violence to the principles of objectivity and fairness.

*III.2.A. The Tribunal turned a blind eye to China's longstanding and continuous working and living activities and exercise of jurisdiction in the South China Sea*

511. The Tribunal held, "Evidence that either the Philippines or China had historically made use of the islands of the South China Sea would, at most, support a claim to historic rights to those islands. Evidence of use giving rise to historic rights with

123 Award of 12 July, para.211.

124 Ibid.

respect to the islands, however, would not establish historic rights to the waters beyond the territorial sea".[125] Still, the Tribunal found it relevant "to consider what would be required for it to find that China did have historic *maritime* rights to the living and non-living resources within the 'nine-dash line'".[126] It further found that historical navigation and trade as well as fishing beyond the territorial sea represented the exercise of high seas freedoms, and therefore could not form the basis for the emergence of a historic right, but suggested that China did not have any historic rights to the living and non-living resources within the dotted line.[127]

512. The Tribunal, in making the above findings, erroneously segregated China's sovereignty over Nanhai Zhudao from China's historic rights in the South China Sea. The Tribunal misconstrued China's historic rights as rights only to the living and non-living resources, and determined whether China's historic rights exist based on this premise. The Tribunal viewed China's navigation and fishing in the South China Sea as exercising high seas freedoms, and thus giving rise to no historic rights in the South China Sea. The Tribunal went in the completely wrong direction when it considered the significance and relevance of evidence and China's practice in the South China Sea. As a matter of fact, China's historic rights in the South China Sea have a scope much greater than those to the living and non-living resources, and the bases for China's historic rights include much more than navigation and fishing activities.

513. China's sovereignty and maritime rights and interests in the South China Sea are established and have been consolidated in the long course of history. The Chinese people have since ancient times lived and engaged in production activities in Nanhai Zhudao and relevant waters. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them, thus establishing its sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea.

*(1) China's practice in the South China Sea prior to the 20th century*

514. As early as the 2nd century BCE in the Western Han Dynasty, the Chinese people sailed in the South China Sea and discovered Nanhai Zhudao in the long course of activities. The Chinese people, at the latest in the Western Han Dynasty, invented sailing vessels which greatly boosted sailing in the South China Sea.

125 Award of 12 July, para.266.

126 Ibid., para.267.

127 Ibid., paras.269-270.

A large number of Chinese historical works, for instance, *Yi Wu Zhi* (An Account of Strange Things)[128] published in the Eastern Han Dynasty (25-220), and *Fu Nan Zhuan* (An Account of Fu Nan)[129] during the period of the Three Kingdoms (220-280), record the South China Sea and the islands and reefs located within it as "*Zhanghaiqitou*" (twisted atolls on the rising sea).

Since the Tang and the Song Dynasties, with the advancement of shipbuilding and navigation technology and the advent and increasing utilization of compass in navigation, the activities of Chinese administrations and people in the South China Sea had become more frequent. A great number of Chinese historical works chronicle the activities of the Chinese people in the South China Sea. These books include, among others, *Meng Liang Lu* (Record of a Daydreamer)[130] and *Ling Wai Dai Da* (Notes for the Land beyond the Passes)[131] in the Song Dynasty (960-1279); *Dao Yi Zhi Lüe* (A Brief Account of the Islands)[132] in the Yuan Dynasty (1271-1368); *Dong Xi Yang Kao* (Studies on the Oceans East and West)[133] and *Shun Feng Xiang Song* (Fair Winds for Escort)[134] in the Ming Dynasty (1368-1644); and *Zhi Nan Zheng Fa*

128 Yang Fu (Eastern Han Dynasty), Yi Wu Zhi [An Account of Surprising Things], cited in Tang Zhou (Ming Dynasty), in Part 9 (Tuchan Xiayao zhi Shu [Local Produces for Medicinal Use]) of Zhengde Qiongtai Zhi [Chronicle of Qiongtai Prefecture under Emperor Zhengde's Reign], Vol. 1 (Hainan Chubanshe [Hainan Publishing House], 2006), p.197. (This is a reproduction of the facsimile edition of an incomplete copy from the reign of Emperor Zhengde of the Ming Dynasty, which is kept in Tianyige, Ningbo; the facsimile edition was proofread by Peng Jingzhong and published by Shanghai Guji Chubanshe [Shanghai Chinese Classics Publishing House] in 1964).

129 Kang Tai (Three Kingdoms Period), Fu Nan Zhuan [An Account of Fu Nan], cited in Li Fang (Song Dynasty), Di Bu San Shi Si—Zhou [Geography, Chapter 34, Islands] in Part 69 of Taiping Yulan [Imperial Readings of the Taiping Era], Vol. 1 (Zhonghua Book Company, 1995), p. 327 (reprinting its 1960 facsimile edition of the Song Dynasty version).

130 Wu Zimu (Song Dynasty), Meng Liang Lu [The Remembrances], in Part. 12 of Qin Ding Si Ku Quan Shu [The Emperor's Four Treasuries], p.17.

131 Zhou Qufei (Song Dynasty), Di Li Men· San He Liu [Geography—Three Sea Currents] in Part 1 of Ling Wai Dai Da Jiao Zhu [Collated and Annotated Notes on the Land beyond the Passes], proofread by Yang Wuquan (Zhonghua Book Company, 1999), p.36.

132 Wang Dayuan (Yuan Dynasty), Wan Li Shi Tang [Ten Thousand-li Rocky Reefs] in Dao Yi Zhi Lüe [A Brief Account of the Islands], proofread by Su Jiqing (Zhonghua Book Company, 1981), p.318.

133 Zhang Xie (Ming Dynasty), Zhou Shi Kao [Studies on the Navy] in Dong Xi Yang Kao [Studies on the Oceans East and West], proofread by Xie Fang (Zhonghua Book Company, 1981), pp.188-189.

134 Ding Chao Shui Xiao Zhang Shi Hou [Rules on the High Tides and Low Tides on the Lunar Calendar] in Shun Feng Xiang Song [Fair Winds for Escort] (Ming

(Compass Directions)[135] and *Hai Guo Wen Jian Lu* (Records of Things Seen and Heard about the Coastal Regions)[136] in the Qing Dynasty (1644-1911). These books also record the geographical locations and geomorphologic characteristics of Nanhai Zhudao as well as the hydrographical and meteorological conditions of the South China Sea. These books record vividly the descriptive names the Chinese people gave to Nanhai Zhudao, such as "*Jiuruluozhou*" (nine isles of cowry), "*Changsha*" (long sand cays) and "*Shitang*" (rocky reefs).

Some of the names given by the Chinese people to component features of China's archipelagos in the South China Sea were adopted by Western navigators and marked in some authoritative navigation guidebooks and charts published in the 19th and 20th centuries. For instance, Namyit (Hongxiu Dao), Sin Cowe (Jinghong Dao) and Subi (Zhubi Jiao) originate from "Nanyi", "Chenggou" and "Chouwei" as pronounced in Hainan dialects.[137]

Numerous historical documents and objects prove that the Chinese people have explored and exploited in a sustained way Nanhai Zhudao and relevant waters. Starting from long time ago, Chinese fishermen sailed southward on the north-easterly monsoon to Nansha Qundao and relevant waters for fishery production activities and returned on the south-westerly monsoon to the mainland the following year.

515. Many foreign documents also recorded the fact that during a long period of time only Chinese people lived and worked on Nansha Qundao.

*The China Sea Directory* published in 1868 by order of the Lords Commissioners of the Admiralty of the United Kingdom, when referring to Zhenghe Qunjiao of Nansha Qundao, observed that "Hainan fishermen, who subsist by collecting trepang and tortoise-shell, were found upon most of these islands, some of whom remain for years amongst the reefs", and that "[t]he fishermen upon Itu-Aba island [Taiping Dao] were more comfortably established than the others, and the water found in the well on that island was better than elsewhere."[138] *The China Sea Directory* published

Dynasty), cited in Liang Zhong Hai Dao Zhen Jing [Two Sailing Guides], proofread by Xiang Da (Zhonghua Book Company, 1961), pp.27-28.

135 Zhi Nan Zheng Fa—Xü [Compass Directions—Foreword] in Zhi Nan Zheng Fa [Compass Directions] (Ming Dynasty), cited in Liang Zhong Hai Dao Zhen Jing [Two Sailing Guides], proofread by Xiang Da (Zhonghua Book Company, 1961), p.108.

136 Chen Lunjiong (Qing Dynasty), Nan Ao Qi [Nanaoqi], in Hai Guo Wen Jian Lu [Records of Things Seen and Heard about the Coastal Regions], Part 1, reprinted by Yilizhai in 1823, pp.14-15.

137 Liu Nanwei, Zhongguo Hai Zhudao Diming Lungao [Research on the Names of the Islands in China Sea] (Beijing Kexue Chubanshe [Beijing Science Press]), 1996, p.68.

138 The Hydrographic Office, Admiralty: China Sea Directory, Vol. II, Directions for the Navigation of the China Sea, between Singapore and Hong Kong, London (1868), p.71.

in 1906 and *The China Sea Pilot* in its 1912, 1923 and 1937 editions made in many parts explicit records of the Chinese fishermen living and working on Nansha Qundao.[139]

The French magazine *Le Monde Colonial Illustré* published in September 1933 contained the following records: Only Chinese people (Hainan natives) lived on the nine islands of Nansha Qundao and there were no people from other countries. Seven were on Nanzi Dao (South West Cay), two of them were children. Five lived on Zhongye Dao (Thitu Island); four lived on Nanwei Dao (Spratly Island), one person more over that of 1930. There were worship stands, thatched cottages and wells left by the Chinese on Nanyao Dao (Loaita Island). No one was sighted on Taiping Dao (Itu Aba Island), but a tablet scripted with Chinese characters was found, which said that, in that magazine's rendition, "*Moi, Ti Mung, patron de jonque, suis venu ici à la pleine lune de mars pour vous porter des aliments. Je n'ai trouvé personne, je laisse le riz à l'abri des pierres et je pars.*" Evidence was also found of fishermen living on the other islands. This magazine also records that there are abundant vegetation, wells providing drinking water, coconut palms, banana trees, papaya trees, pineapples, green vegetables and potatoes as well as poultry on Taiping Dao, Zhongye Dao, Nanwei Dao and other islands, and that these islands are habitable.[140]

Apart from these, Japanese work *Boufuu No Shima* (Stormy Island) published in 1940[141] and *The Asiatic Pilot* (Vol. IV)[142] published by the United States Hydrographic Office in 1925 also contained accounts about Chinese fishermen who lived and worked on Nansha Qundao.

516. China has exercised jurisdiction in a continuous, peaceful and effective manner over Nanhai Zhudao and relevant waters through measures such as establishing administrative setups, strengthening defence at sea, conducting naval patrols, mapping, combating piracy and rescuing foreign ships in distress. Many of China's local official records, such as *Guangdong Tong Zhi* (General Chronicle of Guangdong), *Qiongzhou Fu Zhi* (Chronicle of Qiongzhou Prefecture) and *Wanzhou Zhi* (Chronicle

139 The Hydrographic Office, Admiralty: China Sea Directory, Vol. II, London (1906), p.114. The Hydrographic Department, Admiralty: China Sea Pilot, Vol. III, London (1912), pp.95, 107. The Hydrographic Department, Department: China Sea Pilot, Vol. III, London (1923), pp.90, 97, 100. The Hydrographic Department, Admiralty: China Sea Pilot, Vol. I, London (1937), p.116.

140 Commandant J. Vivielle, Les Ilots des mers de Chine, Le Monde Colonial Illustré, September 1933, p.142.

141 See Ogura Unosuke (Japan), Boufuu No Shima (Stormy Island), Ogura Chuusa Ikou Kankoukai (Publication Society of Commander Ogura's Posthumous Manuscripts, 1940), pp.155-159.

142 Hydrographic Office of US Secretary of the Navy, Asiatic Pilot, Vol. IV, 2nd edition, Washington: G.P.O. (1925), p.118, https://babel.hathitrust.org/cgi/pt?id=uc1.31822033789215;view=1up;seq=138.

of Wanzhou), contain in the section on "territory" or "geography, mountains and waters" a statement that "Wanzhou covers 'Qianlichangsha' and 'Wanlishitang'" or something similar.[143] These statements demonstrate that Nanhai Zhudao and relevant waters were within the jurisdiction of Wanzhou.

It is mentioned in Zeng Gongliang's *Wujing Zongyao* (Outline Record of Military Affairs) published in the Song Dynasty that in order to strengthen defence in the South China Sea, China established naval units to conduct patrols therein.[144] Since the Ming and the Qing Dynasties, the waters in and around Xisha Qundao and Nansha Qundao were placed within the areas patrolled by the Chinese naval forces. In the Ming Dynasty, it was recorded in Huang Zuo's *Guangdong Tong Zhi* (General Chronicle of Guangdong) that efforts were made "to command and dispatch warships for maritime defence purpose" to patrol the areas, which were detailed as "starting from Nantingmen Harbour of Dongguan to the three seas of Wuzhu, Duzhu, Qizhou, then following the kunwei direction on the compass to Wailuo; the kunshen direction, to Zhancheng [Champa] and sea of Kunlun, the ziwu direction to Longyamen Harbour, and then Xianluo [Siam]".[145] In the Qing Dynasty, Ming Yi's *Qiongzhou Fu Zhi* (Chronicle of Qiongzhou Prefecture), Zhong Yuandi's *Yazhou Zhi* (Chronicle of Yazhou Prefecture) and others all listed "Shitang" and "Changsha" under the items of "maritime defence".[146]

143 See Ruan Yuan (Qing Dynasty), Shan Chuan Lüe—Qiong Zhou Fu—Wan Zhou [Brief of the Mountains and Waters—Qiongzhou Prefecture—Wanzhou] in Part 112 of Guangdong Tong Zhi [General Chronicle of Guangdong], edition produced during Emperor Daoguang's Reign (1822), p.504 (quoting Hao Zhi [An Account of Hao]); Ming Yi (Qing Dynasty), Yü Di Zhi [Account of Geography], in Part 4 of Daoguang Qiong Zhou Fu Zhi [Chronicle of Qiongzhou Prefecture under Emperor Daoguang's Reign] (Hainan Chubanshe [Hainan Publishing House], 2006), Vol. 1, p.162; Hu Duanshu (Qing Dynasty), Yü Di Lüe—Shan Chuan Lüe [Geography Highlights—Mountains and Waters], in Part 3 of Daoguang Wanzhou Zhi [Chronicle of Wanzhou of Emperor Daoguang's Reign] (Hainan Chubanshe [Hainan Publishing House]), 2004), p.285.

144 Zeng Gongliang (Song Dynasty), Part 21 (Guang Nan Dong Lu [Guangdong]) of Wu Jing Zong Yao [Outline Record of Military Affairs], cited in Zhongguo Bingshu Jicheng [Collected Chinese Books on Military Affairs], Vol. 3-5 (co-published by Jiefangjun Chubanshe [PLA Publishing Press] & Liaoshen Shushe [Liaoshen Publishing House], 1988), p.1055.

145 Huang Zuo (Ming Dynasty), Wai Zhi San—Yi Qing Shang—Fan Yi—Hai Kou [Part 3 of Account of Outlying Areas—Part 1 of Exotic Affairs—Tributary and Foreign Areas—Pirates], Part 66 of Guangdong Tong Zhi [General Chronicle of Guangdong], Guangdong Sheng Difang Shizhi Bangongshi [Local Chronicle Office of Guangdong Province], Vol. 2, 1997, p. 1724.

146 Ming Yi (Qing Dynasty), Hai Li Zhi—Haifang [Chronicle of Hai and Li—Maritime Defense], Part 18 of Daoguang Qiongzhou Fu Zhi [Chronicle of Qiongzhou Prefecture under Emperor Daoguang's Reign], Vol. 2 (Hainan Chu Ban

The successive Chinese governments have marked Nanhai Zhudao as Chinese territory on official maps, such as the 1755 *Tian Xia Zong Yu Tu* (General Map of Geography of the All-under-heaven) of the *Huang Qing Ge Zhi Sheng Fen Tu* (Map of the Provinces Directly under the Imperial Qing Authority),[147] the 1767 *Da Qing Wan Nian Yi Tong Tian Xia Tu* (Map of the Eternally Unified All-under-heaven of the Great Qing Empire),[148] the 1810 *Da Qing Wan Nian Yi Tong Di Li Quan Tu* (Map of the Eternally Unified Great Qing Empire)[149] and the 1817 *Da Qing Yi Tong Tian Xia Quan Tu* (Map of the Unified All-under-heaven of the Great Qing Empire)[150].

The Chinese government in successive periods attached great importance to combating piracy and banditry and maintaining maritime order in the South China Sea. According to *Qing Shi Lu* (Qing Historical Archive), the Chinese government constantly strengthened defence at sea and punished piracy and banditry in the South China Sea from the middle of the 16th century to the end of the 19th century. For instance, Emperors Qianlong, Jiaqing and Daoguang issued a number of edicts providing for specific instructions and actions, and ordered relevant departments and local governments to maintain peace and tranquillity in the areas of the South China Sea under China's jurisdiction.[151]

The Chinese government also undertook rescue and salvage operations for foreign vessels in distress in the South China Sea. There existed government regulations making the Chinese local governments responsible for rescuing and salvaging foreign vessels in distress. According to *Qing Shi Lu*, in 1738 and 1739 alone, the Chinese local governments, pursuant to these regulations, carried out a good number of such operations in the South China Sea. China's rescue and salvage operations in the South

She [Hainan Publishing House], 2006), p. 782; Zhong Yuandi (Qing Dynasty), Haifang Zhi Yi [Part 1 of Chronicle of Maritime Defense], Part 12 of Guangxu Yazhou Zhi [Chronicle of Yazhou Prefecture under Emperor Guangxu's Reign], Vol. 1 (Hainan Chubanshe [Hainan Publishing House], 2006), p.306.

147 See Han Zhenhua, et al. (eds.), Wo Guo Nanhai Zhudao Shiliao Huibian [A Collection of Historical Materials on China's Nanhai Zhudao] (Dongfang Chubanshe [Oriental Press]), 1988, p.88.

148 ID No. 008460382, Collection of Rare Books Department, National Library of China.

149 ID No. 912001010969, Collection of Rare Books Department, National Library of China.

150 ID No. Yu 156, Yutu, Archives of Neiwu Fu, First Historical Archives of China.

151 Part 13 of Ren Zong Shi Lu [Veritable Records of Emperor Jiaqing], in Yunnan Lishi Yanjiusuo [Yunnan Institute of History Study] (ed.), Qing Shi Lu: Yuenan Miandian Taiguo Laowo Shiliao Zhaichao [Veritable Records of the Qing Dynasty: Extracts of the Historical Materials on Viet Nam, Myanmar, Thailand and Laos], Yunnan Renmin Chubanshe [The People's Press of Yunnan], 1985, pp.278-279.

China Sea usually included dispatching personnel for rescue and assistance, providing food and comfort, and repatriating foreign crews, etc.[152]

*(2) China's practice in the South China Sea since the 20th century*

517. Since the beginning of the 20th century, China has been taking further steps to reaffirm and maintain its territorial sovereignty and maritime rights and interests in the South China Sea. In 1933, France invaded some islands and reefs of Nansha Qundao and declared "occupation" of them in an announcement published in *Journal Officiel*, creating the "Incident of the Nine Islets". The French aggression triggered strong reactions and large scale protests from all walks of life across China.[153] The Chinese fishermen living on Nansha Qundao also took on-site resistance against the French aggression. Shortly after this Incident happened, the Chinese Ministry of Foreign Affairs made clear through its spokesperson, referring to the relevant islands of Nansha Qundao, that "no other people but Chinese fishermen live on the islands and they are recognized internationally as Chinese territory". The Chinese government made strong representations to the French government against its aggression.[154] And in response to the French attempt to trick Chinese fishermen into hanging French flags, the government of Guangdong Province instructed that administrators of all counties should issue public notice forbidding all Chinese fishing vessels operating in Nansha Qundao and relevant waters from hanging foreign flags, and Chinese national flags were distributed to them to be hung on Chinese fishing vessels.[155]

518. Japan invaded and illegally occupied Nanhai Zhudao during its war of aggression against China. After the end of the Second World War, China recovered Nanhai Zhudao. In November and December 1946, the Chinese government dispatched Colonel Lin Zun and other senior military and civil officials to Xisha Qundao and Nansha Qundao to resume exercise of authority over these Islands, with commemorative ceremonies held, sovereignty markers re-erected, and troops

152 Part 101 of Gao Zong Shi Lu [Veritable Records of Emperor Qianlong], pp.1-2, in Yunnan Lishi Yanjiusuo [Yunnan Institute of History Study] (ed.), Qing Shi Lu: Yuenan Miandian Taiguo Laowo Shiliao Zhaichao [Veritable Records of the Qing Dynasty: Extracts from the Historical Materials on Viet Nam, Myanmar, Thailand and Laos], Yunnan Renmin Chubanshe [The People's Press of Yunnan], 1985, pp.26-27.

153 See Fa Zhan Yue Hai Jiu Xiao Dao Wai Bu Zhunbei Ti Kangyi [France Invaded 9 Islets of Nansha Qundao, Ministry of Foreign Affairs to Protest], in Shen Bao [Shanghai Daily], 27 July 1933; Faguo Zhanling Jiu Dao, Wai Bu Jiang Ti Yanzhong Kangyi [France Invaded 9 Islets, Ministry of Foreign Affairs to Solemnly Protest], in Haiwai Yuekan [Overseas Monthly], August 1933.

154 See Shen Bao [Shanghai Daily], ibid.

155 Han Zhenhua et al (eds.), Wo Guo Nanhai Zhudao Shiliao Huibian [A Collection of Historical Materials on China's Nanhai Zhudao], Dongfang Chubanshe [Oriental Press], 1988, p.259.

garrisoned.[156] In March 1947, the Chinese government established on Taiping Dao the Nansha Qundao Office of Administration and placed it under the jurisdiction of Guangdong Province. China also set up a meteorological station and a radio station on Taiping Dao, which started broadcasting meteorological information in June of that year.[157] In June 1949, the Chinese government promulgated Hainan Tequ Xingzheng Zhangguan Gongshu Zuzhi Tiaoli (Regulations on the Organization of the Office of the Chief Executive of the Hainan Special District), which placed Hainan Dao, Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, Nansha Qundao and some other islands under the jurisdiction of the Hainan Special District.[158]

519. The Chinese government also reaffirmed its sovereignty and rights over Nanhai Zhudao in the forms of conducting surveys, naming islands and reefs, and publishing maps. China's Committee for the Examination for the Land and Sea Maps, which was composed of representatives of the Ministry of the Interior, Ministry of Foreign Affairs, Ministry of Education, Ministry of the Navy, General Staff Headquarters, Mongolian and Tibetan Affairs Commission and other institutions, from December 1934 to March 1935, reviewed and approved 132 collective and individual names of islands, shoals, submerged reefs, banks and cays of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao (then named Nansha Qundao) and Nansha Qundao (then named Tuansha Qundao) in the South China Sea, among which 96 were in Nansha Qundao. In April 1935, the Committee compiled and published Zhong Guo Nan Hai Ge Dao Yu Tu (Map of the South China Sea Islands of China), which was marked with detailed names and locations of individual islands, reefs, banks and shoals of Nanhai Zhudao.[159] On the basis of a new round of geographical survey of Nanhai Zhudao, the Chinese government (1) commissioned in 1947 the compilation of *Nanhai Zhudao Dili Zhi Lüe* (A Brief Account of the Geography of the South China Sea Islands); (2) reviewed and approved Nan Hai Zhu Dao Xin Jiu Ming Cheng Dui Zhao Biao (Comparison Table on the Old and New Names of the South China Sea Islands) with an updated listing of 172 collective and individual names of islands and reefs of Nanhai Zhudao, among which 102 were in Nansha Qundao; and (3) drew Nan Hai Zhu Dao Wei Zhi Tu (Location Map of the

156 See Republic of China Executive Yuan Directive [Jiejingluzi] No. 7391, 1946, from the collection of Taiwan Academia Historica.

157 See Republic of China Executive Yuan Order No. 442, and Dong Xi Nan Sha Dao Guanlichu Zuzhi Guicheng Caoan [Draft of the Organizational Rules of Office of Administration of Dongsha, Xisha and Nansha Islands], from the collection of Taiwan Academia Historica.

158 Presidential Proclamation No. 228 of the Republic of China, June 1949.

159 See the illustration in Shuilu Ditu Shencha Weiyuanhui Huikan [Report of the Committee for the Examination for the Land and Sea Maps], Vol. 1.

South China Sea Islands) on which the dotted line is marked.[160] In February 1948, the Chinese government officially published Zhong Hua Min Guo Xing Zheng Qu Yu Tu (Map of the Administrative Districts of the Republic of China) including Nan Hai Zhu Dao Wei Zhi Tu (Location Map of the South China Sea Islands).[161]

520. Since its founding on 1 October 1949, the People's Republic of China has repeatedly reiterated and further upheld its sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea by measures such as adopting legislations, establishing administration and making diplomatic representations. China has never ceased carrying out activities such as patrolling and law enforcement, resources development and scientific survey on Nanhai Zhudao and in the South China Sea.

In September 1958, China promulgated the Declaration of the Government of the People's Republic of China on China's Territorial Sea, explicitly providing that the breadth of China's territorial sea shall be twelve nautical miles, that the straight baselines method shall be employed to determine the baselines of territorial sea and that such provisions shall apply to all territories of the People's Republic of China, including "Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, Nansha Qundao and all the other islands belonging to China".[162]

In March 1959, the Chinese government set up, on Yongxing Dao of Xisha Qundao, the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao. In March 1969, the Office was renamed the Revolutionary Committee of Xisha Qundao, Zhongsha Qundao and Nansha Qundao of Guangdong Province. In October 1981, the name of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao was restored. In April 1983, China Committee on Geographical Names was authorized to publish 287 standard geographical names for part of Nanhai Zhudao, among which 192 were collective and individual names of islands and reefs of Nansha Qundao.[163] In May 1984, the Sixth National People's Congress decided at its Second Session to establish the Hainan Administrative District with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant maritime areas, among others. In April 1988, the Seventh National People's

160 Nanhai Zhudao Weizhi Tu [Location Map of the South China Sea Islands] (1:6500000) drew by the Department of Territories and Boundaries of the Ministry of the Interior, in Zheng Ziyue (ed.), Nanhai Zhudao Dili Zhilüe [A Brief Account of the Geography of the South China Sea Islands] (The Commercial Press, 1947).

161 Fu Juejin (ed.), Zhonghua Minguo Xingzheng Quyu Tu [Map of the Administrative Districts of the Republic of China], drawn in 1947 (The Commercial Press, 1948).

162 Declaration of the Government of the People's Republic of China on China's Territorial Sea, 1958.

163 See Zhonghua Renmin Gongheguo Gongbao [Gazette of the State Council of the People's Republic of China], Issue No. 10 (1983), p.452.

Congress decided at its First Session to establish Hainan Province with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant maritime areas, among others.

In February 1992, China promulgated the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, establishing China's basic system of territorial sea and contiguous zone. This Law explicitly states: "The land territory of the People's Republic of China includes [ … ] Dongsha Qundao; Xisha Qundao; Zhongsha Qundao; Nansha Qundao; as well as all the other islands belonging to the People's Republic of China."

In May 1996, the Standing Committee of the Eighth National People's Congress made the decision at its Nineteenth Session to ratify the Convention, and at the same time declared that, "The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone which was promulgated on 25 February 1992."[164]

In June 1998, China promulgated the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, establishing China's basic system of exclusive economic zone and continental shelf. Article 14 of the Law expressly provides: "No provisions of this Law can prejudice historic rights of the People's Republic of China."

In 1999, China amended its Marine Environment Protection Law of 1982, in which the scope of application of the law was revised from "the internal waters, territorial seas of the People's Republic of China and other sea areas under the jurisdiction of the People's Republic of China" to read "the internal waters, territorial seas, contiguous zones, exclusive economic zones and continental shelves of the People's Republic of China and all other sea areas under the jurisdiction of the People's Republic of China".[165] In 2000, China amended its Fisheries Law of 1986, and revised the geographical scope of its application to read "the inland waters, tidal flats, territorial waters, exclusive economic zones of the People's Republic of China and [ … ] all other sea areas under the jurisdiction of the People's Republic of China".[166] On 1 August 2016, the Supreme People's Court issued the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of the Relevant Cases Occurring in Sea Areas under the Jurisdiction of China (I), Article 2 of which states that "sea areas under the jurisdiction of China shall refer to the inland waters,

164 Statement made by the People's Republic of China upon ratification of the UNCLOS (7 June 1996), para.3, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

165 Marine Environmental Protection Law of the People's Republic of China (1999), Article 2.

166 Fisheries Law of the People's Republic of China (2013), Article 2.

territorial seas, contiguous zones, exclusive economic zones and continental shelves of China, as well as other sea areas under the jurisdiction of the People's Republic of China."[167]

The above domestic laws of China indicate that the maritime zones under the jurisdiction of China comprise not only the maritime zones that China is entitled to under the Convention, but also those areas in which China has historic rights.

In June 2012, the State Council approved the abolition of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the simultaneous establishment of prefecture-level Sansha City with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant waters.

521. China's practice of working and living activities and exercise of jurisdiction in the South China Sea over more than 2,000 years lays a solid foundation for its historic rights therein. Facts show that the Chinese people have all along taken Nanhai Zhudao and relevant waters as a ground for living and production, where they have engaged in exploration and exploitation activities in various forms. The Chinese government in successive periods have exercised jurisdiction over Nanhai Zhudao in a continuous, peaceful and effective manner. In the long course of history, China has established sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea. China's historic rights in relevant areas of the South China Sea are well established and recognized under general international law.

*III.2.B. The Tribunal misconstrued relevant historical facts*

522. The Tribunal claimed that relevant materials like *Geng Lu Bu* (Manual of Sea Routes) were evidence to be considered when addressing the issue of sovereignty over islands, but that evidence "has nothing to do with the question of whether China has historically had rights to living and non-living resources beyond the limits of the territorial sea in the South China Sea and therefore is irrelevant to the matters before this Tribunal."[168] The Tribunal also held:

> Evidence of use giving rise to historic rights with respect to the islands, however, would not establish historic rights to the waters beyond the territorial sea. The converse is also true: historic usage of the waters of the South China Sea cannot lead to rights with respect to the islands there. The two domains are distinct.[169]

The Tribunal further stated that "China's navigation and trade in the South China Sea, as well as fishing beyond the territorial sea, represented the exercise of high seas

167 The Provisions of the Supreme People's Court on Several Issues Concerning the Trial of the Relevant Cases Occurring in Sea Areas under the Jurisdiction of China (I), Interpretation of the Supreme People's Court [2016] No. 16.

168 Award of 12 July, para.264.

169 Ibid., para.266.

freedoms. China engaged in activities that were permitted to all States by international law, as did the Philippines and other littoral States surrounding South China Sea. Before the Second World War, the use of the seabed, beyond the limits of the territorial sea, was likewise a freedom open to any State that wished to do so".[170] To the Tribunal, "Historical navigation and fishing, beyond the territorial sea, cannot therefore form the basis for the emergence of a historic right."[171] The Tribunal is wrong.

*(1) China's jurisdiction over Nanhai Zhudao and relevant maritime areas is indivisible*

523. Chinese people and the Chinese government have made no distinction between islands and sea areas or, more simply, between land and water in the long course of living and working, as well as exercise of jurisdiction in the South China Sea. The Chinese people have taken Nanhai Zhudao and relevant sea areas as a ground for working and home for living.

524. The Tribunal claimed that *Geng Lu Bu* had nothing to do with historic rights to waters. This shows how ignorant the Tribunal is about *Geng Lu Bu*. *Geng Lu Bu* contains not only information about the islands and reefs, but also, more importantly, a wealth of data on the sea areas in the South China Sea, providing a rich record of and a practical guide for Chinese fishermen working and living in those sea areas over the ages.

525. *Geng Lu Bu* presents a rich picture of such activities in the South China Sea. Research reveals that, from the middle of the Yuan Dynasty, or the beginning of the Ming Dynasty at the latest, fishermen from Fujian, Guangdong, Hainan, and Guangxi on China's southeast coasts, guided by China's 24-point navigational compass, sailed on the north-easterly monsoon in winter southward to Xisha Qundao, Zhongsha Qundao and Nansha Qundao for fishing activities. In this process, some fishermen went to Southeast Asia for trading in aquatic products. After Singapore became a trade port, Chinese fishermen sailed there every year to sell aquatic products and buy daily necessities; some of them even settled in there. Next spring, the fishermen returned on the south-westerly monsoon.[172] In this process, Chinese fishermen recorded in concise entries their experiences and navigational routes in handwritten booklets. These booklets have passed down from generation to generation, and ultimately developed into a genre known as *Geng Lu Bu*. "Geng" is a unit of time, the total number of which spent in a leg of the voyage multiplied by the speed makes the

170 Ibid., para.269.

171 Ibid., para.270.

172 See Chapter Four Fishery in Chronicle of Qionghai County Vol. 6, Http://www.hnszw.org.cn/xiangqing.php?ID=46954. The fact that Chinese fishermen sailed Singapore every year to sell aquatic products is also recalled by Hainan fishermen Lu Yefa, Wu Shumao, Huang Jiali, see Xia Daiyun, Lu Yefa, Wu Shumao, Huang Jiali Geng Lu Bu Yanjiu [A Study on Lu Yefa, Wu Shumao, Huang Jiali's Geng Lu Bu], Haiyang Chubanshe [China Ocean Press], 2016, pp. 28-29, 157, 280.

travelling distance.[173] "Lu" refers to the direction.[174] "Bu" means booklets. A *Geng Lu Bu* booklet was constantly supplemented and updated when it was passed down from generation to generation.

526. *Geng Lu Bu* records, among others, information about the courses and distances between the departure ports (Qinglan Port of Wenchang City, Tanmen Port of Qionghai City, Dazhou Dao of Wanning City and Yalong Wan of Sanya City, etc.) and islands and reefs of Nanhai Zhudao, and between those islands and reefs. It also records the routes of Chinese fishermen sailing between those islands and reefs and Southeast Asia including Singapore.[175] According to recent research, more than 20 fishing routes to Xisha Qundao, more than 200 to Nansha Qundao, more than 20 return routes from Nansha Qundao to Hainan Dao have been recorded in the various handwritten booklets of *Geng Lu Bu*. A number of fishing grounds were also recorded therein. In winter, Chinese fishermen sailed to Xisha Qundao on the north-easterly monsoon. Due to the wind direction and the ocean current, when departing Hainan Dao, the wind-driven sailing vessels had to head east, in order to reach Xisha. Thus the fishermen referred to Xisha Qundao and its adjacent waters as "East Sea",[176] and Nansha Qundao and its waters as "North Sea" because of its greater distance.[177]

527. *Geng Lu Bu* contains not only geographical names and sailing routes in the South China Sea but also a large amount of important nautical information. Information about courses, duration, distance, islands and submerged reefs on the

173 See Zhu Jianqiu, "Fang Wei Bu Yi Zhi Nan Pian": Cong Bianzhu "Duhai Fangcheng Jizhu" Tan Gudai Haidao Zhen Jing ["Fang Wei Bu Yi Zhi Nan Pian": A Discussion on Ancient Chinese Guides to Sailing Directions from the Perspective of Compiling the Book of Annotations on the Guides to Sailing Directions], Hai Jiao Shi Yanjiu [Journal of Maritime History Studies], 2013(2), pp.110-116.

174 See Xia Daiyun, Hainan Yumin de Fengfanchuan Hanghai Jishu: Difangxing Zhishi Shiliao Xia Keji Shi Anli Yanjiu [Hainan Fishers' Navigation Technology in the Time of Sailing Boat: A Chinese Scientific Historical Case Study from the View of Local Knowledge], Ziran Bianzhengfa Yanjiu [Studies in Dialectics of Nature], 2016(9), p.87.

175 See Xia Daiyun, Lu Yefa, Wu Shumao, Huang Jiali Geng Lu Bu Yan Jiu [A Study on Lu Yefa, Wu Shumao, Huang Jiali's Geng Lu Bu], Haiyang Chubanshe [China Ocean Press], 2016.

176 "East Sea" referring to Xisha Qundao and its adjacent waters can be found in Su Liude, Yu Yuqing, Lin Hongjin, Wang Guochang, Li Genshen, Lu Honglan, Li Kuimao, Peng Zhengkai's Geng Lu Bu. Relevant versions are from the collection of Guangdong Provincial Museum, Department of Geography (now School of Geography) of South China Normal University, and Hainan University.

177 "North Sea" referring to Nansha Qundao and its adjacent waters can be found in Su Liude, Xü Hongfu, Yu Yuqing, Lin Hongjin, Wang Guochang, Lu Honglan, Peng Zhengkai's Geng Lu Bu. Relevant versions are from the collection of Guangdong Provincial Museum, Department of Geography (now School of Geography) of South China Normal University, and Hainan University.

routes, and speed of ocean current as well as weather conditions of relevant sea areas has been recorded, analyzed, constantly updated and enriched by Chinese fishermen generation after generation.

528. Therefore, *Geng Lu Bu* is not, as the Tribunal claimed, merely evidence relating to sovereignty over islands and reefs, and irrelevant to the issue of historic rights to waters. The fact is, *Geng Lu Bu* testifies to Chinese fishermen's in-depth appreciation of the natural and geological conditions of the sea areas in the South China Sea they have accumulated in the long process of exploration and exploitation. What *Geng Lu Bu* tells is a long history of Chinese fishermen having maintained stable, organized working and living activities in the South China Sea and making this place their home from generation to generation.

*(2) The Tribunal erred in treating China's practice in the South China Sea as exercising high seas freedoms*

529. The Tribunal held that China's navigation, trade, and fishing activities in the South China Sea only represented the exercise of high seas freedoms permitted by international law. Thus, even very intensive Chinese navigation and fishing activities would be insufficient to establish historic rights.[178] The Tribunal failed to appreciate the full meaning of these activities and to consider China's abundant practice in exercising authority in the South China Sea.

530. First, China's activities in the South China Sea are of a scope greater than that mentioned by the Tribunal. As discussed above, China's activities of working and living and exercise of authority in the South China Sea, including establishing administrative setups, strengthening defense at sea, conducting naval patrols, mapping, combating piracy and rescuing foreign ships in distress, fully show the fact that China has been exercising jurisdiction over the relevant sea areas in the South China Sea. The Tribunal disregarded the historical facts contained in voluminous Chinese and foreign historical materials and publications, and assumed that China's relevant historical activities in the South China Sea included merely navigation, trade and fishing. Such an assumption is counter-factual.

531. Second, the Tribunal disregarded China's firm belief that Nanhai Zhudao and relevant sea areas are within China's domain. Chinese people have long been engaged in navigation, trade and fishing in the relevant sea areas of the South China Sea, which have been enshrined as their home where they work and live. This firm belief has been with Chinese people since long ago. This stands in stark contrast to other countries with sporadic activities therein.

532. Third, some of China's historical activities at sea were misconstrued. For instance, with respect to the "Prohibition on Maritime Trade" in Chinese history, the Tribunal related the Philippines' position that, for periods of the 14th century and for

178 See Award of 12 July, paras.268-270.

much of the 15th and 16th centuries, the Imperial Chinese Government actively prohibited maritime trade by Chinese subjects, suppressed maritime activities, and defined venturing out to sea in a multi-masted ship to be an act of treason.[179] The fact is that "Prohibition on Maritime Trade" was aimed at strengthening governmental control over activities at sea, and, for that purpose, targeted unauthorized private maritime trade. The Qing government enhanced its supervision and control over fishing and fishermen through the "Prohibition on Maritime Trade". In the early Qing Dynasty, the local governments in Hainan Dao such as Tanmen strengthened regulation of local fishermen's travel to Nanhai Zhudao for fishing and inhabitation, mainly through issuing licenses, imposing food rationing and collecting taxes. Before sailing out fishing on the sea, fishermen had to obtain a license from the township-level government. The local government would, according to the distance of voyage and the number of fishermen reported by the owner of a fishing vessel, determine the amount of food they could take on board.[180] When the vessel returned to the home port, the local government would dispatch civil officials to count the catch on board and tax the owner accordingly. In the first year of Emperor Yongzheng's reign (1723), the Qing government required that merchant and fishing vessels from the four provinces on the southeast coast be painted with different colours on the prows and masts for identification purposes. Vessels from Guangdong Province, for instance, were nicknamed "Red-head vessels" as their prows were painted red. Identification details were carved into both rail sides of each vessel, including the registration name and number, and the names of province, prefecture and county. It was explicitly provided that, "Fishing is only permitted [for a vessel] within the areas of the province of registration [ … ]. Only licensed vessels are permitted to venture out to the sea".[181] It is thus clear that the government's administration of Chinese fishermen's fishing and island development in the South China Sea has been strengthened during the implementation of the "Prohibition on Maritime Trade" policy.

### *III.3. The Tribunal disingenuously put up and shot down a strawman—whether China's relevant practice after the Convention's entry into force had established historic rights*

533. After erroneously denying the existence of China's well-established historic rights in the South China Sea, the Tribunal proceeded to observe that, for the sake of completeness, it was appropriate to "briefly address whether China has acquired rights or

179 Award on 12 July, para.195.

180 Qing Sheng Zu Shi Lu [Veritable Record of Emperor Kangxi of the Qing Dynasty], Part 271.

181 Jiaqing Da Qing Hui Dian Shi Li [Collected Laws and Regulations of the Qing Dynasty Compiled under Emperor Jiaqing's Reign], Part 507.

jurisdiction at variance with the Convention in the years since the Convention entered into force in 1996".[182] The Tribunal held:

> Since the adoption of the Convention, historic rights were mentioned in China's *Exclusive Economic Zone and Continental Shelf Act*, but without anything that would enable another State to know the nature or extent of the rights claimed. The extent of the rights asserted within the 'nine-dash line' only became clear with China's Notes Verbales of May 2009. Since that date, China's claims have been clearly objected to by other States.[183]

The Tribunal thus deemed that it was in its 2009 note verbale that China claimed historic rights for the first time, and found that there was no acquiescence by other States in respect of China's claim of historic rights, and China therefore did not acquire any historic rights after the Convention's entry into force.

534. What the Tribunal did is simply inexplicable. China has never made any claim of any historic rights formed since only the Convention's entry into force. Rather China always emphasizes its longstanding practice or its conduct in the long course of history. The Tribunal's behaviour can only be considered disingenuous and intended to mislead the unwary.

As elaborated above, China had acquired historic rights very early in the South China Sea and has been enjoying them ever since. There is no such an issue as to whether China's practice after the Convention's entry into force had established historic rights. The Tribunal said that China claimed historic rights in its 1998 Law on the Exclusive Economic Zone and the Continental Shelf, implying that this is the first time that China claimed its historic rights. Article 14 of that Law expressly provides, "No provisions of this Law can prejudice historic rights of the People's Republic of China." Thus, it is clear that this provision simply reaffirms and preserves its long-established historic rights side by side with the regimes of exclusive economic zone and continental shelf under this Law.

535. The Tribunal also held that it was not until 2009 that the Philippines had a chance to know about the scope of China's historic rights. Such a view is untenable. The territorial and maritime delimitation dispute between China and the Philippines in the South China Sea has been in existence for years. The Philippines is fully aware of China's claims in respect of its sovereignty, jurisdiction and historic rights in the South China Sea. The "dotted line" referred to in the Philippines' submissions was first marked on an official map China published in 1948, and has remained in China's official maps consistently ever since, including after the Convention's entry into force. Like the whole world, the Philippines has been well aware of this and had never questioned it.

182 Award of 12 July, para.273.

183 Ibid., para.275 (internal footnote omitted).

In *Fisheries Case (United Kingdom v. Norway, 1951)*, the United Kingdom argued that it was not aware of the Norwegian system of delimitation with respect to straight baselines, asserting that "the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it".[184] The Court did not accept that argument and observed:

> As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the [Norwegian practice] which had at once provoked a request for explanations by the French Government.[185]

Similarly, the Philippines, as a coastal State of the South China Sea, has great interests in the sea areas and has always paid close attention to China's activities at sea. It could not have been ignorant of China's relevant practices. The Philippines, fully aware of the dotted line marked on China's official maps published since 1948 and historic rights referred to in the 1998 Law, had never raised any question. Here, an acceptance or acquiescence obviously exists. It is untenable for the Tribunal to conclude that China for the first time clarified the scope of its historic rights in the 2009 note verbale.

## Conclusion

536. China's historic rights in the South China Sea are the product of Chinese people's longstanding practice in working and living in the South China Sea since ancient times and the exercise of jurisdiction therein by the Chinese government in successive periods. They are inseparable from China's sovereignty over Nanhai Zhudao.

537. The Tribunal's approach to the issue of China's historic rights is as follows: it first decided arbitrarily that China claimed historic rights only to the living and non-living resources in the South China Sea; it then decided that historic rights incompatible with the Convention were superseded by the Convention and that China's historic rights to the living and non-living resources were inconsistent with the regimes of exclusive economic zone and continental shelf set forth in the Convention, and were therefore superseded; furthermore, it found that China did not acquire any historic rights as it characterized on the ground that there was no evidence supporting that China had exercised control over the use of the resources in the South China Sea and that China was simply exercising high seas freedoms.

184 Fisheries case, Judgment of December 18th, 1951, I.C. J. Reports 1951, p. 116, at 138-139.

185 Ibid., at 139.

538. There existed serious errors in the pivotal findings and reasoning steps of the Tribunal. The Tribunal's conclusions are not well founded.

First, there exists a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and China's historic rights in the area constitute an integral part of that dispute. The Tribunal addressed China's historic rights in the South China Sea separately from the territorial issues and the maritime delimitation situation between China and the Philippines; in particular, it found that China claimed historic rights in the exclusive economic zone of the Philippines. The Tribunal's approach and findings fail to treat holistically the dispute between China and the Philippines in the South China Sea, and were contrary to the general practice of addressing the relationship between historic rights and delimitation under the Convention.

Second, the Convention does not fix the relationship between the Convention and general international law including rules regarding historic rights. The Tribunal maintained, the Convention provided comprehensive rules for resolving all issues relating to the law of the sea and it prevailed over rules of general international law inconsistent with it, by virtue of Articles 311, 293, and 309. This is wrong. Issues of historic rights are regulated by general international law. The overall tenor of attitude that the Convention exhibits is respect for historic rights in Articles 10, 15, 51, and 298, and the Convention is silent on the relationship between historic rights and the regimes of exclusive economic zone and continental shelf.

Third, China's historic rights in the South China Sea have been in existence since long ago. The Chinese people have cherished relevant areas of the South China Sea as their home where they live and work, and firmly believe that Nanhai Zhudao and relevant sea areas are within China's domain. The Chinese government in successive periods have also exercised jurisdiction over Nanhai Zhudao and relevant areas continuously, peacefully and effectively. The Tribunal found that China only claimed historic rights to resources and no evidence supported such rights in the South China Sea. Such findings run against the fact that the Chinese people have been working and living in this area and China has exercised jurisdiction therein. The Tribunal came to this conclusion via a premise that did not exist and selective use and misinterpretation of historical records and evidence.

539. The Tribunal acted *ultra vires* and mishandled China's historic rights in the South China Sea. These errors deprive its decisions of any binding force. China's historic rights in the South China Sea are well established in general international law and naturally will continue to exist.

## Chapter Five: The Status of China's Nansha Qundao and Zhongsha Qundao (Submissions No. 3 to 7)

540. This Chapter analyses the Tribunal's findings concerning the Philippines' Submissions No. 3 to 7. These submissions are:

> (3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> (4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
>
> (5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
>
> (6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
>
> (7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf[.][1]

541. The Tribunal found or declared in Award of 12 July that: Zhubi Jiao (Subi Reef), Nanxun Jiao (the southern part) (Gaven Reef (South)), Dongmen Jiao (Hughes Reef), Meiji Jiao (Mischief Reef), and Ren'ai Jiao (Second Thomas Shoal), were low-tide elevations, within the meaning of Article 13 of the Convention, and, as low-tide elevations, they did not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf and were not features capable of appropriation; and, moreover, Zhubi Jiao (Subi Reef), Nanxun Jiao (the southern part) (Gaven Reef (South)) and Dongmen Jiao (Hughes Reef) were located respectively within 12 nautical miles of other high-tide features.[2]

The Tribunal in the relevant part of the *dispositif* further:

> (6) DECLARES that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, in their natural condition, are rocks that cannot sustain human habitation or economic life of their own, within the meaning of Article 121(3) of the Convention and accordingly that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

1 Award of 12 July, para.112.

2 See ibid., para.1203.B.(3)-(5).

(7) FINDS with respect to the status of other features in the South China Sea:

a. that none of the high-tide features in the Spratly Islands, in their natural condition, are capable of sustaining human habitation or economic life of their own within the meaning of Article 121(3) of the Convention;

b. that none of the high-tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf; and

c. that therefore there is no entitlement to an exclusive economic zone or continental shelf generated by any feature claimed by China that would overlap the entitlements of the Philippines in the area of Mischief Reef and Second Thomas Shoal; and

DECLARES that Mischief Reef and Second Thomas Shoal are within the exclusive economic zone and continental shelf of the Philippines[.][3]

The Tribunal deliberately divided, without giving any reason, Nanxun Jiao (Gaven Reef) into Nanxun Jiao (the southern part) (Gaven Reef (South)) and Nanxun Jiao (the northern part) (Gaven Reef (North)), despite the fact that neither China nor the Philippines made such a division.

542. Chapter Two of this Study has elaborated that the Tribunal had no jurisdiction over the Philippines' Submissions No. 3 to 7, since they are related to the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. This Chapter aims to show that, regardless of the jurisdictional issue, the Tribunal at the merits phase erred in the choice of applicable law, the interpretation and application of law, and the admission of evidence when addressing the status and maritime entitlements of China's Nansha Qundao and Zhongsha Qundao and their component features. The Tribunal's findings are erroneous.

543. This Chapter consists of four sections: Section I lays bare the Tribunal's fundamental mistake that set it off in the wrong direction when addressing the status and maritime entitlements of China's Nansha Qundao and Zhongsha Qundao and their component features; Section II discloses the Tribunal's errors in its finding with respect to the status of Nansha Qundao as a continental State's outlying archipelago; Section III reveals the Tribunal's errors in its finding with respect to the status of relevant "low-tide elevations" of Nansha Qundao; and Section IV exposes the Tribunal's errors in its finding with respect to the status of component features of Nansha Qundao and Zhongsha Qundao.

3 Ibid., para.1203.B.(6)-(7).

## I. The Tribunal erroneously addressed separately the status of the component features of China's Nansha Qundao and Zhongsha Qundao, in effect dismembering the two archipelagos and fragmenting the territorial and maritime delimitation dispute

544. China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao. China has internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf based on Nanhai Zhudao. Furthermore, China has historic rights in the South China Sea.

545. The Philippines requested the Tribunal in its Submissions No. 3 to 7 to declare Huangyan Dao and eight features of China's Nansha Qundao as rocks or low-tide elevations, and to determine their respective maritime entitlements. The Philippines further requested the Tribunal to declare that Ren'ai Jiao and Meiji Jiao are within the exclusive economic zone and continental shelf of the Philippines.

546. China has territorial sovereignty over Nansha Qundao and Zhongsha Qundao, and has enjoyed maritime entitlements based upon the two archipelagos each as a unit. In its Position Paper,[4] China reaffirmed this position and objected to the Philippines' submissions concerning the individual status of Huangyan Dao and eight features of Nansha Qundao and their maritime entitlements, which would effectively dismember China's Nansha Qundao. China maintained that the Philippines' submissions were "in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole",[5] and would "distort the nature and scope of the China-Philippines disputes in the South China Sea".[6]

547. Whether or not Nansha Qundao can be dismembered effectively in such a way is a question related to territorial sovereignty, and is beyond the Tribunal's jurisdiction. In disregard of this insurmountable jurisdictional obstacle, the Tribunal in its Award on Jurisdiction arbitrarily refused to recognize that "the Philippines' focus only on the maritime features occupied by China carries implications for the question of sovereignty".[7] The Tribunal was erroneous.

548. In the Award of 12 July, the Tribunal failed to give proper effect to China's position on the archipelago as a unit for sovereignty and maritime entitlement and delimitation purposes. It erroneously addressed separately the status of the component features of China's Nansha Qundao and Zhongsha Qundao, in effect dismembering the two archipelagos and fragmenting the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. The Tribunal maintained that continental States' offshore archipelagos ("outlying archipelagos" is more often and more generally used, and will be used in this Study) should not be enclosed

4 See China's Position Paper, paras.20-21.

5 Ibid., para.19.

6 Ibid., para.22.

7 Award on Jurisdiction, para.154.

within a system of archipelagic or straight baselines pursuant to the Convention, and denied China's Nansha Qundao *as a unit* any maritime entitlement.[8] The Tribunal's approach in effect dismembered China's Nansha Qundao and Zhongsha Qundao, infringing China's sovereignty, territorial integrity and maritime rights and entitlements.

*I.1. The Tribunal erroneously decided on the status of component features of Nansha Qundao and Zhongsha Qundao separately, dismembering the two archipelagos*

549. Fundamental differences and important implications and consequences flow from treating an outlying archipelago of a continental State as a unit or treating its component features separately, for sovereignty and maritime entitlement and delimitation purposes.

550. First, sovereignty over an archipelago as a unit is that over the integral whole of the archipelago, while sovereignty over a component feature separately without regard to the archipelago is that over that feature individually. The two formulations thus imply territorial integrity and territorial divisibility, respectively. Treating the component features of an archipelago separately for sovereignty purposes, without the consent of the State having sovereignty over the archipelago, first and foremost, violates its territorial integrity. With the requisite consent, no problem will arise.

The two approaches may result in different sizes of the areas over which the territorial State has sovereignty. Treating an archipelago as a unit for sovereign purposes gives the territorial State sovereignty over all component features and the interconnecting waters, while treating the component features of an archipelago separately will give rise to the possibility that some of the features may not be subject to appropriation outside the unity of the archipelago and that the interconnecting waters may not be all covered under the sovereignty over these features separately, so that the total size of the areas under sovereignty may be smaller or even much smaller than that from treating the archipelago as an integral unit.

The modes of acquisition of sovereignty over a feature as a component of an archipelago may also differ from those over that feature separately in disregard of the archipelago. Sovereignty over an archipelago as a unit naturally covers sovereignty over each and every component part. The sovereignty over the principal part of an archipelago may cover the remaining component features, if the archipelago is reckoned as a unit, without the need to prove sovereignty over each and every feature in the ordinary way.

551. Second, with respect to maritime entitlements, the State having sovereignty over an archipelago, based on the archipelago as a unit, may claim full maritime entitlement to a territorial sea, contiguous zone, exclusive economic zone and continental shelf, regardless of the status of individual features separately under the Convention.

8 See Award of 12 July, paras.573-576.

Addressing the maritime entitlements of component features of an archipelago separately, in disregard of the unity of the archipelago and without the consent of the State having sovereignty over the archipelago, would encounter the question of the status of these features separately under the Convention.

552. Third, with respect to maritime delimitation, whether or not an archipelago is treated as a unit may have significant impact on the geographical framework and the situation for maritime delimitation between the State having sovereignty over the archipelago and relevant neighbouring States. Where there exists, on the basis of an archipelago, such a framework and situation for maritime delimitation, the status and effect of the archipelago as a unit would constitute important issues in the delimitation process. The issue in question is not the status of each and every component feature of the archipelago, but rather whether the outermost features facing the coast of a relevant neighbouring State can be used as basepoints in the delimitation. In contrast, where all the component features of an archipelago are dealt with separately, the relevant features may be characterized as "rocks" having no exclusive economic zone or continental shelf, or as low-tide elevations having no maritime entitlements, such that there may exist no maritime delimitation situation at all. Even if a delimitation situation exists, the sum total of the entitlements of all separate features, put together, could not compare to that of an archipelago as a unit, not to mention the final effect thereof.

553. In this Arbitration, the Tribunal treated the component features of China's Nansha Qundao and Zhongsha Qundao separately, denying China the benefit that would come from treating an archipelago as a unit in respect of territorial sovereignty, maritime entitlement and maritime delimitation. The Tribunal, in deciding that the relevant features of Nansha Qundao were low-tide elevations incapable of appropriation, has in effect rendered a finding on the merits with respect to territorial sovereignty over part of China's Nansha Qundao, which is beyond its jurisdiction. And it paid no regard to the fact that the interconnecting waters within the archipelago are under China's sovereignty over Nansha Qundao. Moreover, the Tribunal erred in finding that all the islands of Nansha Qundao were "rocks" having no exclusive economic zone or continental shelf, and some features were low-tide elevations with no maritime entitlements, and in denying, in effect, China maritime entitlements based upon Nansha Qundao as a unit. Adding to its mistakes, the Tribunal erroneously found that there was no overlap of maritime entitlements between China and the Philippines, and that Meiji Jiao and Ren'ai Jiao of Nansha Qundao were within the exclusive economic zone and continental shelf of the Philippines. The Tribunal's findings do violence to China's sovereignty over Nansha Qundao and China's maritime entitlements based upon the archipelago as a unit.

*I.2. The Tribunal erroneously addressed separately the status of the component features of China's Nansha Qundao and Zhongsha Qundao, fragmenting the territorial and maritime delimitation dispute*

554. As discussed in Section I of Chapter Two, there exists a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea. The Tribunal should not have addressed the status and maritime entitlements of individual features in isolation from this dispute.

555. It has been well established in international jurisprudence that the land dominates the sea. It is thus "the terrestrial territorial situation [of a feature] that must be taken as starting point for the determination of the maritime rights of a coastal State".[9] In the context of this Arbitration, the terrestrial territory is Zhongsha Qundao and Nansha Qundao each as a unit rather than a particular component feature, individually, of the two archipelagos. It is arbitrary and erroneous for the Tribunal to detach the so-called questions of the "status and entitlements of low-tide elevations"[10] and the "status of features as rocks/islands"[11] from the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and to address the status and maritime entitlements of relevant features in isolation from the issue of sovereignty over the relevant features and entitlements based on Nansha Qundao as a unit.

556. This is a fundamental mistake that set the Tribunal off in the wrong direction. It led to the following erroneous findings and serious consequences:

First, the Tribunal erroneously found that the Philippines' submissions were irrelevant to the question of sovereignty and did not concern maritime delimitation, that there existed a dispute between China and the Philippines with respect to the status and maritime entitlements of the features mentioned in the Philippines' submissions, and that it had jurisdiction over the submissions.[12]

Second, the Tribunal gravely infringed China's sovereignty and territorial integrity by having dealt with, in the manner it did, the status of component features of China's Nansha Qundao and Zhongsha Qundao.[13]

Third, the Tribunal erred in: (1) applying Articles 13 and 121 of the Convention to relevant component features of China's Nansha Qundao, and dividing them into "low-tide elevations" and "high-tide features"; (2) determining that certain features were "low-tide elevations"; (3) deciding that low-tide elevations were not capable of appropriation; (4) declaring that low-tide elevations "form part of the submerged

9 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p.40, at para.185.

10 See Award of 12 July, paras.307-309.

11 See ibid., p.175 (section heading).

12 See Chapter Two of this Study.

13 See Section II of this Chapter.

landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be"; and (5) finding that Meiji Jiao and Ren'ai Jiao, which in China's view constitute an integral part of its Nansha Qundao, were part of the exclusive economic zone and continental shelf of the Philippines.[14]

Fourth, the Tribunal erroneously interpreted and applied Article 121 (its paragraph 3 in particular) of the Convention, and determined that China's relevant islands were "rocks".[15]

## II. The status of Nansha Qundao as an outlying archipelago of China, a continental State, is well founded under general international law

557. The regime of continental States' outlying archipelagos as such is not dealt with in the Convention, but has been well established under customary international law. Since the Convention entered into force, it has continued to be regulated under customary international law and has been reaffirmed and reinforced by State practice. The Tribunal distorted China's position on its sovereignty over, and maritime entitlements based on, Nansha Qundao as a unit, failed to treat relevant component features of Nansha Qundao as its integral part, erroneously applied certain provisions of the Convention to component features of the archipelago in disregard of the well-established regime of continental States' outlying archipelagos, and finally attempted to strangle this regime by asserting the lack of State practice in its support without inquiring into such practice at all.

### *II.1. The regime of continental States' outlying archipelagos is well established*[16]

558. Article 46(b) of the Convention defines archipelago as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such". This definition is generally considered as reflecting customary international law. Already during the first United Nations Conference on the Law of the Sea in 1958, outlying archipelagos were discussed as "groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of or outer coastline of the mainland".[17] An outlying archipelago may form part of a continental State (referred to as a

14 See Section III of this Chapter.

15 See Section IV of this Chapter.

16 The data and research materials of this section draw substantially from Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013).

17 Jens Evensen, Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos, in UNCLOS I Official Records, Vol. I (1958), p.290.

continental State's outlying archipelago), or constitute in whole or in part the territory of an archipelagic State.[18] Continental States' outlying archipelagos are generally considered to have three features: first, these archipelagos are geographically situated at a distance from the coast of the relevant continent; second, these archipelagos do not constitute the entire territory of an independent and sovereign State; third, these archipelagos are under the sovereignty of an independent continental State.[19]

*II.1.A. The regime of archipelago as a unit is well established under customary international law*

559. At the latest in the 19th century, the regime of archipelago as a unit began to emerge in the practice of States outside the South China Sea. In the Proclamation of Neutrality of 16 May 1854, the King of Hawaiian Islands stated: "Our neutrality is to be respected by all Belligerents, to the full extent of Our Jurisdiction, which [ … ] is to the distance of one marine league (three miles), surrounding each of Our Islands [ … ] and includes all the channels passing between and dividing said Islands, from Island to Island [ … .]"[20] Several years later, the kings of Tonga and Fiji issued similar proclamations.[21] Denmark has been treating the Faroe Islands as a unit since it did so in a 1903 order.[22] In a delimitation agreement dated 20 October 1921 concerning the Åland Islands, the archipelago and its surrounding waters were also treated as a unit.[23] Similarly, in 1934, Ecuador claimed its territorial sea based on the Galapagos Islands which were taken as a unit.[24] It is therefore no wonder that already in *Island of Palmas (Netherlands/USA, 1928)*, the sole Arbitrator Huber pointed out that "[a]s regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit."[25]

18 "Continental State" is a juridical concept, vis-à-vis "archipelagic State", rather than a geographical one.

19 See Mohamed Munavvar, Ocean States: Archipelagic Regimes in the Law of the Sea (Nijhoff, 1995), p.136.

20 "Hawaiian Territory", http://www.hawaiiankingdom.org/hawn-territory.shtml.

21 See Laurent Lucchini and Michel Voelckel, Droit de la mer, Paris, A. Pédone, 1990, Tome I, p.359.

22 See Order No. 29 of 27 February 1903 respecting the supervision on Fisheries in the Sea surrounding the Faroe Islands and Iceland outside the Danish Territorial Sea, in UN Legislative Series ST/LEG/Ser.B/6, pp.467-468.

23 See Laurent Lucchini and Michel Voelckel, Droit de la mer, Paris, A. Pédone, 1990, Tome I, p.359.

24 See Decree No. 607 of 29 August 1934, in UN Legislative Series ST/LEG/Ser.B/6, p.478, at 480-481.

25 Island of Palmas case (Netherlands/USA), Award of 4 April 1928, RIAA, Vol. II, p.829, at 855.

560. Meanwhile, the regime of archipelago as a unit also figured importantly in the efforts to codify international law. In 1924, Alvarez from Chile proposed to the International Law Association that "in the case of an archipelago, the islands should be considered as forming a unit, and the extent of the territorial waters should be measured from the islands situated furthest from the centre of the archipelago".[26] In 1928, the *Institut de Droit International* studied the issue of archipelago as a unit, and proposed that an archipelago be taken as a unit in the establishment of the breadth of its territorial sea.[27]

The issue of delimiting the territorial sea based on an archipelago as a unit was also discussed by the delegates from different States at the 1930 Hague Conference for the Codification of International Law. The regime of archipelago as a unit received good support at the Conference, while the maximum distance allowed between the islands was subject to disagreement. The Preparatory Committee presented as a basis for discussion this regime together with the position of some States on such a distance.[28]

561. On the basis of the development of practice and theory of international law, in *Fisheries Case (United Kingdom v. Norway, 1951)*, the ICJ made a decision that lent substantial support to the regime of archipelago as a unit, and confirmed the legality of applying straight baselines to Norway's "skjærgaard", with geographical conditions similar to archipelagos.[29] This case in turn provided a boost to the strengthening and entrenchment of the regime of archipelago as a unit.[30]

562. In the International Law Commission's codification of the law of the sea, François, the Special Rapporteur on the regime of the territorial sea, discussed the issue of archipelagos in depth and then defined archipelagos (groups of islands) as follows: "The term 'groups of islands', in the juridical sense, shall be determined to mean three or more islands enclosing a portion of the sea when joined by straight lines."[31] The Commission had intended to follow up with a provision concerning groups of islands, but was unable to overcome the disagreement on the specifics regarding implementing the idea.[32] Thus, the idea of archipelago as a unit was recognized.

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26 See International Law Association, Report of 33rd Conference, 1924, pp.266 et seq.

27 See Annuaire de l'Institut de droit international, 1928, Vol. 34, pp.646 et seq.

28 See D.P. O'Connell, Mid-Ocean Archipelagos in International Law, 45 British Year Book of International Law (1971), p.1, at 9.

29 See Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p.116, at 128-130.

30 See Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.14-16.

31 Yearbook of the International Law Commission, 1954, Vol. II, p.5 (original in French).

32 See Yearbook of the International Law Commission, 1956, Vol. II, p.270.

563. Article 4 of the 1958 Convention on the Territorial Sea and Contiguous Zone provides for the method of straight baselines, which covers the idea of archipelago as a unit. The 1982 Convention establishes the regime of archipelagic States on the very foundation stone of archipelago as a unit. It codifies this idea of archipelago into a definition of archipelago in Article 46(b). By that time the regime of archipelago as a unit had been well established in customary international law. For example, before the establishment of the regime of archipelagic States, some States had applied the method of straight baselines in delimiting their territorial sea in reliance on the concept of archipelago as a unit. This concept necessarily covers continental States' outlying archipelagos. Admittedly, the 1982 Convention has not exhausted this matter, and does not address the regime of continental States' outlying archipelagos, as such. But this failure was mainly due to political reasons. The absence of provisions concerning the regime of continental States' outlying archipelagos as such in the Convention does not detract from the general implication of the concept of archipelago as a unit, or the application of this concept to continental States' outlying archipelagos.

564. In sum, the concept of archipelago as a unit is well established in international law.

*II.1.B. The Convention does not address the regime of continental States' outlying archipelagos as such*

565. The Convention and its negotiating history show that continental States' outlying archipelagos fall within "matters not regulated by this Convention" and "continue to be governed by the rules and principles of general international law", as stated in paragraph 8 of the preamble to the Convention.

*(1) The issue of continental States' outlying archipelagos was shelved during the negotiation of the Convention*

566. The proposals made in the early period of the Third United Nations Conference on the Law of the Sea covered all kinds of archipelagos without distinguishing between island States' archipelagos and continental States' outlying archipelagos.[33] This approach reflected the state of the practice that both island States and continental States drew straight baselines around their archipelagos.[34] As the Conference proceeded, some States opposed applying the regime of archipelagos to all archipelagos

33 See Working paper co-sponsored by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway, A/CONF.62/L.4, UNCLOS III Official Records, Vol. III, pp.82-83.

34 Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.30 (internal note 104).

without distinction. These States mainly included maritime powers[35] and States neighbouring the outlying archipelagos of continental States.[36] Those States endorsed the application of the regime of archipelagos to island States only, not to outlying archipelagos of continental States. That endorsement ultimately culminated in the regime of archipelagic States in the Convention. However, the majority of the States were only concerned about the availability of innocent passage in the interconnecting waters within an archipelago.[37]

567. The Second Committee summarized the positions of States in a working paper, essentially presenting alternative applications of the archipelagic concept solely to archipelagic States or to all, including continental States' outlying archipelagos.[38] The informal Working Group on Archipelagos, consisting of island States and maritime powers, focused its discussion on the specific conditions for applying the regime of archipelagic States and the right of passage through archipelagic waters, without addressing the issue of continental States' outlying archipelagos.[39]

The consensus reached by the informal Working Group was incorporated into the 1975 Informal Single Negotiating Text (ISNT), in which archipelagic States and

35 C.F. Amerasinghe, The Problem of Archipelagos in the International Law of the Sea, 23 International & Comparative Law Quarterly (1974), p.539, at 544; J.A. Roach and R.W. Smith, Excessive Maritime Claims, 3rd edition (Martinus Nijhoff Publishers, 2012), p.203.

36 These States mainly include Turkey (neighbouring Greece's Aegean archipelago), Thailand and Myanmar (neighbouring India's Andaman and Nicobar Islands), and Bulgaria and Pakistan. See respectively, 39th plenary meeting, UNCLOS III Official Records, Vol. I, pp.169-170, paras.29 and 42 (Turkey); 36th meeting of the Second Committee, UNCLOS III Official Records, Vol. II, p.262, para.22 (Bulgaria), p.265, para.70 (Thailand); 37th meeting of the Second Committee, UNCLOS III Official Records, Vol. II, p.266, para.7 (Myanmar), p.270, para.51 (Pakistan).

37 See 36th meeting & 37th meeting of the Second Committee, UNCLOS III Official Records, Vol. II, pp.260-273.

38 See Appendix I: Working Paper of the Second Committee: Main Trends (originally issued as Doc.A/CONF.62/C.2/WP.1), Doc.A./CONF.62/L.8/Rev.1, UNCLOS III Official Records, Vol. III, pp.136-138. Provisions 202 and 204 of this document contained the following three formulae dealing with the issue of outlying archipelagos. Formula A of provision 202 provided that, "These articles apply only to archipelagic States." Formula B provided that, "A coastal State with one or more off-lying archipelagos, as defined in article … (provision 203, formula A, paragraph 2) which form an integral part of its territory, shall have the right to apply the provisions of articles … to such archipelagos upon the making of a declaration to that effect". Formula C provided that, "The method applied to archipelagic States for the drawing of baselines shall also apply to archipelagos that form part of a State, without entailing any change in the natural régime of the waters of such archipelagos or of their territorial sea".

39 See Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.34-35.

outlying archipelagos of continental States were treated as separate issues in two sections. Section 1 focused on archipelagic States and stipulated the application of archipelagic baselines and the sovereign character of the waters enclosed by the baselines. Section 2 concerning continental States' outlying archipelagos contained only one article (Article 131), which provided that, "The provisions of section 1 are without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental State".[40] This article was deleted in the 1976 Revised Single Negotiating Text (RSNT).[41] From that point on, no provisions on continental States' outlying archipelagos were found in the subsequent drafts or the text of the Convention itself.

568. In fact, during the negotiation of the Convention, continental States possessing outlying archipelagos, despite their significant stake, did not have the opportunity to participate in the discussion in the informal Working Group on Archipelagos, which drove the course of the negotiation.[42] This finds expression in the express complaint Ecuador made in the Resumed Eighth Session of the Third Committee that relevant delegations were excluded from the discussion on the issue of archipelagos.[43]

569. The negotiating history shows that the regime of archipelagic States established in the Convention reflects the balancing of conflicting interests between archipelagic States and maritime powers.[44] Part IV of the Convention only applies to archipelagic States, and the issue of continental States' outlying archipelagos falls within the matters not regulated by the Convention.

*(2) Continental States defended the regime of outlying archipelagos during the negotiation of the Convention*

570. As discussed above, some continental States had already treated their outlying archipelagos each as a unit before the Third United Nations Conference on the Law of the Sea started. During the negotiation, it was the consensus among the continental States possessing outlying archipelagos that the regime of outlying archipelagos should be incorporated into the forthcoming Convention. At the early stage of the negotiation, those continental States expressly maintained that the proposed regime of archipelagos in the forthcoming Convention should apply to all archipelagos without

40 Informal single negotiating text, part II, A/CONF.62/WP.8/Part II, UNCLOS III Official Records, Vol. IV, p.170.

41 See Revised single negotiating text (part II), Doc.A/CONF.62/WP.8/Rev.1/Part II, Chapter VII, UNCLOS III Official Records, Vol. V, pp.170-172.

42 Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.34.

43 42nd meeting of the Third Committee, UNCLOS III Official Records, Vol. XII, pp.44-45, paras.42-47.

44 See Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.42-49.

distinction.[45] In the 27th plenary meeting of 1974, India made a proposal, explicitly stating that, "No distinction should be made between an archipelago that constituted a single State and an archipelago that formed an integral part of a coastal State, nor should an archipelago at some distance from the coastal State be treated differently from one located near a coastal State."[46] The Chinese delegation proposed that, "An archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it."[47]

571. After the issue of continental States' outlying archipelagos was excluded from the negotiation on archipelagos, relevant continental States expressed strong oppositions and repeatedly requested the Conference to reopen the discussion on this issue. For example, France was recorded to state that "the régime [of archipelagos] should be applicable to all archipelagos, whatever their type and location, because their problems were similar".[48] Ecuador noted that the issue of continental States' archipelagos had "merely been touched on", despite its importance for many States.[49] Spain requested that the Conference consider the issue of continental States' outlying archipelagos and recommended the establishment of a negotiating group for this purpose.[50] Greece's representative pointed out that "the question of archipelagos belonging to continental States had not yet been settled in the informal composite negotiating text; he had no objection to the relevant provisions which dealt only with archipelagic States, but felt that a fair solution should be found for other archipelagos, as they suffered serious injustice."[51]

572. After the regime of archipelagic States was put in shape, continental States still persisted in requesting equal treatment for their outlying archipelagos in the forthcoming Convention. Even during the last two sessions, a number of States made such

45 Such States include India, Canada, China, Greece, Spain, France, Australia, Portugal, Ecuador, Peru, Argentina, Venezuela and Honduras. See respectively, 27th plenary meeting, UNCLOS III Official Records, Vol. I, p.96, para.8 (India), p.98, para.23 (Canada); 31st plenary meeting, UNCLOS III Official Records, Vol. I, p.125, para.52 (China); 37th meeting of the Second Committee, UNCLOS III Official Records, Vol. II, p.266, para.5 (Portugal), p.267, para.16 (Ecuador), p.268, para.24 (Peru), p.272, para.83 (Argentina); 40th meeting of the Second Committee, UNCLOS III Official Records, Vol. II, p.286, para.1 (Venezuela); 3rd meeting of the Second Committee, UNCLOS III Official Records, Vol. II, p.100, para.17 (Honduras).

46 27th plenary meeting, UNCLOS III Official Records, Vol. I, p.96, para.8.

47 31st plenary meeting, UNCLOS III Official Records, Vol. I, p.125. para.52.

48 36th plenary meeting, UNCLOS III Official Records, Vol. II, p.263. para.46.

49 90th plenary meeting, UNCLOS III Official Records, Vol. IX, p.16, para.123.

50 See 91st plenary meeting, UNCLOS III Official Records, Vol. IX, p.18, para.21.

51 103rd plenary meeting, UNCLOS III Official Records, Vol. IX, p.65, para.48.

requests. In the Tenth Session, Ecuador maintained that whereas a special regime was being set up for archipelagic States by the Conference, there existed no valid legal reason to discriminate against archipelagos forming part of the territory of a State and that identical geographical formations must be accorded identical treatment.[52] Greece and Cape Verde expressed their support for Ecuador's position.[53] In the Eleventh Session, India, Spain and Ecuador stated that it was unfair to continental States possessing outlying archipelagos for the Conference to have their outlying archipelagos excluded from the archipelagic regime.[54] At the final stage of the Conference, relevant continental States solemnly declared that the question of outlying archipelagos belonging to continental States had not yet been settled.[55]

573. The aforementioned negotiating history shows that the Convention does not regulate the issue of continental States' outlying archipelagos as such, and continental States have effectively preserved the regime of outlying archipelago as a unit during the negotiation.

*II.1.C. The regime of continental States' outlying archipelagos is well established under customary international law*

574. Customary international law consists of or is evidenced by "a general practice accepted as law".[56] As the ILC stated, "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."[57] Both constituent elements are present regarding the status of continental States' outlying archipelagos as units.

*(1) State practice concerning the status of outlying archipelagos as units*

575. As discussed above, before the adoption of the Convention, the status of continental States' outlying archipelagos each as a unit had been established in customary international law. Since the adoption of the Convention, the practice of continental States with respect to their outlying archipelagos has strengthened the relevant rules of customary international law. As highlighted in Table 1 below, the more significant

52 See 135th plenary meeting, UNCLOS III Official Records, Vol. XIV. p.19, para.1.

53 See UNCLOS III Official Records, Vol. XIV, 136th plenary meeting, p.38, para.110 (Greece); 139th plenary meeting, p.64, para.37 (Cape Verde).

54 See UNCLOS III Official Records, Vol. XVII, 187th plenary Meeting, p.38, para.8 (India); 190th plenary Meeting, p.90, para.100 (Spain), pp.96-97, paras.196, 200 (Ecuador).

55 Ibid. See also, 103rd plenary meeting, UNCLOS III Official Records, Vol. IX, p.65, para.48 (Greece).

56 Statute of the International Court of Justice, article 38(1)(b).

57 Report of the International Law Commission on the work of its sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/71/10, p.82.

instances of State practice in drawing straight and/or special baselines for their outlying archipelagos or in taking them as integral units in legislation include:

a. Denmark (Faroe Islands; Sjaelland and Laesø Islands)

Denmark has been treating the Faroe Islands as a unit since it did so in a 1903 order.[58] In 1963, Denmark through Ordinance No. 156 established the system of straight baselines for the Faroe Islands, with the longest segment being 60.8 nautical miles (nm). In 1976, Denmark through Ordinance No. 599[59] revised the system of straight baselines promulgated in 1963, with the longest segment being 61 nm. In 2003, Denmark through Executive Order No. 680[60] established the system of straight baselines around the Sjaelland and Laesø Islands.

b. Ecuador (Galapagos Islands)

Ecuador has been treating the Galapagos Islands as a unit for the measurement of its territorial sea since 1934.[61] In 1971, Ecuador through Supreme Decree No. 959-A[62] applied straight baselines to the Galapagos Islands. The longest segment is 124 nm, and the average 69 nm. The island of Darwin, approximately 90 nm from the main part of the islands, is situated within the baselines thus drawn.

c. Norway (Svalbard)

In 1970, Norway through a decree applied a system of straight baselines to the western and southern parts of Svalbard. In 2001, Norway through a new decree[63] extended the application of this system to the whole archipelago. To be specific, one single system of straight baselines is drawn around the three main islands of the archipelago, while three separate systems are drawn around three groups of islands situated at a distance from the main part of the archipelago.

d. Spain (Balearic Islands; Canary Islands)

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58 See Order No. 29 of 27 February 1903 respecting the supervision on Fisheries in the Sea surrounding the Faroe Islands and Iceland outside the Danish Territorial Sea, in UN Legislative Series ST/LEG/Ser.B/6, pp.467-468.

59 See Ordinance No. 599 of 21 December 1976 on the Delimitation of the Territorial Sea around the Faroe Islands, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_1976_Ordinance599.pdf.

60 See Executive Order No. 680 of 18 July 2003 amending Executive Order No. 242 of 21 April 1999 concerning the Delimitation of Denmark's Territorial Sea, in Law of the Sea Bulletin, No. 53 (2003), pp.44-53.

61 See Decree No. 607 of 29 August 1934, in UN Legislative Series ST/LEG/Ser.B/6, pp. 478-481.

62 Supreme Decree No. 959-A of 28 June 1971 prescribing straight baselines for the measurement of the Territorial Sea, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1971_Decree.pdf.

63 See Regulations Relating to the Limits of the Norwegian Territorial Sea Around Svalbard, Royal Decree of 1 June 2001, in Law of the Sea Bulletin, No. 46 (2001), pp.72-80.

In 1977, Spain through Royal Decree No. 2510[64] established a system of straight baselines for delimiting the territorial sea around the Balearic Islands. Two separate sets of straight baselines are applied to two subgroups in the Balearic Islands, with the longest segment measuring 39 nm.

By virtue of the above decree, Spain also established a system of straight baselines for delimiting the territorial sea at the Canary Islands. The decree provides for the drawing of separate sets of straight baselines for four large islands and prescribes a system of nine straight baselines joining six relatively smaller islands together, with the longest baseline segment measuring 43.4 nm. Act No. 15 on the Economic Zone of 1978 provides that "in the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands and islets forming the archipelagos".[65] Law 44/2010 of Spain on the waters of the Canary Islands establishes a system of 20 straight baseline segments joining a series of points of the islands and islets forming the Canary archipelago.[66]

e. France (Kerguelen Islands; Guadeloupe; New Caledonia)

In 1978, France through Decree No. 78-112[67] established a system of straight baselines for the Kerguelen Islands. In 1999, Decree No. 99-324[68] established a system of straight baselines for Guadeloupe. In 2002, Decree No. 2002-827[69] established separate sets of straight baselines for New Caledonia, with the longest segment measuring 36 nm.

64 See Royal Decree No. 2510/1977 of 5 August 1977, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1977_Decree.pdf.

65 See Act No. 15/1978 on the Economic Zone, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1978_Act.pdf.

66 See Law 44/2010 of 30 December of Canary Islands waters; Boletón Oficial del Estado, Num. 318, Ser. I, pp.109237-109240, as quoted in Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.128.

67 See Decree No. 78-112 of 11 January 1978, as quoted in Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.117.

68 See Decree No. 99-324 to determine the baselines from which the breadth of the French territorial sea adjacent to the Martinique and Guadeloupe regions is measured, 21 April 1999, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/FRA_1999_Decree.pdf.

69 See Decree No. 2002-827 of 3 May 2002—Decree defining the straight baselines and closing lines of bays used to determine the baselines from which the breadth of French territorial waters adjacent to New Caledonia is measured, in Law of the Sea Bulletin, No. 53 (2003), p.58.

f. Australia (Houtman Abrolhos Islands; Furneaux Group)

In 1983, Australia through the Proclamation of the inner limits (the baseline)[70] applied a system of straight baselines to the Houtman Abrolhos Islands. According to this Proclamation, Australia also applies a system of straight baselines in the east-south sector of the Furneaux Group, but not in the northern sector.

g. Portugal (Azores; Madeira Islands)

In 1985, Portugal through Decree-Law No. 495/85[71] applied various sets of archipelagic baselines to Azores and to the Madeira Islands, with the longest segment measuring 62 nm.

h. Argentina (Islas Malvinas (in dispute[72]))

In 1991, Argentina through Act No. 23.968 established separate sets of straight baselines for the two main islands and their respective adjacent islands of the Islas Malvinas.[73]

i. United Kingdom (Turks and Caicos Islands; Falkland Islands (in dispute[74]))

In 1989, the United Kingdom through the Turks and Caicos Islands (Territorial Sea) Order[75] established a system of special baselines for measuring the territorial sea around the archipelago by using a combination of low-water lines and straight baselines, with the longest straight baseline measuring 29.8 nm. In the same year, the United Kingdom through the Falkland Islands (Territorial Sea) Order[76] applied a system of 21 straight baselines for measuring the territorial sea of its occupied Falkland Islands, with the longest segment measuring around 41.2 nm.

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70 See Proclamation of 4 February 1983 (Proclamation of the inner limits (the baseline)), pursuant to section 7 of the Seas and Submerged Lands Act 1973, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUS_1983_Proclamation.pdf.

71 See Decree-Law No. 495/85 of 29 November 1985, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PRT_1985_Decree.pdf. This decree indicates "Azores Archipelagic Baselines" and Madeiras Archipelagic Baselines, yet fails to clarify the nature of the waters within such "Archipelagic Baselines".

72 Argentina and the United Kingdom have territorial disputes over this archipelago, which is named "Falkland Islands" by the United Kingdom.

73 Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.122.

74 The United Kingdom and Argentina have territorial disputes over this archipelago, which is named "Islas Malvinas" by Argentina.

75 See United Kingdom, Statutory Instruments, 1989, No. 1996, http://www.legislation.gov.uk/uksi/1989/1996/made.

76 See Falkland Islands (Territorial Sea) Order 1989, United Kingdom, Statutory Instruments, 1989, No. 1993, http://www.legislation.gov.uk/uksi/1989/1993/made.

j. China (Xisha Qundao; Diaoyu Dao and its affiliated islands)

In 1958, China through the Declaration on Territorial Sea[77] established the system of straight baselines for all China's territories, including Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao. China's Law on Territorial Sea and Contiguous Zone of 1992[78] provides that the method of straight baselines shall be employed in drawing the baselines of China's territorial sea. In 1996, China announced the straight baselines of the territorial sea adjacent to its Xisha Qundao,[79] with the longest segment measuring 68.5 nm. In 2012, China announced the straight baselines of the territorial sea adjacent to its Diaoyu Dao and the affiliated islands.[80]

k. India (Andaman and Nicobar Islands; Lakshadweep Islands)

In 2009, India established straight baseline systems for the Andaman and Nicobar Islands, and the Lakshadweep Islands.[81] The longest segment of the former measures 84.7 nm, and that of the latter 113.7 nm.

l. Myanmar (Preparis and Co Co Islands Groups)

In 2008, Myanmar through the State Peace and Development Council Law No. 8/2008[82] established straight baseline systems for the Preparis and Co Co Islands Groups.

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77 See Declaration of the Government of the People's Republic of China on China's Territorial Sea (4 September 1958), paras.2 and 4, in Renmin Ribao, 5 September 1958, p.1.

78 See Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China (25 February 1992), articles 2 and 3, http://law.npc.gov.cn/FLFG/flfgByID.action?flfgID=140&keyword=领海及毗连区法&zlsxid=01.

79 See Deposit of lists of geographical coordinates as contained in the Declaration on the Baselines of the Territorial Sea of the People's Republic of China of 15 May 1996, in Law of the Sea Bulletin, No. 32 (1996), pp.37-40.

80 See Statement of the Government of the People's Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, 10 September 2012, in Law of the Sea Bulletin, No. 80 (2012), pp.30-31.

81 See Act No. 80 of 28 May 1976 (Territorial Waters, Continental Shelf, EEZ and other Maritime Zones Act); Notification of the Ministry of External Affairs of 11 May 2009 concerning the baseline system, in Law of the Sea Bulletin, No. 71 (2010), pp.26-31; Notification of the Ministry of External Affairs of 11 May 2009 concerning the baseline system Corrigendum, in Law of the Sea Bulletin, No. 72 (2010), p.80. See also, Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.137-138. India has currently only declared the straight baselines in the western part of the Andaman and Nicobar Islands, and it said that the straight baselines in the eastern part of the archipelago would be notified separately.

82 See Law Amending the Territorial Sea and Maritime Zones Law of 5 December 2008 (The State Peace and Development Council Law No. 8/2008), in Law of the Sea Bulletin, No. 69 (2009), pp.69-73.

m. Eritrea (Ethiopia) (Dahlak Archipelago)

According to Ethiopia's Federal Revenue Proclamation No. 126 of 1952, the seaward limit of the territorial waters of the Dahlak archipelago is constituted by the quadrilateral consisting of lines joining the outermost islands.[83] On declaring its independence, the State of Eritrea incorporated into its maritime law the limits that had been in effect in Ethiopia.[84] Eritrea has not provided any specific information in respect to the baselines around the Dahlak Archipelago, nor has it drawn the baselines on a chart.

n. Sudan

Sudan's Territorial Waters and Continental Shelf Act of 1970 provides for the application of straight baselines to its groups of islands.[85]

o. Iran

1993 Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea provides that the waters between the adjacent islands belonging to Iran shall constitute the internal waters of Iran.[86]

p. Syria

Syria's Law No. 28 of 2003 provides that the internal waters of Syria include the waters between its adjacent islands.[87]

q. United Arab Emirates

Federal Law No. 19 of 1993 of the United Arab Emirates (UAE) provides that the internal waters of the State include the waters between the adjacent islands belonging to UAE.[88]

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83 See Federal Revenue Proclamation No. 126 of 1952, as quoted in Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.135-136.

84 As described in Sophia Kopela, ibid., p.135 (internal note 128).

85 See Territorial Waters and Continental Shelf Act, 1970, art. 6 (g), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_1970_Act.pdf.

86 See Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993, art. 3, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf.

87 See Law No. 28 dated 19 November 2003—Definition Act of Internal Waters and Territorial Sea Limits of the Syrian Arab Republic, art. 2, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/syr_2003e.pdf.

88 See Federal Law No. 19 of 1993 in respect of the delimitation of the maritime zones of the United Arab Emirates, 17 October 1993, art. 2(4), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARE_1993_Law.pdf.

89 See Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The %20 United%20 Nations%20 Convention%20on%20 the%20Law%20 of%20 the%20Sea.

**Table 1** State practice in drawing special baselines for continental States' outlying archipelagos (Source: Compiled by the author)

| No. | State | Name of outlying archipelago | Type of baselines | Year of drawing baselines or legislation | Year of ratifying or accessing to UNCLOS[89] |
|---|---|---|---|---|---|
| 1 | Denmark | Faroe Islands | unit concept | 1903 | 2004 |
| | | | one set of straight baselines | 1963/1976 | |
| | | Sjaelland and Laesø Islands | one set of straight baselines | 2003 | |
| 2 | Ecuador | Galapagos Islands | unit concept | 1934 | 2012 |
| | | | one set of straight baselines | 1971 | |
| 3 | Norway | Svalbard | separate sets of straight baselines | 1970/2001 | 1996 |
| 4 | Spain | Balearic Islands | separate sets of straight baselines | 1977 | 1997 |
| | | Canary Islands | one set of straight baselines | 1977/2010 | |
| 5 | France | Kerguelen Islands | one set of straight baselines | 1978 | 1996 |
| | | Guadeloupe | one set of mixed baselines | 1999 | |
| | | New Caledonia | separate sets of straight baselines | 2002 | |
| 6 | Australia | Houtman Abrolhos Islands | one set of straight baselines | 1983 | 1994 |
| | | Furneaux Group | one set of mixed baselines | 1983 | |
| 7 | Portugal | Azores and Madeira Islands | separate sets of archipelagic baselines | 1985 | 1997 |
| 8 | United Kingdom | Turks and Caicos Islands | one set of mixed baselines | 1989 | 1997 |
| | | Falkland Islands (in dispute) | one set of straight baselines | 1989 | |
| 9 | Argentina | Islas Malvinas (in dispute) | separate sets of straight baselines | 1991 | 1995 |
| 10 | China | Xisha Qundao | one set of straight baselines | 1996 | 1996 |
| | | Diaoyu Dao and its affiliated islands | separate sets of straight baselines | 2012 | |
| 11 | India | Andaman and Nicobar Islands | straight baselines (incomplete) | 2009 | 1995 |
| | | Lakshadweep Islands | one set of straight baselines | | |
| 12 | Myanmar | Preparis and Co Co Islands Groups | separate sets of straight baselines | 2008 | 1996 |
| 13 | Ethiopia/ Eritrea | Dahlak Archipelago | archipelagic unity provided in legislation; baselines not yet specified | 1952/1991 | — |
| 14 | Sudan | various archipelagos | archipelagic unity provided in legislation; baselines not yet specified | 1970 | 1985 |
| 15 | Iran | various archipelagos | archipelagic unity provided in legislation; baselines not yet specified | 1993 | 1998 |
| 16 | Syria | various archipelagos | archipelagic unity provided in legislation; baselines not yet specified | 2003 | — |
| 17 | UAE | various archipelagos | archipelagic unity provided in legislation; baselines not yet specified | 1993 | — |

*(2) The State practice and associated opinio juris are more than sufficient to establish the regime of continental States' outlying archipelagos as one under customary international law*

576. The general, consistent and continuing State practice and associated *opinio juris* are more than sufficient to establish the regime of continental States' outlying archipelagos as one under customary international law.

(a) Generality and consistency of State practice

577. As to the generality of State practice, there is no strict requirement for the number of participating States in the formation of customary international law, and emphasis is placed more on their representativeness in the system. The ICJ emphasized in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark, 1969)* that "a very widespread and representative participation [ … ] might suffice of itself, provided it included that of States whose interests were specially affected".[90] As to the importance of the practice of specially affected States, the Special Rapporteur of the Asian-African Legal Consultative Organization (AALCO) Informal Expert Group (IEG) on Customary International Law noted:

> The fact is that many matters might not attract any attention from those States not affected. It is also usually the case that those States specially affected by a certain matter will leave a heavier footprint in the formation of rules relating to that matter. Needless to say, those States may have to shoulder greater burden than others. Naturally their concerns and their conduct deserve special consideration.[91]

578. Conclusion 8 of the ILC Draft Conclusions on Identification of Customary International Law adopted on first reading in 2016 states that "[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent".[92] As to the "widespread and reprsentative" requirement, the ILC commented that, "It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include *those that had an opportunity or possibility of applying the alleged rule*."[93] Sir Michael Wood, the Special Rapporteur, pointed out that "it very well may be that only a relatively small number of States

90 North Sea Continental Shelf cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969, p.3, at para.73.

91 Sienho Yee, Report on the ILC Project on "Identification of Customary International Law", 14 Chinese Journal of International Law (2015), p.375, at para.48.

92 Report of the International Law Commission on the work of its sixty-eighth session, 2 May–10 June and 4 July–12 August 2016, A/71/10, p.94.

93 Ibid., pp.94-95 (internal citation omitted; emphasis added).

engage in a practice, and the inaction of others suffices to create a rule of customary international law."[94]

579. Therefore, in evaluating the generality of State practice of treating outlying archipelagos as units in drawing baselines, it is the practice of those continental States possessing outlying archipelagos that is the most relevant. Only such States are, in the words of the ILC, "those that had an opportunity or possibility of applying the alleged rule", and "States whose interests were specially affected". According to our statistics, there are some 20 continental States possessing outlying archipelagos, and at least 17 of them have treated their outlying archipelagos as units and adopted the method of straight baselines in drawing baselines, or treated their outlying archipelagos as units in their legislation. In addition, Greece clearly advocated that continental States' outlying archipelagos should be treated equally during the Third United Nations Conference on the Law of the Sea.[95] Only a limited number of States, such as the United States, New Zealand and Russia, do not treat their outlying archipelagos as units, and separately draw baselines for each island.[96] The practice of this overwhelming majority of continental States possessing outlying archipelagos more than satisfies the requirement of "a very widespread and representative participation". Meanwhile, as discussed below, such practice is genenerally not objected by States possessing no outlying archipelagos.

580. With respect to the consistency of State practice, the ILC noted that "complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform [ … ]".[97] The overwhelming majority of continental States possessing outlying archipelagos have drawn baselines (especially straight baselines) around their outlying archipelagos as units, or treated their outlying archipelagos as units in their legislation. Some States have adopted a special system of mixed baselines which embody the archipelagic unit concept, taking account of the geographical conditions.

581. With respect to the time element, Conclusion 8 of the ILC Draft Conclusions states: "Provided that the practice is general, no particular duration is

94 Second report on identification of customary international law, by Michael Wood, Special Rapporteur, A/CN.4/672, para.53.

95 See, e.g., 103rd plenary meeting, UNCLOS III Official Records, Vol. IX, p.65, para.48; 136th plenary meeting, UNCLOS III Official Records, Vol. XIV, p.38, para.110.

96 These States and their outlying archipelagos are: United States (Hawaiian Islands, Aleutian archipelago, Florida Keys, Midway Islands, Virgin Islands), New Zealand (Cook Islands), and Russia (Franz Josef Land). See Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), p.140.

97 Report of the International Law Commission on the work of its sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/71/10, p.96.

required."[98] The practice of drawing baselines around continental States' outlying archipelagos as units is not only general, but also has a long pedigree. As early as in 1903, Denmark started to treat the Faroes Islands as a unit. Later on, States such as Ecuador, Ethiopia (Eritrea) and Norway followed. In 1958, China declared the application of straight baselines to its outlying archipelagos including Nansha Qundao. During the negotiation of the Convention, Denmark and Ecuador drew their straight baselines on the basis of their previous practice. Over the same period, Spain and France also did so around their outlying archipelagos as units. From the conclusion of the Convention in 1982 to its entry into force in 1994, Australia, Portugal, the United Kingdom and Argentina drew baselines around their outlying archipelagos as units. Subsequent to the entry into force of the Convention, China reaffirmed in its legislation that the system of straight baselines apply to its outlying archipelagos, and drew such baselines around Xisha Qundao and Diaoyu Dao and its affiliated islands. France, India and Myanmar also drew baselines around their outlying archipelagos as units. All these States have continued to treat their outlying archipelagos as units since their ratification of the Convention. None has ever deviated from this practice.

(b) *Opinio juris*

582. Acceptance as law (*opinio juris*) is the other constituent element of customary international law. It refers to the requirement that "the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a conviction that it is permitted, required or prohibited by customary international law."[99] The general, consistent and continuing practice of drawing baselines (straight baselines in particular) around continental States' outlying archipelagos as units is also accompanied by the requisite *opinio juris*.

583. In fact, the existence of *opinio juris* is reflected in the consistency and recurrence of relevant States's practice in treating their outlying archipelagos as units. As discussed above, long before the Third United Nations Conference on the Law of the Sea, relevant continental States had adhered to the belief that they were entitled to draw baselines around their outlying archipelagos as units, and put it into practice. During the negotiation of the Convention, relevant States reaffirmed this belief and persistently defended their outlying archipelagos as units. The fact that the Convention does not regulate outlying archipelagos as such does not detract from the *opinio juris*. Instead, relevant States have strengthened the *opinio juris* through their practice in relation to the Convention subsequent to the adoption or their ratification of the Convention. For example, in replying to the United States' protest to its drawing of straight baselines around the Faroe Islands, Denmark explicitly stated that

98 Ibid., p.94.

99 Ibid., p.97.

"these baselines are permitted in international law".[100] In its declaration made upon ratification of the Convention in 2012, Ecuador reiterated the "full force and validity" of its 1971 Decree on the application of straight baselines to the Galapagos Islands in accordance with international law.[101]

584. The reaction of other States to a particular practice, including silence on it, also constitutes important evidence of the existence of *opinio juris*. In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore, 2008)*, the ICJ observed that "silence may also speak, but only if the conduct of the other State calls for a response".[102] Where a State is required to respond, the absence of reaction may amount to acquiescence. The ICJ in *Fisheries Case (United Kingdom v. Norway, 1951)* stated that, in the face of Norway's repeated and enduring practice of drawing straight lines, "the attitude of goverments bears witness to the fact that they did not consider it to be contrary to international law."[103] Conclusion 10 of the ILC Draft Conclusions on Identification of Customary Intenrational Law states, "Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction."[104]

585. The drawing of baselines "has always an international aspect".[105] The practice of continental States in drawing baselines around outlying archipelagos as units is known to all States.[106] States generally tolerate, acquiesce and even explicitly accept such practice. For example, Norway and the United Kingdom in their respective maritime delimitation agreements with Denmark regarding the Faroe Islands expressly recognized Denmark's treatment of the Faroe Islands as a unit.[107]

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100 American Embassy Copenhagen telegram 07435, Oct. 24, 1991 as quoted in J.A. Roach & R.W. Smith, Excessive Maritime Claims, 3rd edition (Martinus Nijhoff Publishers, 2012), p.109.

101 See Ecuador's Declaration upon ratification of the LOSC, 24 September 2012, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Ecuador%20Upon%20ratification.

102 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p.12, at para.121.

103 Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p.116, at 139.

104 Report of the International Law Commission on the work of its sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, A/71/10, p.99.

105 Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p.116, at 132.

106 For information about relevant national legislations, see Law of the Sea Bulletin and the website of the UN Division for Ocean Affairs and the Law of the Sea.

107 See, respectively, Agreement between the Government of the Kingdom of Denmark and the Government of the Kingdom of Norway concerning the delimitation of the continental shelf in the area between the Faroe Islands and Norway and concerning the boundary between the fishery zone near the Faroe Islands and the Norwegian

586. The practice of continental States in drawing baselines around their outlying archipelagos as units has only encountered sporadic, isolated and selective protests. The principal protester is the United States. It has protested against the drawing of straight baselines by some States such as Ecuador (Galapagos Islands)[108], Denmark (Faroes Islands), Portugal (Azores, and Madeira Islands)[109] and China (Xisha Qundao,[110] and Diaoyu Dao and its affiliated islands[111]), but not all. These protests are selective and inconsistent.[112] They are largely aimed at ensuring the access of US military vessels and aircraft to the major oceans and seas in the world.

*(3) Continental States' full maritime entitlements based on their outlying archipelagos as units*

587. It has been established in customary international law that continental States' outlying archipelagos as units are fully entitled to maritime zones, including internal waters, territorial sea, exclusive economic zone and continental shelf. This is reflected in some maritime delimitation agreements involving outlying archipelagos. For example, Denmark claims entitlements, based on the Faroe Islands as a unit, to an exclusive economic zone (fishery zone) of 200 nautical miles and a continental shelf, and

economic zone (signed on 15 June 1979; entry into force on 3 June 1980), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-NOR1979CS.PDF; Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to Maritime Delimitation in the Area between the Faroe Islands and the United Kingdom (signed on 18 May 1999; entry into force on 21 July 1999), Preamble, paragraph 2, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/DNK.htm.

108 See American Embassy Quito Note delivered on 24 February 1986, State Department telegram 033256, 3 February 1986, American Embassy Quito telegram 01651, 25 February 1986, as quoted in J.A. Roach & R.W. Smith, Excessive Maritime Claims, 3rd edition (Martinus Nijhoff Publishers, 2012), p.109.

109 See Excerpt from the State Department telegram 266998, Aug. 25, 1986 delivered to the American Embassy Lisbon in the fall of 1986, as quoted in J.A. Roach & R. W. Smith, Excessive Maritime Claims, 3rd edition (Martinus Nijhoff Publishers, 2012), p.108.

110 See Maritime Claims Reference Manual (2016), http://www.jag.navy.mil/organization/documents/mcrm/ChinaNov2016.pdf.

111 Ibid.

112 The United States drew straight baselines around the Ryukyu Islands which was then under the administration of the United States. See Ordinance No. 68 (29 February 1952), Article 1; United States Civil Administration of the Ryukyu Islands, Office of the Deputy Governor, Civil Administration Proclamation No. 27: Geographical Boundaries of the Ryukyu Islands (25 December 1953), Articles I, II; Ordinance No. 125 (11 February 1954), Article 6; Ordinance No. 144 (16 March 1955), Article 2.1.9.

has reached delimitation agreements with Norway[113] and the United Kingdom[114] respectively. Norway claims entitlements to an exclusive economic zone (fishery zone) of 200 nautical miles and a continental shelf based on the Svalbard archipelago as a unit, and has reached delimitation agreements with Denmark (Greenland)[115] and Russia[116] respectively. These agreements give effect, in various degrees, to the full entitlements of the outlying archipelagos as units involved.

*II.2. The status of China's Nansha Qundao as an outlying archipelago has been well established*

*II.2.A. China's Nansha Qundao meets the criteria of archipelagos in customary international law*

588. As stated earlier, "archipelago" is defined in Article 46(b) of the Convention as "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such". This definition in the Convention is a codification of customary international law, and is generally recognized as also applicable to continental States' outlying archipelagos. China's Nansha Qundao is such an archipelago.

113 See Agreement between the Government of the Kingdom of Denmark and the Government of the Kingdom of Norway concerning the Delimitation of the Continental Shelf in the Area between the Faroe Islands and Norway and concerning the Boundary between the Fishery Zone near the Faroe Islands and the Norwegian Economic Zone (15 June 1979), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-NOR1979CS.PDF.

114 See Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to Maritime Delimitation in the Area between the Faroe Islands and the United Kingdom (18 May 1999), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/DNK-GBR1999MD.PDF.

115 See Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard (20 February 2006), UNTS, Vol. 2378, No. 42887, pp.30-32.

116 See Treaty between the Russian Federation and the Kingdom of Norway concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean (15 September 2010), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF.

*(1) Nansha Qundao is one "intrinsic geographical, economic and political entity"*

589. Nansha Qundao forms one geographical entity. Located in the central and southern part of the South China Sea, Nansha Qundao covers an area extending from Xiongnan Jiao of Liyue Tan in the north to the area of Zengmu Ansha in the south, and from Wan'an Tan in the west to Haima Tan in the east. Among Nanhai Zhudao, Nansha Qundao is the largest archipelago in terms of the number of islands and reefs and the size of geographical area. Nansha Qundao consists of nearly 200 features including islands, reefs, shoals and banks. Geographically, Nansha Qundao possesses all the characteristics of an archipelago, i.e., formed by islands, reefs, cays, banks, interconnecting waters and other natural features. Geologically, Nansha Qundao is mainly constituted by coral reefs. Islands, cays, reefs and banks surround each other, forming atolls, and lagoons are walled within them. Smaller atolls often form parts of a larger group of reefs. These special geographical and geological characteristics further enhance the connection between components of Nansha Qundao, that between various natural features, and that between natural features and relevant waters. By geographical characteristics, Nansha Qundao is fully qualified as an archipelago, that is, the various components and interconnecting waters are so closely interrelated that such islands, waters and other natural features form a geographical entity.

590. Nansha Qundao forms one economic and political entity. Historically, it is Chinese people who first discovered Nansha Qundao, and have been engaging in production activities in Nansha Qundao and its adjacent waters. The Chinese government in successive periods has exercised jurisdiction over Nansha Qundao. *Geng Lu Bu*, which came into being and circulation at the latest in the Ming Dynasty, shows that Chinese fishermen's production activities in Nansha Qundao are such that its islands, reefs, banks, cays and interconnecting waters have formed a well-knit economic network.[117] These Chinese people have treated Nansha Qundao as their home throughout the thousands of years of their production activities therein. Chinese activities in Nansha Qundao, including the production activities by Chinese people and the exercise of jurisdiction by the Chinese government, show China's longstanding treatment of Nansha Qundao as a political and economic entity, for exploration, exploitation and administration. After World War II, in 1946 and 1947, the Chinese government recovered and resumed the exercise of sovereignty over Nanhai Zhudao including Nansha Qundao which was once illegally occupied by Japan. Since its founding, the People's Republic of China has exercised jurisdiction over Nansha Qundao through its successive administrative units such as the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao; the Revolutionary Committee of Xisha Qundao, Nansha Qundao and Zhongsha Qundao of Guangdong Province; the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao; and the Sansha

117 See this Study, Chapter Four, Section III.

City. In response to some States infringing upon China's sovereignty over Nansha Qundao or intruding into relevant waters of Nansha Qundao for economic activities, the Chinese government has, without fail, issued protests and statements reaffirming China's indisputable sovereignty over Nansha Qundao and its adjacent waters.[118]

591. In sum, China's Nansha Qundao is one "intrinsic geographical, economic and political entity".

*(2) Nansha Qundao historically has been regarded as one entity*

592. China's Nansha Qundao historically has been regarded as one entity. This is clear from relevant State practice and international instruments.

593. Chinese people historically have regarded Nansha Qundao as one entity. A great number of China's ancient maps clearly depict Nansha Qundao as one entity named "*Wanshengshitangyu*" (ten thousand-li rocky reefs) (e.g., *Zheng He Hang Hai Tu* (Zheng He's Nautical Charts)),[119] or "*Wanlishitang*" (ten thousand-li rocky reefs) (e.g., *Da Qing Wan Nian Yi Tong Tian Xia Quan Tu* (Map of the Eternally Unified All-under-heaven of the Great Qing Empire)),[120] or "*Wanlichangsha*" (ten thousand-li sand cays) (e.g., *Qing Hui Fu Zhou Xian Ting Zong Tu* (Qing Dynasty Atlas of Prefectures, Cities, Counties, and Districts)).[121] Since the early 20th century, the Chinese government has published three times (in 1935, 1947 and 1983) the groupings of islands and reefs in Nanhai Zhudao, and what is now known as Nansha Qundao has always been treated as one entity with its usual components, although the names have been adjusted from time to time.[122] In short, the Chinese government has always administrated Nansha Qundao as one entity.

594. The archipelagic unit status of China's Nansha Qundao is also widely acknowledged and recognized in the international community. For example, Japan invaded and illegally occupied Nanhai Zhudao during its war of aggression against China. In December 1943, China, the United States and the United Kingdom solemnly demanded in the Cairo Declaration that all the territories Japan had stolen

118 See, e.g., Renmin Ribao (People's Daily), 16 August 1951, 17 July 1971, 12 January 1974, 21 January 1974, 5 February 1974, 1 April 1974, 8 May 1974, 3 July 1974, 15 June 1976, 29 December 1978, 27 April 1979, 27 September 1979, 30 January 1980, 22 July 1980, 29 November 1982.

119 See Han Zhenhua et al (eds.), Woguo Nanhai Zhudao Shiliao Huibian [Collection of Historical Archives Concerning China's Nanhai Zhudao] (Dongfang Press, 1988), p.86.

120 See ibid., p.88.

121 See ibid., p.84.

122 Geographical Names Commission, Guangdong Province (ed.), Nanhai Zhudao Diming Ziliao Huibian [Collection of Materials Regarding the Geographical Names of China's Nanhai Zhudao] (Guangdong Cartographic Publishing House, 1987), pp.38-61.

from the Chinese shall be restored to China. In July 1945, China, the United States and the United Kingdom issued the Potsdam Proclamation. That Proclamation explicitly declares in Article 8: "The terms of the Cairo Declaration shall be carried out." After Japan announced its acceptance of the Potsdam Proclamation and its unconditional surrender, China recovered Nansha Qundao once illegally occupied by Japan. In 1951, with respect to the United States-British Draft Peace Treaty with Japan, Foreign Minister Zhou Enlai, pointed out that "as a matter of fact, just like all the Nan Sha Islands, Chung Sha Islands and Tung Sha Islands, Si Sha Islands (the Paracel Islands) and Nan Wei Island (Spratly Island) have always been China's territory, occupied by Japan for some time during the war of aggression waged by Japanese imperialism, they were all taken over by the then Chinese Government, following Japan's surrender", "Whether or not the United States-British Draft Treaty contains provisions on this subject and no matter how these provisions are worded, the inviolable sovereignty of the People's Republic of China over Nan Wei Island (Spratly Island) and Si Sha Islands (the Paracel Islands) will not be in any way affected."[123] Nansha Qundao as one entity is reflected in the San Francisco Peace Treaty of 1951. Article 2 of the Treaty states: "Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands."[124] This is also reflected in the "Treaty of Peace" signed by Japan and China's Taiwan authorities in 1952. Article 2 of this "Treaty" states: "It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951 [ … ], Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands."[125] Japan, in the 1972 Joint Communiqué of the Government of the People's Republic of China and the Government of Japan, reiterated its adherence to the terms of Article 8 of the Potsdam Proclamation. This is in fact a further recognition of China's resumption of the exercise of sovereignty since the end of World War II.

595. China's territorial sovereignty over Nansha Qundao as one entity has been expressly recognized by States surrounding the South China Sea. The above-mentioned official publication by China in 1935, 1947 and 1983 of groupings of islands and reefs, with what is now known as Nansha Qundao treated always as one entity with its usual components, triggered no objection from other States. On 4 September

123 See Renmin Ribao (People's Daily), 16 August 1951, p.1.

124 Treaty of Peace with Japan (signed at San Francisco on 8 September 1951), article 2 (f), in UNTS, Vol. 136, No. 1832, p.50.

125 "Treaty of Peace" between Japan and China's Taiwan authorities (signed at Taipei on 28 April 1952; entered into force on 5 August 1952, by the exchange of the instruments of ratification at Taipei), article 2, in UNTS, Vol. 138, No. 1858, p.38.

1958, China promulgated the Declaration on China's Territorial Sea, explicitly providing that the breadth of China's territorial sea shall be twelve nautical miles, that the straight baselines method shall be employed to determine the baselines of territorial sea, and that such provisions shall apply to all territories of the People's Republic of China, including Nansha Qundao. Ten days later, Pham Van Dong, Premier of the Government of the Democratic Republic of Viet Nam, solemnly stated in a diplomatic note to Zhou Enlai, Premier of the State Council of China, that the Vietnamese government "recognizes and supports" the Declaration of the Chinese government on China's Territorial Sea and "respects this decision".[126] And some States have expressly recognized China's sovereignty over Nansha Qundao as one entity. For example, on 4 February 1974, the then Indonesian Foreign Minister Adam Malik stated to AFP that,

> *si nous regardons les cartes actuelles, ells montrent que les deux archipels des Paracels [Xisha Qundao] et des Spratleys [Nansha Qundao] appartiennent à la Chine [; … ] cela signifie que, pour nous, ces archipels appartiennent à la République populaire de Chine.*[127]

*II.2.B. China has territorial sovereignty over, and maritime rights and entitlements based on, Nansha Qundao as a unit*

596. China has territorial sovereignty over Nansha Qundao as a unit. The geographical scope of China's Nansha Qundao is clear. When the Philippines designated some islands and reefs of China's Nansha Qundao and large areas of their surrounding waters as "Kalayaan Island Group", China immediately pointed out, and has maintained the position, that the so-called "Kalayaan Island Group" claimed by the Philippines is in fact part of China's Nansha Qundao, and the Philippines' occupation of some islands and reefs of China's Nansha Qundao as well as other related acts constitute infringement upon China's territorial sovereignty.

597. China has declared in accordance with international law that the straight baselines method employed for measuring the breadth of its territorial sea applies to Nansha Qundao. Both China's Declaration on Territorial Sea of 1958[128] and its Law

126 The note sent on 14 September 1958 by Premier of the Government of the Democratic Republic of Viet Nam Pham Van Dong to Premier Zhou Enlai of the State Council of the People's Republic of China, reproduced at http://www.fmprc.gov.cn/nanhai/chn/snhwtlcwj/W020140608602937535933.zip.

127 AFP, La Position de L'Indonesie, AFP/SLN/%22, 4 February 1974; also quoted in China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea, para.52, http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm.

128 Paragraph 2 of this Declaration provides that "China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight lines

of Territorial Sea and Contiguous Zone of 1992[129] provide that the straight baselines method shall be employed for measuring the breadth of the territorial sea, and that it is applicable to all China's territory including Nansha Qundao.

598. China has full maritime entitlements based on Nansha Qundao as a unit. This position is clear and consistent. For example, the Permanent Mission of China to the United Nations, in Note Verbale No. CML/8/2011 addressed to the Secretary-General of the United Nations, stated that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[130]

599. After the Tribunal rendered its award on 12 July 2016, the Chinese government issued a statement reaffirming China's territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia:

i. China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
ii. China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao;
iii. China has exclusive economic zone and continental shelf, based on Nanhai Zhudao;
iv. China has historic rights in the South China Sea.[131]

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connecting base-points on the mainland coast and on the outermost coastal islands; the water area extending twelve nautical miles outward from this baseline is China's territorial sea. The water areas inside the baseline, including Bohai Bay and the Qiongzhou Straits, are Chinese inland waters." Paragraph 4 expressly provides that the aforestated system of straight baselines apply to Nansha Qundao: "The principles provided in paragraphs (2) and (3) likewise apply to Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands, and all other islands belonging to China."

129 Article 2 of this Law provides in part: "The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China." Article 3 provides in part: "The method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China." http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm.

130 Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011).

131 Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (12 July 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm.

*II.3. The Tribunal erred in applying certain provisions of the Convention to China's Nansha Qundao*

*II.3.A. The Tribunal misinterpreted China's position on Nansha Qundao as a unit*

600. As discussed above, China enjoys maritime entitlements based on Nansha Qundao as a unit.

601. With regard to the Philippines' submissions requesting the Tribunal to determine the maritime entitlements of certain individual features of Nansha Qundao separately, China maintained:

> [I]n respect of the Nansha Islands, the Philippines selects only a few features and requests the Arbitral Tribunal to decide on their maritime entitlements. This is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole.[132]

China also expressly pointed out:

> The Philippines, by requesting the Arbitral Tribunal to determine the maritime entitlements of only what it describes as the maritime features "occupied or controlled by China", has in effect dissected the Nansha Islands. It deliberately makes no mention of the rest of the Nansha Islands, including those illegally seized or claimed by the Philippines. Its real intention is to gainsay China's sovereignty over the whole of the Nansha Islands, deny the fact of its illegal seizure of or claim on several maritime features of the Nansha Islands, and distort the nature and scope of the China-Philippines disputes in the South China Sea. In addition, the Philippines has deliberately excluded from the category of the maritime features "occupied or controlled by China" the largest island in the Nansha Islands, Taiping Dao, which is currently controlled by the Taiwan authorities of China. This is a grave violation of the One-China Principle and an infringement of China's sovereignty and territorial integrity. This further shows that the second category of claims brought by the Philippines essentially pertains to the territorial sovereignty dispute between the two countries.[133]

602. In order to establish its jurisdiction, the Tribunal denied that the Philippines' focus only on some maritime features necessarily carries implications for China's sovereignty over Nansha Qundao,[134] and distorted China's position. With respect to China's position as articulated in its Note Verbale No. CML/8/2011 that "China's

132 China's Position Paper, para.19.

133 Ibid., para.22.

134 See Award on Jurisdiction, para.154.

Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf",[135] the Tribunal mused in paragraph 160 of its Award on Jurisdiction that China generally argues that "China's Nansha Islands [are] [*sic*] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[136] In quoting China's position, the Tribunal deliberately changed the singular form "is" which is used in the English version of China's note verbale into the plural form "are", thus distorting China's position that it enjoys maritime entitlements based on Nansha Qundao as a unit into one based on the individual features of Nansha Qundao. The Tribunal mused again in paragraph 169 of its Award on Jurisdiction that "China has set out its view on the status of features in the Spratly Islands as a group, stating that 'China's Nansha Islands [are] [*sic*] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.'"[137] Once again, the Tribunal deliberately changed the singular form "is" in China's note verbale into the plural form "are".

Thus, the Tribunal quoted twice China's Note Verbale No. CML/8/2011 to show China's position on this issue, and twice it changed the singular form "is", which is used in the English version of the note verbale and clearly shows the unity of Nansha Qundao, into the plural form "are", which would dismember Nansha Qundao into various individual features ostensibly for entitlement purposes, but with consequences reaching the entire regime of outlying archipelagos. The Tribunal's deliberate distortion of China's position was only to cater to the Philippines' position and the need to establish jurisdiction.

*II.3.B. The Tribunal erred in applying the Regime of Islands in the Convention to individual features of China's Nansha Qundao to deny its status as a unit*

603. Nansha Qundao as a unit is China's outlying archipelago. It is wrong for the Tribunal to dismember or dissect it into various individual features, and apply the Regime of Islands in the Convention to them.

604. The Tribunal distorted China's position on Nansha Qundao as a unit, misinterpreted it as one on Nansha Qundao as a loose group of "high-tide features", excluding the interconnecting waters and other component features. The Tribunal said in its Award of 12 July that China's position could be understood that "the criteria of human habitation and economic life [of Article 121(3)] must be assessed while bearing in mind that a population may sustain itself through the use of a network of closely related maritime features".[138] The Tribunal further said that it "has not

135 Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011).

136 Award on Jurisdiction, para.160.

137 Ibid., para.169.

138 Award of 12 July, para.572.

limited its consideration to the features specifically identified by the Philippines in its Submissions, but requested the Philippines to provide detailed information on all of the significant high-tide features in the Spratly Islands".[139] Here, it is clear from these statements that the Tribunal only focused on the "high-tide features" of Nansha Qundao, and did not treat it as an archipelago. Furthermore, as will be discussed below, the Tribunal considered that the system of straight baselines could not be applied to outlying archipelagos. Through these steps, the Tribunal dismembered Nansha Qundao.

605. The Tribunal erred in dismembering China's Nansha Qundao into various individual features and applying Article 121 of the Convention to them, so as to deny Nansha Qundao archipelagic unity. Article 121 of the Convention is not applicable to continental States' outlying archipelagos and their components. *Virginia Commentary* points out that "Article 121 applies [ … ] to individual islands, not to groups of islands coming within the scope of article 46, on archipelagos".[140] If Article 121 of the Convention is applied to component features of an outlying archipelago, it is impossible to provide sufficient protection for archipelagic unity. Such an application would in effect result in refashioning geography by dismembering the outlying archipelago. This would deprive the continental State of sovereignty over the archiepalgo as one entity, and may also affect the geographical scope of the area under its sovereignty. As noted by Kopela, the solution of functional maritime zones on the issue of archipelagos cannot provide outlying archipelagos with the equal protection as the regime of archipelagos.[141]

*II.3.C. The Tribunal erred in applying the rules on baselines in the Convention to deny China's Nansha Qundao unity*

*(1) The Tribunal decided* ultra vires *on matters regarding the drawing of baselines for China's Nansha Qundao*

606. The Tribunal said, "China's statements could also be understood as an assertion that the Spratly Islands should be enclosed within a system of archipelagic or straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit."[142] Because the Philippines did not raise any

139 Ibid (internal citation omitted).

140 Satya N. Nandan and Shabtai Rosenne (eds.), Virginia Commentary, Vol. III, article 121, p.326, para.121.1.

141 Sophia Kopela, Dependent Archipelagos in the Law of the Sea (Martinus Nijhoff Publishers, 2013), pp.236-243.

142 Award of 12 July, para.573.

issue concerning the baseline-drawing of China's Nansha Qundao in its submissions, the Tribunal had no jurisdiction to make decision on this.[143]

607. The drawing of baselines for measuring the breadth of the territorial sea is a sovereign prerogative of a coastal State, and can only be carried out by an act of that State. In *Fisheries Case (United Kingdom v. Norway, 1951)*, the ICJ noted that "the act of delimitation is necessarily a unilateral act", and "only the coastal State is competent to undertake it", although "the delimitation of sea areas has always an international aspect".[144] Here, the ICJ affirmed that the drawing of baselines is within the exclusive competence of the coastal State, although its validity depends on international law. China has promulgated that the straight baselines method shall be employed to determine the baselines of the territorial sea of Nansha Qundao, but has not published the detailed basepoints or baselines with finality. The Tribunal has no power to prejudge, on the basis of its own assumption, the validity of the baselines for China's Nansha Qundao.

*(2) The Tribunal erred in applying the rules on archipelagic baselines in the Convention to China's Nansha Qundao*

608. In interpreting China's position, the Tribunal said that China might be asserting that Nansha Qundao should be enclosed within a system of archipelagic or straight baselines and accorded an entitlement to maritime zones as a single unit. The Tribunal considered the use of archipelagic baselines untenable for the following reasons: (i) the use of archipelagic baselines provided for in the Convention is limited to archipelagic States and China, as a continental State, cannot meet the definition of an archipelagic State and cannot employ archipelagic baselines;[145] and (ii) the application of archipelagic baselines surrounding Nansha Qundao would go against the ratio of water to land requirement set out in Article 47 of the Convention, as "[t]he ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines".[146]

609. China is a continental State. The Convention's regime of archipelagic States cannot be directly applied to China, and the archipelagic baselines provisons in the Convention cannot be directly applied to China's Nansha Qundao. It is the customary international law regime of outlying archipelagos that should be applied. The Tribunal erred in fixating its eyes only on the specific water-to-land ratio requirement under Article 47 of the Convention, without inquiring into customary international law on this issue.

143 See this Study, Chapter Two, Section VI.

144 Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p.116, at 132.

145 See Award of 12 July, para.573.

146 Ibid., para.574.

*(3) The Tribunal erred in denying the applicability of straight baselines to outlying archipelagos*

610. The Tribunal said that Article 7 of the Convention provides the conditions for a State to apply straight baselines and it was aware of the practice of some States in employing straight baselines with respect to outlying archipelagos to approximate the effect of archipelagic baselines, but considered "any application of straight baselines to the Spratly Islands in this fashion would be contrary to the Convention".[147] The Tribunal said:

> Article 7 provides for the application of straight baselines only "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." Although the Convention does not expressly preclude the use of straight baselines in other circumstances, the Tribunal considers that the grant of permission in Article 7 concerning straight baselines generally, together with the conditional permission in Articles 46 and 47 for certain States to draw archipelagic baselines, excludes the possibility of employing straight baselines in other circumstances, in particular with respect to outlying archipelagos not meeting the criteria for archipelagic baselines. Any other interpretation would effectively render the conditions in Articles 7 and 47 meaningless.[148]

The Tribunal further said that it saw "no evidence that any deviations from this rule have amounted to the formation of a new rule of customary international law that would permit a departure from the express provisions of the Convention".[149]

611. The Tribunal erred in excluding the applicability of Article 7 of the Convention to outlying archipelagos. The Convention provides that a coastal State has the right to employ certain methods to determine the baselines for measuring the breadth of the territorial sea in accordance with the Convention. Article 7 sets the geographical conditions for the application of straight baselines; it sets no limit to the geographical scope of the application. Therefore, continental States undoubtedly can apply straight baselines to their outlying archipelagos as long as the geographical conditions are satisfied. In *Fisheries Case (United Kingdom v. Norway, 1951)*, the ICJ noted that the method of delimiting the terrtorial sea "is dictated by geographic realities".[150] As O'Connell said, "Although there is an obvious distinction between mid-ocean and coastal archipelagos, the principles utilized by the Court are not so narrow

147 Ibid., para.575.

148 Ibid.

149 Ibid., para.576.

150 Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p.116, at 128.

as to encompass only the one species."[151] Article 7, for which *Fisheries Case* provides the impetus, stipulates that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity", and the method of straight baselines may be employed. It makes no distinction between continental coasts and island/archipelagic coasts. With regard to the object and purpose of Article 7, the UN Office for Ocean Affairs and the Law of the Sea pointed out:

> [I]t is necessary to focus on the spirit as well as the letter of the first paragraph of article 7. [ … ] The concept of straight baselines is designed to avoid the tedious application of rules dealing with the normal baselines and the mouths of rivers and bays, where their application would produce a complex pattern of territorial seas.[152]

The avoidance of such a complexity is the justification for the application of straight baselines. This takes on greater poignancy with respect to outlying archipelagos. Therefore, it is unreasonable for the Tribunal to conclude, on a superficial reading of Article 7, that the straight baselines could not be applied to outlying archipelagos.

612. Furthermore, the method of straight baselines is only one method employed in drawing the baselines rather than a special regime.[153] The Tribunal's unduly narrow interpretation of Article 7 disregarded the subsequent State practice concerning the application of straight baselines. As Lowe and Tzanakopoulos observed, "[S]tate practice has tended to disregard these parameters and consider straight baselines almost as an open alternative to 'normal' baselines, in the face of rather limited objection".[154]

613. While the Tribunal had noted the practice of continental States with respect to their outlying archipelagos, it failed to examine the practice, and jumped to the conclusion that relevant practice deviated from the relevant provisions of the Convention and constituted practice contrary to those provisions, and such practice had not yet formed a new rule of customary international law.[155] In this regard, the Tribunal missed the point. As discussed above, the regime of continental States' outlying

151 D.P. O'Connell, Mid-Ocean Archipelagos in International Law, 45 British Year Book of International Law (1971), p.1, at 15.

152 UN Office for Ocean Affairs and the Law of the Sea, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea (United Nations, 1989), p.18, para.35.

153 International Law Association Committee on Baselines under the International Law of the Sea, Washington Conference Report (2014), para.20.

154 Vaughan Lowe QC and Antonios Tzanakopoulos, The Development of the Law of the Sea by the International Court of Justice, in Christian J. Tams and James Sloan (eds.), The Development of International Law by the International Court of Justice (Oxford University Press, 2013), p.177, at 190.

155 See Award of 12 July, para.576.

archipelagos is not addressed by the Convention, but by customary international law. Thus, there is no issue of this regime deviating from the Convention. The fact is, as demonstrated above, the regime of continental States' outlying archipelagos has been well established in customary international law. This is undeniable.

## III. The Tribunal erred in separately addressing certain "low-tide elevation" components of Nansha Qundao (Submissions No. 4 to 6)

614. With respect to the Philippines' Submissions No. 4 to 6 which concern low-tide elevations, the Tribunal in the Award of 12 July declared: Hughes Reef (Dongmen Jiao), Gaven Reef (South) (Nanxun Jiao (the southern part)), Subi Reef (Zhubi Jiao), Mischief Reef (Meiji Jiao) and Second Thomas Shoal (Ren'ai Jiao) were low-tide elevations, and were not features capable of appropriation, and did not generate entitlements to a territorial sea, exclusive economic zone, or continental shelf; Subi Reef (Zhubi Jiao), Gaven Reef (South) (Nanxun Jiao (the southern part)), and Hughes Reef (Dongmen Jiao) might be used as the baseline for measuring the breadth of the territorial sea of the relevant high-tide features; and Mischief Reef (Meiji Jiao) and Second Thomas Shoal (Ren'ai Jiao) were within the Philippines' exclusive economic zone and continental shelf.[156]

615. All these so-called "low-tide elevations" as determined by the Tribunal are components of China's Nansha Qundao. As elaborated in Section I of this Chapter, the Tribunal committed the fundamental mistake of disregarding the unity of Nansha Qundao, resulting in dismembering, in effect, the archipelago through such errors as applying Articles 13 and 121 of the Convention to certain component features, which the Tribunal categorized into "low-tide elevations" and "high-tide features", and further determining that some were "low-tide elevations" incapable of appropriation. The most important premise for the Tribunal's conclusion is that low-tide elevations were "submerged landmass" and thus incapable of appropriation. The Tribunal's approach would have detrimental effect on China's sovereignty over and maritime rights and entitlements based on the archipelago.

### *III.1. The Tribunal erred in dismembering Nansha Qundao by addressing its component features separately and characterizing certain of its component features as "low-tide elevations"*

#### *III.1.A. The Tribunal erred in dismembering Nansha Qundao by addressing its component features separately*

616. Article 13(1) of the Convention provides, "A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but

156 Ibid., para.1203.B.(3)-(7).

submerged at high tide." Article 121(1) provides, "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." These two definitions are provided in these provisions for the purpose of characterizing individual features. However, if an individual feature forms an integral part of an archipelago, the status of that feature can only be determined within the bigger framework of the archipelago. Thus, these two definitions cannot be applied directly to component features of an archipelago for sovereignty and maritime entitlement purposes.

617. The Tribunal individually addressed and determined the status of Dongmen Jiao, Nanxun Jiao, Zhubi Jiao, Meiji Jiao, and Ren'ai Jiao, merely based on their own physical characteristics. Whatever these physical characteristics may be, they cannot be the sole basis on which the Tribunal could decide on the status of the features. The Tribunal confused a feature's physical characteristics with its status. Because relevant features constitute an integral part of China's Nansha Qundao, the Tribunal's approach would in effect dismember the archipelago.

*III.1.B. The Tribunal's decision that certain features of Nansha Qundao were "low-tide elevations" is not well founded in fact*

618. In the course of determining whether certain features of Nansha Qundao were "low-tide elevations", the Tribunal, considering that the evidence presented by the Philippines such as satellite imagery was insufficient to establish the relevant fact,[157] took the initiative to seek as the main evidence the historical materials from certain surveys done by the British, Japanese and United States navies. These historical materials included the records of surveys in respect of certain features and maritime areas of China's Nansha Qundao, undertaken by the British Royal Navy between 1862 and 1868, by the British Royal Navy and the Japanese Navy in the 1920s and 1930s, and by the French and the United States navies in the 1930s, as well as certain published nautical charts and sailing directions.[158] Obviously, those materials are too old to serve as the evidence for determining the physical characteristics of certain features of Nansha Qundao.

619. The ICJ elaborated on the probative value of age-old materials in *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*. The Court said that, in determining the physical characteristics of relevant maritime features, it did not "consider that surveys conducted many years (in some cases many decades) before the present proceedings are relevant in resolving that issue",[159] and that "what is relevant to the issue before it is the contemporary evidence."[160] Therefore, as far as the determination

157 See ibid., para.326.

158 See ibid., para.329.

159 See Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.35.

160 Ibid., at para.36.

of the physical characteristics of maritime features is concerned, age-old materials should not be considered relevant. The Tribunal in this Arbitration took note of the ICJ's above observation, but shuffled it aside on the pretext that "they must be understood in the context of that case",[161] without explaining why the two cases were different or giving any other reasons. The Tribunal's *modus operandi* obviously deviated from the international jurisprudence on this point and did so without justification.

620. Moreover, the records of surveys, sailing directions and nautical charts were made for the primary purpose of assisting sailing and ensuring navigation safety, rather than determining the physical characteristics of maritime features. They were of no probative value for the latter purpose. In *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*, the ICJ pointed out:

> Nor does the Court consider that the charts on which Nicaragua relies have much probative value with regard to that issue. Those charts were prepared in order to show dangers to shipping at Quitasueño, not to distinguish between those features which were just above, and those which were just below, water at high tide.[162]

The Tribunal acknowledged that the records served "the purpose of sailing directions in enabling visual navigation",[163] but it ignored the ICJ's teaching on their lack of value for determining the status of the features involved. The Tribunal not only viewed these records as relevant evidence and gave them extremely high probative value, but also took them as the only and conclusive evidence. This stands in sharp contrast to the approach of the ICJ.

621. Accordingly, the Tribunal's determination that certain features of Nansha Qundao were "low-tide elevations" is not well founded in fact.

### *III.2. The Tribunal erred in finding that certain "low-tide elevations" of Nansha Qundao were incapable of appropriation*

622. With respect to the question whether low-tide elevations are capable of appropriation, the Tribunal held in Paragraph 309 of the Award of 12 July:

> [N]otwithstanding the use of the term "land" in the physical description of a low-tide elevation [in the Convention], such low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be. Accordingly, and as distinct from land territory, the Tribunal subscribes to the view that "low-tide elevations

161 Award of 12 July, para.331.

162 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.35.

163 Award of 12 July, para.338.

> cannot be appropriated, although 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself'."

The quotation is from Paragraph 26 of the ICJ's Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*.

623. The five "low-tide elevations" referred to in the Philippines' submissions are, in fact, component features of Nansha Qundao, over which China has sovereignty. Therefore, there is no issue of whether these features *individually* are capable of appropriation. The Tribunal erred in approaching this issue in this way and deciding that these features were incapable of appropriation. Furthermore, even if it could approach these features individually, the Tribunal's decision that they were incapable of appropriation is not well founded in law.

*III.2.A. The Tribunal erred in finding that certain features of Nansha Qundao were incapable of appropriation*

624. As elaborated in Section II of this Chapter, an archipelago constitutes a unit in law. A State's sovereignty over an archipelago extends to the whole archipelago including all its component features, whether they are "high-tide features", in the words of the Tribunal, or "low-tide elevations".

625. This finds clear support in international jurisprudence. In *Minquiers and Ecrehos (United Kingdom/France, 1953)*, the ICJ gave due regard to the Minquiers group as a dependency of British Channel Islands when it found that the sovereignty over the Minquiers group belongs to the United Kingdom.[164] In *The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of the Dispute (1998)*, the tribunal found that those low-tide elevations situated outside the territorial sea of the mainland or islands, together with other features forming a particular group, belonged to the party having sovereignty over that group.[165] In *Territorial and Maritime Dispute (Nicaragua v. Columbia, 2012)*, in the light of the fact that relevant international treaties had settled the sovereignty over the San Andrés Archipelago, the ICJ stated that "in order to address the question of sovereignty over the maritime features in dispute, the Court needs first to ascertain what constitutes the San Andrés Archipelago".[166]

626. In this Arbitration, rather than first ascertaining what constitutes Nansha Qundao, the Tribunal disregarded that question and misplaced its focus on

164 The Minquiers and Ecrehos case, Judgment of November 17th, 1953, I.C.J. Reports 1953, p.47, at 71.

165 See Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, RIAA, Vol. XXII, p.209, at para.527.

166 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.42.

ascertaining the physical characteristics of certain component features of Nansha Qundao one by one, determining some of them as "low-tide elevations", and, on such a basis, declaring that these "low-tide elevations" were incapable of appropriation. In so doing, the Tribunal does violence to international jurisprudence, and its decision would in effect dismember China's Nansha Qundao.

*III.2.B. The Tribunal's decision that individual low-tide elevations were incapable of appropriation is groundless*

627. Whether or not an individual low-tide elevation is capable of appropriation is itself a question of sovereignty and, as elaborated in Sections I and II of Chapter Two, is beyond the jurisdiction of the Tribunal. The Tribunal, in its Award of 12 July, quoted from Paragraph 26 of the ICJ's judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*:

> [A]s distinct from land territory, the Tribunal subscribes to the view that "low-tide elevations cannot be appropriated, although 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself'."[167]

628. The Tribunal, just based on such a single case, jumped to the conclusion that "low-tide elevations" could not constitute the territory of a coastal State and were incapable of appropriation. It seems that the Tribunal enshrined the general and abstract statement by the ICJ in *Nicaragua v. Colombia* as a "sacred rule". In effect, the ICJ's statement in that case was neither necessary nor well-founded in law. Actually, the ICJ had until then addressed the issue of the sovereignty over only those low-tide elevations situated within the overlapping territorial sea, and its relevant cases do not exclude the possibility that low-tide elevations are capable of appropriation.

629. In *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)*, the question was presented whether low-tide elevations can be appropriated as territory, and the ICJ confirmed that there existed no treaty law or customary rules with respect to the issue. The ICJ stated:

> International treaty law is silent on the question whether low-tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations. It is only in the context of the law of the sea that a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast.[168]

167 Award of 12 July, para.309 (internal citation omitted).

168 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p.40, at para.205.

In the following cases such as *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras, 2007)*[169] and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore, 2008)*,[170] the ICJ in whole or in part quoted and followed the aforementioned statement in its judgments. However, such an important statement was completely ignored in *Territorial and Maritime Dispute (Nicaragua v. Columbia, 2012)*.[171] Surprisingly, the ICJ offered no explanation.

630. In *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001),* although the ICJ indicated that low-tide elevations are different from islands, it did not exclude the possibility that low-tide elevations were capable of appropriation. The ICJ stated:

> It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable.[172]

The ICJ further pointed out:

> The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands.[173]

The Court herein found that low-tide elevations were not "territory in the same sense" as islands, solely on the basis of their different entitlements attributed by the law of the sea. The Court's statement did not squarely address the question of whether or not low-tide elevations can be appropriated as territory.[174]

169 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.141.

170 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p.12, at para.296.

171 See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.26.

172 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p.40, at para.206.

173 Ibid.

174 Judge Oda in his Separate Opinion observed: "I believe that the questions of whether sovereignty over an islet or a low-tide elevation may be acquired through appropriation by a State and how such features can affect the extent of the territorial sea or the boundary of the territorial sea remain open matters." Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Separate Opinion of Judge Oda, I.C.J. Reports 2001, p.119, at para.7.

631. Immediately, the ICJ put some emphasis on the possible existence of other rules and legal principles that can make a difference:

> It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.[175]

This statement makes clear that there exists a possibility that low-tide elevations can be fully assimilated with islands or other land territory under certain applicable rules and legal principles.

632. With respect to the "low-tide elevations" involved in the Philippines' submissions, the conditions that the ICJ had in mind in the phrase "in the absence of" are present; in fact, there exist the "other rules and legal principles" indicated by the ICJ.[176] As stated above, the relevant "low-tide elevations" are an integral part of China's Nansha Qundao; Nansha Qundao is China's outlying archipelago whose territorial status has been well established under customary international law. Under such circumstances, the Tribunal should have followed the ICJ's teaching (Paragraph 625 above) to first decide what constitutes Nansha Qundao; instead, it disregarded the well-established regime of continental States' outlying archipelagos, and one-sidedly determined the issue of territorial status only on the basis of the physical characteristics of certain component features as "low-tide elevations".

Moreover, the Tribunal also failed to pay attention to the historically formed sovereignty over or sovereign claims to the low-tide elevations in a specific maritime area. The rules concerning historic bays or titles, etc., undoubtedly also belong in the category of "other rules and legal principles" in the ICJ's mind.

633. In *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras, 2007)*, the ICJ cited the judgment in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)* to confirm that there exist no rules of customary international law with respect to whether or not low-tide elevations are capable of appropriation.[177] The Court stated that given all these

175 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p.40, at para.206.

176 Such "other rules and legal principles", not present in Qatar v. Bahrain case, were present in Eritrea/Yemen arbitration (Phase I), where the unity of maritime features and historic titles seemed to have led to attribution of sovereignty over low-tide elevations. See Award of the Arbitratal Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA, Vol. XXII, p.209, at para.527(i), (ii), (iv) and (v).

177 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.141.

circumstances, it was not in a position to make a determinative finding on the relevant issues.[178]

634. In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore, 2008)*, the ICJ recalled that it had dealt with this question in the previous cases, cited the judgment in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)*,[179] and stated:

> In view of its previous jurisprudence and the arguments of the Parties, as well as the evidence presented before it, the Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Malaysia. In this regard the Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks.[180]

635. The Court also took note that, in the Special Agreement and in the final submissions, both parties asked it to decide the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, respectively, but did not grant the Court jurisdiction to draw the line of delimitation with respect to the overlapping territorial sea of the two States.[181] The Court concluded that "sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located",[182] without finally deciding on the sovereignty over the feature for lack of jurisdiction to conduct the delimitation, a condition precedent for the sovereignty decision. It is clear that, in this case, the ICJ strictly followed its approach adopted in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)*.

636. However, in *Territorial and Maritime Dispute (Nicaragua v. Columbia, 2012)*, the ICJ only provided a conclusory statement in paragraph 26 of its judgment that "low-tide elevations cannot be appropriated".[183] In this regard, China in its Position Paper pointed out: "In its 2012 Judgment in *Nicaragua v. Columbia*, while the ICJ stated that 'low-tide elevations cannot be appropriated' [...], it did not point to any legal basis for this conclusory statement. Nor did it touch upon the legal status of low-tide elevations as components of an archipelago, or sovereignty or claims of sovereignty that may have long existed over such features in a particular maritime

178 Ibid., at paras.142, 144.

179 See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p.12, at paras.295-296.

180 Ibid., at para.297.

181 See ibid., at para.298.

182 Ibid., at para.299.

183 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.26.

area."[184] In a presentation on applicable law and Article 38 of the ICJ Statute delivered at the conference to celebrate the 70th anniversary of the ICJ's founding, a scholar observed:

> In *Nicaragua v. Columbia*, the Court did not revisit the evidence of State practice or the reasoning on the status of low-tide elevations presented in the earlier judgment quoted, although when the *Qatar v. Bahrain* case was decided Judge Oda issued a strong separate opinion stating that the status of low-tide elevations was an open question, and the *Eritrea/Yemen* arbitration award did attribute sovereignty over such features beyond the territorial seas to the parties.[185]

637. With respect to the question of whether or not low-tide elevations are capable of appropriation, the ICJ expressly indicated that there exists no treaty law or rules of customary international law on point. In the previous cases ranging from *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)* to *Territorial and Maritime Dispute (Nicaragua v. Columbia, 2012)*, the ICJ considered the specific circumstances of relevant cases and did not exclude the possibility that low-tide elevations may be capable of appropriation. In *Territorial and Maritime Dispute (Nicaragua v. Columbia, 2012)*, the ICJ stated in *obiter dictum* that "low-tide elevations are not capable of appropriation", but it did not apply the *dictum* to any specific feature, showing that the statement was unnecessary, and was not part of the holding in that case. Thus, the *dictum* does not constitute a precedent that can be invoked. The ICJ's free issuance of *obiter dicta* here runs counter to its previous cautious approach to territorial and maritime matters.

In this Arbitration, the Tribunal failed to take a careful and thorough review of the previous cases that reflect how international courts and tribunals addressed the issue in question. Instead, it rendered a groundless decision by picking an *obiter dictum* as its basis. Earlier in *The Eritrea-Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of the Dispute (1998)*, the arbitral tribunal, consisting of distinguished experts in the field, gave a decision that sovereignty over low-tide elevations forming a particular group belongs to the party having sovereignty over that group. Michael Reisman has already put a spotlight on the significance of this decision, stating that *Eritrea/Yemen Arbitration* "may be the first instance in which an authoritative decision has characterized low-tide elevations beyond the territorial sea as a territory, in effect assimilating them to islands", actually "territorializing" low-tide elevations.[186]

184 China's Position Paper, para.25.

185 Sienho Yee, Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases, 7 Journal of International Dispute Settlement (2016), p.472, at 486 (internal citation omitted).

186 Michael Reisman, The Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the

*III.3. The Tribunal erred in deciding that Meiji Jiao and Ren'ai Jiao of China's Nansha Qundao were "the submerged landmass", and formed part of the exclusive economic zone and continental shelf of the Philippines*

638. In the Award of 12 July, the Tribunal declared that low-tide elevations "form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be",[187] and that "Mischief and Second Thomas form part of the exclusive economic zone and continental shelf of the Philippines."[188] In the *dispositif*, the Tribunal upheld the Philippines' Submission No. 5, declaring "Mischief Reef and Second Thomas Shoal are within the exclusive economic zone and continental shelf of the Philippines."[189] The Tribunal's decision is erroneous.

639. As stated above, China has territorial sovereignty over Nansha Qundao and its component features, including Meiji Jiao and Ren'ai Jiao. The Tribunal's decision on these two features as two separate entities infringes China's territorial sovereignty over and maritime entitlements based on the archipelago.

640. Further, the Tribunal's decision that low-tide elevations are "submerged landmass" finds no support in either the Convention or customary international law. To the contrary, such a decision is inconsistent with the text, and runs counter to the spirit, of some provisions of the Convention.

641. The Convention contains no provision referring to low-tide elevations as "submerged landmass". Indeed, this phrase does not appear in the Convention at all; it is a creature of the Tribunal's invention. Article 13 of the Convention expressly defines a low-tide elevation as naturally formed "area of land", which is above water at low tide but submerged at high tide. Obviously, such a feature is not seabed, subsoil or "the submerged landmass".

642. In accordance with Articles 7, 13 and 47 of the Convention, low-tide elevations in certain circumstances can be used as base points, generating entitlement to a territorial sea. Under these circumstances, low-tide elevations are land territory. Thus, Bahrain argued in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001)*:

> [T]he fact that low-tide elevations may in some circumstances give rise to a territorial sea entitlement demonstrates that they form part of the territory of the State in question and that they are subject to its territorial sovereignty. Territorial sea can only exist if territorial sovereignty exists to generate it.[190]

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Proceedings (Territorial Sovereignty and Scope of the Dispute), 93 American Journal of International Law (1999), p.668, at 680.

187 Award of 12 July, para.309.

188 Ibid., para.647.

189 Ibid., para.1203.B.(7).

190 Counter-Memorial of Bahrain, 31 December 1997, para.524.

In such circumstances, low-tide elevations may also have a significant effect on maritime delimitations.

643. Neither can it be inferred from other articles of the Convention that low-tide elevations are "the submerged landmass". Other than Article 13, only Article 76 uses the term "submerged", and here it is used to describe the continental margin—"the submerged prolongation of the landmass"—and its components the "seabed, subsoil of the continental shelf [ … ]". Obviously, none of these can be considered as low-tide elevations.

644. As is well established under customary international law reflected in Article 46(b) of the Convention, China's territorial sovereignty over Nansha Qundao extends over the whole archipelago and its component features, including Meiji Jiao and Ren'ai Jiao. The Philippines' claim of exclusive economic zone and continental shelf cannot override China's territorial sovereignty over Nansha Qundao including Meiji Jiao and Ren'ai Jiao. Neither can the Tribunal's decision.

## IV. The Tribunal erroneously interpreted and applied Article 121 of the Convention (Submissions No. 3, 5 and 7)

645. The Tribunal declared that Huangyan Dao (Scarborough Shoal) and Chigua Jiao (Johnson Reef), Huayang Jiao (Cuarteron Reef), Yongshu Jiao (Fiery Cross Reef), Nanxun Jiao (the northern part) (Gaven Reef (North)) and Ximen Jiao (McKennan Reef) (including Hughes Reef) of Nansha Qundao, were "rocks" that cannot sustain human habitation or economic life of their own, as described in Article 121(3) of the Convention; and found further that all of the "high-tide features" in Nansha Qundao were such "rocks", and none generated entitlements to an exclusive economic zone or continental shelf; and that, therefore, there was no entitlement to an exclusive economic zone or continental shelf generated by any feature claimed by China that would overlap the entitlements of the Philippines in the areas of Meiji Jiao (Mischief Reef) and Ren'ai Jiao (Second Thomas Shoal).[191]

646. As elaborated in Section I of this Chapter, the Tribunal separately addressed the status and maritime entitlements of component features of Nansha Qundao and Zhongsha Qundao. Its decision in effect would dismember the two archipelagos, infringing China's territorial sovereignty and maritime rights and entitlements. The Tribunal erred in applying Article 121 of the Convention to the component features of the two archipelagos for the purpose of determining the status and maritime entitlements of these features separately.[192]

191 See Award of 12 July, para.1203.B.(6)-(7).

192 As has been observed, "Article 121 applies to [ … ] individual islands, not to groups of islands coming with the scope of article 46, on archipelagos." Satya N. Nandan and Shabtai Rosenne (eds.), Virginia Commentary, Vol. III (1995), article 121, p.326, para.121.1. The *travaux préparatoires* of the Convention also affirm this

647. This section focuses on other aspects of the Tribunal's errors, i.e., the interpretation and application of Article 121 of the Convention.

*IV.1. The Tribunal misinterpreted Article 121 of the Convention*

648. Article 121 of the Convention provides:

> Article 121
> Regime of islands
>
> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Obviously, the expression "cannot sustain human habitation or economic life of their own" in Article 121(3) is ambiguous, and the Convention does not give further explanation. Such ambiguity is intentional, as will be discussed below. International courts and tribunals, when interpreting and applying Article 121, should bear in mind that intentional ambiguity, and prudently determine "[r]ocks which cannot sustain human habitation or economic life of their own". Of course, where the physical condition of a feature clearly shows that it cannot sustain human habitation or economic life of its own, this island should no doubt be determined as a rock within the meaning of Paragragh 3. Where there is doubt as to whether a feature is a rock under Paragraph 3, which is the exception to Paragraph 2, this doubt should tip the balance in favour of finding it as an island under Paragraph 2. That is to say, if no exception can be established, the general rule naturally applies.

649. The Tribunal reached the following conclusions with respect to the interpretation of Article 121(3): (1) the use of the word "rock" does not limit the provision to features composed of solid rock;[193] (2) the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own;[194] (3) the "human habitation" in question should be non-transient and involve the

understanding. For example, Greece proposed the following provision in its draft article on the regime of islands (Article 9, paragraph 4): "The above provisions do not prejudice the régime of archipelagic islands". "Greece: draft articles", A/CONF.62/C.2/L.22, UNCLOS III Official Records, Vol. III, p.201.

193 See Award of 12 July, para.540.

194 See ibid., para.541.

inhabitation of the feature by a stable community of people;[195] (4) the "economic life" in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features, and must pertain to the feature as "of its own", and must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea;[196] (5) the ability to sustain either human habitation or an economic life of its own would suffice to entitle a "high-tide feature" to an exclusive economic zone and continental shelf;[197] (6) the capacity of a feature is necessarily an objective criterion and has no relation to the question of sovereignty over the feature;[198] (7) the capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis and the principal factors that contribute to the natural capacity of a feature would include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time, and also include the prevailing climate, the proximity of the feature to other inhabited areas and populations, and the potential for livelihoods on and around the feature;[199] (8) the capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life;[200] and (9) if the evidence of physical conditions is insufficient for features that fall close to the line between rocks and islands, the historical evidence with respect of their human habitation or economic life should be considered.[201]

650. In interpreting Article 121, the Tribunal dealt with Paragraph 3 of the article in isolation from Paragraphs 1 and 2, and, while doing so, the Tribunal rewrote, in effect, the text of Article 121(3), departing from the "legislative" intent and relevant State practice of Article 121, and going against the rules of treaty interpretation in international law.

651. As generally recognized that, this rules of treaty interpretation are codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. These two articles provide:

> Article 31
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

195 See ibid., para.542.
196 See ibid., para.543.
197 See ibid., para.544.
198 See ibid., para.545.
199 See ibid., para.546.
200 See ibid., para.547.
201 See ibid., paras.548-551.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

652. The ICJ has repeatedly affirmed that Articles 31 and 32 of the 1969 Vienna Convention reflect customary international law.[202] The International Law Commission also emphasized: "The process of interpretation is a unity and that the provisions of [Article 31 of Vienna Convention] form a single, closely integrated rule."[203]

*IV.1.A. The paragraphs of Article 121 of the Convention should be interpreted in a holistic manner*

653. Paragraph 1 of Article 121 provides for the definition of an island; Paragraph 2 stipulates that islands generate the same maritime entitlements as other land territory;

202 See, e.g., LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p.466, at para.99; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p.1045, at para.18.

203 International Law Commission, Draft articles on the law of treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p.220, at para.8.

and Paragraph 3 prescribes an exception to the application of Paragraph 2. As pointed out by the ICJ, "the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime".[204] Accordingly, the three paragraphs of Article 121 should be interpreted and applied in a holistic manner rather than in isolation. In particular, Paragraph 3, as an exception to the application of Paragraph 2, should be interpreted and applied in conjunction with the former two paragraphs.

654. According to Article 121(2), "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory." In *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain, 2001),* the ICJ pointed out: "In accordance with Article 121, paragraph 2, of the 1982 Convention on the Law of the Sea, which reflects customary international law, islands, regardless of their size, [...] enjoy the same status, and therefore generate the same maritime rights, as other land territory."[205] The general rule is that islands generate full maritime entitlements as provided for in Paragraph 2, while the provision of Paragraph 3 providing that rocks do not have full maritime entitlements constitutes the exception to this general rule. This flows from the entire text of Article 121, read in its entirety. As scholars pointed out, in treaty interpretation, "exceptions to general rules are strictly construed", or, put another way, "the general rule or principle carries more weight than its exceptions."[206]

655. The Tribunal's Award of 12 July contains a section entitled "Interpretation of Article 121 of the Convention".[207] But the Tribunal fixated its eyes on Paragraph 3 in the interpretation of the article,[208] on the pretext that "[t]he critical element of Article 121 for the Tribunal is its paragraph (3)".[209] Its interpretation of Article 121 was neither conducted in a holistic manner, nor under the "rule and exception" framework.

656. The Tribunal invented the category of "high-tide features",[210] and used it in place of "island" which is expressly provided for in the Convention. If such an "invention" is of any assistance to distinguishing between low-tide elevations and islands, it

204 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.139.

205 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p.40, at para.185.

206 Myron H. Nordquist and William G. Phalen, Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award, in Myron H. Nordquist, John Norton Moore and Ronan Long (eds.), International Marine Economy (Brill Nijhoff, 2017), p.3, at 38.

207 Award of 12 July, p.204 (section heading).

208 See ibid., paras.478-553.

209 Ibid., para.475.

210 See ibid., para.390.

is of no value at all to distinguishing "fully entitled islands" and "rocks" in the interpretation and application of Article 121;[211] instead, it provides convenience for the Tribunal to engage in problematic interpretation of that article. It is superfluous for the Tribunal to replace "islands" with "high-tide features", as all features addressed in Article 121 are "high-tide features". Its "invention" was only to help to dilute the relationship between Paragraphs 1 and 2 and to disregard the "rule and exception" relationship between Paragraphs 2 and 3. By so doing, the Tribunal, in effect, misinterpreted and distorted the regime of islands as an indivisible one.

657. When discussing Article 121(3), the Tribunal put the question as: "Does the feature in its natural form have the capability of sustaining human habitation or an economic life? If not, it is a rock."[212] The Tribunal replaced the "cannot sustain human habitation or economic life of their own" formulation in this paragraph with its "have the capability of sustaining human habitation or an economic life" formulation, changing the original requirement of proving a negative ("cannot sustain") into one of proving a positive ("have the capability of sustaining"). By putting the question this way and its subsequent analysis in searching for a positive establishment of such capacity,[213] the Tribunal altered the state of affairs to be established and the threshold for doing so, and, further, by putting the question as a stand-alone one, managed to turn upside down the established "rule and exception" relationship between Paragraphs 2 and 3. The Tribunal misinterpreted Article 121 as requiring that an island can have full entitlements only if it is positively established that it "can sustain human habitation or economic life of their own" so that any doubt would tip the balance—in the so-called "close to the line" situation[214]—in favour of finding a "rock", directly contrary to the proper interpretation of Article 121 which requires that any doubt should tip the balance in favour of finding an island under Paragraph 2, which follows from a proper treatment of the "rule and exception" relationship between Paragraphs 2 and 3. Indeed, islands should be presumed to have full maritime entitlements according to Article 121(2). Article 121(3), as the exception to Article 121(2), comes into play only when it is established that the islands in question "cannot sustain human habitation or economic life of their own".

*IV.1.B. The Tribunal rewrote, in effect, Article 121 in the name of interpretation*

658. The Tribunal acknowledged that "the scope of application of [ … ] paragraph (3) [of Article 121] is not clearly established", and proceeded to interpret this provision.[215] The Tribunal said that it must apply Articles 31 and 32 of the 1969 Vienna

211 See ibid.

212 Ibid., para.483.

213 See ibid., paras.548, 616.

214 See ibid.

215 Ibid., para.474.

Convention on the Law of Treaties.[216] But it failed to do so. It distorted its ordinary meaning and context, scrambled its object and purpose, used the *travaux préparatoires* of the Convention in a selective manner, and added requirements that are not contained in Article 121(3). It rewrote, in effect, Article 121 of the Convention in the name of interpretation.

*(1) The Tribunal added the requirements of "natural capacity" and "itself/themselves" in its interpretation of the term "cannot sustain"*

659. The Tribunal said, when examining the context of Article 121, that Articles 13 and 121 both apply to a "naturally formed area of land". The Tribunal said that "[j]ust as a low-tide elevation or area of seabed cannot be legally transformed into an island through human efforts, [ … ] a rock cannot be transformed into a fully entitled island through land reclamation", and thus, "the status of a feature must be assessed on the basis of its natural condition".[217] The Tribunal then made a further jump that "the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own."[218]

660. There is no problem with saying that an island is a "naturally formed area of land". However, one cannot make a leap to say that "the status of a feature must be assessed on the basis of its natural condition", not to mention that "the status of a feature is to be determined on the basis of its natural capacity". First of all, the status of a feature must be determined on the basis of the definition of that status. There is no such a general basis as "natural condition" or "natural capacity" that can be used for determining the status of all features. If the definition of the status of a feature is one about natural characteristics, its status can no doubt be determined on the basis of natural conditions. If the definition of the status of a feature is different, then the determination of its status must be done on a different basis. The status of a feature as a rock under Article 121(3) can only be determined on the definition given in that provision, not on any other basis. The Tribunal committed a fundamental error in distilling a "natural capacity" criterion from the term "naturally formed" used to describe the natural characteristics of low-tide elevations and islands in Articles 121(1) and 13(1) and from some other speculations that find no support in the Convention, and in adding this requirement to Article 121(3).[219]

216 See ibid., para.476.

217 Award of 12 July, para.508.

218 Ibid., para.541.

219 See Myron H. Nordquist and William G. Phalen, Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award, in Myron H. Nordquist, John Norton Moore and Ronan Long (eds.), International Marine Economy (Brill Nijhoff, 2017), p.3, at 5, 31.

661. The term "naturally formed" is used in Article 13(1) and Article 121(1) to provide an objective description of how low-tide elevations and islands are formed, and is irrelevant to the question of capacity to sustain human habitation or economic life. It is Article 121(3) that addresses this question of capacity. In the text of Article 121(3), there is no reference to "natural", nor is there any term expressly or implicitly indicating "in natural conditions" or "natural capacity".

662. The criterion of "natural capacity" is not applicable to "human habitation" or "economic life", unless human beings were to live in the natural state permanently. Human activities will necessarily alter natural conditions to some extent. In order to survive and develop, human beings have to improve their living conditions. Nature is the foundation for human survival and development. The capacity to sustain human habitation and economic life, which is based on certain natural conditions, is not a natural capacity, but a human capacity to survive and develop in a particular environment. Therefore, the part of Article 121(3) concerning "cannot sustain human habitation or economic life of their own" shall not be understood in a static manner.

663. The Tribunal's use of the "natural capacity" criterion and its related analysis made it clear that it effectively added "itself" to "cannot sustain human habitation", making it to read "itself cannot sustain human habitation". The Tribunal said, "if a feature is presently inhabited or has historically been inhabited, [it] should consider whether there is evidence to indicate that habitation was only possible through outside support."[220] The Tribunal further said: "Trade and links with the outside world do not disqualify a feature to the extent that they go to improving the quality of life of its inhabitants. Where outside support is so significant that it constitutes a necessary condition for the inhabitation of a feature, however, it is no longer the feature *itself* that sustains human habitation."[221] Here, the Tribunal interpreted the term "cannot sustain human habitation" in Article 121(3) as "*itself* cannot sustain human habitation". This interpretation is wrong. There is no textual support for using "natural capacity" or "itself" to modify "cannot sustain". Nor can the phrase "of their own", which is used in Article 121(3) to modify "economic life", be borrowed to modify "cannot sustain". "Cannot sustain" and "economic life" are two different things (namely, verb and object respectively), and cannot be confused as one.

664. The Tribunal's interpretation of "sustain economic life of [its] own" in this regard is obviously inconsistent with the conclusion in *Decision of the Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen (Iceland/Norway, 1981)*. Jan Mayen had no settled population, and was inhabited solely by technical and other staff, a small number in total, of the island's meteorologicalstation. Their inhabitation completely depended on external supply.

220 Award of 12 July, para.550.

221 Ibid. (emphasis added).

The Conciliation Commission found that Jan Mayen must be considered as an island within the meaning of Paragraphs 1 and 2 of Article 121.[222]

*(2) The Tribunal added the requirements of "settlement" and "community" in its interpretation of the term "human habitation"*

665. The Tribunal said that "the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner".[223] For the Tribunal, "with respect to 'human habitation', the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection."[224] In its view, "The term 'human habitation' should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain."[225] Here, the Tribunal added the requirements of "settlement" and "community" in its interpretation of the term "human habitation". By so doing, the Tribunal has changed the meaning of "human habitation" in Article 121(3).

666. Article 121 of the Convention makes no reference to "settlement" or "community", nor does it contain any terms which indicate that "human habitation" can be found only on the basis of the existence of a "settlement" and a "community". The Tribunal's addition of the requirement of "settlement", which requires the habitation to be non-transient, is beyond the requirement stated in the provision. Kwiatkowska and Soons, in a paper written in 1990, considered that the "human habitation" need not be "permanent". They wrote:

> [N]either should the human habitation of an island need to be permanent, for [ … ] an island (rock) is required to possess not human habitation *per se*, but the capacity to sustain human habitation, which implies that habitation of an island (rock) might not be permanent.[226]

It is thus clear that the capacity to "sustain human habitation" in the Convention refers to the capacity to sustain human habitation, not a state of habitation, whether historical or present. The Tribunal confused capacity to sustain human habitation

222 See 1981 Report and Recommendations of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen, reproduced in International Legal Materials, Vol. 20, No. 4 (1981), p.797, at 803-804.

223 Award of 12 July, para.489.

224 Ibid., para.542.

225 Ibid.

226 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands Yearbook of International Law (1990), p.139, at 166.

with a particular state of habitation. And Soons, a member of this Tribunal, had lost memory of his scholarly opinion.

The Tribunal also added a further requirement of "community". It said, "Such a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice."[227] On this point, the Tribunal cannot lay claim to originality. This idea is nothing new. As early as in the 1930s, Gidel, a French international lawyer, advocated a definition requiring an island to have the natural conditions that permit "la résidence stable de groupes humains organisés".[228] His proposal never went beyond the stage of proposal; it was not accepted at that time, nor has it ever been incorporated in any treaties or any rules of customary law.

667. The Tribunal said that the respective purposes of Article 121(3) and the exclusive economic zone were at once "best accomplished by recognising the connection between the criteria of 'human habitation' and the population of the coastal State for the benefit of whom the resources of the exclusive economic zone were to be preserved"; "without human habitation, the link between a maritime feature and the people of the coastal State becomes increasingly slight".[229]

668. The Tribunal's above statement is misleading. The exclusive economic zone is undoubtedly to serve the benefit of the population of coastal States. However, whether or not a feature can generate an exclusive economic zone is not dependent upon the population of the coastal States or human habitation on that feature, but on the conditions specified in Article 121 of the Convention, regardless of their population and level of economic development. There is no support in the Convention for the Tribunal to base an island's entitlement to an exclusive economic zone on a connection between the criteria of human habitation and the population of coastal States. Many considerations may have been debated during the Third United Nations Conference on the Law of the Sea, but what has finally appeared is the text of Article 121, and the short text of Article 121(3) cannot be extrapolated to recover the ground one side or another lost during the negotiations.

*(3) The Tribunal added the requirement of "self-contained" in its interpretation of the term "economic life of their own"*

669. With respect to "economic life of their own", the Tribunal said:

> The "of their own" component is essential to the interpretation because it makes clear that a feature itself (or group of related features) must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive

227 Award of 12 July, para.542.

228 Gilbert Gidel, Le droit international public de la mer: le temps de paix, Vol. III (Mellottée, 1934), p.684.

229 Award of 12 July, para.517.

> activities, without the involvement of a local population. In the Tribunal's view, for economic activity to constitute the economic life of a feature, the resources around which the economic activity revolves must be local, not imported, as must be the benefit of such activity. Economic activity that can be carried on only through the continued injection of external resources is not within the meaning of "an economic life of their own." Such activity would not be the economic life of the feature as "of its own", but an economic life ultimately dependent on support from the outside. Similarly, purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as "of its own".[230]

The Tribunal's above interpretation in effect added new meaning to "economic life of their own", requiring that the "economic life of their own" should be self-contained.

670. The Tribunal's interpretation of economic life of its own is too narrow. Such an interpretation finds no support either in international jurisprudence or in practice. As Oude Elfrink pointed out, "What should be determinative is not the extent of support from the outside as such, but how it relates to the resources or services the island has of its own."[231] Charney gave a detailed exposition:

> The French and Spanish texts refer respectively to *une vie économique propre* and *vida económica propia*—"an economic life of its own." They closely follow the English version, allowing the meaning to include the acquisition of necessities from outside sources, based on the economic value or resources of the feature. The Chinese text regarding economic life uses the term *wei chi*, which is translated as "sustain"; it does not use *zhi sheng* [*sic*] *wei chi*, which means "self-sustaining," indicating that this text does not require the ability to survive independently. The Chinese text does appear, however, to link the requirements of human habitation and economic life, as does the Arabic text. The Russian text employs the phrase *samostoiatel'noi khoziaistvennoi deiatel'nosti*, which may be translated as "self-sustaining economic activity." Native Russian speakers consulted seem to disagree as to whether this text, like the others, would permit the purchase of necessities from outside sources. Given the ambiguity of the Russian text, the clarity of the Chinese text, and the compatibility of the English, French, Spanish and Arabic texts, Article 121(3) ought to be

230 Ibid., para.500 (internal citation omitted).

231 Alex G. Oude Elferink, The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, https://site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/.

> interpreted to permit the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.[232]

671. The Tribunal stated that, "extractive economic activities" without the involvement of a local population did not constitute "economic life of their own". But, in reality, it often happens that nationals of a State use the resources of an island under its sovereignty which they do not inhabit. The Tribunal artificially severed the connection between an island and a population elsewhere under one sovereignty.

672. Although the Tribunal acknowledged that "economy" generally "may relate to a process or system by which goods and services are produced, sold and bought, or exchanged",[233] it erroneously limited "economic life", in the name of interpreting "of their own", to something that is done: by the local population, on the local resources, and for the local population. This in effect requires the relevant economic life to meet the standard of self-sufficiency, and reflects the Arbitrators' aspiration for traditional, self-contained, agrarian life. The economic life in the Tribunal's understanding is obviously that of a bygone era, very different from the realities of human economic life in a globalized world of the 21st century. Already in 1999, Charney taught, "economic life in this sense is not expressly limited to traditional agrarian activities".[234] The Tribunal has no right to impose a particular form of its own aspiration on China's archipelagos.

673. The Tribunal said that "the term 'economic life of their own' is linked to the requirement of human habitation, and the two will in most instances go hand in hand", and concluded that "the 'economic life' in question would ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features."[235] The Tribunal acknowledged that the two requirements of "sustain[ing] human habitation or economic life of their own" were disjunctive, "such that the ability to sustain either human habitation or an economic life of its own would suffice to entitle a high-tide feature to an exclusive economic zone and continental shelf"; however, it considered that "as a practical matter, [ … ] that a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community".[236] It is amazing that the Tribunal by the mere phrase "as a practical matter" changed the disjunctive requirements in Article 121(3), which it acknowledged, into conjunctive requirements.

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232 Jonathan I. Charney, Rocks that Cannot Sustain Human Habitation, 93 American Journal of International Law (1999), p.863, at 871.

233 Award of 12 July, para.499.

234 Jonathan I. Charney, Rocks that Cannot Sustain Human Habitation, 93 American Journal of International Law (1999), p.863, at 870.

235 Award of 12 July, para.543.

236 Ibid., para.544.

674. Just as Oude Elfrink pointed out, the Tribunal's interpretation "makes the requirement of 'economic life of their own' ancillary to the requirement of 'human habitation', instead of these being two requirements that stand on an equal footing".[237] The Tribunal deliberately emphasized the self-contained nature of "economic life", which would in effect deprive the criterion of "economic life of their own" of its independent and alternative status.

675. The Tribunal's interpretation goes against the text of Article 121(3). The language clearly uses the disjunctive "or" rather than the conjunctive "and". As Oude Elfrink observed, "the fact that article 121(3) distinguishes between the separate requirements of human habitation and economic life, indicates that there is no basis in the text of article 121(3) to justify this assumption, but rather points in the contrary direction."[238]

676. Nor does the drafting history of Article 121(3) lend any support to the Tribunal. The requirements of "human habitation" and "economic life" were introduced as separate requirements. There is no support for the Tribunal's position that the drafter intended that the phrase "economic life of their own" should be read as "economic life of their own benefiting a local population".[239]

677. Other scholars also clearly argue against giving "economic life" a status subsidiary to "human habitation". For example, Prescott and Schofield pointed out that: "This reef [Huangyan Dao] has attracted fishermen for many years and it is reasonable to assume that the rocks and the drying reefs can sustain an economic life of their own in the context of Article 121(3) of UNCLOS".[240] For reasons unknown to us, Schofield testified as an expert witness in this Arbitration against his own opinion.[241]

*(4) The Tribunal's misinterpretation in effect rewrote Article 121*

678. As the ICJ observed, international courts and tribunals are obliged to "interpret the Treaties, not to revise them".[242] Wolfrum, an arbitrator in this Arbitration, also

237 Alex G. Oude Elferink, The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, https://site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/.

238 Ibid.

239 See ibid., citing The Law of the Sea; Regime of Islands (United Nations, 1988), passim.

240 Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, 2nd edition (Martinus Nijhoff Publishers, 2005), p.434.

241 See Hearing on the Merits Tr. (Day 4), p.45.

242 Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950, p.221, at 229.

said, "interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain".[243] However, the Tribunal manifestly failed to follow this. The Tribunal's misinterpretation in effect rewrote Article 121. Paragraphs 3 of this article, in particular, would be rewritten to read: "*Only islands* which *themselves in their natural condition can* sustain *local* human *community's* habitation *and* economic life of their own *human population may* have exclusive economic zone *and* continental shelf".

679. The Tribunal's interpretation of Article 121 flagrantly violated the rules of treaty interpretation. Instead of interpreting the treaty, the Tribunal, by empowering itself to make law, in effect, rewrote relevant provisions of the Convention in the name of interpreting the treaty. As will be detailed below, the Tribunal's interpretation goes against the intent of negotiating States and finds no support in State practice.

*IV.1.C. The Tribunal's interpretation goes against the intent of the negotiating States*

680. As the Tribunal acknowledged, "Article 121 [of the Convention] has not previously been the subject of significant consideration by courts or arbitral tribunals and has been accorded a wide range of different interpretations in scholarly literature. As has been apparent in the course of these proceedings, the scope of application of its paragraph (3) is not clearly established".[244] This situation obviously calls for resort to the draft history of and circumstances of conclusion relating to Article 121. The Tribunal's interpretation finds no support in the drafting history; to the contrary, it goes against the intent of negotiating States.

681. "Deliberate ambiguity" characterized the intent of negotiating States surrounding Article 121(3), as is clear from the simple, skeletal text of the provision, already discussed, and the negotiating history. During the negotiating process of the Convention, a draft provision that later became Article 121(3) of the Convention, also called "rocks-provision", was incorporated into the Informal Single Negotiating Text (ISNT) as Article 132(3) therein by the Chairman of the Second Committee, Andres Aguilar of Venezuela, on the basis of the previous discussions during the Third United Nations Conference on the Law of the Sea.[245] On this issue, the negotiating States split into two groups: (1) some States advocated the same legal

243 The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, ITLOS Case No. 1, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para.24 (internal citation omitted).

244 Award of 12 July, para.474 (internal citation omitted).

245 See Informal single negotiating text, part II, Article 132, A/CONF.62/WP.8/Part II, UNCLOS III Official Records, Vol. IV, pp.170-171.

treatment of insular and continental territory and proposed, accordingly, to delete the rocks-provision;[246] (2) the other States advocated the determination of the legal status of islands according to their size, geological characteristics, population and the economic life they sustain and proposed further clarification of the rocks-provision.[247] The proposals submitted by the two opposing groups of States, however, did not make it into the Revised Single Negotiating Text (RSNT) (Article 128(3)) or the Informal Composite Negotiating Text (ICNT) (Article 121(3)), where the rocks-provision remained unchanged. The President of the Conference Hamilton Shirley Amerasinghe noted in his Explanatory Memorandum to the 1979 revision of the ICNT that the regime of islands "had not yet received adequate consideration and should form the subject of further negotiation during the resumed session".[248] Although a few States later submitted the proposal of either clarifying or deleting or allowing reservations to Article 121(3),[249] their effort ended in failure. This draft in the ICNT ultimately became Article 121(3) of the Convention.

682. The negotiating history of the Convention makes it clear that on the issue of the definition of island, there were two totally different opinions. Some States advocated that islands should be distinguished according to their size, geological characteristics, population and the economic life they sustain, and that only certain islands can be given full entitlements. Such an opinion was not generally supported. In fact, some States objected and claimed to reserve the traditional definition of island for their national interests, and that adopting "flexible criteria" and "complex forms" may

246 This group of States includes Japan, Greece, France, Cyprus, United Kingdom, Brazil, Zambia, Iran, Portugal, and Ecuador. See UN Office for Ocean Affairs and the Law of the Sea, The Law of the Sea. Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea (United Nations, 1988), pp.89-91, 95, 98, 105, 107-108.

247 This group of States includes Algeria, Bangladesh, Cameroon, Iraq, Libya, Madagascar, Morocco, Nicaragua, Somalia, Turkey, Mauritius, Egypt, Malta, Mozambique, Pakistan, Colombia, Singapore, Dominican, Romania, Ireland, Democratic Republic of Germany, and Soviet Union. See ibid., pp.89-91, 95-96, 98-99, 103-109.

248 A/CONF. 62/WP.10/Rev.l (1979), see ibid., p.93.

249 At the eleventh session (1982), Romania proposed to add a new paragraph reading: "Uninhabited islets should not have any effects on the maritime spaces belonging to the main coasts of the States concerned". See 169th plenary meeting, UNCLOS III Official Records, Vol. XVI, p.97, para.53. On the other hand, the United Kingdom proposed the deletion of paragraph 3, as there was "no reason to discriminate between different forms of territory for the purposes of maritime zones". See 168th plenary meeting, UNCLOS III Official Records, Vol. XVI, p.91, para.57. Venezuela proposed an amendment to article 309 (concerning reservations or exceptions) to allow reservations to be made to articles 15, 74, 83 and 121, paragraph 3. See Venezuela: draft amendment to article 309, A/CONF.62/L.108, UNCLOS III Official Records, Vol. XVI, p.223.

cause greater inequality. Article 121(3)—"Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf"—reflects a subtle and fragile balance, so as to ensure that the regime of islands under the Convention could be approved.[250]

Myron H. Nordquist, a member of the United States Delegation to the Third UN Conference on the Law of the Sea, also confirmed:

> [P]erhaps the draftsmen faced an impossible task of getting agreement on specific criteria given the diversity of opinions and factual situations around the world. By simply resorting to "deliberate ambiguity" in paragraph 3, the draftsmen took the text as far as they could and then made a gamble that delegates would eventually give up on seeking more precise agreement at the Conference, which is what happened.[251]

683. The foregoing opinion reflects a common understanding among commentators. For example, Van Dyke and Brooks wrote in 1983:

> Because so much ocean space is involved in this question, it would have been desirable if the negotiators at the Law of the Sea Conference had examined the issue once again before settling on the language of Article 121. But because many nations have uninhabited islands (including Mexico and the United States), most nations were keeping quiet about this issue.[252]

Kwiatkowska and Soons pointed out in 1990, "Since islands, whether rocks or not, are themselves special/relevant circumstances in equitable delimitation, it is not surprising that the result of consensus reached on their definition by UNCLOS III is as ambiguous as it is."[253] They observed,

> [ . . . ] even if the consensus ultimately reached on retaining paragraph 3 in Article 121 could be claimed as evidence that States intended in this case to

250 See the statements of negotiating States as summarized in UN Office for Ocean Affairs and the Law of the Sea, The Law of the Sea. Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea (United Nations, 1988), pp.103-104.

251 Myron H. Nordquist, Textual Interpretation of Article 121 in the UN Convention of the Law of the Sea, in Holger Hestermeyer et al (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (Martinus Nijhoff Publishers, 2012), p.991, at 1034-1035 (internal citation omitted).

252 Jon M. Van Dyke and Robert A. Brooks, Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resource, 12 Ocean Development & International Law (1983), p.265, at 288.

253 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands Yearbook of International Law (1990), p.139, at 181.

> create a legally binding principle, the controversies on the content of this principle which remained unresolved by the Conference make it [ … ] impossible to determine its content with any reasonable degree of certainty.[254]

Clive Schofield, an expert witness hired by the Philippines in this Arbitration, wrote in 2009:

> Despite exhaustive analysis by eminent scholars, Article 121 of the Convention has, thus far, defied definitive interpretation. Indeed, it is almost inconceivable that such a definitive interpretation could be achieved merely on the basis of analysis of the text of Article 121 itself. This is in many ways unsurprising, as the regime of islands was drafted in an intentionally vague and ambiguous fashion.[255]

684. As revealed above, the "deliberate ambiguity" reflected in Article 121(3) was intended to balance the conflicting interests and claims of the negotiators. This intent should be reflected in any interpretation of this provision, so that neither camp's opinion would be privileged. The Tribunal's interpretation of Article 121(3) in essence made a choice between the two different positions and claims of negotiating States at the Third United Nations Conference on the Law of the Sea, doing violence to the text, spirit and intent of this provision. In effect, the Tribunal was attempting to recover the battle ground one had lost during the negotiation.

685. Contrary to the Tribunal's approach, the ICJ has adopted an extremely prudent stance over the interpretation of Article 121(3). In *Maritime Delimitation in the Black Sea (Romania v. Ukraine, 2009)* and *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*, the ICJ had the opportunity to voice its opinion on the interpretation and application of Article 121(3) and to determine whether the relevant features fell within Paragraph 2 or Paragraph 3 of Article 121, but it eschewed that opportunity; instead of interpreting or clarifying "cannot sustain human habitation or economic life of their own", the Court opted for another route to come to judgment in these cases.[256]

254 Ibid., at 176.

255 Clive Schofield, The Trouble with Islands: The Definition and Role of Islands and Rocks, in Seoung-Yong Hong and Jon M. Van Dyke (eds.), Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea (Martinus Nijhoff Publishers, 2009), p.19, at 27.

256 See, e.g., Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p.61, at para.187; Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.180.

*IV.1.D. The Tribunal's interpretation finds no support in State practice*

686. The Tribunal's interpretation finds no support in State practice. As Oude Elfrink pointed out, "At the moment, there is an abyss between the tribunal's approach and the practice of many States."[257]

*(1) The practice of States claiming maritime entitlements based on their tiny and/or sparsely populated islands*

687. During the negotiations and since the adoption of the Convention, coastal States claimed in succession their exclusive economic zones and continental shelves. States possessing islands including tiny and/or sparsely populated ones have mostly claimed entitlements to an exclusive economic zone and a continental shelf.[258]

Take Johnston Atoll of the United States as an example. Its original size was a mere 46 acres (approximately 0.1861 sq.km), and has been increased to 596 acres (approximately 2.4119 sq.km) by human capacity, i.e., dredge and fill operations.[259] At the very beginning, there was no human habitation on the island at all. Since the late 19th century, some people from the outside started the business of collecting guano on the island. That lasted for a long time. After World War II, it became a US testing ground for nuclear and chemical and biological weapons. At present, it is administered by the United States Fish and Wildlife Service. There are no ordinary residents on the island, not to mention "a stable community of people for whom the feature constitutes a home and on which they can remain".[260] No evidence had been found that suggested the existence of source of fresh water before artificial works. The United States claimed in 1983 that the island has a 200 nm exclusive economic zone.[261]

257 Alex G. Oude Elferink, The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, https://site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/.

258 See Table of claims to maritime jurisdiction, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf.

259 See "Introduction of Johnston Island", https://www.fws.gov/refuge/Johnston_Atoll/about.html.

260 Award of 12 July, para.542.

261 See Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, 10 March 1983, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Proclamation.pdf.

688. The practice of selected States claiming exclusive economic zone and continental shelf based on tiny and/or sparsely populated islands is shown in the table below:

**Table 2** Practice of selected States claiming exclusive economic zone / continental shelf based on tiny and/or sparsely populated islands (Source: Compiled by the author)

| No. | State | Island | Year of declaration of exclusive economic zone and continental shelf | Year of ratification of, accession and succession to the Convention[262] |
|---|---|---|---|---|
| 1 | Norway | Jan Mayen<br>Bouvet Island | 1976[263] | 1996 |
| 2 | France | Clipperton Island<br>Tromelin Island<br>(also claimed by Mauritius) | 1978[264]<br>1978[265] | 1996 |
| 3 | Venezuela | Aves | 1978[266] | Not acceded |
| 4 | United States | Johnston Atoll<br>Wake Island<br>Jarvis Island | 1983[267] | Not ratified |
| 5 | Brazil | Trindade Island | 1993[268] | 1988 |

262 See Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm# The%20United%20Nations%20Convention%20on%20the%20 Law%20of%20the%20Sea.

263 See Royal Decree of 17 December 1976 relating to the establishment of the Economic Zone of Norway, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Decree.pdf.

264 See Decree No. 78-147 of 3 February 1978 creating an exclusive economic zone off the coasts of Clipperton Island, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/fra_mzn80_2010.pdf.

265 See Decree no. 78-146 of 3 February 1978 establishing an exclusive economic zone along the coasts of Tromelin, Glorieuse, Juan-de-Nova, Europa and Bassas-da-India Islands, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/fra_mzn74_2009.pdf.

266 See Act establishing an Exclusive Economic Zone along the coasts of the Mainland and Islands of 26 July 1978, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VEN_1978_Act.pdf.

267 See Proclamation 5030 by the President of the United States of America on the Exclusive Economic Zone of the United States of America, 10 March 1983, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Proclamation.pdf; Table of claims to maritime jurisdiction, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf; Public Notice 2237: Exclusive Economic Zone and Maritime Boundaries; Notice of Limits, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1995_eez_public_notice.pdf.

689. The islands listed in the above table, more or less, have the following characteristics: (1) these islands in their poor natural conditions lack potable water/fresh water and have very limited vegetation, with mostly moss and low shrub, and those at high latitudes are in a harsh climate; (2) some of the islands have seen land reclamation and artificial construction; (3) the only inhabitants on the islands are military personnel, civil servants, scientists, researchers and meteorologists, without permanent population or a stable community; and (4) the people living on the islands are entirely dependent on outside supplies. The conditions on these islands do not meet the capacity to sustain human habitation requirement, as interpreted by the Tribunal, not to mention its criteria for economic life of their own. Nevertheless, the relevant States claimed an exclusive economic zone and continental shelf based on these islands. The Tribunal's interpretation goes against this significant practice of States.

*(2) The practice of maritime delimitation involving islands*

690. In State practice, the effect of islands in maritime delimitation rather than their status, i.e., whether they constitute "rocks" under Article 121(3), is the real concern of the parties involved in a delimitation. Just as Kwiatkowska and Soons pointed out,

> If Article 121, paragraph 3 has any role to play, it would seem to consist in signalling the necessity of giving the question of "rocks" careful consideration, with the implementation of the rocks-principle rightly remaining in most cases a matter for the application of equity to maritime boundary delimitation in which islands are involved.[269]

If criterion determined by the Tribunal were to be followed, many islands would be deemed as "rocks" which "cannot sustain human habitation or economic life of their own". The so-called "rocks" under the Tribunal's criterion, however, are often regarded and treated as "fully entitled islands" in State practice, and given an economic exclusive zone and a continental shelf with varying sizes.

691. In maritime delimitation agreements, States show flexibility in dealing with islands. For instance, Australia and France claimed 200 nm jurisdictional maritime zones based on Heard and McDonald Islands[270] and Kerguelen Islands respectively,

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268 See Law No. 8.617 of 4 January 1993, on the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_1993_8617.pdf.

269 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands Yearbook of International Law (1990), p.139, at 181.

270 Heard Island as Australian territory, 2200 nm away from the western coast of Australia, covers an area of 368 $km^2$. McDonald Islands also as Australian territory, 23 nm to the west of Heard Island, cover an area of 2.5 $km^2$. There is no settled population on those islands. See Clive Schofield, The Trouble with Islands: The

and completed maritime delimitation between those islands in 1982.[271] Their delimitations have not encountered formal protests of other States.[272] For another example, Aves Island of Venezuela measures about 585 metres in length and, at its narrowest point, 30 metres in width. The delimitation treaties of Venezuela with France, the Netherlands and the United States respectively seem to recognize Aves Island's entitlement to an exclusive economic zone and a continental shelf.[273] In the delimitation agreements of Finland with Estonia and Sweden respectively, the Finnish islets of Bogskär were recognized as valid basepoints and accorded some effect in the establishment of the boundary line.[274] In the delimitation of continental shelf between Denmark (Greenland) and Iceland, both sides regarded the latter's Kolbeinsey as a basepoint, and gave it some effect in delimitation.[275] The above instances evince that relevant States tended to flexibly approach Article 121(3) of the Convention in maritime delimitation. They further show that Article 121(3) with its "deliberate ambiguity" provides a flexible legal framework for dealing with relevant matters, and that the subtle balance between different interests of negotiating States reflected in this provision is working well.

692. In some international judicial and arbitral cases, the central concern of the States involved is also the effect of islands in delimitation rather than the interpretation and application of Article 121(3). In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway, 1993)*, Norway claimed that Jan Mayen, like Greenland, a territory of Denmark, was an "island", and should be given full effect in delimitation. Although Denmark questioned whether Jan Mayen

Definition and Role of Islands and Rocks, in Seoung-Yong Hong and Jon M. Van Dyke (eds.), Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea (Martinus Nijhoff Publishers, 2009), p.19, at 30.

271 Agreement on Marine Delimitation between the Government of Australia and the Government of the French Republic (January 4, 1982), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-FRA1982MD.pdf.

272 See Clive Schofield, The Trouble with Islands: The Definition and Role of Islands and Rocks, in Seoung-Yong Hong and Jon M. Van Dyke (eds.), Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea (Martinus Nijhoff Publishers, 2009), p.19, at 30-31.

273 See Alex G. Oude Elferink, Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes, IBRU Boundary and Security Bulletin Summer 1998, p.58, at 61.

274 Bogskär consists of two islets measuring approximately 3700 $m^2$ and 1110 $m^2$, and some smaller islets and rocks. The total area of Bogskär is approximately 5000 $m^2$. Bogskär lies respectively 62, 16.4 and 22.6 nm from the Estonian, Finnish, and Swedish coasts. See ibid., at 60.

275 Ibid., at 60 ("Kolbeinsey, which measures a few hundred square meters and has a maximum altitude of 6 m, lies approximately 55 nm to the north of the coast of Iceland").

could sustain human habitation or economic life of its own in accordance with Article 121(3),[276] it argued not that Jan Mayen had no entitlement to continental shelf or fishery zones, but that the island of Jan Mayen could only be accorded partial effect, not full effect.[277] The ICJ confirmed that Jan Mayen "generates potential title to the maritime areas recognized by customary international law, i.e., in principle up to a limit of 200 miles from its baselines",[278] and did not uphold Denmark's claim that Jan Mayen should be given a partial effect.[279] This case shows, in the context of maritime delimitation, the States involved pay more attention to the effect of islands in delimitation than their status as islands under Article 121(2) or rocks under Article 121(3).

693. Therefore, the Tribunal's interpretation of Article 121(3) not only does violence to the intent of the negotiating States, but also goes against State practice. Beckman said that the Tribunal's interpretation of Article 121(3) is "the boldest and the most controversial".[280] Oude Elfrink warned, "if the findings of the tribunal on size, and sustaining human habitation and economic life of their own were to be applied across the board, many islands that have not been considered to fall under the scope [of] article 121(3) would likely have to be (re)categorized as article 121 (3) rocks".[281]

694. By adopting such an erroneous approach, the Tribunal plunged itself into judicial activism. Just as Nordquist and Phalen pointed out, "The Tribunal was not empowered under the Convention to rewrite the Convention text. It overstepped its

276 See Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Report 1993, p.38, at paras.79-80. The condition of Jan Mayen was described by the ICJ thus: "Jan Mayen has no settled population; it is inhabited solely by technical and other staff, some 25 in all, of the island's meteorological station, a LORAN-C station, and the coastal radio station. The island has a landing field, but no port; bulk supplies are brought in by ship and unloaded principally in Hvalrossbukta (Walrus Bay). Norwegian activities in the area between Jan Mayen and Greenland have included whaling, sealing, and fishing for capelin and other species. These activities are carried out by vessels based in mainland Norway, not in Jan Mayen." Ibid., at para.15.

277 See ibid., at para.80.

278 Ibid., at para.70.

279 Ibid.

280 Robert Beckman, 'Deliberate Ambiguity' and the Demise of China's Claim to Historic Rights in the South China Sea, 1 Asia-Pacific Journal of Ocean Law and Policy (2016), p.164, at 165.

281 Alex G. Oude Elferink, The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First, https://site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/.

role [ … ]; such discretionary input [to the meaning of the Convention text] by the Tribunal has no credible support in the text or context of the Convention."[282]

*IV.2. The Tribunal erroneously determined that all "high-tide features" of China's Nansha Qundao and Zhongsha Qundao were "rocks"*

695. The Tribunal further erroneously applied its forgoing misinterpretation of Article 121(3) to selected component features of China's Nansha Qundao and Zhongsha Qundao, and erroneously determined all "high-tide features" of these two archipelagos were "rocks". The Tribunal made the following three errors: first, it erred in proving the objective capacity of features by their historical use, thereby confusing the two; second, it did not faithfully apply the standards and methods put forward by itself; and third, its findings are not based on solid facts.

*IV.2.A. The Tribunal erred in proving the objective capacity of features by their historical use, thereby confusing the two*

696. The Tribunal said:

> The use of the word "cannot" in Article 121(3) indicates a concept of capacity [ … ]. This enquiry is not concerned with whether the feature actually does sustain human habitation or an economic life. It is concerned with whether, objectively, the feature is apt, able to, or lends itself to human habitation or economic life. That is, the fact that a feature is currently not inhabited does not prove that it is uninhabitable. The fact that it has no economic life does not prove that it cannot sustain an economic life.[283]

The Tribunal continued to say that in applying this criterion, it should consider that "historical evidence of human habitation and economic life in the past may be relevant for establishing a feature's capacity", thereby introducing the concept of "historical use" .[284] The Tribunal further said:

> If a known feature proximate to a populated land mass was never inhabited and never sustained an economic life, this may be consistent with an explanation that it is uninhabitable. Conversely, positive evidence that humans historically lived on a feature or that the feature was the site of economic activity could constitute relevant evidence of a feature's capacity.[285]

282 Myron H. Nordquist and William G. Phalen, Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award, in Myron H. Nordquist, John Norton Moore and Ronan Long (eds.), International Marine Economy (Brill Nijhoff, 2017), p.3, at 5-6.

283 Award of 12 July, para.483.

284 See ibid., para.484.

285 Ibid.

The Tribunal considered that, "In such circumstances, the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put".[286]

697. Thus, the Tribunal put forward an "objective capacity" criterion, but wanted to prove, in some circumstances, the objective capacity of features by their historical use, thereby confusing the two.

698. As far as the relevant component features of China's Nansha Qundao are concerned, the Tribunal considered that "the status of a feature be ascertained on the basis of its earlier, natural condition prior to the onset of significant human modification", on the pretext that many of the features "have been subjected to substantial human modification" and that "it is now difficult to observe directly the original status of the feature in its natural state".[287] It emphasized that "historical evidence of conditions on the features" represented "a more reliable guide" to the capacity of the features to sustain human habitation or economic life.[288]

699. Although the existence of historical use could be evidence for the sustaining capacity of a feature, the non-existence of such historical use itself does not disprove its present or future capacity, or its potential capacity in general. The Tribunal disregarded the fact that it was not because of their lack of the sustaining capacity or some external factors such as war and pollution as mentioned by the Tribunal, but because of other reasons, such as national policy, traditional customs, cultural taboos and availability of better environments for production and living in other places, that a number of features were historically uninhabited or rarely inhabited. It was erroneous for the Tribunal to employ historical use as evidence to prove the objective capacity of features.

*IV.2.B. The Tribunal failed to faithfully apply the criteria and methods put forward by itself when applying Article 121(3) of the Convention*

*(1) The Tribunal disregarded the impact of the connection between and among certain features on their capacity*

700. The Tribunal said:

> [T]he capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life. [ … ] provided that such islands collectively form part of a network that sustains human habitation in keeping with the traditional lifestyle of the peoples in question, the Tribunal would not equate the role of multiple

286 Ibid., para.549.

287 Ibid., para.511.

288 Ibid., para.578.

> islands in this manner with external supply. Nor would the local use of nearby resources as part of the livelihood of the community equate to the arrival of distant economic interests aimed at extracting natural resources.[289]

701. Therefore, the Tribunal recognized that the connection between certain features and its impact on their individual capacity should not be neglected when assessing the capacity of a particular feature. Yet, when applying Article 121(3) to assess the status of Huangyan Dao of China's Zhongsha Qundao and the selected "high-tide features" of China's Nansha Qundao, the Tribunal severed the close relationship between relevant features, and deliberately ignored the capacity of these features to collectively sustain human habitation or economic life of their own, which obviously goes against the criterion the Tribunal put forward by itself.

702. The Tribunal deliberately ignored the support that the objective capacity of Huangyan Dao may receive from other features in the South China Sea. When the Tribunal assessed whether Huangyan Dao could sustain human habitation or economic life, it merely examined the physical conditions and historical records of Huangyan Dao itself, and disregarded the support it may receive from other features in the South China Sea.[290] The Tribunal's disregard of such support seemed to be based on the reason that Huangyan Dao is "remote" from any feature possessing fresh water, vegetation and living space.[291] What does it mean by "remote"? The Tribunal failed to clarify.

703. The Tribunal ignored the support that the objective capacity of component features of Nansha Qundao may receive from other features in the South China Sea. The Tribunal only paid lip service to the situation of "a network of closely related maritime features",[292] but never considered, in addressing the objective capacity of component features of Nansha Qundao, the support provided by other features in the South China Sea. Facts show that Nansha Qundao and other features in the South China Sea, including Hainan Dao, Xisha Qundao, Zhongsha Qundao and Dongsha Qundao, are closely related and have formed a network of human habitation and economic life since a long time ago. A piece of convincing evidence for such a network is *Geng Lu Bu*, which describes the well-tried routes by which the Chinese fishermen went to Nanhai Zhudao and the relevant waters for fishing. Every year, some Chinese fishermen went to Bei Jiao of Xisha Qundao at first, where the fishing vessels were organized into two groups: one with small tonnage vessels and the other with large tonnage vessels. The former just stayed at Xisha Qundao for fishing operation, usually at Yongxing Dao and its surrounding waters. The latter continued its

289 Ibid., para.547.

290 See ibid., para.556.

291 Ibid.

292 Ibid., para.572.

journey southward to Nansha Qundao and anchored at Beizi Dao, Nanwei Dao, Zhongye Dao for potable water resupply. Then, some vessels stayed at these features and their surrounding waters for fishing operation, while the others sailed as far as Nankang Ansha, Zengmu Ansha, from which they went to Singapore to trade their fish catch for commodities and then followed the same route back home.[293]

704. The Tribunal further ignored the support which component features of Nansha Qundao provide to each other for their objective capacity. The Tribunal said:

> [T]he Tribunal is conscious that small island populations will often make use of a group of reefs or atolls to support their livelihood and, where this is the case, does not consider that Article 121(3) can or should be applied in a strictly atomised fashion. Accordingly, the Tribunal has not limited its consideration to the features specifically identified by the Philippines in its Submissions, but requested the Philippines to provide detailed information on all of the significant high-tide features in the Spratly Islands.[294]

705. But the Tribunal precisely applied Article 121(3) in such a "strictly atomised fashion", and failed to assess the collective sustaining capacity of Nansha features in accordance with the criteria the Tribunal itself put forward. Nansha Qundao is mainly constituted by coral reefs. Islands, cays, reefs and banks surround each other, forming atolls, and lagoons are walled within them. Smaller atolls often form parts of a larger group of reefs. Historical facts show that Chinese fishermen have always utilized component features of Nansha Qundao in a mutually supporting manner for living and production. Were the Tribunal to follow the criteria put forward by itself, it would find that component features of Nansha Qundao as a network could perfectly sustain human habitation and economic life.

*(2) The Tribunal disregarded the external factors influencing the historical use of Nansha Qundao*

706. When assessing the historical use of a feature, the Tribunal said, "[It] should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period [ … ]".[295] After that, the Tribunal said that it "sees no evidence that would suggest that the historical absence of human habitation on the Spratly Islands is the

293 See Zhou Weimin and Tang Lingling (eds.), Nanhai Tianshu—Hainan Yumin Geng Lu Bu Wenhua Quanshi [The Nanhai Book—Interpretation of Manual of Sea Routes of Hainan Fishermen from a Cultural Perspective] (Kunlun Publishing House, 2015).

294 Award of 12 July, para.572.

295 Ibid., para.549.

product of intervening forces [ … ]".[296] The Tribunal made this conclusory statement without conducting any examination of the historical facts. The fact is that since recent times, the South China Sea has experienced disturbance from intervening forces.

707. Since the beginning of the 20th century, powers outside this region had been coveting China's Nansha Qundao, and successively invaded and illegally occupied by force some features of Nansha Qundao. In 1933, France invaded nine islets of Nansha Qundao, sent their military vessels to Nansha Qundao, and expelled Chinese fishermen. In 1939, Japan declared that Nansha Qundao (Japan re-named it "Shinan Gunto") were placed under the administration of the then Japanese occupied Taiwan, and the Chinese fishermen residing on Nansha Qundao were driven out. During World War II, Nansha Qundao became a bombardment target because the Japanese constructed a meteorological station on it and used it as a transfer air base. After World War II, China resumed the exercise of sovereignty over Nanhai Zhudao. Since the 1970s, some States surrounding the South China Sea began to invade and illegally occupy certain component features of Nansha Qundao by force, and raised illegal territorial claims. Against this background, Chinese fishermen conducting routine fishing operations in relevant waters of China's Nansha Qundao were frequently harassed and attacked, and their life, safety and property were in danger. Even worse, there were instances in which Chinese fishermen were treated in a violent, cruel and inhumane manner. Owing to these factors, the normal activities of Chinese people in Nansha Qundao and its relevant waters were severely disturbed.

708. The Tribunal itself proclaimed that it should take into account the influence of war and other external factors on the situation of human habitation on features, yet it turned a blind eye to the wars and other factors disturbing the normal activities of Chinese people and endangering their life, safety and property in the area of Nansha Qundao. The Tribunal's finding is baseless and erroneous.

*IV.2.C. The Tribunal erred in the use of certain evidence to determine the capacity of certain component features*

709. The Tribunal claimed that it had reviewed a substantial volume of evidence concerning the conditions on the more significant of the "high-tide features" of Nansha Qundao, including evidence presented by the Philippines, as well as evidence in other publicly available sources and materials obtained by the Tribunal from the archives of the United Kingdom Hydrographic Office and France's *Bibliothèque Nationale de France* and *Archives Nationales d'Outre-Mer*.[297] However, the Tribunal failed to take judicial or arbitral notice of China's relevant materials that is also publicly available, including the publications in Chinese. Even the materials it had at its disposal were not given proper weight. For example, regarding the *amicus curiae* submission

296 Ibid., para.622.

297 See ibid., para.577.

concerning Taiping Dao by the Chinese (Taiwan) Society of International Law, the Tribunal merely described the Philippines' negative attitude towards it,[298] without reacting to the content of the submission when determining the capacity of Taiping Dao.

710. In making its factual findings, the Tribunal noted that, "the Spratly Islands were historically used by small groups of fishermen", and "some of these individuals were present in the Spratlys for comparatively long periods of time, with an established network of trade and intermittent supply [ … ]".[299] It summarized its findings this way:

> On the basis of the evidence in the record, it appears to the Tribunal that the principal high-tide features in the Spratly islands are capable of enabling the survival of small groups of people. There is historical evidence of potable water, although of varying quality, that could be combined with rainwater collection and storage. There is also naturally occurring vegetation capable of providing shelter and the possibility of at least limited agriculture to supplement the food resources of the surrounding waters. The record indicates that small numbers of fishermen, mainly from Hainan, have historically been present on Itu Aba and the other more significant features and appear to have survived principally on the basis of the resources at hand (notwithstanding the references to annual deliveries of rice and other sundries).[300]

Then the Tribunal abruptly switched:

> The principal features of the Spratly Islands are not barren rocks or sand cays, devoid of fresh water, that can be dismissed as uninhabitable on the basis of their physical characteristics alone. At the same time, the features are not obviously habitable, and their capacity even to enable human survival appears to be distinctly limited. In these circumstances, and with features that fall close to the line in terms of their capacity to sustain human habitation, the Tribunal considers that the physical characteristics of the features do not definitively indicate the capacity of the features. Accordingly, the Tribunal is called upon to consider the historical evidence of human habitation and economic life on the Spratly Islands and the implications of such evidence for the natural capacity of the features.[301]

711. The Tribunal's above statement is flawed. It follows from, first and foremost, the Tribunal's misinterpretation of Article 121(3) as requiring a positive

298 See ibid., para.438.

299 Ibid., para.601.

300 Ibid., para.615.

301 Ibid., para.616.

establishment of the capacity. As discussed in paragraph 657 above, the Tribunal's view is directly contrary to the proper interpretation of Article 121 which requires that any doubt should tip the balance in favor of finding an island under Paragraph 2, which follows from a proper treatment of the "rule and exception" relationship between Paragraphs 2 and 3.

712. The physical conditions of component features of Nansha Qundao indicate that they, if separately considered, are obviously islands under Article 121(2). They cannot prove these features "cannot sustain human habitation or economic life of their own" under Article 121(3). In any event, they are not features "fall close to the line in terms of their capacity". The Tribunal's finding that the capacity of component features of Nansha Qundao was "distinctly limited" was resulted from its questionable use of the materials on physical characteristics of the features. In this regard, common sense demands resort to contemporary evidence; yet the Tribunal cherished stale materials and banked on them only. For instance, when determining whether there existed potable water at Nansha Qundao, the Tribunal simply relied on the publications of the Admiralty Hydrographic Office from 1868 to 1944 as well as reports and accounts produced by individuals decades ago,[302] and concluded that the quality of the water in most of the significant "high-tide features" of Nansha Qundao, including Taiping Dao, "will not necessarily match the standards of modern drinking water and may vary over time, with rainfall, usage, and even tidal conditions affecting salinity levels".[303] The Tribunal did not take a look at any contemporary evidence, and even ignored the materials presented in the above mentioned *amicus curiae* submission concerning Taiping Dao. But the available contemporary materials that the Tribunal did not mention indicate that there is at Nansha Qundao, particularly its Taiping Dao, an abundant supply of underground water,[304] which is of fairly good quality.[305]

302 See ibid., paras.580-583.

303 Ibid., para.584.

304 There are four groundwater wells (Well No. 5, No. 9, No. 10, No. 11) operating on Taiping Dao supplying drinking water and daily use water. According to scientific studies and survey reports, the annual precipitation is very high on Taiping Dao. In addition, the porous nature of the local bioclastic sands and the coral reef underneath make Taiping Dao very suitable for absorbing and storing the rainwater underground. The total quantity of groundwater supplied by the aforementioned four wells could reach 237,000 tons per year. See "On the Issue of the Feature of Taiping Island (Itu Aba Pursuant to Article 121(1) and (3) of the 1982 United Nations Convention of the Law of the Sea", *Amicus Curiae* Submission by the Chinese (Taiwan) Society of International Law, 23 March 2016, paras.29-30.

305 The temperature of the groundwater from the four wells ranges from 26.9°C to 29.3°C and the pH is fairly stable at 7.3 to 7.7. The salinity of the water from Well No. 5 was lower than 3‰, far below the average salinity of 33‰ to 35‰ of sea water. According to international standards, Taiping Dao, undoubtedly, has natural

713. Even if component features of Nansha Qundao "fall close to the line in terms of their capacity" and thus it is necessary, according to the Tribunal, to consider historical use, the Tribunal again failed to ensure that its findings were well founded in fact. It mistook evidential materials on the situation for only a particular period of time as that for the whole course of history, including the present; it took notice of, but failed to give proper weight to, evidential materials showing the long term presence of Chinese fishermen; and it completely ignored other publicly available evidential materials showing the relevant features sustaining human habitation and economic life of their own.

714. The Tribunal considered from the records that the historical human habitation of Nansha Qundao was characterized by "a pattern of temporary residence on the features for economic purposes, with the fishermen remitting their profits, and ultimately returning, to the mainland".[306] Thus, the Tribunal considered the criterion of human habitation was not met by such temporary inhabitation.[307]

715. The Tribunal's above findings were mainly based on what was recorded on some component features of Nansha Qundao at specific time by the Admiralty Hydrographic Office's publications and French reports.[308] Nevertheless, the foregoing materials could only prove the situation of fishermen on some features at a specific point in time, which could not reflect the actual situation and the whole picture of Chinese fishermen's production and life on relevant features in the South China Sea, let alone the objective capacity of those features.

716. A large volume of materials indicate that fishermen residing on Nansha Qundao regarded it as their home, rather than transient shelters.[309] For example, the

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underground fresh water. In particular, the quality of the sample water obtained from Well No. 5 is close to that of the Evian brand bottled water, one of the most well-known brands of natural mineral water in the world. Well No. 5 could supply 2 to 3 tons of underground fresh water to as many as 1000 to 1500 persons every day, based on the average amount of 2000 c.c. of drinking water required per person per day. The quality of the groundwater drawn from the other three wells has been proved to be suitable for daily human use. See ibid., para.31.

306 Award of 12 July, para.618.

307 Ibid.

308 See ibid., paras.597-600.

309 For example, materials show that a good number of Chinese fishermen from Wenchang County, Hainan Province, had lived on Taiping Dao, Nanwei Dao and Mahuan Dao for many years. The historical fact of the non-transient habitation of Chinese on Taiping Dao was recorded in detail by French in 1933. See materials reproduced in Han Zhenhua et al (eds.), Woguo Nanhai Zhudao Shiliao Huibian [Collection of Historical Materials concerning China's Naihai Zhudao] (Dongfang Press, 1988), pp.434-435 ("An Investigation into Huang Demao"), 563-565 ("A French magazine mentioning in 1933 that Hainanese fishermen engaged in fishing activities in Nansha Qundao").

relevant documents recorded the relics of Chinese habitation on Taiping Dao in detail, including houses, dug wells, planted crops, livestock, tombs, Chinese tablets, and temples.[310] These facts demonstrate that the predecessors of Chinese fishermen had a clear intent to settle on Nansha Qundao and treated it as home. Obviously, Chinese fishermen remained on these islands for permanent inhabitation, rather than transient inhabitation as determined by the Tribunal. Otherwise, it would be unimaginable that, in an age of hardly being able to keep body and soul together, these fishermen would spend so much energy and money on building so many facilities, especially the temples for their spiritual and emotional comfort. The Tribunal took note of some of these materials,[311] but failed to give them due effect or weight, and completely ignored the rest. Thus, the Tribunal's findings are far from well founded in fact.

*IV.3. The rock of Oki-no-Tori (Oki-no Tori-shima) is not remotely comparable to component features of the archipelagos of Nanhai Zhudao*

717. In the Award of 12 July, the Tribunal detailed China's diplomatic representations on the issue of the rock of Oki-no-Tori between 2009 and 2011, in which China argued this feature on its natural conditions obviously cannot sustain human habitation or economic life of its own, is a prime example of a rock under Article 121(3), and shall have no exclusive economic zone or continental shelf. The Tribunal said that China had not, however, assessed the factors involved in addressing the rock of Oki-no-Tori in any specific analysis of most of the individual features in the South China Sea, implying that China was applying double standards: one to the rock of Oki-no-Tori, the other to component features of the archipelagos of Nanhai Zhudao.[312] The Tribunal's approach blurred the overwhelming distinction between component features of the archipelagos of Nanhai Zhudao and the rock of Oki-no-Tori. This was completely wrong.

718. As far as Nansha Qundao is concerned, there are nearly 200 islands, reef and shoals, banks, sands and cays in it, which scatter in the south of the South China Sea like hundreds of stars, forming atolls, and lagoons are walled within them. Smaller atolls often form parts of a larger group of reefs. Nansha Qundao constitutes an archipelagic unit. In contrast, the rock of Oki-no-Tori is a stand-alone rock in the western Pacific Ocean, with only two small portions naturally protruding above water at high tide,[313] no larger than two king-size beds.[314] Besides that, it is obvious that the

310 See, e.g., Han Zhenhua et al (eds.), ibid., pp.425-427 ("Narrative Material of A Fisherman Named Liang Anlong").

311 See, e.g., Award of 12 July, paras.100, 466 (quoting statement of China's Foreign Ministry Spokesperson).

312 See Award of 12 July, paras.451-458.

313 See ibid., para.451.

314 See Jon Van Dyke, Speck in the Ocean Meets Law of the Sea, Letter to the Editor, The New York Times, January 21, 1988, p.A26.

natural conditions of component features of Nansha Qundao are much better than those of the rock of Oki-no-Tori.

719. It is obvious that the rock of Oki-no-Tori is a "rock" under Article 121(3) of the Convention, and accordingly has no exclusive economic zone or continental shelf. This reflects the consensus of international lawyers.[315] It is also far away from any delimitation situation. For example, Kwiatkowska and Soons wrote in 2011:

> In fact, with a single exception of Okinotorishima, the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations, often intertwined with disputes over sovereignty [ … ].[316]

720. Nansha Qundao is China's outlying archipelago and is, as a unit, fully entitled to an exclusive economic zone and continental shelf. The maritime entitlements that can be generated by an archipelago should be determined based on the archipelago as a unit, rather than its individual features.

721. The distinction between the rock of Oki-no-Tori and the component features of Nansha Qundao is thus obvious and overwhelming. The Tribunal attempted to confuse the public by talking about, in the same breath, the rock of Oki-no-Tori and component features of China's Nansha Qundao.

## Conclusion

722. The Tribunal's findings with respect to the status of features in the South China Sea are gravely flawed.

723. First, the Tribunal erroneously addressed separately the status of the component features of China's Nansha Qundao and Zhongsha Qundao, in effect dismembering the two archipelagos and fragmenting the territorial and maritime delimitation dispute. By so doing, the Tribunal committed a fundamental mistake that set the Tribunal off in the wrong direction.

724. Second, the regime of continental States' outlying archipelagos is well-established in customary international law, but the Tribunal disregarded this regime and distorted China's position on its archipelagos each as a unit. The Tribunal erred in: (1) applying Article 121 to component features of China's Nansha Qundao and Zhongsha Qundao; (2) fixating its eyes only on the specific water-to-land ratio requirement under Article 47 of the Convention, without inquiring into customary

315 See, e.g., Jon Van Dyke, ibid.; Barbara Kwiatkowska and Alfred H.A. Soons, Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3), The Global Community: Yearbook of International Law and Jurisprudence, Vol. I (2011), p.111, at 114; Victor Prescott and Clive Schofield, The Maritime Political Boundaries of the World, 2nd edition (Martinus Nijhoff Publishers, 2005), p.63.

316 Barbara Kwiatkowska and Alfred H.A. Soons, ibid. (internal citation omitted).

international law on the issue of outlying archipelagos; and (3) denying the applicability of straight baselines to outlying archipelagos by narrowly and erroneously interpreting Article 7 of the Convention and disregarding subsequent State practice.

725. Third, the Tribunal erred in: (1) applying Articles 13 and 121 of the Convention to relevant component features of China's Nansha Qundao, and dividing them into "low-tide elevations" and "high-tide features"; (2) determining that certain features were "low-tide elevations"; (3) deciding that low-tide elevations were not capable of appropriation; (4) declaring that low-tide elevations "form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be"; and (5) finding that Meiji Jiao and Ren'ai Jiao, which constitute an integral part of China's Nansha Qundao, were part of the exclusive economic zone and continental shelf of the Philippines.

726. Fourth, the Tribunal erroneously interpreted and applied Article 121 of the Convention. It disregarded the "rule and exception" relationship between Paragraphs 2 and 3, and misinterpreted Article 121 as requiring that an island can have full entitlements only if it is positively established that it "can sustain human habitation or economic life of their own" so that any doubt would tip the balance—in the so-called "close to the line" situation—in favour of finding a "rock", directly contrary to the proper interpretation of Article 121 which requires that any doubt should tip the balance in favour of finding an island under Paragraph 2, which follows from a proper treatment of the "rule and exception" relationship between Paragraphs 2 and 3.

The Tribunal's misinterpretation effectively rewrote Article 121(3) as "*Only islands* which *themselves in their natural condition can* sustain *local* human *community's* habitation *and* economic life of their own *human population may* have exclusive economic zone *and* continental shelf". The Tribunal's misinterpretation goes against the text and intent of negotiating States and finds no support in State practice, flagrantly violating the rules of treaty interpretation.

The Tribunal erroneously determined that all "high-tide features" of China's Nansha Qundao and Zhongsha Qundao were "rocks" under Article 121(3) by applying its misinterpretation of Article 121(3) to those features, and by making its finding on the basis of irrelevant or incomplete evidential materials. In doing so, the Tribunal erred in proving the objective capacity of features by their historical use, thereby confusing the two; failed to faithfully apply the criteria and methods put forward by itself when applying Article 121(3); and erred in cherishing stale materials and ignoring contemporary, weighted evidence.

727. The Tribunal's findings with respect to the status of features in the South China Sea gravely infringe China's sovereignty and territorial integrity and maritime rights and entitlements, threatening to strangle the regime of continental States' outlying archipelagos. The Tribunal manifestly failed to discharge its duty under Article 9 of Annex VII of the Convention that "the arbitral tribunal must satisfy itself [ … ] the claim is well founded in fact and law".

## Chapter Six: The Legality of China's Activities in the South China Sea (Submissions No. 8 to 14)

728. The Philippines' Submissions No. 8 to 14 concern China's certain activities in the South China Sea. The Tribunal, in its Award on Jurisdiction, concluded that it had jurisdiction to consider the issues concerning traditional fishing rights (Submission No. 10), environmental protection relating to fishing (Submission No. 11), and operation of China's law enforcement activities at sea (Submission No. 13); in its Award of 12 July, concluded that it had jurisdiction to consider the issues concerning China's efforts to exercise jurisdiction over resources and related activities in the South China Sea (Submissions No. 8 and 9), China's construction activities at Meiji Jiao (Submission No. 12(a)-(c)), environmental protection and preservation relating to construction activities on the islands, and aggravation and extension of the dispute (Submission No. 14(d)). In the Award of 12 July, the Tribunal held that China's relevant activities in the South China Sea were unlawful. The Tribunal's conclusions are clearly flawed.

729. As discussed in Chapter Two, the Philippines' Submissions No. 8 through 14 in essence form part of the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, over which the Tribunal had no jurisdiction. China has sovereignty over Nansha Qundao and Zhongsha Qundao, and enjoys maritime entitlements based on each archipelago as a unit. Liyue Tan, Ren'ai Jiao and Meiji Jiao are components of China's Nansha Qundao, and cannot be dealt with separately from Nansha Qundao.

As a result, for the Tribunal to adjudicate on the legality of China's activities in this Arbitration is to put the cart before the horse. This is made clear by the Special Chamber in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire, 2017)*. There the Chamber held that a decision of delimitation has a constitutive nature and cannot be qualified as merely declaratory and further that, "the consequence of [this] is that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States".[1]

730. Adding to its erroneous finding that it had jurisdiction over Submissions No. 8 through 14, the Tribunal further found that China's activities breached certain

1 Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire, 2017), ITLOS Case No. 23, Judgment of 23 September 2017, para.592. In paragraph 593, the Chamber took note of the convergent decision of the ICJ in Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012), Judgment, I.C.J. Reports 2012, p.624, at para.250.

provisions of the Convention. However, the Tribunal made a number of errors in fact-finding and interpretation and application of the Convention. Section I shows that the Tribunal mischaracterized and adjudicated China's activities to affirm and safeguard its sovereignty and rights and to manage and exploit resources. Section II illuminates that the Tribunal jumped to its conclusion that Philippine fishermen had "traditional fishing right" at Huangyan Dao. Section III demonstrates that the Tribunal erred in finding that China had violated its obligations under the Convention to protect and preserve the marine environment by tolerating and protecting harmful fishing activities of its nationals and by construction activities. Section IV shows that the Tribunal erred in characterizing China's construction activities at Meiji Jiao as building artificial islands, installations and structures within the Philippines' exclusive economic zone and continental shelf. Section V elaborates that the Tribunal erred in treating the China's law enforcement activities as normal navigation activities and applying Article 94 of the Convention and the Convention on the International Regulation for Preventing Collisions at Sea (the COLREGS). Section VI clarifies that the Tribunal erred in finding that China's construction activities on the relevant islands and reefs of Nansha Qundao had aggravated and extended the dispute.

## I. China's activities to affirm and safeguard its sovereignty and rights and to manage and exploit resources in the South China Sea (Submissions No. 8 and 9)

731. In its Submission No. 8, the Philippines requested the Tribunal to declare that, "China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf".[2] In its Submission No. 9, the Philippines requested the Tribunal to declare that, "China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines".[3]

732. The subject-matters of Submissions No. 8 and 9 form part of the territorial and maritime delimitation dispute between China and the Philippines. Chapter Two of this Study has clarified that the Tribunal does not have jurisdiction over these two submissions. Liyue Tan, Ren'ai Jiao and Meiji Jiao referred to in these two submissions are components of China's Nansha Qundao. These features cannot be lifted out of Nansha Qundao, so as to have their status and/or entitlements decided upon separately from Nansha Qundao. The activities of China's marine surveillance vessels at Liyue Tan, Meiji Jiao and Ren'ai Jiao, as well as China's issuance of fishing

2 Award of 12 July, para.649.

3 Ibid., para.717.

moratorium in the South China Sea, are those conducted by China to affirm its sovereignty and rights, to manage and exploit resources, and to enforce related laws and regulations in relevant areas over which China has sovereignty, sovereign rights and jurisdiction. In fact, as part of its efforts to manage resources and to preserve the ecological environment and to ensure the sustainable development of fisheries in the South China Sea, China has, since 1999, put in place a summer fishing ban in some areas of the South China Sea.[4] That is to say, before the Philippines' initiation of this Arbitration, China had continuously implemented this summer fishing ban for 13 years.

*I.1. The Tribunal erred in finding that China had unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf*

*I.1.A. Articles 77 and 56 of the Convention are not applicable in this Arbitration*

733. In its Award of 12 July, the Tribunal, with respect to Submission No. 8, declared:

> China has, through the operation of its marine surveillance vessels in relation to M/V Veritas Voyager on 1 and 2 March 2011 breached its obligations under Article 77 of the Convention with respect to the Philippines' sovereign rights over the non-living resources of its continental shelf in the area of Reed Bank;[5]
>
> China has, by promulgating its 2012 moratorium on fishing in the South China Sea, without exception for areas of the South China Sea falling within the exclusive economic zone of the Philippines and without limiting the moratorium to Chinese flagged vessels, breached its obligations under Article 56 of the Convention with respect to the Philippines' sovereign rights over the living resources of its exclusive economic zone [ … ].[6]

734. The Tribunal's decision regarding Submission No. 8 was based on incorrect premises. The Tribunal erroneously established its jurisdiction over this submission and found that relevant sea areas were within "the exclusive economic zone and continental shelf of the Philippines". Adding to this, the Tribunal erred in applying Articles 77 and 56 of the Convention to China's activities to affirm and safeguard its sovereignty and rights and to manage and exploit resources in the South China Sea and finding that China violated these provisions. Article 77 of the Convention

4 Announcement on the Summer Ban on Marine Fishing in the South China Sea Maritime Space issued by the Ministry of Agriculture, Ministry of Agriculture of the People's Republic of China, http://www.moa.gov.cn/zwllm/zcfg/nybgz/200806/t20080606_1057142.htm.

5 Award of 12 July, para.1203.B.(8).

6 Ibid., para.1203.B.(9).

provides for the sovereign rights of the coastal State over the continental shelf.[7] Article 56 of the Convention stipulates the rights, jurisdiction and duties of the coastal State in the exclusive economic zone.[8] The condition for applying the two articles is that there is no dispute concerning the sovereignty over and/or entitlements to relevant sea areas and that the area of the continental shelf and exclusive economic zone of the coastal State is ascertained. Given that there exists a territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and that China maintains that relevant sea areas are the areas over which China enjoys

7 Article 77 of the Convention, "Rights of the coastal State over the continental shelf", provides:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

8 Article 56 of the Convention, "Rights, jurisdiction and duties of the coastal State in the exclusive economic zone", provides:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

sovereignty, sovereign rights and jurisdiction, the areas involved are far from being the ascertained continental shelf and exclusive economic zone of the Philippines.

*I.1.B. The Tribunal misinterpreted China's activities to affirm and safeguard its sovereignty and rights and erred in applying the law*

735. There exists a territorial and maritime delimitation dispute covering areas including Liyue Tan between China and the Philippines. The two States made diplomatic representations on a number of occasions. Liyue Tan is a component feature of China's Nansha Qundao, while the Philippines claims it as part of its exclusive economic zone and continental shelf. China has consistently objected to the Philippines' unilateral exploration for and exploitation of petroleum resources at Liyue Tan. In March 2011, the Philippines hired M/V Veritas Voyager to conduct petroleum explorations there without China's consent, and China's marine surveillance vessels demanded the departure of the M/V Veritas Voyager.

736. The Tribunal said that China and the Philippines had different understandings of their respective entitlements in the South China Sea, especially at Reed Bank (Liyue Tan), and that "the approach called for by the Convention was for the Parties to seek to resolve their differences through negotiations or the other modes of dispute resolution identified in Part XV of the Convention and the UN Charter." The Tribunal further said that "China was unequivocally aware that there existed a difference of views regarding the Parties' respective entitlements in the South China Sea and, in particular, in the area of Reed Bank", but still "sought to carry out its own understanding of its rights through the actions of its marine surveillance vessels". The Tribunal concluded that "China's actions amount to a breach of Article 77 of the Convention, which accords sovereign rights to the Philippines with respect to its continental shelf in the area of Reed Bank".[9]

737. Having acknowledged the existence of a difference of views between China and the Philippines and their obligation to resolve their differences through negotiations or the other modes of dispute resolution, the Tribunal should have applied this obligation equally to China and the Philippines, but it failed to do so. The obligation applies to both States, not one only. In the relevant incidents, it was the Philippines who took unilateral actions first in the disputed sea areas to conduct petroleum explorations, and attempted to "carry out its own understanding of its rights" through such unilateral actions and impose such understanding on China. It is only natural that China would not accept such actions. The actions of its marine surveillance vessels were carried out as a response measure against the Philippines' unilateral actions for the purpose of dissuading the Philippines from "carry[ing] out its own understanding of its rights" through unilateral actions. It is incredible that the Tribunal turned a

9 Award of 12 July, para.708.

blind eye to the Philippines' failure in fulfilling its due obligation, and to the fact that it was the Philippines who first took unilateral actions. The Tribunal's logic, by which China was not allowed to take any response actions other than protest against the Philippines' unilateral action, is ridiculous.

738. It is also necessary to point out that the Tribunal erred in declaring that China breached Article 77 of the Convention. As discussed above, the areas involved are far from being the ascertained continental shelf of the Philippines, thus there exists no premise for the application of Article 77.

*I.1.C. The Tribunal lacked factual basis for deciding on Submission No. 8*

739. With respect to the issue of non-living resources involved in the incidents of March 2011 regarding the activities of China Marine Surveillance vessels at Liyue Tan, the only evidential material the Philippines submitted and the Tribunal relied on was the "Memorandum from Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (March 2011)"[10]. This is an internal document of the Philippines government. Putting aside whether a *single* document may be a sufficient basis for such important fact-finding, its internal nature with all the attendant issues[11] should have prompted the Tribunal to conduct an examination, but it failed to do so.

740. With respect to the issue concerning "living resources" in Submission No. 8, the Philippines alleged that China interfered with the Philippines' sovereign rights and jurisdiction to exploit the living-resources in its sea areas by the 2012 summer moratorium on fishing in the South China Sea and the 2012 revised Hainan Provincial Regulation on the Control of Coastal Border Security[12], and further by preventing Philippine vessels from fishing at Meiji Jiao and Ren'ai Jiao since 1995. As to "the Summer Ban on Marine Fishing in the South China Sea", the Tribunal admitted that "the Philippines did not invoke any other evidence that would establish that the 2012 fishing moratorium was enforced against any Philippine fishing vessel in any area falling in the Philippines' exclusive economic zone".[13] The absence of evidence means the allegations are not proven, and thus international courts and tribunals would refrain from taking further steps. Inexplicably, the Tribunal, nevertheless, concluded that "the fishing moratorium established a realistic prospect that Filipino fisherman, seeking to exploit the resources in the relevant maritime areas, could be exposed to the punitive measures", and that "such developments may have a deterring

10 See Memorandum from Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (March 2011), Memorial of the Philippines, Vol. IV, Annex 69.

11 See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p.168, at para.134.

12 See Award of 12 July, para.686.

13 Ibid., para.711.

effect on Filipino fishermen and their activities."[14] Following from such speculations, the Tribunal considered that, in effect, China's 2012 fishing moratorium constituted an assertion of jurisdiction over fisheries, which amounts to a breach of Article 56 of the Convention.[15] Apparently, none of the situations described by the Tribunal such as "a realistic prospect", "could be exposed to the punitive measures", or "a deterring effect" had ever been proven to exist in fact; they were just the Tribunal's baseless speculations of what might occur. As a matter of fact, Philippine fishermen's activities did not weaken in any degree as a result of this fishing ban. To this the Tribunal turned a blind eye.

741. With respect to "China's prevention of the Philippine vessels from fishing at Mischief Reef and Second Thomas Shoal", the Tribunal admitted that the Philippines failed to prove that China prevented Filipino fishermen from fishing at either Meiji Jiao [Mischief Reef] or Ren'ai Jiao [Second Thomas Shoal].[16] However, inexplicably, the Award of 12 July states:

> The Tribunal *hastens to emphasise* that the absence of evidence on this point in record before it does not mean that such events did not occur or that China's actions may not otherwise have dissuaded Filipino fishermen from approaching Second Thomas Shoal and Mischief Reef. The Tribunal can *readily imagine* that the presence of Chinese law enforcement vessels at both locations, combined with China's general claim to fisheries jurisdiction in the South China Sea, could well lead Filipino fishermen to avoid such areas.[17]

This statement betrays the "hastened", "readily imagined" nature of its decision on this point. This goes against the judicial or arbitral character of its function. Admitting a lack of evidence and making its decision merely on the basis of allegations and speculations, the Tribunal openly defied the command under Article 9 of Annex VII. This is extremely rare in international jurisprudence.

*I.2. The Tribunal erred in finding that China failed to prevent fishing by Chinese flagged vessels in "the Philippines' exclusive economic zone"*

742. With respect to the Philippines' Submission No. 9 "with respect to fishing by Chinese vessels at Mischief Reef and Second Thomas Shoal", the Tribunal found:

> a. that, in May 2013, fishermen from Chinese flagged vessels engaged in fishing within the Philippines' exclusive economic zone at Mischief Reef and Second Thomas Shoal; and

14 Ibid., para.712.
15 See ibid.
16 Ibid., para.714.
17 Ibid., para.715.

> b. that China, through the operation of its marine surveillance vessels, was aware of, tolerated, and failed to exercise due diligence to prevent such fishing by Chinese flagged vessels; and
>
> c. that therefore China has failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone; and
>
> Declares that China has breached its obligations under Article 58(3) of the Convention [ … .][18]

*I.2.A. The Tribunal erred in applying Article 58 (3) of the Convention*

743. Article 58 (3) of the Convention stipulates:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

The application of this provision is premised on an ascertained exclusive economic zone. The Tribunal's application of this provision to China was based on the assumption that the relevant sea area is within the Philippines' exclusive economic zone and that China is a non-coastal state therein. However, this is not the case. Meiji Jiao and Ren'ai Jiao are components of China's Nansha Qundao and are far from being part of the ascertained exclusive economic zone of the Philippines. Thus the Chinese fishermen certainly have the right to fish therein, and the relevant fishing activities are of course under China's administration. Even as the Tribunal speculated, the Chinese government vessels had taken measures to administer and protect its nationals' fishing vessels at Meiji Jiao and Ren'ai Jiao, such measures should be deemed as exercising its inherent rights as a sovereign State.

*I.2.B. The evidence accepted by the Tribunal in addressing Submission No. 9 cannot support its conclusion*

744. There are serious problems in the Tribunal's fact-finding with respect to China's activities of "escorting and protecting fishing". The "evidence" the Tribunal relied on is Annex 94 submitted by the Philippines on 30 March 2014, which is titled "Armed Forces of the Philippines, Near-occupation of Chinese Vessels of Second Thomas (Ayungin) Shoal in the Early Weeks of May 2012 (May 2013)" [*sic*].[19] This

18 Ibid., para.1203.B.(10).

19 See Armed Forces of the Philippines, Near-occupation of Chinese Vessels of Second Thomas (Ayungin) Shoal in the Early Weeks of May 2012 (May 2013), Memorial of the Philippines, Vol. IV, Annex 94. With regard to this evidence, the time is flawed.

document described an incident that took place after the initiation of the Arbitration by the Philippines. The content of this Annex related to Ren'ai Jiao only, and had nothing to do with China's activities of escorting and protecting fishing at Meiji Jiao in May 2013, as "found" by the Tribunal.

745. With respect to Chinese activities at Meiji Jiao and Ren'ai Jiao, the Tribunal admitted that, the evidence provided by the Philippines was limited,[20] but the Tribunal accepted the Philippines' sole evidence, and considered that "the account of events provided by the Armed Forces of the Philippines is accurate and that Chinese fishing vessels, accompanied by the ships of CMS, were engaged in fishing at both Mischief Reef and Second Thomas Shoal in May 2013".[21] In the Tribunal's view, first, "China has asserted sovereign rights and jurisdiction in the South China Sea, generally, and has apparently not accepted these areas as part of the Philippines' exclusive economic zone", and had constantly issued a "Nansha Certification of Fishing Permit" to its nationals; second, the pattern of Chinese fishing activity at Meiji Jiao and Ren'ai Jiao was consistent with that exhibited in the waters adjacent to Zhubi Jiao and Huangyan Dao.[22] Based on the above discussions, the Tribunal presumed that China had, through the operation of its government vessels, escorted and protected Chinese fishing activities at Meiji Jiao and Ren'ai Jiao in May 2013. Here, the Tribunal's consideration and conclusion were based on speculation, not well founded in fact.

## II. China's "preventing Filipino fishermen from fishing" in the waters of Huangyan Dao (Submission No. 10)

746. The Philippines, in its Submission No. 10, requested the Tribunal to find that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal".[23] The Philippines asserted that the fishing by Philippine fishermen in the waters of Huangyan Dao qualified as "traditional fishing", which was protected by general international law as incorporated through Article 2(3) of the Convention.[24] The Philippines maintained that China, by preventing Philippine fishermen from fishing in the waters of Huangyan Dao, violated Article 2(3) of the Convention.[25]

20 See Award of 12 July, para.745.
21 Ibid., para.746.
22 See ibid., paras.747-751.
23 Ibid., para.758.
24 See ibid., para.777.
25 See ibid., para.772.

747. In its Award of 12 July, the Tribunal maintained that traditional fishing rights were vested private rights.[26] The Tribunal continued that international law has long recognised that developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights, and that established traditional fishing rights in the territorial sea remain protected by international law.[27] The Tribunal accepted the evidence submitted by the Philippines and determined that fishing activities of Philippine fishermen in the territorial sea of Huangyan Dao gave rise to traditional fishing rights, and were protected by the rules of international law about the treatment of the vested rights of foreign nationals which fall within "other rules of international law" provided in Article 2(3) of the Convention.[28] The Tribunal found that Huangyan Dao had been a traditional fishing ground for fishermen of many nationalities, and that "China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented fishermen from the Philippines from engaging in traditional fishing at Scarborough Shoal".[29]

748. It has been clarified in Chapter Two of this Study that the Tribunal had no jurisdiction over the Philippines' Submission No. 10. This section will expound that the Tribunal erred in disregarding the inseparability between Submission No. 10 and territorial sovereignty, in finding that Philippine fishermen had traditional fishing rights in the waters of Huangyan Dao, and in interpreting and applying Article 2(3) of the Convention.

*II.1. The Tribunal disregarded the inseparability between Submission No. 10 and territorial sovereignty over Huangyan Dao*

749. The Tribunal considered that the Philippines' Submission No. 10 was based on one of two alternative premises. If the Philippines were sovereign over Huangyan Dao, then it would be illegal for China to prevent the fishing by Philippine fishermen at Huangyan Dao. If China is sovereign over Huangyan Dao, then China had failed to respect the Philippine fishermen's "traditional fishing rights within China's territorial sea".[30] Exactly based on the above consideration, the Tribunal held that its jurisdiction to address the merits of the Philippines' Submission No. 10 did not depend

26 Interestingly, although it considered the Philippines' so-called traditional fishing rights as a sort of "private rights", the Tribunal did not even pause to take note of the question whether Philippine fishermen had resorted to the rule of "exhaustion of local remedies" under Article 295 of the Convention and the related issue of admissibility of Submission No. 10.

27 See Award of 12 July, paras.799, 804.

28 See ibid., para.808.

29 Ibid., para.1203.B.(11).

30 See ibid., para.811.

on a determination of the sovereignty over Huangyan Dao. The Tribunal is wrong; the Philippines' Submission No. 10 is inseparable from the territorial sovereignty over Huangyan Dao.

750. The Tribunal held that the activities alleged in Submission No. 10 occurred within the "territorial sea" of Huangyan Dao, and, accordingly, determined that the legal regime of territorial sea under the Convention was applicable. This decision disregarded the position of the Chinese government on the territorial sovereignty over Huangyan Dao. China has sovereignty over Nanhai Zhudao which includes Zhongsha Qundao, and Huangyan Dao is an integral part of Zhongsha Qundao. China has not yet drawn the baselines in the Huangyan Dao region. Under such circumstances, it is impossible to determine whether the area where the alleged activities occurred is China's internal water or territorial sea in the Huangyan Dao region, not to mention to nail down the legal regime of territorial sea as the one to be applied to the alleged activities at Huangyan Dao.

751. In the *dispositif* on the Philippines' Submission No. 10, the Tribunal did not specify which article(s) of the Convention China breached. The Tribunal was aware that its adjudication was based on a hypothesis. Had the Tribunal held that China breached Article 2(3) of the Convention, it would amount to admitting that China is the coastal State who is sovereign over Huangyan Dao. Although it accepted the Phillipines' allegation that China had violated Article 2(3) of the Convention, the Tribunal did not indicate in the *dispositif* which article(s) of the Convention China had breached. The Tribunal's adjudication of the relevant submission is, at best, a hypothetical answer to a hypothetical question; it is just playing a trick of deception.

### *II.2. The Tribunal erred in finding that the fishing activities of Philippine fishermen gave rise to traditional fishing rights*

#### *II.2.A. The Tribunal disregarded the existence of longstanding practice as the fundamental element of traditional fishing*

752. In general, "traditional fishing" is a vested interest acquired through longstanding fishing acitivities. On this question, Fitzmaurice undertook in-depth research and concluded that "if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has [ … ] acquired a vested interest [ … ]".[31] In international jurisprudence, international courts and tribunals place special emphasis on the "traditional" element of this right. "Traditional" is usually manifested in the existence of a practice for "an extended period" or "generations".

31 Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 The British Year Book of International Law (1953), p.1, at 51.

753. Although it noted the "traditional" element requirement in general,[32] the Tribunal made no inquiry into whether or not Philippine fishermen's activities were "traditional".

754. In *Barbados v. Trinidad and Tobago (2006)*, Barbados claimed that its fishermen had traditional fishing rights in the disputed sea area, and the earliest records of relevant fishing activities dated to the first half of the 18th century, including records from the French and the English authorities.[33] Barbados, however, submitted no direct evidence showing that its fishermen had fished off Tobago for the period from the early 19th century to the mid-20th century.[34] Instead, Barbados only submitted, for instance, some oral history as indirect evidence, as well as some speculations, and claimed that "the traditional character of Barbadian fishing activities in the waters off Tobago is of general knowledge and has been publicly recognised".[35] It also claimed that since the 1970s, Barbadian fisherfolk fishing off Tobago had usually transported their catch back to Barbados in modern-day ice boats.[36] The tribunal in that case considered the full range of evidence presented by Barbados, and concluded that the evidence provided by Barbados:

> [D]oes not sustain its contention that its fisherfolk have traditionally fished for flyingfish off Tobago for centuries. Evidence supporting that contention is, if understandably, nevertheless distinctly, fragmentary and inconclusive. The documentary record prior to the 1980s is thin. [...] Those contemporaneous reports indicate that the practice of long-range Barbadian fishing for flyingfish, in waters which then were the high seas, essentially began with the introduction of ice boats in the period 1978-1980, that is, some six to eight years before Trinidad and Tobago in 1986 enacted its Archipelagic Waters Act. Indeed, that appears to be consistent with the direct evidence in the affidavits of the Barbadian fisherfolk, none of whom testifies that they themselves fished off Tobago prior to that time. Those short years are not sufficient to give rise to a tradition.[37]

755. That case thus demonstrates that the establishment of a "tradition" requires a consistent practice of fishing activities for an extended period. The tribunal in that

32 See Award of 12 July, para.798.

33 See Barbados v. Trinidad and Tobago, Memorial of Babardos, 2004, para.56

34 See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at para.247.

35 Barbados v. Trinidad and Tobago, Memorial of Babardos, 2004, para.62.

36 See ibid., para.65.

37 Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at para.266.

case not only made an inquiry into the existence of traditional fishing but also applied a strict standard for proving it. What the Tribunal did in this Arbitration stands in stark contrast to what the tribunal did in that case.

756. State practice demonstrates that States usually use "centuries", "from time immemorial" or other similar words to describe the fishing practice involved when they claim "traditional fishing rights". For instance, in *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland, 1974)*, Germany claimed that it had "traditional fishing rights" in the zone of exclusive fishery jurisdiction that unilaterally delimited by Iceland, pointing out that its vessels had started fishing in the Icelandic area as long ago as the end of the 19th century.[38] In *Eritrea/Yemen-Sovereignty and Maritime Delimitation in the Red Sea (Second Stage, 1999)*, such phrases as "several centuries" and "from time immemorial" were used to stress the existence of traditional fishing rights.[39]

757. The Tribunal in this Arbitration, in its discussion of traditional fishing rights, paid no particular attention to the establishment of a "tradition"; instead, it simply and confusingly equated "traditional fishing" with "artisanal fishing", and held that:

> In keeping with the fact that traditional fishing rights are customary rights, acquired through long usage, [ … ] the methods of fishing protected under international law would be those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region.[40]

758. Indeed, artisanal fishing is usually the method adopted in traditional fishing activties. However, the traditional nature of the method alone is insufficient to prove the traditional nature of the fishing activities. In order to determine whether there exist traitional fishing activities, international courts and tribunals, in general, emphasize the long-term nature of fishing activities. This is reflected in *Eritrea/Yemen-Sovereignty and Maritime Delimitation in the Red Sea*[41] and *Barbados v. Trinidad and Tobago*. For instance, in the latter case, Barbados claimed that its fishermen had traditional fishing rights in the waters off Tobago, and that this fishing activity was artisanal in nature. However, the Tribunal in that case found that the short years in which the relevant fishing activities of Barbadian fisherfolk occurred were insufficient to give rise to a

38 See Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p.175, at para.55.

39 See Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), 17 December 1999, RIAA, Vol. XXII, p.335, at paras.92, 95.

40 Award of 12 July, para.806.

41 See Eritrea/Yemen: Territorial Sovereignty and Scope of the Dispute in the Red Sea, Award of 9 October 1998 (First Stage), paras.126-127; Eritrea/Yemen: Maritime Delimitation in the Red Sea, Award of 17 December 1999(Second Stage), para.103.

"tradition", and thus denied Barbados' claim to traditional fishing rights. The artisanal method was not considered.[42]

759. The Tribunal in this Arbitration did not pay attention to the time element, but focused on whether the Philippines fishing activities were artisanal, and further equated "artisanal" with "traditional". Such an approach of the Tribunal is to mistake part for whole. The Tribunal merely stated that "the claims of both the Philippines and China to have traditionally fished at the [Scarborough] shoal are accurate and advanced in good faith",[43] and swiftly proceeded to find that the relevant fishing activities of the Philippines constituted traditional fishing activities. Such an approach totally departed from the logic of traditional fishing rights.

*II.2.B. The Tribunal's finding that the fishing activities of Philippine fishermen constituted traditional fishing is not founded in fact*

760. The Tribunal simply determined that Philippine fishermen had engaged in "traditional fishing activities" or had "traditional fishing rights" in relevant sea areas without examining evidential materials submitted by the Philippines. It simply accepted and relied on them. In fact, none of the materials relied on by the Tribunal could demonstrate that Philippine fishermen had engaged in "traditional fishing activities" in the waters of Huangyan Dao.

761. The materials listed by the Tribunal are as follows. The first set includes a Philippine Navy report in 2012 and the remarks of a China's Foreign Ministry spokesperson on 18 April 2012. The Tribunal held that they proved that the waters surrounding Scarborough Shoal had been a traditional fishing ground of fishermen from neighbouring Asian countries.[44] The second set includes some maps produced in 1734 and 1784, purporting to reflect the connection between Huangyan Dao and the Philippine mainland.[45] The third set includes a 1953 book published by the Philippine Bureau of Fisheries and an academic article, depicting Huangyan Dao as having historically served as one of the "principal fishing areas" for Philippine fishermen.[46] The fourth set includes the affidavits of six Philippine fishermen, allegedly "providing direct documentation of Philippine fishing activities in the area at least since 1982 and indirect evidence from 1972".[47]

42 See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at para.266.

43 Award of 12 July, para.805.

44 See ibid., para.761.

45 See ibid., para.762.

46 See ibid.

47 Ibid., para.763 (internal footnote omitted).

762. What did China's Foreign Ministry Spokesperson say on 18 April 2012 was that the waters surrounding the Huangyan Dao have been a traditional fishing ground only for Chinese fishermen rather than fishermen from neighbouring Asian countries. At page 121 of the 1953 book provided by the Philippines, it was stated that "[t]he principal fishing areas include Stewart Banks, Scarborough Reef, Apo Reef, the areas around Fortune, Lubang, Marinduque, Polilio, Ticao, Burias, Masbate, Cuyo and Busuanga Islands".[48] From its context, this sentence emphasized only that these sites were the principal fishing areas; it said nothing about whether or not the activities of Philippine fishermen in those areas were traditional; and was irrelevant to whether or not those areas ("Scarborough Reef" in particular) were traditional fishing grounds for Philippine fishermen. The article of a Philippine scholar referred to by the Tribunal was mainly about fishery and its development, and its importance for the Philippines' economic progress. Neither fishing ground nor Huanyan Dao and its adjacent waters were discussed or mentioned in this article. The Philippine Navy report and relevant publications asserted that the surrounding waters of Huanyan Dao were a traditional fishing ground for the Philippines and other countries, but provided no explanation or evidence. None of the above materials constitutes evidence with any probative value regarding whether or not Philippine fishermen conducted traditional fishing activities at Huangyan Dao and its adjacent waters.

763. With respect to the Philippine fishermen's affidavits, it should be noted that, as has been pointed out, the probative value of an affifavit, as testimonial evidence in written form, is minimal compared to direct oral witness testimony.[49] In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain, 2001),* Judge Torres Bernárdez pointed out, in his dissenting opinion, that "regarding the affidavits, the Court considered them as a form of witness evidence, but one not tested by cross-examination. Its value as testimony is therefore minimal."[50] In *Barbados v. Trinidad and Tobago (2006)*, Barbados submitted fifteen affidavits of contemporary fisherfolk attesting that they, and their forebears, habitually fished off Tobago.[51] The Tribunal in that case was aware that the affidavits were written after

48 P. Manacop, The Principal Marine Fisheries, in D.V. Villadolid (ed.), Philippine Fisheries: A Handbook Prepared by the Technical Staff of the Bureau of Fisheries, 1953, p.103, at 121, quoted in Memorial of the Philippines, Vol.III, Annex 8.

49 See Anna Riddell and Brendan Plant, Evidence before the International Court of Justice (British Institute of International and Comparative law, 2009), pp.279-280.

50 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Dissenting Opinion of Judge Torres Bernárdez, I.C.J. Reports 2001, p.257, at para.36.

51 See Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006, RIAA, Vol. XXVII, p.147, at para.247.

the dispute arose and for litigious purposes, and thus did not give undue weight to these written reports.[52]

In this Arbitration, the affidavits submitted by the Philippines were written on 12 November 2015, which was produced well after the Philippines' initiation of this Arbitration on 22 January 2013. Obviously, these affidavits were specifically made for litigious purposes, and their probative value as testimony is minimal. In any event, these affidavits showed that the fishing activities of Philippine fishermen at Huangyan Dao started only in 1982. The time period of Philippine fishermen's fishing activities is short and does not constitute an extended period of time, so as to give rise to a tradition.

764. The Tribunal, in considering the Philippines' claim of traditional fishing rights, disregarded the "tradition" element requirement, prevailing in international jurisprudence, for establishing such rights. It did not even mention when Philippine fishermen started their alleged fishing activities, and rushed to the conclusion that Philippine fishermen had "traditional fishing rights" in relevant sea areas. Such a finding is not well founded in fact.

*II.3. The Tribunal erred in construing the nature of traditional fishing rights and applying Article 2(3) of the Convention*

765. The Tribunal said that artisanal fishing rights were not the historic rights of States, but private rights, and that the legal basis for protecting artisanal fishing stemmed from the notion of vested rights.[53] The Tribunal maintained: "Where private rights are concerned, international law has long recognized that developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights".[54] Referring to Article 2 (3) of the Convention which provided that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law", the Tribunal proceeded that "the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea."[55] The Tribunal erred in qualifying traditional fishing rights as private rights, in interpreting international cases, and in interpreting and applying Article 2(3) of the Convention, and imported rashly and mechanically traditional fishing rights into the legal regime of the territorial sea.

52 See ibid., para.266.

53 Award of 12 July, para. 798.

54 Ibid., para.799.

55 Ibid., para. 808 (internal footnote omitted).

*II.3.A. The Tribunal's qualification of traditional fishing rights as a private right lacks any basis in law*

766. The Tribunal erroneously interpreted the *Eritrea/Yemen-Sovereignty and Maritime Delimitation in the Red Sea (Second Stage, 1999)*. The Tribunal asserted that traditional fishing rights "are not the historic rights of States, as in the case of historic titles, but private rights, as was recognised in *Eritrea v. Yemen*, where the tribunal declined to endorse 'the western legal fiction [ … ] whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State'".[56] The paragraph in that award, cited by the Tribunal in this Arbitration, stated in full:

> As the Tribunal has indicated in its Award on Sovereignty, the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen. [ … ] This does not mean, however, that Eritrea may not act on behalf of its nationals, whether through diplomatic contacts with Yemen or through submissions to this Tribunal. There is no reason to import into the Red Sea the western legal fiction—which is in any event losing its importance—whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individuals had no opportunities to advance their own rights. It was never meant to be the case however that, were a right to be held by an individual, neither the individual nor his State should have access to international redress.[57]

Instead of discussing whether tradtional fishing rights were private rights or rights of the State, the tribunal in that case stressed the particularity of law and social culture in the Red Sea area, and refused to import the western legal fiction, that is, all legal rights, even those in reality held by individuals, were deemed to be those of the State for the purpose of allowing diplomatic representation. The view that under international law traditional fishing rights are not rights of States but private rights cannot be inferred from the above statement. Furthermore, the Tribunal did not give any further explanation why traditional fishing rights were private rights rather than the rights of States.

767. The Tribunal disregarded the fact that the Convention treated tradtional fishing rights as the rights of States. Article 51(1) of the Convention provides that:

> Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other

56 Ibid., para.798 (internal footnote omitted).

57 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA, Vol. XXII, p.335, at para.101.

> legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.

This is the only provision in the Convention that mentions the "traditional fishing rights". States, not private persons, are the holders of traditional fishing rights under this provision.

768. Traditional fishing rights are generally treated as the rights of States rather than private rights in international law literature. Fitzmaurice maintained that, although traditional fishing rights stem from activities of fishing vessels of a given country in a certain area over a long period, it is "their country" that has through them acquired a vested interest.[58] Fitzmaurice has been cited approvingly and followed by scholars.[59]

*II.3.B. The Tribunal erred in citing and interpreting the relevant international judicial cases concerning the protection of private rights*

769. The Tribunal cited the *Settlers of German Origin in Poland* (1923), the *Arbitration regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army (2009), and the Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (United Kingdom v. United States, 1893)*, in an attempt to prove that it was a rule of international law that "developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights".[60] The Tribunal proceeded to apply this alleged rule to this Arbitration by invoking Article 2 (3) of the Convention. However, the Tribunal neglected the particular backgrounds to and legal frameworks in those cases, and misread the relevant judgment and awards. As a matter of fact, the passages in those cases cited by the Tribunal are irrelevant to this Arbitration.

770. In *Settlers of German Origin in Poland*, although there was a transfer of sovereignty from Germany to Poland, the German Civil Law had continued, without interruption, to operate in the territory in question. Hence, the Permanent Court of International Justice wrote that, "it can hardly be maintained that, although the law survives, private rights acquired under it have perished", and therefore "private rights

58 See Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 The British Year Book of International Law (1953), p.1, at 51.

59 See, e.g., Yehuda Blum, Historic Title in International Law (Martinus Nijhoff, 1965), pp.313-314.

60 See Award of 12 July, para.799.

acquired under existing law do not cease on a change of sovereignty".[61] In that case, the fact that private rights acquired under the German Civil Law remained unchanged was due to the fact that law was made to continue, without interruption, to operate in the territory in question. The Permanent Court of International Justice made it clear that this issue it dealt with was that of private rights under the particular provisions of the law and treaty involved, not as a general matter, and its decision was solely based on the applicable treaty and the specific national law in force in the territory at issue.[62] When citing to that case, the Tribunal completely disregarded the special circumstances in the case, especially the treaty arrangements between Germany and Poland, and distorted the important meaning of that case.

771. The *Arbitration regarding the Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army (2009)* was mainly based on the Comprehensive Peace Agreement (including the Abyei Protocol), which confirmed the Parties' intention to accord special protection to the traditional rights of the people settling within and in the vicinity of the Abyei Area, so that the grazing rights would not be affected by the tribunal's boundary delimitation.[63] The tribunal in that case emphasized that "[s]overeign rights over territory are not, after all, the only relevant considerations in areas in which traditional land-use patterns prevail."[64] The protection of traditional grazing rights resulted from the special arrangement of the Comprehensive Peace Agreement and Abyei Protocol. Clearly, the Tribunal failed to see this.

772. In *Bering Sea Arbitration,* the tribunal ruled that, "the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit".[65] In accordance with its mandate (the treaty referring the dispute to arbitration), the tribunal formulated certain regulations for the proper protection and preservation of the fur-seals in or habitually resorting to the Bering Sea, which contained an exemption for Indians preserving their traditional fishing rights.[66]

61 Questions relating to Settlers of German Origin in Poland, Advisory Opinion, 1923, PCIJ Series B, No. 6, p.6, at 36.

62 See ibid.

63 See Arbitration regarding the delimitation of the Abyei Area (Government of Sudan v. Sudan People's Liberation Movement/Army), Final Award of 22 June 2009, paras.750-752,758.

64 Ibid., para.748.

65 Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (United Kingdom v. United States), Award of 15 August 1893, RIAA, Vol. XXVIII, p. 263, at 269

66 See ibid., p.271.

Obviously, such an arrangement in the form of regulations resulted from the particularities of the mandate for arbitration.

773. The cases cited by the Tribunal are not apposite here. First, China has indisputable sovereignty over Huangyan Dao. There exists no change or tranfer of territorial sovereignty nor a circumstance of deilimitation. Second, what all the above cases dealt with are the "private rights" legitimately acquired under particular treaties or national laws. The Tribunal in this Arbitration determined that the Phillipines' traditional fishing rights were "private vested rights", but did not clarify under which national law or particular agreement they were acquired and whether they were legitimate.

*II.3.C. The Tribunal's finding that traditional fishing rights were subject to "other rules of international law" referred to in Article 2(3) of the Convention is not well founded in fact or law*

774. Article 2(3) of the Convention provides that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." This article follows from Article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which is based on Article 1 of the Draft Articles concerning the Law of the Sea prepared by the International Law Commission in 1956. The draft article read:

> 1. The sovereignty of a State extends to a belt of sea adjacent to its coast, described as the territorial sea.
>
> 2. This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.[67]

Regarding what rules are included in "other rules of international law" referred to in that draft article, the International Law Commission's commentary reads, in part, as follows:

> (3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.
>
> (4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles.

67 Commentary to the articles concerning the law of the sea, Yearbook of the International Law Commission, 1956, Vol.II, p.265.

> (5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.[68]

Draft Article 1 was not fully discussed throughout the negotiation process of the 1958 Convention on the Territorial Sea and the Contiguous Zone, nor given special attention to in the negotiation process of the Convention.

775. In *Chagos Marine Protected Area Arbitration (Mauritius v. UK, 2015)*, the arbitral tribunal stated that:

> the Commission understood Article 1(2) of the Draft Articles to require States to exercise their sovereignty in the territorial sea subject to the general rules of international law. The Commission also recognized that States may possess particular rights in the territorial sea by virtue of bilateral agreements or local custom, but noted merely that the Articles were not intended to interfere with such rights.[69]

Article 2(3) of the Convention completely followed the relevant provision of the 1958 Convention on the Territorial Sea and the Contiguous Zone; thus, "other rules of international law" refers to general rules of international law. In the meantime, in a particular area of the territorial sea of a coastal State, Article 2(3) does not prevent a coastal State from according to other States by bilateral treaty or custom rights in excess of those provided by the Convention.

776. As can been seen from the above, both the *travaux préparatoires* of the Convention and international jurisprudence demonstrate that, on the premise that a coastal State has full sovereignty over its territorial sea, the exercise by a coastal State of its sovereignty is limited not only by the Convention but also by other rules of international law. Such limitations must be based on general international law, local customs or treaties. The Tribunal did not prove that traditional fishing activities of Philippine fishermen were covered by any of the above limitations.

777. Under the Convention, a coastal State has sovereignty over the territorial sea; such sovereignty is much stronger than the sovereign rights over resources in the excusive economic zone. The Tribunal, in analysing historic rights, considered that "[t]he notion of *sovereign* rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources".[70] According to the Tribunal, historic rights to resources, even if they exsited before, could no longer

68 Ibid.

69 Chagos Marine Protected Area Arbitration (Mauritius v. UK), Award of 18 March 2015, para.516.

70 Award of 12 July, para.243.

exist after the entry into force of the exclusive economic zone regime of the Convention. Yet, the Tribunal found that traditional fishing rights might still exist in the territorial sea over which a coastal state enjoys sovereignty. This is unbelievable. Such a ruling is considered by scholars as abnormal.[71]

### III. China's activities and the protection and preservation of the marine environment in the South China Sea (Submissions No. 11 and 12(b))

778. In its Memorial of 30 March 2014, the Philippines presented Submissions No. 11 and No. 12 (b), which requested the Tribunal to find that "China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal", and that China's occupation of and construction activities on Mischief Reef violated China's duties to protect and preserve the marine environment under the Convention.[72] During the Hearing on the Merits on 30 November 2015, the Philippines amended Submission No. 11 to extend its coverage to the marine environment at Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan (Hughes) Reef, Gaven Reef and Subi Reef.[73]

779. In its Award of 12 July, the Tribunal divided the Philippines' foregoing claims into two categories: (1) China's toleration of, and active support for, environmentally harmful fishing practices by Chinese fishing vessels at Scarborough Shoal and Second Thomas Shoal had violated its obligations to protect and preserve the marine environment under the Convention; and (2) China's island-building activities on Cuarteron Reef, Fiery Cross Reef, Johnson Reef, Hughes Reef, Gaven Reef (North), Subi Reef, and Mischief Reef had violated its duties to protect and preserve the marine environment under the Convention.[74]

780. In its Award on Jurisdiction, the Tribunal found that it had jurisdiction to address the Philippines' allegation concerning China's toleration of, and active support for, environmentally harmful fishing practices employed by Chinese nationals at Scarborough Shoal and Second Thomas Shoal.[75] In its Award of 12 July, the Tribunal found that it had jurisdiction to consider the Philippines' claim that China's

71 See Chris Whomersley, The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique, 16 Chinese Journal of International Law (2017), p.387, at para.77; Sophia Kopela, Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration, 48 Ocean Development & International Law (2017), p.181, at 195-196.

72 See Memorial of the Philippines, Vol.I, p.272.

73 See Hearing on the Merits Tr. (Day 4), p.169.

74 See Award of 12 July, paras.925, 932-933.

75 See Award on Jurisdiction, para.408.

construction activities on the seven reefs had damaged the marine environment.[76] With respect to the merits, the Tribunal found that Chinese fishermen's harmful fishing practice caused irreparable damage to marine life, and that the Chinese government was fully aware of the practice, but had tolerated and protected it, and thus had violated Articles 192 and 194(5) of the Convention.[77] The Tribunal further found that China had, through its island-building activities, also caused devastating and lasting damage to the marine environment, and had breached Articles 192, 194(1), 194 (5), 197, 123, and 206 of the Convention.[78]

781. As stated in Chapter Two, the Tribunal had no jurisdiction over the Philippines' Submissions No. 11 and 12(b). In its Award of 12 July, the Tribunal inaccurately defined the nature of due diligence obligation and erred in law application and fact finding relating to "harmful harvesting activities of fishermen" and island-building activities in Nansha Qundao.

*III.1. Nature of the due diligence obligation invoked by the Tribunal*

782. With respect to "harmful harvesting activities of fishermen" and island-building activities in Nansha Qundao, the Tribunal determined that China had breached some provisions of the Convention, especially Articles 192 and 194, and the duty of due diligence therein. The Tribunal maintained that, "Articles 192 and 194 set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment", and proceeded to cite international judicial cases as saying that the obligation to "ensure" was an obligation of conduct, which required "'due diligence' [ … ] not only adopting appropriate rules and measures, but also a 'certain level of vigilance in their enforcement and the exercise of administrative control.'"[79] Ostensibly acknowledging that the duty of due diligence was an obligation of conduct, the Tribunal, nevertheless, applied this duty in effect as an obligation of result to China in this Arbitration. Moreover, the Tribunal deliberately disregarded the element of "in accordance with their capacities" in the duty of due diligence.

783. The duty of due diligence in international law is an obligation of conduct. As such, the duty of due diligence is not to guarantee that harm would never occur. States have fulfilled the duty of due diligence when they have taken necessary measures and made efforts to implement them. In 2001, the International Law

76 See Award of 12 July, para.938.

77 See ibid., paras.957-958, 962-964.

78 See ibid., paras.983-991.

79 Award of 12 July, para.944 (internal footnote omitted).

Commission, in Paragraph 7 of the commentary to Article 3 of its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, pointed out:

> The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required [ … ] to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur.[80]

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (2011)*, the Seabed Disputes Chamber of the ITLOS stated that the purpose of the term of "measures necessary to ensure" in the Convention is to exempt States who have taken certain measures from liability for damage.[81]

784. The duty of due diligence requires States to perform it "in accordance with their capacities". This means that States are not to be unrealistically required to take measures beyond their capacities. In fact, the capacity of a State constantly develops and changes over time. Just as the Seabed Disputes Chamber pointed out:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.[82]

In *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) to the Tribunal* (2015), the ITLOS affirmed the foregoing observation.[83] In the light of the different circumstances of States, no uniform requirements for "necessary measures" are provided for. Clearly, a State has fulfilled due diligence obligations if it has taken "necessary measures" in accordance with its capacity.

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80 Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Yearbook of the International Law Commission, 2001, Vol.II, Part Two, p.154.

81 See Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of 1 February 2011, ITLOS, para.119.

82 Ibid., para.117.

83 Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal), Case No. 21, Advisory Opinion of 2 April 2015, ITLOS, para.132.

*III.2. The Tribunal erred in finding that China had, through its toleration and protection of, and failure to prevent harmful harvesting, breached certain provisions of the Convention*

785. The Tribunal found that "China has, through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at Scarborough Shoal, Second Thomas Shoal and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention."[84] Invoking Articles 192 and 194 of the Convention, the Tribunal held that China had a due diligence obligation, which required China not only to adopt appropriate rules and measures in the protection and preservation of "rare or fragile ecosystems" as well as "the habitats of endangered species", but also to keep a certain level of vigilance in its enforcement and exercise of administrative control.[85] The Tribunal considered the harvesting of sea turtles, species threatened with extinction, to constitute a harm to the marine environment. The Tribunal was certain that "the harvesting of corals and giant clams from the waters surrounding Scarborough Shoal and features in the Spratly Islands, on the scale that appears in the record before it, has a harmful impact on the fragile marine environment."[86]

786. The Tribunal found no evidence in the record that would indicate that China has taken any steps to enforce Articles 192 and 194(5) of the Convention as well as the relevant international rules and measures applicable to endangered species against fishermen engaged in poaching of endangered species. It also found that "China was aware of the harvesting of giant clams. It did not merely turn a blind eye to this practice. Rather, it provided armed government vessels to protect the fishing boats."[87]

787. The Tribunal's findings suffer from three problems: first, the Tribunal deliberately distorted China's actions to affirm and safeguard its sovereignty; second, the Tribunal erred in applying Article 194(5) of the Convention; and third, the Tribunal disregarded the fact that China had actively taken measures to fulfil its due diligence obligation.

*III.2.A. The Tribunal deliberately distorted China's actions to affirm and safeguard its sovereignty*

788. The Tribunal alleged that in the incidents at Huangyan Dao and Ren'ai Jiao, the Chinese government dispatched government vessels to protect harmful harvesting activities of Chinese fishermen.[88] By doing so, the Tribunal deliberately distorted China's actions to affirm and safeguard its sovereignty in the incidents at Huangyan

84 Award of 12 July, para.992.

85 Ibid., paras.944-945.

86 Ibid., para.960.

87 Ibid., para.964 (internal footnote omitted).

88 Ibid.

Dao and Ren'ai Jiao in an attempt to stigmatise China by accusing it of protecting harmful fishing practices.

789. In fact, the actions of the Chinese government in the two incidents were aimed at affirming and safeguarding its territorial sovereignty. China made clear in its Position Paper: "Regarding the situation at Huangyan Dao, it was the Philippines that first resorted to the threat of force by dispatching on 10 April 2012 a naval vessel to detain and arrest Chinese fishing boats and fishermen in the waters of Huangyan Dao."[89] China has sovereignty over Huangyan Dao. The Philippines' armed personnel illegally and forcibly boarded Chinese fishing vessels in the lagoon of Huangyan Dao, which constituted a serious violation of China's sovereignty. In the face of such provocations, China was forced to take response measures to safeguard its sovereignty,[90] and dispatched government vessels to protect the life, safety and property of Chinese fishermen. The Tribunal made a fundamental mistake about the nature of China's actions, erroneously identifying them not as actions to safeguard its sovereignty but as actions "to protect Chinese fishermen's harvesting of endangered species". Similarly, in the incident at Ren'ai Jiao, China was also forced to take response measures to safeguard its sovereignty; the Tribunal made the same mistake. Obviously, Articles 192 and 194 should not be applied to these two incidents, let alone the due diligence obligation.

*III.2.B. The Tribunal erred in applying Article 194(5) of the Convention*

790. The Tribunal found that China had violated Article 194(5) of the Convention. Article 194, titled "Measures to prevent, reduce and control pollution of the marine environment", provides:

> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
>
> 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

89 China's Position Paper, para.51.

90 See ibid., para.48.

> 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:
>
> (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
>
> (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
>
> (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;
>
> (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.
>
> 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.
>
> 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Article 194 must be interpreted as a whole. As has been pointed out, Paragraph 5 "extends the concept of the protection and preservation of the marine environment to 'rare or fragile ecosystems' and the 'habitat of depleted, threatened or endangered species and other forms of marine life'."[91] Therefore, both the title of Article 194, "Measures to prevent, reduce and control pollution of the marine environment", and the content of first four paragraphs indicate that the measures provided for in Paragraph 5 for the protection and preservation of "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" shall be taken when they suffer from "pollution of the marine environment".

91 Shabtai Rosenne and Alexander Yankov (eds.), Virginia Commentary (Martinus Nijhoff Publishers, 1991), Vol. IV, p.68, para.194.10(o).

In other words, the existence of "pollution of the marine environment" is a precondition for applying Paragraph 5.

791. In this Arbitration, to find a violation of Article 194(5), the Tribunal must prove first that "harmful harvesting activities" have in fact caused a specific kind of pollution listed in Article 194(3), and then that the pollution has in fact caused damage to ecosystems. That is to say, "pollution of the marine environment" is the vehicle through which "harmful harvesting activities" cause "damage to ecosystems". However, in its Award of 12 July, the Tribunal simply jumped from "harmful harvesting activities" to damage to endangered species, skipping the issue of pollution, *i.e.*, whether harmful harvesting activities had caused pollution.[92] The Tribunal directly connected "harmful harvesting activities" to "causing damage to ecosystems". Since the Tribunal did not prove that "harmful harvesting activities" had caused "pollution of the marine environment", Article 194(5) should not have been applied.

*III.2.C The Tribunal disregarded the fact that China had actively taken necessary measures to fulfill its due diligence obligation*

792. As mentioned above, the duty of due diligence is an obligation of conduct, requiring States Parties to use "the best practicable means at their disposal and in accordance with their capabilities" in the light of the circumstances of the activities in issue. In fact, to prevent illegal harvesting of endangered species, the Chinese government, taking account of specific circumstances and practical demands, has taken a series of measures, including actively enacting laws and regulations and taking corresponding administrative and judicial measures to enforce them. The Tribunal said that "[t]here is no evidence in the record that would indicate that China has taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species".[93] Such a conclusion totally disregarded the facts.

793. The following publicly available information shows that China has taken sufficient measures to fulfill its due diligence obligation.

*(1) China has enacted laws and regulations to protect aquatic wild animals including endangered species*

794. First, China has adopted legislation to place aquatic wild animals under special State protection, and prohibit their harvesting and trading. For example, the Law of the People's Republic of China on the Protection of Wildlife (adopted in 1989, amended in 2004 and 2009, and revised in 2016) provides that the hunting, catching or killing of wildlife under special State protection shall be prohibited; the sale and

92 See Award of 12 July, paras.954-958.

93 Ibid., para.964.

purchase of such wildlife or the products thereof shall be prohibited.[94] The Fisheries Law of the People's Republic of China (adopted in 1986, amended in 2000, 2004, 2009 and 2013) stipulates that it is prohibited to fish and kill, or hurt the aquatic wild animals under special State protection.[95] Furthermore, the Regulations of the People's Republic of China on the Protection of Aquatic Wild Animals (adopted in 1993, revised in 2011) provides that: no entity or individual shall be allowed to damage the waters, places, and living conditions where aquatic wild animals under State priority protection and local priority protection live and breed; it is prohibited to capture or kill any aquatic wild animal under State priority protection; and the sale and purchase of aquatic wild animals under special State protection or the products thereof shall be prohibited.[96] The Law of the People's Republic of China on the Protection of Wildlife, the Regulations of the People's Republic of China on the Protection of Aquatic Wild Animals and the Criminal Law have provided in detail for corresponding legal liabilities for violations.[97]

795. Second, China prohibits the use of dangerous methods to hunt and catch aquatic wild animals in order to protect the places where aquatic wild animals live and breed. The Law on the Protection of Wildlife bans using explosives and other prohibited methods in hunting or catching of wildlife, and provides for corresponding legal liabilities.[98] The Fisheries Law specifically provides that such methods as catching fish by explosives, poison or electricity, which destroy fishery resources, are prohibited, and provides for corresponding legal liabilities.[99] In addition, the Criminal Law specifically provides criminal liabilities for serious violations of the above prohibitions.[100]

796. Third, China has adopted a licensing system for commercial fishing. In accordance with the Fisheries Law and the Provisions on the Administration of Fishery Licensing (issued in 2002, revised in 2004, 2007 and 2013), commercial fishing operators shall obtain a fishing license issued by relevant authorities; fishing vessels without licenses are prevented from fishing in relevant waters; licensees shall be

94 See Articles 21 and 27 of Law of the People's Republic of China on the Protection of Wildlife.

95 See Article 37 of Fisheries Law.

96 See Articles 7, 12 and 18 of Regulations of the People's Republic of China on the Protection of Aquatic Wild Animals.

97 See Articles 45 and 48 of Law of the People's Republic of China on the Protection of Wildlife; Articles 26-28 of Regulations on the Protection of Aquatic Wild Animals; Article 341 of Criminal Law of the People's Republic of China.

98 See Articles 24, 45 and 46 of Law of the People's Republic of China on the Protection of Wildlife.

99 See Articles 30 and 38 of Fisheries Law.

100 See Articles 340-341 of Criminal Law.

responsible for the fishery activities conducted by them, and shall bear the corresponding legal liabilities arising from the fishery activities.[101]

*(2) China has actively taken administrative measures to protect endangered species*

797. At the central government level, the Ministry of Agriculture of China is the principal agency responsible for implementing the above laws and regulations.

798. Joint law enforcement actions have been often taken by multiple departments to combat and punish illegal harvesting of giant clams, corals and sea turtles. For example, on 25 June 2003, Ministry of Agriculture, State Administration for Industry and Commerce, General Administration of Customs and Ministry of Public Security jointly started a special law enforcement program to penalize illegal hunting, killing, purchasing, selling, transporting, importing and exporting aquatic wild animals.[102] On 28 June 2012, Ministry of Agriculture, Ministry of Public Security and General Administration of Customs organized another special law enforcement program to combat illegal harvesting, trading and utilizing, and smuggling of aquatic wild animals.[103]

799. At the regional level, Guangdong Province, Guangxi Zhuang Autonomous Region and Hainan Province have successively established, with appropriate approval, a number of natural reserves at various levels since 2005.[104] In order to protect the marine ecological environment of the South China Sea and combat illegal dredging and selling of giant clams, Qionghai City of Hainan Province has specially issued the Implementation Program for Carrying out the Special Law Enforcement Inspection for Combating Illegal Dredging, Transporting and Selling of Giant Clams in Qionghai City.[105] The local government of Tanmen Town, home to many fishermen

101 See Article 23 of Fisheries Law; Articles 16-22 and 36 of Provisions on the Administration of Fishery Licensing.

102 See Four Central Government Departments Jointly Carried out a Special Law Enforcement Program to Save Aquatic Wild Animals, http://news.xinhuanet.com/newscenter/2003-06/25/content_937686.htm.

103 See Aquatic Wildlife Protection Office of the Ministry of Agriculture: Multiple Central Government Departments Carried out a Joint Law Enforcement Program to Protect Aquatic Wildlife, http://news.xinhuanet.com/politics/2012-06/28/c_112310682.htm.

104 See Overview of Monitoring and Protecting Marine Biodiversity in the South China Sea, http://www.oceanol.com/zhuanti/201705/22/c64772.html.

105 See Implementation Program for Carrying out the Special Law Enforcement Inspection for Combating Illegal Dredging, Transporting and Selling of Giant Clams in Qionghai City, http://xxgk.hainan.gov.cn/qhxxgk/bgt/201503/t20150326_1539023.htm.

fishing in the South China Sea for generations, has formulated a corresponding implementation program and established a long-term administrative mechanism.[106]

*(3) Criminal enforcement processes have been put in place and resorted to for the protection of endangered species*

800. For their criminal acts of illegal harvesting of endangered species, such as giant clams, corals and sea turtles, especially those that occurred in the South China Sea, the perpetrators have been prosecuted. For instance, on 3 December 2007, Li, Fu and Yang were arrested for illegal purchasing, transporting, selling sea turtles, and subsequently prosecuted and punished by a People's Court in the suburban areas of Sanya City, Hainan Province.[107] In May 2014, Yao was arrested for illegal selling of red coral products, and subsequently sentenced to imprisonment by a People's Court in Guangzhou City, Guangdong Province.[108]

801. There were some other criminal cases not directly related to the South China Sea area. For example, in the first half of 2013, four defendants were arrested on suspicion of illegal selling of red corals, and sentenced to criminal penalties by a People's Court in Xiapu County, Fujian Province in 2014.[109] These cases corroborate China's efforts to protect endangered species.

802. The foregoing facts demonstrate that China has taken necessary legislative, executive and judicial measures to fulfil its due diligence obligation. The Tribunal's finding that China had not taken any steps against fishermen engaged in poaching of endangered species runs counter to the facts. This shows that, in spite of acknowledging that the duty of due diligence is an obligation of conduct, the Tribunal in effect applied it to China as an obligation of result.

*III.3. The Tribunal erred in finding that China's construction activities on the component islands of Nansha Qundao violated certain provisions of the Convention*

803. On the basis of a report by experts appointed by the Tribunal and the materials provided by the Philippines, the Tribunal found that, through its "island-building"

106 See Implementation Program for Carrying out the Special Inspection for Combating Illegal Acts such as Dredging, Transporting and Selling of Giant Clams, http://xxgk.hainan.gov.cn/qhxxgk/tmz/201509/t20150925_1672393.htm.

107 See Three persons were sentenced to imprisonment from 9 months to 2 years respectively for purchasing, transporting, and selling 54 sea turtles, http://www.hi.chinanews.com/hnnew/2008-08-07/121212.html.

108 See Yao illegally sold products of precious and endangered species of wildlife under special State protection (2014) Sui Li Fa Xing Chu Zi No. 859, http://v6.pkulaw.cn/pfnl/1970324871089435.html.

109 See Four persons were sentenced to criminal penalties for illegal selling of more than 7 kilograms of red corals, http://lfzy.hebeicourt.gov.cn/public/detail.php?id=10002.

activities in Nansha Qundao, China had breached Articles 192, 194(1), 194(5), 197, 123 and 206. The Tribunal's finding is three-fold.

First, in terms of the obligation to protect and preserve the marine environment, the Tribunal, relying on the above-mentioned report, found that China's "island-building" activities had caused devastating and long-lasting damage to marine environment,[110] and that China had violated Articles 192, 194(1) and 194(5) of the Convention.

Second, with respect to the obligation to cooperate, seeing no convincing evidence that China attempted to cooperate or coordinate with the other states bordering the South China Sea, the Tribunal found that China had breached Articles 123 and 197 of the Convention.[111]

Third, regarding the obligation to monitor and assess, the Tribunal considered that:

> Although China's representatives have assured the States parties to the Convention that its "construction activities followed a high standard of environmental protection," it has delivered no assessment in writing to that forum or any other international body as far as the Tribunal is aware.[112]

On account of this, the Tribunal found that China had not fulfilled its duties under Article 206 of the Convention.

804. China's construction activities on the component islands of Nansha Qundao are those conducted on its own territory, and fall within the scope of China's sovereignty. China has taken full account of the environmental factors in its construction activities, and adopted corresponding environmental protection measures. The Tribunal had no jurisdiction over China's construction activities in Nansha Qundao. The Tribunal's finding that China's relevant activities had caused damage to environment is erroneous.

*III.3.A. The Tribunal erred in finding that China's construction activities had breached the obligation to protect and preserve the marine environment*

805. The Tribunal erred in two respects at least: first, it had treated the duty of due diligence provided for in Articles 192, 194(1) and (5) of the Convention as an obligation of result rather than conduct; second, with respect to fact finding, the Tribunal relied on a dubious expert report, and disregarded the environmental protection measures adopted by China in respect of its construction work.

110 See Award of 12 July, para.983.

111 See ibid., para.986.

112 Ibid., para.991 (internal footnote omitted).

*(1) The Tribunal erroneously treated the provisions of Articles 192, 194(1) and (5) as provided for an obligation of result*

806. As mentioned above, the duty of due diligence is just an obligation of conduct, not of result; its performance does not guarantee that damage will never occur. Therefore, to determine whether China has violated its due diligence obligation, the Tribunal should examine whether China has taken necessary measures to prevent, reduce and control pollution of the marine environment and to protect and preserve ecosystems as well as the habitat of marine life, and made the best efforts to do so, rather than fixating its eyes on the result alone.

807. However, on the basis of the expert reports, the Tribunal concluded that China's construction activities had caused devastating and long-lasting damage to marine environment, and that China had breached relevant provisions of the Convention.[113] The Tribunal in effect imposed the "obligation of result" on China. The Tribunal failed to follow the standard of obligation of conduct to examine whether China had used the best practicable means at its disposal and in accordance with its capabilities to prevent, reduce and control pollution of the marine environment, and to protect and preserve ecosystems as well as the habitat of marine life. The Tribunal simply equated the "result of damage" asserted in the report with the violation of Articles 192, 194(1) and (5).

*(2) The Tribunal committed errors in fact-finding*

808. The Tribunal committed gross errors in fact-finding. The Tribunal relied on a dubious expert report, and disregarded the environmental protection measures adopted by China in respect of its construction activities.

809. The reliability of the expert report adopted by the Tribunal is clearly doubtful. First, the Tribunal proposed appointing Sebastian Ferse as expert on 29 February 2016, and on 12 April 2016 informed the Parties of its intention to appoint two additional experts, namely Peter Mumby and Selina Ward,[114] and thus completing the appointment of three experts no earlier than the latter date. It is shocking that three experts completed their report on 29 April 2016.[115] Thus no more than 17 days elapsed from the appointment of the last two experts to the issuance of the report by the all three experts. Such a short period of time is far from enough for dealing with such a complicated scientific assessment of the South China Sea marine environment. Thus the independence and professionalism of the experts are open to serious doubt.

Second, the expert report lacks first-hand, empirical data. In *Dispute concerning certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua, 2015)*, the ICJ noted that Nicaragua had produced no direct evidence of changes in

113 See ibid., paras.982-983.

114 See ibid., paras.85, 90.

115 See ibid., para.95.

the morphology of the Lower San Juan, and its argument rested on modelling and estimates by its experts which had not been substantiated by empirical data, and gave no weight to Nicaragua's expert evidence.[116] In this Arbitration, the three experts should have collected relevant empirical data and used scientific methods to assess them when determining the potential environmental impact of China's construction activities in Nansha Qundao. They failed to do so. The expert report entirely cited researches having no direct relevance to China's construction activities in Nansha Qundao, such as those about other geographical areas including the Port of Miami, the Caribbean, Great Barrier Reef and Hawaiian.[117]

Third, the report repeatedly used, without examination, the aerial images and satellite images provided by the Philippines. The reliability of these images is doubtful. For instance, the aerial images and satellite images in Annexes No. 597, 781 and 782 provided by the Philippines were taken from the materials posted on the website of the Center for Strategic & International Studies.[118] Given that this center is a US think tank with a tendency rather than a professional research institute for aerial images and satellite images, the reliability of these images is questionable. Moreover, the aerial images and satellite images in Annexes No. 787-792 and 795 provided by the Philippines indicated no specific sources, but "various sources",[119] a form of indication of sources that should have no place in a serious proceeding.

810. With respect to the construction activities in Nansha Qundao, the Chinese government has attached great importance to the protection of the ecological environment of relevant islands, reefs and waters, and strictly followed the principle of "Green Construction, Eco-Friendly Reefs". Based on solid evidence and thorough studies, China has applied dynamic protection measures to the whole process so as to combine construction with ecological and environmental protection and realize sustainable development of islands and reefs.[120] On 10 and 18 June 2015, the State

116 See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Costa Rica v. Nicaragua), Judgment, I.C.J. Report 2015, p.665, at para.203.

117 See Assessment of the potential environmental consequence of construction activities on seven reefs in the Spratly Islands in the South China Sea.

118 See ibid., p.35, footnote 204 and "ANNEX B: List of Cited Documents Provided by the PCA", citing Written Response of the Philippines to the Tribunal's 13 July 2015 Questions, Volume II, Annex 597; Supplemental documents of the Philippines, Vol. IV, Annexes 781-782.

119 See ibid., p.36, footnote 209 and "ANNEX B: List of Cited Documents Provided by the PCA", citing Supplemental documents of the Philippines, Vol. IV, Annexes 787-792,795. The indication of sources of these annexes in this "ANNEX B" and the submissions of the Philippines read as "various sources".

120 See Foreign Ministry Spokesperson Hong Lei's Regular Press Conference, 6 May 2016, www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1361284.shtml.

Oceanic Administration released two documents on its website, making it clear that construction activities abided rigorously by the concept of "Green Construction, Eco-Friendly Reefs" and that many protection measures were adopted in the stages of planning, design, and construction.[121] These measures taken by China are sufficient to establish that China has fulfilled its due diligence obligation to protect, in its construction work, the ecological environment of Nansha Qundao. The Tribunal, however, deliberately ignored these facts and made a biased ruling against China by relying on an unprofessional "expert report".

*III.3.B. The Tribunal erred in finding that China's construction activities had breached the obligation to cooperate provisions of the Convention*

811. The Tribunal committed two errors in its finding that China's construction activities had breached the obligation to cooperate: first, it erred in applying Article 197 of the Convention to China's construction activities; second, it ignored China's efforts to promote cooperation on the protection and preservation of the marine environment in the South China Sea, and erroneously found that China had violated Article 123(b) of the Convention.

*(1) The Tribunal erred in applying Article 197*

812. The Tribunal erred in applying Article 197 of the Convention to China's construction activities. Article 197, titled "Co-operation on a global or regional basis", provides:

> States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

In brief, Article 197 addresses rulemaking and duty to cooperate in rulemaking. It stresses the basic obligations of States to cooperate in formulating and elaborating international rules, standards and recommended practices and procedures, for the protection and preservation of the marine environment.[122] The matters covered by the obligation to cooperate is "formulating and elaborating international rules, standards and recommended practices and procedures". China's construction activities in Nansha Qundao do not fall within the matters regulated by Article 197. The

121 See Construction Activities at Nansha Reefs Did Not Affect the Coral Reef Ecosystem, http://www.soa.gov.cn/xw/dfdwdt/jgbm_155/201506/t20150610_38318.html; Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems, http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html.

122 See Shabtai Rosenne and Alexander Yankov (eds.), Virginia Commentary (Martinus Nijhoff Publishers, 1991), Vol. IV, p.78, at paras.197.1-197.2.

obligation to cooperate under Article 197 is inapplicable to China's construction activities. The Tribunal's decision that China had violated the obligation to cooperate under Article 197 is a clear error in the application of law.

*(2) The Tribunal disregarded China's efforts to promote cooperation on the protection and preservation of the marine environment in the South China Sea*

813. Article 123 of the Convention, entitled "Co-operation of States bordering enclosed or semi-enclosed seas", provides:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> [ … ]
>
> (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

814. Since the 1990s, China has actively championed regional co-operation on marine environment protection among littoral countries around the South China Sea. After years of negotiations, China and ASEAN Member States jointly signed the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. Paragraph 6 of the DOC states that "the parties concerned may explore or undertake cooperative activities", including measures for marine environmental protection. In 2011, within the framework of fully and effectively implementing the DOC, China proposed the establishment of three special technical committees: marine scientific research and environmental protection, search and rescue, and transnational crime, and has since been making efforts to promote the initiative.[123] In the same year, China officially established a substantial "China-ASEAN Maritime Cooperation Fund" to promote cooperation on maritime search and rescue, marine environmental protection and scientific research.[124] In 2012, the State Council of China approved the Cooperation Framework Plan on the South China Sea and its Surrounding Waters (2011-2015), which treated marine environmental protection, marine ecosystem and biological diversity as important realms of cooperation.[125] China has also actively

123 See The South China Sea issue: airing the main theme of peace, stability and cooperation, 2 August 2011, http://news.xinhuanet.com/world/2011-08/02/c_121756333.htm.

124 See China will set up China-ASEAN Maritime Cooperation Fund, 19 November 2011, http://news.xinhuanet.com/fortune/2011-11/19/c_122305378.htm.

125 See Chen Lianzeng, deputy director of State Oceanic Administration, urged recently in a media interview to promote the implementation of the Cooperation Framework Plan on the South China Sea and its Surrounding Waters (2011-2015), 11 June 2012, http://www.soa.gov.cn/xw/hyyw_90/201211/t20121112_361.html.

engaged in bilateral co-operation on marine environmental protection with littoral countries such as Thailand, Cambodia and Indonesia.[126]

815. Article 123 of the Convention provides for a general requirement of cooperation among States bordering enclosed or semi-enclosed seas, and encourages that they "shall endeavor" to cooperate, directly or through an appropriate regional organization. The Tribunal in fact turned a blind eye to China's long-standing efforts to promote cooperation on marine environment protection and scientific research among littoral countries around the South China Sea through appropriate regional organizations and bilateral channels. Its finding that China had, through its construction activities in Nansha Qundao, breached Article 123 of the Convention, is utterly unjustifiable.

*III.3.C. The Tribunal incorrectly found that China had breached the obligation to assess environmental impact in respect of its construction activities*

816. The Tribunal found that China had, in respect of its construction activities in Nansha Qundao, breached the requirement with respect to environmental impact assessment under Article 206 of the Convention. The Tribunal considered that given the scale and impact of the construction activities,

> China could not reasonably have held any belief other than that the construction "may cause significant and harmful changes to the marine environment". Accordingly, China was required, "as far as practicable" to prepare an environmental impact assessment. It was also under an obligation to communicate the results of the assessment.[127]

The Tribunal said that it could not make a definitive finding whether or not China had in fact prepared an environmental impact assessment, but that it had no doubt that China failed to communicate the results of the assessment in writing. Accordingly, the Tribunal found that China had breached its duties under Article 206 of the Convention.[128]

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126 See Liu Cigui, director of State Oceanic Administration, met with Minister of Natural Resources and Environment of Thailand, 18 April 2012, http://www.soa.gov.cn/xw/hyyw_90/201212/t20121226_23410.html; The first seminar on marine co-operation between China and Cambodia held in Qingdao, 26 September 2012, http://www.soa.gov.cn/bmzz/jgbmzz2/gjhzsgatbgs/201211/t20121109_12154.html; The delegation of State Oceanic Administration of China visited Ministry of Maritime Affairs and Fisheries of Indonesia and attended the sixth seminar on marine scientific research and environmental protection between China and Indonesia, 9 November 2012, http://www.soa.gov.cn/bmzz/jgbmzz2/gjhzsgatbgs/201211/t20121109_14901.html.

127 Award of 12 July, para.988.

128 See ibid., para.991.

Here, the Tribunal committed at least two errors: (1) the Tribunal disregarded the facts and jumped to its conclusion on the environmental impact of China's construction activities; and (2) the Tribunal disregarded States' discretion in determining whether an environmental impact assessment is required.

*(1) The Tribunal disregarded the facts and jumped to its conclusion on the environmental impact of China's construction activities*

817. As mentioned above, there was no basis for the Tribunal's finding that "island-building activities have caused devastating and long-lasting damage to the marine environment".[129] The Tribunal disregarded the basic facts and jumped to the conclusion that "given the scale and impact of the island-building activities, China could not reasonably have held any belief other than that the construction may cause significant and harmful changes to the marine environment."

During the construction activities in Nansha Qundao, China has conducted real-time monitoring of the work and its environmental impacts as well as regular scientific assessments of the monitoring data. The assessments showed that the construction activities would not cause "substantial pollution of or significant and harmful changes to the marine environment". That has been made clear by China on many occasions. For instance, on 9 April 2015, a Foreign Ministry spokesperson stated:

> China's construction projects on the islands and reefs have gone through scientific assessments and rigorous tests. We put equal emphasis on construction and protection by following a high standard of environmental protection and taking into full consideration the protection of ecological environment and fishing resources. The ecological environment of the South China Sea will not be damaged.[130]

On 28 April 2015, a Foreign Ministry spokesperson made a similar statement.[131] On 10 June 2015, the State Oceanic Administration released a document on its website, concluding that "the construction activities did not adversely affect the regional coral reef ecosystems".[132] On 18 June 2015, it released another document on its website, indicating that the ecological impact caused by the construction activities on the

129 Ibid., para.983.

130 Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1253488.shtml.

131 See Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on April 28, 2015, http://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1258820.shtml.

132 Construction Activities at Nansha Reefs Did Not Affect the Coral Reef Ecosystem, http://www.soa.gov.cn/xw/dfdwdt/jgbm_155/201506/t20150610_38318.html.

coral reefs is partial, temporary, controllable, and recoverable.[133] Accordingly, China has reasonable grounds to believe that the construction activities in Nansha Qundao would not cause "substantial pollution of or significant and harmful changes to the marine environment".

*(2) The Tribunal disregarded States' discretion in determining whether an environmental impact assessment is required*

818. The Tribunal considered that China had breached Article 206 of the Convention. This article provides:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

Article 205, entitled "Publication of reports", stipulates:

> States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

819. Article 206 provides for a conditional obligation to assess environmental impact and an obligation to communicate the results of such assessment. According to this article, this conditional obligation applies only when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment. As the *Virginia Commentary* observed, States have discretion in deciding on the need for assessing environmental impact; if such an assessment needs to be done and has been done, the obligation to communicate reports of the results of the assessments is absolute.[134] If a State, after evaluation, does not have reasonable grounds to believe that planned activities under its jurisdiction or control would cause substantial pollution of or significant and harmful changes to the marine environment, it may decide itself that there is no need to conduct an environmental impact assessment. Under such circumstance, there is no results to communicate in accordance with Articles 206 and 205.

820. Based on the data obtained from constant monitoring and the scientific assessment of the data, China had reasonable grounds to believe that its construction

133 See Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems, http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html.

134 See Shabtai Rosenne and Alexander Yankov (eds.), Virginia Commentary (Martinus Nijhoff Publishers, 1991), Vol. IV, p.124, at para.206.6(b).

activities would not cause "substantial pollution of or significant and harmful changes to the marine environment". Thus the threshold for conducting an "environmental impact assessment" under Article 206 is not met; China naturally did not need to conduct such an assessment and there is no report to communicate. The Tribunal's finding in this respect is wrong.

## IV. China's construction activities on Meiji Jiao of Nansha Qundao (Submissions No. 12 (a) and (c))

821. In its Submissions No. 12(a) and (c), the Philippines requested the Tribunal to adjudge and declare that:

> (12) China's occupation of and construction activities on Mischief Reef
>
> (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
>
> [ … ]
>
> (c) constitute unlawful acts of attempted appropriation in violation of the Convention;[135]

822. The Tribunal found that "it has jurisdiction to consider the Philippines' Submission".[136] In its Award of 12 July, the Tribunal:

> a. FINDS that China has engaged in the construction of artificial islands, installations, and structures at Mischief Reef without the authorisation of the Philippines;
>
> b. RECALLS (i) its finding that Mischief Reef is a low-tide elevation, (ii) its declaration that low-tide elevations are not capable of appropriation, and (iii) its declaration that Mischief Reef is within the exclusive economic zone and continental shelf of the Philippines; and
>
> c. DECLARES that China has breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its exclusive economic zone and continental shelf [ … .][137]

823. The Tribunal erred in determining that Meiji Jiao, a component of China's Nansha Qundao, was a low-tide elevation within the exclusive economic zone and continental shelf of the Philippines, and in applying Articles 60 and 80 of the Convention, which concern only exclusive economic zone and continental shelf of coastal States, to China's construction activities within its territory. Adding to its mistakes, the Tribunal erroneously found that China had engaged in the construction of

135 Award of 12 July, para.994.

136 See ibid., para.1028.

137 Ibid., para.1203.B.(14).

artificial islands, installations, and structures on Meiji Jiao without the Philippines' permission and breached the Philippines' sovereign rights in its exclusive economic zone and continental shelf.

*IV.1. China's construction activities on Meiji Jiao are an act of exercising sovereignty*

824. China has sovereignty over Nansha Qundao, and Meiji Jiao is one of its components. China's construction activities on Meiji Jiao were carried out within its own territory and an act of exercising sovereignty. Nansha Qundao is under the jurisdiction of Sansha City, Hainan Province of China. The construction activities on Meiji Jiao constitute part of the Overall Urban Plan of Sansha City.

*IV.2. The Tribunal erred in applying Articles 60 and 80 and finding that China infringed on the Philippines' sovereign rights in its exclusive economic zone and continental shelf*

825. As discussed above, the Tribunal *ultra vires* mischaracterized China's territory Meiji Jiao as part of the Philippines' exclusive economic zone and continental shelf. Following this incorrect premise, the Tribunal further misapplied Articles 60 and 80 of the Convention, which only concern exclusive economic zone and continental shelf of coastal States, to China's act of exercise of sovereignty within its territory.

826. Article 60 of the Convention is titled "Artificial islands, installations and structures in the exclusive economic zone", paragraph 1 of which provides that "[i]n the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use [ … ]", and paragraphs 2 to 8 provide other matters related to this exclusive right.[138] Article 80 is

138 Article 60 of the Convention provides that:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
>
> 3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall

titled "Artificial islands, installations and structures on the continental shelf", and provides that "Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf." The provisions of the two articles concerning artificial islands, installations and structures are very clear, and apply only to coastal States' exclusive economic zone and continental shelf. However, Nansha Qundao including Meiji Jiao is China's territory. The construction activities China carried out on Meiji Jiao are within its own territory. China was not building artificial islands, installations and structures within the Philippines' exclusive economic zone and continental shelf. Therefore, Articles 60 and 80 are not applicable in such circumstances.

## V. China's law enforcement activities against the Philippine vessels in the area of Huangyan Dao (Submission No. 13)

827. Regarding China's law enforcement activities in the area of Huangyan Dao on 28 April 2012 and 26 May 2012,[139] the Philippines accused China of "operating its

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also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

139 The two episodes refer to: (1) On 28 April 2012, when the Philippines' law enforcement vessels BRP Pampanga and BRP Edsa II conducted maritime patrol and "briefing and turnover" in the area of Huangyan Dao, China's law enforcement vessel FLEC 310 approached them in an attempt to expel them. This was regarded by the Philippines as causing "near-collision"; (2) On 26 May 2012, the Philippines' law enforcement vessel MCS 3008 attempted to enter the lagoon of Huangyan Dao

law enforcement vessels in a dangerous manner causing serious risk of collision to the Philippine vessels navigating in the vicinity of Scarborough Shoal",[140] and breaching its obligations of ensuring safe navigation under Articles 94 and 21(4) of the Convention, as well as the COLREGS.[141]

828. The Tribunal held that the COLREGS were incorporated into the Convention as a species of the "generally accepted international regulations" provided in Article 94(5). Thus a violation of the COLREGS constituted a violation of Article 94 of the Convention in this regard.[142] The Tribunal found that China's operation of its law enforcement vessels in the area of Huangyan Dao on 28 April 2012 and 26 May 2012 created serious risk of collision and danger to the Philippine ships and personnel and, as a result, violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS, and thus Article 94 of the Convention.[143]

829. Chapter Two of this Study has pointed out that the Philippines' Submission No. 13 involves the issue of territorial sovereignty and thus the Tribunal had no jurisdiction. This section further explains that: (1) The Tribunal cherry-picked two episodes from the whole of the Huangyan Dao incident and treated them in isolation, disregarding that the essence of the Huangyan Dao incident is China's law enforcement actions to affirm and safeguard its sovereignty in response to the Philippines' provocations challenging China's territorial sovereignty; (2) The Tribunal erred in applying the COLREGS to China's law enforcement actions through Article 94 of the Convention and in finding that China violated Article 94; and (3) The activities of the Philippines' vessels did not constitute innocent passage under the Convention, and China's driving away the Philippine vessels in the area of Huangyan Dao was lawful and reasonable.

### *V.1. The Tribunal mischaracterized China's expelling of the Philippine vessels in the area of Huangyan Dao*

830. The two episodes involving Chinese and Philippine vessels in the waters of Huangyan Dao on 28 April 2012 and 26 May 2012 were China's law enforcement actions to affirm and safeguard its sovereignty in response to the Philippines' provocations challenging China's territorial sovereignty. The Tribunal cherry-picked the two episodes and mischaracterized China's law enforcement actions as normal navigational activities.

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but was blocked by China's law enforcement vessels CMS 71, CMS 84, FLEC 303 and FLEC 306. China's expelling the Philippine vessels was regarded by the Philippines as causing "near-collision". See Award of 12 July, paras.1047-1058.

140 Award of 12 July, para.1044.

141 See Memorial of the Philippines, Vol. I, para.6.114.

142 Award of 12 July, paras.1081-1083.

143 Ibid., para.1203.B.(15).

831. On the morning of 10 April 2012, twelve Chinese fishing boats were operating normally in the lagoon of Huangyan Dao. The Philippine Navy warship Gregorio del Pilar came to block the entrance to the lagoon. The Philippine armed personnel boarded four Chinese fishing boats, questioned and roughened up Chinese fishermen, and searched the boats. Their actions and behaviour, rude and rough, severely violated China's territorial sovereignty and the human rights of the Chinese fishermen. On the afternoon of 10 April, upon learning of the incident, China Marine Surveillance vessels No. 84 and No. 75, both performing routine patrol duty nearby, immediately headed to the island to stop the illegal actions of the Philippine vessel.[144] Afterwards both China and the Philippines sent more vessels to the area.

832. The episodes on 28 April 2012 and 26 May 2012, as referred to in the Philippines' Submission No. 13, constituted a part of the Huangyan Dao incident in which the Philippines challenged China's territorial sovereignty and China had to take response measures. A Philippine Coast Guard report submitted by the Philippines to the Tribunal clearly indicated that the mission of the Philippine vessels' entry into the waters of Huangyan Dao on 28 April 2012 included:

> 1.1 [t]o conduct maritime patrol and law enforcement activities at vicinity Bajo de Masinloc also known as Scarborough Shoal [ … ]
>
> 1.2 [t]o "show flag" and exercise presence in the vicinity of Bajo de Masinloc and to document presence and unusual actions of foreign vessels in the area.
>
> 1.3 [ … ]
>
> 1.4 [t]o strictly ensure that actions within the different maritime zones are within the guidelines and in accordance with existing PCG policies, domestic laws and UNCLOS.
>
> 1.5 [t]o monitor current situation in the area of Bajo de Masinloc and carry out DFA specific instruction to watch out for markers that may be put up by the Chinese threat [ … ][145]

On 26 May, the Philippine vessels entered into the waters of Huangyan Dao, bypassed the blockage formed by Chinese law enforcement vessels in dangerous manners such as sharp turn and sharp stop, and eventually intruded into its lagoon and anchored there. Chinese law enforcement vessels were forced to take necessary response measures. China's response measures within its internal waters or territorial sea were not normal navigational activities, and cannot be so characterized by the Tribunal.

144 See Embassy of the People's Republic of China in the Republic of the Philippines, Ten Questions Regarding the Huangyan Island, 15 June 2012, http://www.fmprc.gov.cn/ce/ceph/eng/zt/nhwt/t941672.htm.

145 Report from Commanding Officer, SARV-003, Philippine Coast Guard, to Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard, 28 April 2012, para.1, Memorial of the Philippines, Vol. IV, Annex 78.

833. The Tribunal found that the Philippines' Submission No. 13 "relates 'principally to events that occurred in the territorial sea' of Scarborough Shoal",[146] and that Chinese law enforcement vessels in the territorial sea should have followed the COLREGS. Geographically speaking, China has sovereignty over the sea area which was characterized by the Tribunal as the "territorial sea". Nevertheless, given that the base points and baselines in the area of Huangyan Dao have not been announced by China, the identification of that area as "territorial sea" rather than internal waters by the Tribunal is simply jumping the gun. As stated in Chapter Five, China enjoys sovereignty over, and maritime entitlements based on, the Zhongsha Qundao as a unit which includes Huangyan Dao. It is for China to announce those base points and baselines and it has not done so. As a result, the line between the internal waters and territorial sea of China in that area remains unclear. Although a coastal State has sovereignty over both its internal waters and territorial sea, different rules apply to these two zones under the Convention and general international law. This further shows that the Tribunal cannot address and should not have addressed the Philippines' Submission No. 13 separately from the question of sovereignty.

*V.2. The Tribunal erred in applying the COLREGS through Article 94 of the Convention*

834. The Tribunal said:

> Article 94 incorporates the COLREGS into the Convention, and they are consequently binding on China. It follows that a violation of the COLREGS, as "generally accepted international regulations" concerning measures necessary to ensure maritime safety, constitutes a violation of the Convention itself.[147]

835. The Tribunal applied Article 94 of the Convention without analysis. Based on the nature of the activities of Chinese and Philippine vessels as well as the scope of application of the COLREGS, the COLREGS should not have been applied.

*V.2.A. The Tribunal erred in applying Article 94 of the Convention*

836. Article 94 of the Convention, placed within Part VII, "High Seas", provides:

> Duties of the flag State
>
> 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
>
> 2. In particular every State shall:
>
> (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

146 Award of Jurisdiction, para.410; Award of 12 July, para.1045.

147 Award of 12 July, para.1083.

> (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
>
> 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
>
> (a) the construction, equipment and seaworthiness of ships;
>
> (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
>
> (c) the use of signals, the maintenance of communications and the prevention of collisions.
>
> 4. Such measures shall include those necessary to ensure:
>
> (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
>
> (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
>
> (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.
>
> 5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
>
> [ … ]

Article 86, "Application of the provisions of this Part", the first Article of Part VII, "High Seas", expressly stipulates:

> The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

837. Article 86 makes it clear that the provisions in Part VII, "High Seas", do not apply, on their own, to other maritime zones except for the high seas. For them to apply to another zone, another provision in the Convention must enable them to do so.

For instance, the Convention has extended the application of provisions on the high seas to the EEZ through Article 58(2). Article 58(2) provides: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". If Article 94 incorporated the COLREGS not only into the regime of high seas but also the regime of EEZ of the Convention, Article 58(2) would become meaningless. This interpretation would violate the principle of treaty interpretation that full force and effect should be given to all provisions of a treaty.

838. Without resting on an enabling provision, Article 94 does not apply to the territorial sea. The Tribunal should have looked for one similar to Article 58(2) for such application. However, the Tribunal did not mention such a provision, and applied Article 94 directly to the territorial sea without any analysis.[148] The Philippines did attempt to find such a provision and mentioned Article 21(4) only, but the Tribunal did not use this provision. This provision provides that, "Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea." The language makes it clear that this provision incorporates "all generally accepted international regulations relating to the prevention of collisions at sea" into the rules that apply to foreign ships in the territorial sea of the coastal States. If the Tribunal were to follow the Philippines's view to apply this provision, it would have to prove ships of which State were "foreign ships". Undoubtedly, this would involve a determination on sovereignty. From another perspective, suppose that Article 94 incorporated the COLREGS not only into the regime of high seas but also the regime of territorial sea of the Convention, Article 21(4) would become meaningless. This interpretation would violate the principle of treaty interpretation that full force and effect should be given to all provisions of a treaty.

839. Furthermore, the Tribunal was unable to find any provision in the Convention which enables Article 94 to apply to internal waters. The Tribunal vaguely identified the area where the events occurred as the territorial sea and applied Article 94. However, the area might be within China's internal waters. There can be no issue of applying Article 94 in this situation. The Tribunal's decision is thus cursory and unprofessional.

*V.2.B. The Tribunal erred in applying the COLREGS to China's law enforcement activities in the "territorial sea" at Huangyan Dao*

840. In any event, the COLREGS only apply to normal navigations of ships; it does not apply to the law enforcement activities conducted by coastal States in accordance with Article 25 of the Convention aiming, and in a manner necessary, to prevent the

148 See Award on Jurisdiction, para.410; Award of 12 July, para.1083.

non-innocent passage of foreign vessels. It is wrong for the Tribunal to apply the COLREGS to China's law enforcement activities in the "territorial sea" at Huangyan Dao.

841. Rule 1 of the COLREGS provides that it applies to all vessels in all waters including law enforcement vessels. However, the COLREGS, interpreted as a whole and in the light of international law and State practice, apply to the prevention of collisions arising in normal navigation; they do not apply when law enforcement vessels take necessary measures to approach, intercept or board another vessel for the purposes of law enforcement. The purposes and circumstances of conclusion of the COLREGS indicate this.[149]

842. The law enforcement activities of law enforcement vessels appear similar to normal navigation. However, there exist substantial differences between them. The purpose of law enforcement is to compel the compliance of law that has been violated, and to ensure law-breakers be punished by law. Maritime law enforcement normally relies on vessels, and law enforcement activities are often conducted by navigating and operating vessels. As law enforcement tools, vessels at sea and vehicles on the land are the same in nature. The reason why Rule 1(a) of the COLREGS provides that "[t]hese rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels" lies in the fact that a law enforcement vessel is a vessel by nature and its normal navigation should comply with the COLREGS, just as in the normal situation a police car should abide by traffic rules except when the car takes necessary law enforcement measures as required under the particular circumstances. Therefore, normally the navigational activities of law enforcement vessels are subject to the COLREGS while their necessary law enforcement activities appropriate to the circumstances are not.

843. In fact, that necessary law enforcement activities appropriate to the circumstances constitute an exception to application of the COLREGS has been reflected in the Convention. Articles 110 and 111 provide for the rights of visit and of hot pursuit respectively, which fully indicate that the law enforcement activities of law enforcement vessels, *inter alia* those against resisting foreign vessels, are not subject to the COLREGS. According to Article 110, a warship or any other duly authorized law enforcement ships is justified in boarding a foreign ship when there is reasonable ground for suspecting that it is engaged in piracy, slave trade or any other illegal activities. Similarly, Article 111 grants a warship or any other duly authorized law enforcement ship the rights of hot pursuit, arrest and inquiry when there is reasonable ground for suspecting that it has violated the national laws and regulations of the flag State of the

149 See A. N. Cockcroft and J. N. F. Lameijer, A Guide to the Collision Avoidance Rules: International Regulations for Preventing Collisions at Sea, 7th edition (Elsevier, 2012), p.xi. Samir Mankabady, Collision at Sea: A Guide to the Legal Consequences (North-Holland Publishing Company, 1978), pp.6-7.

warship or the law enforcement ship. It is well-known that the realization of the rights of visit and of hot pursuit requires the warship or any other duly authorized law enforcement ship to navigate at high speed and approach proactively or even cross ahead of the foreign vessel being chased. These requirements are clearly in conflict with such rules as keeping "safe speed", "safe distance", and "no cross ahead" as provided in the COLREGS. In other words, the COLREGS do not apply to a warship or any other duly authorized law enforcement ship when it is conducting such law enforcement activities as exercising the rights of visit or of hot pursuit under the Convention.

844. Furthermore, the Convention does not require that a coastal State apply the COLREGS in its territorial sea. Highlighting that "Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea", Article 21(4) does not impose any corresponding requirement on coastal States in their territorial seas, not to mention their law enforcement activities therein.[150]

845. The practice of such States as the United Kingdom and the United States has also revealed that the COLREGS regulate the prevention of collisions of ships in normal navigation, primarily commercial ships rather than law enforcement ships. In the United Kingdom, regulations for preventing collisions mainly apply to the navigation of commercial ships and have been incorporated into domestic commercial shipping acts or codes, such as the Merchant Shipping Act 1862, the Merchant Shipping Act 1894,[151] and the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996.[152] In the United States, regulations for preventing collisions and domestic shipping rules have been grouped together into the "Navigation Rules".[153] No violation of general rules for preventing collisions at sea by law enforcement vessels engaging in necessary law enforcement activities has been found yet.

846. Craig H. Allen, an expert appointed by the Philippines, served for 21 years with the United States Coast Guard. In his report submitted to the Tribunal, he stated:

> I should add that the missions assigned to the U.S. Coast Guard cutters on which I served often required the cutter to "approach" vessels to identify them

150 See Chris Whomersley, The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique, 16 Chinese Journal of International Law (2017), p.387, at paras.66-68.

151 See Samir Mankabady, Collision at Sea: A Guide to the Legal Consequences (North-Holland Publishing Company, 1978), p.6.

152 See The Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, UK Statutory Instrument 1996 No. 75, http://www.uklaws.org/statutory/instruments_15/doc15451.htm.

153 See Navigation Rules, https://www.navcen.uscg.gov/?pageName=NavRules Amalgamated.

> and determine their flag and the nature of their activities and, if the circumstances warranted, to intercept the vessel in order to carry out law enforcement boardings. [ … ] It was clear to us in the U.S. Coast Guard that, in carrying out our constabulary missions, the mission did not excuse us from compliance with the COLREGS.[ … ] Thus, any argument that government-owned or government-operated vessels can simply ignore the rules with impunity when engaged in constabulary operations finds no support in the text of UNCLOS, the COLREGS or decisional law.[154]

847. It is interesting that such an expert as Allen made such a confusing statement. Allen's statement reveals that, the vessels of the U.S. Coast Guard are entitled to take all necessary measures including approaching and intercepting for the purpose of law enforcement. In the circumstance described by Allen, the law enforcement measures taken by the U.S. Coast Guard can never meet the requirements provided in the COLREGS, such as "keeping safe distance" and "preventing risks of collision". Furthermore, Allen did not list all enforcement measures that may be taken by the U.S. Coast Guard. *The Commander's Handbook on the Law of Naval Operations*[155] of the United States indicates that these measures include the use of force, which is certainly beyond the scope of the COLREGS. Thus it is not clear how Allen reached such conclusion in his report. Of course, the necessary law enforcement activities by vessels must be conducted in accordance with law, albeit not the COLREGS.

*V.3. The operation of China's vessels in the area of Huangyan Dao is lawful and reasonable*

848. Since the Tribunal found that the events occurred in the "territorial sea" at Huangyan Dao, it should apply the relevant provisions on the territorial sea of the Convention, especially those concerning innocent passage. According to the Convention, the activities of the Philippine vessels in China's territorial sea were not "innocent passage", and China via its law enforcement vessels was entitled to "take the necessary steps in its territorial sea to prevent passage which is not innocent" according to international law including the Convention.[156]

*V.3.A. The activities of the Philippines' vessels did not constitute "innocent passage" under the Convention*

849. In its Award on Jurisdiction, the Tribunal found that the Philippines' Submission No. 13 reflected a dispute concerning the application of Articles 21, 24

154 Opinion of Craig H. Allen, Judson Falknor Professor of Law, University of Washington (19 Mar. 2014), pp.5-6, Memorial of the Philippines, Vol. VII, Annex 239.

155 See The Commander's Handbook on the Law of Naval Operations (edition July 2007), para.2.5.2.1.

156 See Article 25(1) of the Convention.

and 94 of the Convention.[157] In its Award of 12 July, the Tribunal, however, turned a blind eye to Articles 21 and 24 of the Convention concerning innocent passage. Since the arbitrators in this Arbitration are all professionals in the law of the sea, they should understand the operation of these two articles. Since they had already found that the Philippines' Submission No. 13 reflected a dispute concerning the application of the two articles, they could not have forgotten the two articles as a result of negligence. The only probable explanation is that, as a precondition for applying the innocent passage provisions, the Tribunal must first determine which State is the coastal State of the territorial sea and which vessels are the foreign vessels exercising the right of innocent passage. Such determinations inevitably concern the sovereignty over Huangyan Dao, over which the Tribunal had no jurisdiction.

850. Having found that the two events occurred in the "territorial sea" at Huangyan Dao, the Tribunal should have continued to find that the activities of the Philippine vessels on 28 April and 26 May 2012 did not constitute innocent passage.

851. First, the activities of the Philippine law enforcement vessels were inconsistent with the purposes and the manner of "passage". Article 18 provides:

> Meaning of passage
>
> 1. Passage means navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
>
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Therefore, foreign vessels conducting "passage" in the coastal States' territorial sea shall pass for the purpose of "navigation", as provided in Article 18(1). However, the activities of the Philippine law enforcement vessels in the two events were not conducted for the purpose provided in Article 18(1). The government documents submitted by the Philippines to the Tribunal indicated that the purpose of the Philippine law enforcement vessels entering into the "territorial sea" at Huangyan Dao was to conduct maritime patrol and law enforcement activities in the area of Huangyan Dao.[158] Moreover, the Award of 12 July described the activities of the Philippine law enforcement vessels entering into the territorial sea at Huangyan Dao as including

157 See Award on Jurisdiction, para.410.

158 See Report from the Commanding Officer, SARV-003, Philippine Coast Guard, to Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard (28 April 2012), para.1.1, Memorial of the Philippines, Vol.IV, Annex 78.

transferring personnel and resupplying, clearly demonstrating the purpose of their entering into the lagoon of Huangyan Dao[159] was not passage or navigation within the meaning of Article 18(1).

Nor was the manner of "passage" of the Philippine vessels consistent with the requirement of being "continuous and expeditious" provided in Article 18(2). After entering into the territorial sea at Huangyan Dao, military personnel was transferred between two Philippine Coast Guard ships, and a Philippine Bureau of Fisheries and Aquatic Resources vessel approached and resupplied a Coast Guard ship anchored there earlier.[160] These activities could not be characterized as "continuous and expeditious" passage.

852. Second, even if the activities of the Philippine vessels were "passage", they were not "innocent passage" as provided for in Article 19 of the Convention. Article 19 provides:

> Meaning of innocent passage
>
> 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
>
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> [ … ]
>
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
>
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
>
> [ … ]
>
> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
>
> [ … ]
>
> (j) the carrying out of research or survey activities;
>
> [ … ]
>
> (l) any other activity not having a direct bearing on passage.

As mentioned above, the purpose of the Philippine vessels' entering into the area of Huangyan Dao was to challenge China's sovereignty. Obviously, the Philippine vessels' activities such as "document presence and unusual actions" of China's vessels, "conducting maritime patrol and law enforcement activities", "transferring

159 See Award of 12 July, paras.1049-1058.

160 See ibid., paras.1047-1050.

personnel", "resupplying", "monitoring current situation in the area", and "showing flag and exercising presence" were not innocent. Such activities were clearly prejudicial to the peace, good order or security in that area, within the meaning of Article 19 of the Convention.

853. Third, the activities of the Philippine law enforcement vessels were inconsistent with the laws and regulations of China on innocent passage through the territorial sea. Article 21 of the Convention provides that, "the coastal State may adopt laws and regulations on the safety of navigation and the regulation of maritime traffic, in conformity with the provisions of this Convention and other rules of international law", and that, "Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea."

China has adopted relevant domestic laws and regulations, including but not limited to the 1983 Maritime Traffic Safety Law of the People's Republic of China (revised in 2016) and the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone. Despite the interception by China's law enforcement vessels, the Philippine vessels still forcibly intruded into the lagoon of Huangyan Dao and anchored there. The activities of the Philippine vessels breached not only international law including the Convention but also China's laws and regulations.

*V.3.B. It is lawful and reasonable for China's law enforcement vessels to expel the Philippine vessels*

854. According to Article 25(1) of the Convention, "the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent". As has been pointed by scholars, such steps

> could include an exchange of communications requesting a delinquent ship to refrain from certain acts, a request that the ship leave the territorial sea immediately, the positioning of vessels to prevent the ship from continuing its passage, the intervention of state authorities such as a Coast Guard or Maritime Police in order to board the vessel to direct it away from the territorial sea, or subject to threat posed to the coastal state by the delinquent ship the use of armed force.[161]

Article 8*bis*(9) of the Protocol of 2005 to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation adopted by the International Maritime Organization, Article 3 of the Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly, and Article 22(1)(f) of the Agreement for the Implementation of the Provisions of the United Nations

161 Donald R. Rothwell and Tim Stephens, International Law of the Sea (Hart Publishing, 2010), p.218.

Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks all allow the use of force by law enforcement officials as the last resort when necessary.

855. International jurisprudence shows that the "necessary steps to prevent passage which is not innocent" under Article 25 of the Convention include the use of force. The tribunal in *SAIGA (No. 2) (Saint Vincent and the Grenadines v. Guinea, 1999)* considered:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.[162]

The ITLOS also offered some guidelines to the maritime law enforcement activities:

> These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.[163]

856. State practice also supports taking all necessary steps such as approaching, intercepting, boarding and using force to conduct maritime law enforcement. Paragraph 2.5.2.1 of *The Commander's Handbook on the Law of Naval Operations* of the United States provides that "the coastal state may take affirmative actions in and over its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force".[164] Paragraph 3.11.5 also provides that "[i]n the performance of maritime law enforcement missions, occasions will arise where resort to the use of force will be both appropriate and necessary. U.S. armed forces personnel engaged in maritime law enforcement actions under Coast Guard operational or tactical control (OPCON or TACON) both outside and within territorial limits of the United States will follow the Coast Guard Use of Force Policy for warning shots and disabling fire."[165] Article 20 of the Japan Coast Guard Law provides that "Article 7 of the Law

162 The M/V "SAIGA" (No.2) Case (Saint Vincent and the Grenadines v. Guinea), ITLOS Case No. 2, Judgment, 1999, para.155.

163 Ibid., para.156.

164 See The Commander's Handbook on the Law of Naval Operations (edition July 2007), para.2.5.2.1.

165 See ibid., para.3.11.5.

Concerning the Execution of Duties of Police Officials (Law No. 136 of 1948) shall apply *mutatis mutandis* to the use of arms by Coast Guard officers and assistant Coast Guard officers."[166] Some countries such as Japan have built law enforcement vessels which can withstand impact from collisions with fishing boats and put them in service.[167]

857. Facing the Philippine vessels' challenge to China's sovereignty and resistance to China's law enforcement, Chinese law enforcement vessels merely took measures without physical contact such as approaching and interception. Such measures were consistent with the rules of international law including the Convention, and were quite moderate and restrained. The Tribunal's finding that China breached the COLREGS and Article 94 of the Convention disregarded the basic facts and erred in applying the law.

## VI. China's actions in the South China Sea and the alleged claim of "aggravation or extension" of the dispute (Submission No. 14)

858. The Philippines' Submission No. 14 asked the Tribunal to adjudge:

> Since the commencement of this arbitration in January 2013, China has unlawfully aggravated or extended the dispute by, among other things:
>
> (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
>
> (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
>
> (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
>
> (d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.[168]

859. The Tribunal found that it had no jurisdiction over the Philippines' Submissions No. 14(a) to (c) on the ground the matters involved "military activities", within the meaning of Article 298(1)(b) of the Convention, but had jurisdiction over

166 Japan Coast Guard Law (Law No. 28 of April 27, 1948 as amended through Law No. 102 of 1999), http://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm.

167 See Elizabeth Shim, Report: Japan to Deploy Enhanced Patrol Boats to Deter Chinese Vessels, UPI News (10 October 2016), https://www.upi.com/Top_News/World-News/2016/10/10/Report-Japan-to-deploy-enhanced-patrol-boats-to-deter-Chinese-vessels/9331476124548/.

168 Award of 12 July, para.1110.

the Philippines' Submission No. 14(d) concerning China's construction activities in Nansha Qundao.[169]

With respect to the merits of the Philippines' Submission No. 14(d), the Tribunal declared:

> China has breached its obligations pursuant to Articles 279, 296, and 300 of the Convention, as well as pursuant to general international law, to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing.[170]

860. The Tribunal came to its conclusion in three steps: the first was to demonstrate that the duty "to refrain from aggravating or extending the dispute" constituted "a principle of general international law"; the second was to maintain that Articles 279, 296 and 300 of the Convention also contained the obligation "to refrain from aggravating or extending the dispute"; and the third was to determine that China's construction activities in Nansha Qundao had "aggravated and extended the dispute".

861. Chapter Two of this Study has clarified that the Tribunal had no jurisdiction over the Philippines' Submission No. 14. This Section will make clear the Tribunal's errors in the characterization of China's activities and in the interpretation and application of law. In brief, the Tribunal erred in disregarding the fact that the subject-matter raised in the Philippines' Submission No. 14 is in essence China's exercise of sovereignty, finding that China's construction work had "aggravated and extended the dispute" based on incorrect premises, giving overly broad interpretation to "the obligation of refraining from aggravating or extending the dispute", and arbitrarily establishing links between the relevant provisions of the Convention and the obligation of "refraining from aggravating and extending the dispute".

### *VI.1. The Tribunal disregarded the fact that the subject-matter raised in the Philippines' Submission No. 14 is in essence China's exercise of sovereignty*

862. As stated in Chapter Four of this Study, China has sovereignty over Nansha Qundao, one of China's outlying archipelagos. Ren'ai Jiao, Meiji Jiao, Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao referred to in the Philippines' Submission No. 14 are all components of China's Nansha Qundao and an integral part of China's territory.

863. The same as to conduct construction activities in other areas of China's territory, to conduct construction activities on Meiji Jiao, Huayang Jiao, Yongshu Jiao,

169 See ibid., para.1203.A.(6).

170 Ibid., para.1203.B.(16).

Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao, components of Nansha Qundao, is an inherent right enjoyed by China under international law as the sovereign over Nansha Qundao; the exercise of this right falls entirely within the scope of China's sovereignty. Spokespersons of China's Foreign Ministry had indicated repeatedly that the construction activities in Nansha Qundao fall within the scope of China's sovereignty, and are lawful, reasonable and justified, and that they are not targeted at any other country.[171]

864. Whatever grounds the Philippines seized upon to claim the components of China's Nansha Qundao, the subject-matter of the Philippines' Submission No. 14 remains the same, i.e., territorial sovereignty. The Tribunal disregarded this fact. This is the root cause of all its erroneous findings on this submission.

*VI.2. The Tribunal's determination that China's construction activities had "aggravated or extended the dispute" rested on incorrect premises*

865. The Tribunal found that:

> (a) China has aggravated the Parties' dispute concerning their respective rights and entitlements in the area of Mischief Reef by building a large artificial island on a low-tide elevation located in the exclusive economic zone of the Philippines.
>
> (b) China has aggravated the Parties' dispute concerning the protection and preservation of the marine environment at Mischief Reef by inflicting permanent, irreparable harm to the coral reef habitat of that feature.
>
> (c) China has extended the Parties' dispute concerning the protection and preservation of the marine environment by commencing large-scale island-building and construction works at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.
>
> (d) China has aggravated the Parties' dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones by permanently destroying evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef.[172]

171 For example, Foreign Ministry Spokesperson Hua Chunying's Remarks on Test Flight to Newly-Built Airport on Yongshu Jiao of China's Nansha Islands, January 2, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1329223.shtml; Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on January 4, 2016, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1329468.shtml; Foreign Ministry Spokespeson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs, June 16, 2015, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1273370.shtml.

172 Award of 12 July, para.1181.

866. The Tribunal's decision that China's normal activities of exercising sovereignty on its own territory "have aggravated or extended the dispute" is erroneous.

867. First, the premise for the Tribunal's decision that China's construction activities on Meiji Jiao had "aggravated" the dispute between China and the Philippines concerning their respective rights and entitlements in the area of Meiji Jiao was that those activities were conducted in the exclusive economic zone of the Philippines.[173] This premise is incorrect. But, as shown in Chapter Five, Meiji Jiao, a component feature of China's Nansha Qundao, is China's territory, not part of the Philippines' exclusive economic zone and continental shelf. China's construction activities on Meiji Jiao, as illuminated in Section IV of this Chapter, were normal construction activities on its own territory and the exercise of an inherent right enjoyed by sovereign States, having nothing to do with the construction of "artificial installations" or "artificial islands" in another State's "exclusive economic zone" as provided for in Articles 60 and 80 of the Convention. China's construction activities on Meiji Jiao do not fall within "the dispute concerning the interpretation or application of the Convention" over which the Tribunal might have jurisdiction to address, and thus would not give rise to the issue of "aggravating the dispute", i.e., the dispute between China and the Philippines concerning their respective rights and entitlements alleged by the Tribunal.

868. Second, the Tribunal's decision that China's construction activities had "aggravated" and "extended" the dispute concerning the protection and preservation of the maritime environment was also based on wrong premises. The Tribunal maintained that China's construction activities on Huayang Jiao, Yongshu Jiao, Nanxun Jiao (the northern part), Chigua Jiao, Dongmen Jiao, Zhubi Jiao, and Meiji Jiao had caused permanent and irreparable harm to the coral reef habitat thereof, and "aggravated" the dispute with respect to the protection and preservation of the marine environment.[174] As shown in Chapter Two, the "dispute" concerning the protection and preservation of maritime environment raised by the Philippines did not exist. Thus there is no dispute in this respect to be aggravated. The alleged aggravation of a nonexistent dispute is a fake issue. Meanwhile, the factual premise for the Tribunal's decision is that China's construction activities inflicted permanent, irreparable harm to the marine environment. This factual premise did not exist either. As indicated in Section III of this Chapter, China's construction activities in Nansha Qundao had never caused permanent and irreparable damage to maritime environment.

869. Third, the Tribunal decided that China's construction activities on the features "ha[d] aggravated the Parties' dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime

173 See ibid., para.1177.

174 See ibid., para.1178.

zones".[175] The Tribunal asserted that China's construction activities on the features had permanently destroyed evidence of the natural status of the relevant features: "The small rocks and sand cays that determine whether a feature constitutes a low-tide elevation or a high-tide feature capable of generating an entitlement to a territorial sea are now literally buried under millions of tons of sand and concrete."[176] As indicated in Chapter Two, there exists no genuine dispute between China and the Philippines concerning the status of specific features in Nansha Qundao. Thus there is no dispute in this respect to be aggravated. Furthermore, the Tribunal's finding was based on another premise that the features in question were isolated "maritime features", the legal status of which can be determined according to its own natural characteristics. However, as discussed in Chapters Two and Five, Meiji Jiao, Huayang Jiao, Yongshu Jiao, Nanxun Jiao (the northern part), Chigua Jiao, Dongmen Jiao, and Zhubi Jiao are all part of China's Nansha Qundao. The Tribunal erred in lifting the individual features off China's Nansha Qundao and addressing their status separately. As components of China's Nansha Qundao, whatever their natural characteristics may be, their legal status as components of Nansha Qundao and China's territory remain unchanged. In this Arbitration, to properly determine the status of the features in question, the Tribunal should first examine whether they constitute part of Nansha Qundao, instead of plunging straight into an inquiry on separate status only by their natural characteristics. Therefore, the Tribunal's decision that China's construction activities on the features in question had aggravated the dispute concerning the status of the features was also based on a fundamentally wrong premise.

### *VI.3. The Tribunal erroneously interpreted "the obligation of refraining from aggravating or extending the dispute" in international law and applied it to China in respect of its construction activities*

870. The Tribunal should have adjudicated the dispute by interpreting and applying the relevant provisions of the Convention. Even if it is necessary to apply other rules of international law, this should come after interpretating and applying the Convention. But the Tribunal did the opposite in this Arbitration. The Tribunal did not first look for "the obligation of refraining from aggravating or extending the dispute" in the Convention itself. Instead, it went looking for "the obligation of refraining from aggravating or extending the dispute" in general international law before resorting to the Convention. The Tribunal gave overly broad interpretation to "the obligation of refraining from aggravating or extending the dispute", and arbirarily linked it with the relevant provisions of the Convention.

175 Ibid., para.1181(d).

176 Ibid., para.1179.

*VI.3.A The Tribunal improperly found that there existed a general obligation subject to no specific limitations of "refraining from aggravating or extending the dispute" in general international law*

871. The Tribunal maintained that, during the pendency of the dispute settlement process, there existed a duty on the parties to the dispute to refrain from aggravating or extending the dispute. The Tribunal argued:

> This duty exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding. Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.[177]

The Tribunal further argued that, this obligation was also apparent in multilateral and bilateral treaties providing for the settlement of disputes, and underlined by Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration).[178]

872. In support of its position, the Tribunal cited several paragraphs from *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria, Interim Measures of Protection, 1939)*, *LaGrand (Germany v. United States, 2001)*, and *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire, Provisional Measures, 2015*). These paragraphs were from the above-mentioned 1939 and 2015 orders on provisional measures and 2001 final judgment specifically addressing the consequences of violating such an order. Except the Tribunal in this Arbitration, no international court or tribunal has been found to have decided upon "the obligation of refraining from aggravating or extending the dispute" outside the context of considering the issue of provisional measures. The relevant cases demonstrate that "the obligation of refraining from aggravating or extending the dispute" elaborated by the relevant international courts or tribunals is closely connected with provisional measures.

Furthermore, the power to indicate provisional measures by PCIJ, ICJ or ITLOS is based on the express authorization of the Statute of the Permanent Court of International Justice, the Statute of the International Court of Justice or the Convention, respectively. In *LaGrand*, which was quoted by the Tribunal, the ICJ explicitly indicated that, the object and purpose of the Statute is to enable it to fulfil the

177 Ibid., para.1169.

178 Ibid., para.1170.

functions provided for it.[179] The parties' obligation of "refraining from aggravating or extending the dispute" imposed by the international courts or tribunals in provisional measures indicated under express authorization differs from an independent, general obligation of "refraining from aggravating or extending the dispute" in general international law.

873. The Tribunal's view that "when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings"[180] is a misreading of the regime of provisional measures. In fact, the primary character of provisional measures is "provisional". Provisional measures indicated by international courts or tribunals are provisional, not permanent arrangements for certain purposes. As the tribunal in *Guyana v. Suriname (2007)* indicated:

> the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally. As the [ICJ] in the *Aegean Sea* case noted, the power to indicate interim measures is an exceptional one, and it applies only to activities that can cause irreparable prejudice. The cases dealing with such measures are nevertheless informative as to the type of activities that should be permissible in disputed waters in the absence of a provisional arrangement.[181]

874. The multilateral and bilateral treaties referred to by the Tribunal can only prove that the duty of "refraining from aggravating or extending the dispute" may be a conventional obligation, not that it could become "an obligation under general international law", independent from the treaties. As the Tribunal stated, a duty to refrain from aggravating or extending a dispute during settlement proceedings was provided in multilateral conventions providing for the settlement of disputes and in bilateral arbitration and conciliation treaties.[182] Such an obligation is thus regulated by treaty, which precisely shows that it stems from an express consent between States. Certainly, States can establish rules applicable to themselves by concluding treaties, but the rules established by treaty do not necessarily become rules of customary international law or general international law.[183]

179 LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p.466, at para.102.

180 Award of 12 July, para.1169.

181 Award of the Arbitral Tribunal of Guiyana v. Suriname of 17 September 2007, para.469 (internal footnote omitted).

182 See Award of 12 July, para.1170.

183 North Sea Continetal Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p.3, at paras.67-81.

875. The Friendly Relations Declaration referred to by the Tribunal cannot support its view either. The declaration, adopted as a resolution by the General Assembly in 1970, provides in relevant part: "State parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations." Leaving aside the legal status of the declaration, this provision applies only when "the maintenance of international peace and security" may be endangered. It is arbitrary for the Tribunal to simply equate, without providing any analysis and reasoning, the duty in this provision with the duty of "refraining from aggravating the dispute" in general and not subject to specific limitations.

876. In sum, failing to do an in-depth study on State practice and *opinio juris* concerning this obligation, and taking only several words out of context from a few internaitonal cases and simply referring to some multilateral and bilateral treaties, the Tribunal hastily and erroneouly reached the conclusion that the duty of "refraining from aggravating or extending the dispute" is "an obligation under general international law". The above-mentioned cases, treaties and instruments can only demonstrate that the application of "the obligation of refraining from aggravating the dispute" is subject to special authorization, agreement or specific circumstances. This obligation is not a general obligation subject to no specific limitations.[184]

877. The obligation of "refraining from aggravating or extending a dispute" in international law should not be understood or applied without regard to the realities of international community, in particular, the inherent right of a State to take various lawful measures to safeguard its rights and interests. When "a dispute" arises, such right to safeguard its rights and interests does not diminish. According to State practice, in a dispute situation, it is the common practice of States to adopt various measures allowed in international law to declare, affirm, consolidate and safeguard their claims or rights. When adopting measures to safeguard their own claims, States do not consider that such measures have "aggravated or extended" the dispute.[185] No

184 See Chris Whomersley, The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique, 16 Chinese Journal of International Law (2017), p.387, at paras.95-100.

185 It is worth noting that after extensive research on the possible duty of "restraint" in the disputed maritime areas, a research team of the British Institute of International and Comparative Law concluded:

> 401. It is thus difficult to draw any general trends from the practice collated regarding the content of the obligations of Articles 74(3) and 83(3) or any applicable customary international law obligations of restraint. However, the review of State practice indicates that States carry out a wide variety of activities in undelimited areas, which have been met with protest by neighbouring States to varying degrees. The widespread practice of licensing for hydrocarbon exploration and collecting seismic data even in actively disputed areas may indicate

explicit, definite and generally-accepted criteria for a determination of "aggravating or extending a dispute" can be found in general international law. For this reason, the obligation of "refraining from aggravating or extending a dispute" makes sense only when combined with specific measures and situations. Outside the context of such specific measures and situations to discuss this obligation would be an exercise in futility. In international practice, the obligation of "refraining from aggravating or extending a dispute" only applies to a situation where a lawful third-party body has issued a decision, or the parties to a disptue have reached agreement. This is precisely the real value of this obligation. The application of this obligation is conditional, and its scope of application is limited. The root cause of the Tribunal's misreading of this obligation lies in its deliberate disregard of the various restrictions on its application.

*VI.3.B. The Tribunal erroneously found that "the obligation of refraining from aggravating or extending the dispute" was embodied in certain provisions of the Convention and applied it to China in respect of its construction activities*

878. Adding to its mistakes, the Tribunal erronenously found:

> China has breached its obligations pursuant to Articles 279, 296 and 300 of the Convention, as well as pursuant to general international law, to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing.[186]

No legal analysis was given for this finding. The only statement that could be considered as expressing its reasoning read: "actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations [namely, the obligations under Articles 279, 300 and 296]."[187] The Tribunal tied the obligation of "refraining from aggravating or extending the dispute" to Articles 279, 300 and 296 of the Convention. The Tribunal did so without proper reasoning.

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that States consider such activity to comply with their obligations under Article 83(3). On the other hand, such activity is invariably objected to by the neighbouring State, and in some cases even activity which stops short of exploration has been considered unacceptable, for example, the issue of promotional material pertaining to exploration.

British Institute of International and Comparative Law, Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (2016), p.114.

186 Award of 12 July, para.1203.B.(16)g.

187 Ibid., para.1172.

879. In fact, "the obligation of refraining from aggravating or extending a dispute" referred to by the Tribunal cannot be found in or necessarily be inferred from Articles 279, 300 and 296 of the Convention. Article 279 of the Convention provides that:

> State Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

Article 2, paragraph 3, of the Charter of the United Nations reads:

> All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 33, paragraph 1, of the Charter of the United Nations, provides for the means of pacific settlement of disputes:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Article 300 of the Convention provides:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

And Article 296 of the Convention provides:

> 1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
>
> 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

880. The "obligation to settle disputes by peaceful means" provided in Article 279 is different from the "obligation to refrain from aggravating or extending the dispute". What is required and emphasized in Article 279 is only "peaceful means", including "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies or arrangement". It aims at peaceful settlement of a dispute, while the obligation of "refraining from aggravating or extending the dispute" directs at managing and controlling a dispute. China maintains that the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea should be resolved by peaceful means through negotiations and consultations. This is completely in accordance with Article 279 of the Convention, and Articles 2(3) and

33(1) of the Charter of the United Nations. The Charter of the United Nations and the Convention only require States to settle their disputes through peaceful means, but do not impose a specific means. The purpose of this approach is to respect States' sovereignty and will regarding their choice of means of dispute settlement. If parties to a dispute do not choose the means of third-party settlement, the dispute can only be settled through direct negotiations and consultations between States involved. This is a reflection of the principle of the sovereign equality and also the basic consensus of international community. "The obligation of refraining from aggravating or extending the dispute" cannot be found in the provisions of Article 279 of the Convention, Articles 2(3) and 33(1) of the Charter of the United Nations.

881. Article 296 provides for the "finality and binding force of decisions". This is completely different from "the aggravation or extension of the dispute". Paragraph 1 of Article 296 addresses whether a decision rendered by "a court or tribunal having jurisdiction" can be appealed. Paragraph 2 provides for the scope of "binding force" of a decision. The duty of "refraining from aggravation or extention of a dispute" is clearly different from the issue of whether a decision can be appealed or the scope of binding force of a decision, and is simply not addressed in Article 296. The obligation of refraining from aggravating or extending the dispute cannot be found in Article 296.

882. The text of Article 300 and international practice indicate that a breach of the obligation under Article 300 can occur only when State Parties to the Convention exercise "the rights, jurisdiction and freedoms" recognized in the Convention in bad faith and in abuse of rights. Similarly, "the obligation of refraining from aggravating or extending the dispute" cannot be found in Article 300.

883. Furthermore, as stated above, the Tribunal could only address disputes concerning the interpretation or application of the Convention. China's construction activities are an exercise of sovereignty in Nansha Qundao, and they are not the subject-matters of "any dispute concerning the interpretation or application of the Convention". The Tribunal itself also admitted that, it "is fully conscious of the limits on the claims submitted to it and [ … ] intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea."[188] Undoubtedly, China's construction activities do not concern the interpretation or application of the Convention, and Articles 279, 296 and 300 of the Conention do not apply. The Tribunal erroneously found that "the obligation of refraining from aggravating or extending the dispute" was embodied in Articles 279, 296 and 300 of the Convention, and applied it to China in respect of its construction activities.

884. In sum, the Tribunal's determination that China had aggravated or extended the dispute is erroneous in fact and law. First, the Tribunal disregarded that the subject-matter of Philippines' Submission No. 14 is China's exercise of sovereignty,

188 Award of Jurisdiction, para.153.

which falls outside the scope of the Convention. Second, based on false premises, the Tribunal erroneously found that China's construction activities were artificial island-building in the Philippines' exclusive economic zone and continental shelf and had caused "permanent and irreparable harm" to the marine environment, and further that China had aggravated or extended the dispute. Third, the Tribunal deliberately ignored the various restrictions to the application of the obligation of "refraining from aggravating or extending the dispute", and improperly interpreted it by taking it outside the context of the regime of provisional measures in international jurisprudence and relevant treaties. Fourth, without proper analysis, the Tribunal erroneously found that "the obligation of refraining from aggravating or extending the dispute" was embodied in Articles 279, 296 and 300 of the Convention, and applied it to China in respect of its construction activities.

## Conclusion

885. The Philippines' submissions concerning China's activities in the South China Sea in essence constituted part of the territorial and maritime delimitation dispute between the two States, over which the Tribunal had no jurisdiction.

In the merits phase, the Tribunal made the following errors:

First, with respect to Submissions No. 8 and 9, the Tribunal erred in determining that relevant areas referred to in these two submissions were within the "Philippines' exclusive economic zone and continental shelf", and that China's activities to affirm and safeguard its sovereignty and maritime rights infringed the Philippines' sovereign rights in its exclusive economic zone and continental shelf. The Tribunal's above determinations were not well founded in fact or law.

Second, with respect to Submission No. 10, the Tribunal disregarded the fact that the subject-matter of this submission is in essence the territorial sovereignty over Huangyan Dao, and found without any factual basis that the Philippine fishermen's fishing activities gave rise to "traditional fishing rights". The Tribunal also erred in finding that "traditional fishing rights" were private rights, and importing "traditional fishing rights" into the legal regime of the territorial sea through Article 2(3) of the Convention.

Third, in addressing the Philippines' Submissions No. 11 and No. 12(b), the Tribunal acknowledged that the due diligence obligation is an obligation of conduct, but in effect applied it to China as an obligation of result. The Tribunal erred in finding that China violated its obligations under the relevant provisions of the Convention by failing to prevent Chinese nationals from carrying out harmful fishing practices, and that China's construction activities caused severe damage to marine environment and breached Articles 123, 192, 194, 197 and 206 of the Convention.

Fourth, as to the Philippines' Submission No. 12(a) and (c), the Tribunal mischaracterized China's construction activities on Meiji Jiao, a component of Nansha

Qundao, as artificial island-building activities within the Philippines' exclusive economic zone and continental shelf, and hence misapplied Articles 60 and 80 of the Convention.

Fifth, with respect to the Philippines' Submission No. 13, the Tribunal disregarded the fact that the actions of China during the Huangyan Dao incident were in essence China's necessary law enforcement measures to affirm and safeguard its territorial sovereignty in response to the Philippines' provocations. The Tribunal arbitrarily identified the sea area under China's sovereignty involved in the incident as the "territorial sea" despite the fact that China has yet to announce the base points and baselines in that region. Even following its approach, the Tribunal should have applied the corresponding regime of innocent passage in the territorial sea, but failed to do so. Instead, the Tribunal erroneously incorporated through Article 94 of the Convention the COLREGS into the regime of territorial sea of the Convention and further applied the COLREGS to Chinese government vessels' necessary law enforcement measures in the area of Huangyan Dao, and found China violated Article 94 of the Convention.

Sixth, in addressing the Philippines' Submission No. 14(d), the Tribunal, based on wrong premises, found that China's construction activities, an exercise of sovereignty, had aggravated and extended the dispute. The Tribunal erroneously interpreted the "obligation not to aggravate or extend the dispute" in international law, and asserted that such obligation was embodied in Articles 279, 296 and 300 of the Convention, and applied it to China in respect of its construction activities.

## Chapter Seven: Due Process and Evidence

886. Due process and evidence are important aspects of international proceedings. Good administration of justice demands compliance with the relevant rules and general practice with respect to these two issues, without which no impartial hearing or decision can result in a case.

887. Since the very beginning of this Arbitration, the Chinese government has adhered to its position of non-acceptance and non-participation. China maintains that the Tribunal manifestly had no jurisdiction over the case, and has strongly objected to any move to push forward the proceedings. During the Arbitration, China refused to accept or participate in any of the proceedings. It refused to participate in the constitution of the Tribunal, refused to submit a counter-memorial, refused to participate in the hearings on jurisdiction and the merits, and rejected and returned all the materials sent from the Tribunal through the Registry, etc.[1]

888. The Tribunal mistreated China's non-acceptance and non-participation position, and regarded China as a non-appearing party in the proceeding.[2] However, even if the Tribunal's approach were to be followed, still China could not be deprived of its rights with respect to due process and evidence. Non-appearance is an act within a State's sovereign competence and one of its legitimate rights. Non-appearance does not deprive the State of its procedural rights, nor does it give the court or tribunal license to disregard the general rules and practice with respect to due process and evidence.

889. In this Arbitration, the Tribunal failed to comply with these rules and practice. This casts serious doubt on its impartiality in the proceedings and the validity of its decisions.

890. With respect to due process, the Tribunal failed to state the reasons on which its findings were based; the composition of the Tribunal lacks representativeness, so that its awards are not informed by a proper understanding of Asian civilizations and legal systems, and the regional elements; the Tribunal's handling of certain procedural issues shows partiality; and the Tribunal improperly and unprecedentedly allowed a number of States to attend the arbitral hearings as observers.

891. With respect to evidence relating to many matters, the Tribunal departed from the basic requirements on the burden of proof, applied improper standard of proof, accepted evidence which clearly lacked relevance, materiality and weight, and inferred facts erroneously.

1 See Award on Jurisdiction, para.112.

2 See ibid., para.114.

## I. Due Process

892. The procedural rules applicable in this Arbitration include the relevant provisions of the Convention and its Annex VII and the Rules of Procedure adopted by the Tribunal. Generally speaking, as pointed out by the tribunal in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* in its reasoned decision on challenge to an arbitrator, to the extent that a matter of procedure is not expressly provided for in the Convention, Annex VII thereto, or the Rules of Procedure, the general principles of international law as evidenced by the practice of international courts and tribunals are to be applied.[3] In addition, the Rules of Procedure was adopted without consent of China. A rule in the Rules of Procedure is invalid and inapplicable if it is contrary to the Convention (including Annex VII) or general principles of international law, including those evidenced by the practice of international courts and tribunals.[4]

893. Having surveyed instruments such as the Statute of the ICJ, the Rules of Court, the Statute of the ITLOS, ITLOS Rules of the Tribunal, PCA Optional Rules for Arbitrating Disputes between Two States, and the ICSID Arbitration Rules of Procedure for Arbitration Proceedings, model rules such as the 1958 ILC Model Rules on Arbitral Procedure and the 2013 UNCITRAL Arbitration Rules, as well as the relevant practice of international courts and tribunals, and having taken into account the specific circumstances of this Arbitration, we submit that serious violations of the requirements of due process existed in respect of the Tribunal's duty to state reasons for certain of its important findings, of its constitution, and of its handling of various proceeding matters, etc.

### *I.1. The Tribunal failed to state reasons for certain of its important findings*

894. A judgment or award shall state the reasons on which it is based. This is one of the essential requirements as to its content and form. This is general practice of international courts and tribunals.[5] It is provided in both the Statute of the ICJ and the Statute of the ITLOS that "[t]he judgment shall state the reasons on which it is

3 See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Reasoned Decision on Challenge, 2011, paras.140-155, https://pcacases.com/web/view/11.

4 Cf. Hugh Thirlway, Article 30, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.516, at 518-519; Sienho Yee, Intervention in an Arbitral Proceeding under Annex VII to the UNCLOS?, 14 Chinese Journal of International Law (2015), p.79, at paras.28-31.

5 Report of the International Law Commission covering the work of its fourth session, 4 June-8 August 1952, Article 24 and comment, Yearbook of the International Law Commission 1952, Vol. II, p.65.

based".[6] The PCA Optional Rules for Arbitrating Disputes between Two States and the 2013 UNCITRAL Arbitration Rules also provide that "[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given".[7] Similar provisions can also be found in other international judicial or arbitral rules.[8]

That a judgment or award shall state the reasons on which it is based is one of the basic rules to be followed by an international court or tribunal. This is the basis for its authority. As Robert Jennings observed when commenting on the Statute of the ICJ:

> [ … ] the only authority a court has is to apply the law to a case submitted to it and to come to a decision accordingly … [C]ourts have to give their reasons because their only authority is derived from the fact that they have been established for the purpose of doing precisely that.[9]

895. The reasons stated in a judgment or award should provide sufficient support for the *dispositif* and every decision points. For instance, Article 29 of the ILC Model Rules on Arbitral Procedure provides, "The award shall, in respect of every point on which it rules, state the reasons on which it is based."

896. In international arbitration, a failure to state the reasons on which the award is based may result in its nullification. Under Article 35(c) of the ILC Model Rules on Arbitral Procedure, "a failure to state the reasons for the award" is one of the grounds on which the validity of the award may be challenged by a party.[10] Similarly, Rule 50 of the ICSID Arbitration Rules, "that the award has failed to state the reasons on which it is based" is one of grounds on which a party may request annulment of the award.[11]

897. The above-mentioned basic rule that the award shall state the reasons on which it is based is embodied in the UNCLOS and the Rules of Procedure adopted by the Tribunal. Article 10 of Annex VII provides, in part, "The award of the arbitral tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based". Article 26(1) of the Rules of Procedure provides, "The Arbitral

6 See Statute of the International Court of Justice, Article 56(1); Statute of the International Tribunal for the Law of the Sea, Article 30(1).

7 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, Article 32(3); Arbitration Rules of the United Nations Commission on International Trade Law (2013), Article 34(3).

8 See Rome Statute of the International Criminal Court, Article 74(5); Model Rules on Arbitral Procedure 1958 of the International Law Commission, Article 29.

9 Sir Robert Y. Jennings, Judicial Reasoning at an International Court (1991), p.2, as quoted in Lori F. Damrosch, Article 56, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.1366, at 1374-1375, at footnote 49.

10 See Article 35(c) of the 1958 Model Rules on Arbitral Procedure.

11 See Arbitration Rules of International Centre for Settlement of Investment Disputes, Rule 50(1)(c)(ii).

Tribunal shall render its award in accordance with Articles 8 to 10 of Annex VII to the Convention".

898. The Tribunal, however, failed to faithfully follow this basic rule. In its decisions on certain important issues, it did not state the reasons for these decisions: it gave only a simple listing of viewpoints without any supporting analysis, or provided only overly superficial, simplistic reasoning, or simply gave no reason at all. Therefore, the above-mentioned requirement that the reasons stated should provide an adequate support to the award is not satisfied. This is evident from the instances to be given below, among others.

899. First, the Tribunal's findings on several important issues lack necessary reasoning. As elaborated in Chapter Two, Section II of this Study, the Tribunal put forward two criteria for assessing whether the Philippines' submissions were related to the issue of sovereignty, and arrived at the conclusion that the Philippines' submissions did not concern sovereignty.[12] The Tribunal did not provide any legal basis for the two criteria. Nor did it apply the criteria to each of the Philippines' 15 submissions; it simply jumped to its conclusions. The relevant parts of its award are riddled with conclusory statements, such as "The Tribunal likewise does not see that any of the Philippines Submissions require an implicit determination of sovereignty", and "The Tribunal does not see that success on these Submissions would have an effect on the Philippines sovereignty claims".[13] For these bald statements, little supporting reasoning could be found.

900. Second, the Tribunal misinterpreted various provisions of the Convention and deliberately distorted the Chinese government's official positions without providing any reasons. For instance, as elaborated in Chapter Two, Section II of this Study, the Tribunal interpreted "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" in Article 298(1)(a)(i) of the Convention as "dispute[s] over maritime boundary delimitation itself".[14] Whether on the text or the meaning of the provision, the Tribunal's interpretation worked an obvious departure from that provision, and was to exert a drastic impact on its decisions on jurisdiction, but the Tribunal provided no reason for it. This is beyond belief.

To take another example, as discussed in Chapter Two, Section III of this Study, in its consideration whether there existed a dispute between China and the Philippines concerning the Philippines' Submissions No. 3 to 7, the Tribunal, when quoting from the English translation, provided by China, of its Note Verbale CML/8/2011 dated 14 April 2011, altered the words "China's Nansha Islands is" into "China's Nansha Islands [are]", changing the quoted sentence to read "China's

12 See Award on Jurisdiction, para.153.

13 Ibid.

14 Ibid., para.155; see also, paras.157, 366.

Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf".[15] By changing the singular "is" into the plural "are", the Tribunal distorted China's position of regarding Nansha Qundao as a unit, into one of regarding its component features separately, for sovereignty and maritime entitlement purposes. The Tribunal provided no reason for this deliberate alternation.

901. Third, the Tribunal failed to provide any reason for granting the Philippines leave to amend its submissions. As discussed in Chapter Three, Section I of this Study, compared with its submissions presented in its Memorial of 30 March 2014, the Philippines' Final Submissions presented on 30 November 2015 contained a number of amendments. For instance, with respect to Submission No. 11 alleging that China had failed to protect and preserve the marine environment, the Philippines extended the geographical scope to cover not only Huangyan Dao and Ren'ai Jiao, as it did originally, but also Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao. With respect to Submission No. 14 alleging that China had aggravated and extended the dispute by certain actions, the Philippines added to those actions China's "dredging, artificial island-building and construction activities" on Meiji Jiao, Huayang Jiao, Yongshu Jiao, Nanxun Jiao, Chigua Jiao, Dongmen Jiao and Zhubi Jiao.[16] The reason the Tribunal gave for its acceptance of these amendments was that "the proposed amendment was related to or incidental to the Philippines' original Submission [ … ] and did not involve the introduction of a new dispute between the Parties."[17] The Tribunal did not analyse how the amendments were related to or incidental to the Philippines' original submissions and how the amendments did not involve the introduction of a new dispute between the two States, not to mention the fact that, as discussed in Chapter Three, this newly minted formulation does not conform to the general rules on the admissibility of amended claims.

*I.2. The composition of the Tribunal lacks representativeness*

902. The constitution of an international court or tribunal should represent, to the greatest extent feasible, the main forms of civilization, the principal legal systems, or the geographical regions in the world. This requirement is conducive to safeguarding the impartiality of the court or tribunal. It provides a pre-emptive bar to the possible prejudices of judges or arbitrators, helping to guarantee that the judgment or award be made in accordance with international law, not some one-sided understanding of it, and ultimately to settle the dispute in a way that is the most acceptable to the parties.

15 Ibid., para.160.

16 See Award of 12 July, para.78.

17 Ibid., paras.820, 933 and 1111.

903. It is generally accepted that the composition of an international court or tribunal should be representative of the world. Article 9 of the Statute of the ICJ provides that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured". Here, "the main forms of civilization" is used to underscore the diversity and pluralism in the international community; and "principal legal systems of the world" is referred to "to ensure that the Court would be equipped with the legal expertise necessary for the performance of its functions".[18] The Statute of the ITLOS provides, with respect to the composition of the Tribunal as a whole and in the selection of the members of the Seabed Disputes Chamber, that "the representation of the principal legal systems of the world and equitable geographical distribution shall be assured".[19] The Rome Statute of the International Criminal Court, in Article 36(8)(a), provides to the same effect.

904. In *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union, 2000)*, among the five judges of the Special Chamber of the ITLOS, two were from Latin America, the other three came from Western Europe, Eastern Europe and Asia respectively.[20] Thus, the Special Chamber included judges from different legal systems and regions. In *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, the constitution of the ITLOS Special Chamber also reflected the above principle.[21] Similarly, this principle is also reflected in the constitution of the Annex VII arbitral tribunal in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, where the five arbitrators were from Eastern Europe (Russian Federation), Western Europe (United Kingdom), Asia (Republic of Korea), Latin America (Mexico) and Africa (Algeria).[22]

905. Annex VII to the Convention does not expressly provide for representativeness in the composition of tribunals. Under such a circumstance and if there is no

18 Bardo Fassbender, Article 9, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.292, at 307, para.32.

19 See Statute of the International Tribunal for the Law of the Sea, Articles 2(2), 35(2).

20 See Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), ITLOS Case No. 7.

21 See Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23.

22 See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), https://pcacases.com/web/view/149.

agreement between the parties on the issue, the general rules and practice of international courts and tribunals should be followed.[23]

906. In this Arbitration, the Philippines appointed an arbitrator upon initiating the arbitral proceedings against China. China, which maintains a non-acceptance and non-participation position, did not participate in the constitution of the Tribunal. The other four arbitrators fell to be appointed by the then President of the ITLOS, Mr. Shunji Yanai. The five arbitrators that eventually constituted the Tribunal, ostensibly in accordance with Annex VII, are from Germany, Poland, France, the Netherlands and Ghana. Among them, none is from Asia, four are European Union citizens from civil law countries; and the only one from outside Europe had spent the better part of his life in Europe.

907. It is obvious that the composition of the Tribunal does not represent geographical areas, the main forms of civilization or principal legal systems of the world. In particular, there was no member from Asia. This problematic constitution resulted in a tribunal that lacked meaningful cognizance of and thus took little account of Asian civilizations, diplomatic and legal traditions, and other regional factors which should have informed its decision making in the Arbitration. This led to many further errors in its decisions.

908. First, the Tribunal failed to take account of the effect of the cultural traditions and diplomatic practice of Asian countries on fact and law. For example, the Tribunal held that both the DOC and the bilateral instruments between China and the Philippines were political documents, and found that the two States did not have an agreement, within the meaning of Article 281 of the Convention, on settling their relevant dispute through negotiation. The Tribunal's interpretation conformed to neither general international law nor the history of and background to the negotiation of the DOC, which reflected the cultural traditions and diplomatic practice of countries in the region. As emphasized by Mr. Surakiart, former Deputy Prime Minister and Foreign Minister of Thailand and one of the main drafters of the DOC, throughout the 48 years of ASEAN history, member States do not typically sign treaties; they usually make declarations which are observed, adhered to and referred to by States within the ASEAN context.[24] If the Tribunal knew about this regional custom, it should have found that there exists a binding agreement between China and the Philippines,

23 Sienho Yee, The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns, 15 Chinese Journal of International Law (2016), p.219, at para.12.

24 See the restatement of former Prime Minister Surakiart's remarks by a scholar in his presence, in Chinese Society of International Law and Hong Kong International Arbitration Centre, Proceedings of Public International Law Colloquium on Maritime Disputes Settlement (Hong Kong International Arbitration Centre, 2016), pp.417-418. See also summary in Teresa Cheng SC, Closing Remarks, ibid., pp.435-436.

embodied in Article 4 of the DOC and a series of bilateral instruments, on settling their dispute through consultation and negotiation.

909. Second, the Tribunal disregarded the traditions and legal practice in this region when interpreting and applying the Convention and other rules of international law. In this region, there exists unique understanding of territory, boundary, maritime space, and maritime rights. Failing to inquire into and take account of these elements, the Tribunal's decisions on historic rights and those made in disregard of sovereignty ran counter to the historical and legal traditions prevailing in this region.

910. Third, the Tribunal disregarded Asian elements in using evidence and fact finding. Most evidential materials examined and relied upon by the Tribunal were from Western countries and even former colonial powers. The Tribunal occasionally referred to some Chinese materials such as *Geng Lu Bu*, but exhibited its ignorance about them. Moreover, the Tribunal appointed five experts, including one expert hydrographer from Australia, one expert on navigational safety issues from the United Kingdom, and three experts on coral reef issues from Germany, the United Kingdom and Australia. None of them is from Asian countries. The Tribunal accepted their reports and swiftly proceeded to rely on them, without examination, in its determination of facts concerning key issues of the South China Sea.

911. Furthermore, it must be pointed out that Shunji Yanai, the then President of the ITLOS who appointed four out of the five arbitrators in this Arbitration, had served in the Japanese government for a considerably long time before assuming the post of judge at the ITLOS. As is well known, Japan invaded and illegally occupied China's islands and reefs in the South China Sea in the 1930s and the 1940s. For a long time, Japan has busied itself with the South China Sea issue; since the Philippines initiated the Arbitration, Japan has become a more fervent advocate against China than the Philippines. Under such circumstances, Shunji Yanai should have recused himself from appointing the arbitrators.[25] But he did not. One cannot but question his impartiality in the appointment of arbitrators and the legitimacy of the constitution of the Tribunal.

*I.3 The Tribunal's handling of certain procedural issues shows partiality*

912. Impartiality is one of the most fundamental principles that international courts and tribunals must observe. As a scholar observed, it "applies not only to the decision

25 Cf. Article 3(e) of Annex VII to the Convention provides, "[ … ] If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties [ … ]."

itself but also to the process by which the decision is made".[26] In this Arbitration, the Tribunal's handling of certain procedural issues was replete with double standards and self-contradictions, all redounding to the benefit of the Philippines. The Tribunal acted without due impartiality.

913. First, there are contradictory findings in the Tribunal's awards. For example, in its identification and characterization of the dispute reflected in the Philippines' submissions, the Tribunal disregarded the fact that the essence of the submissions is territorial sovereignty and maritime delimitation, thus rejecting the inherent connection between the Philippines' submissions and the territorial and maritime delimitation dispute between the two States. However, when deciding on whether China and the Philippines had conducted negotiations regarding the relevant disputes as it identified, the Tribunal erroneously took the consultations between China and the Philippines concerning the issues of territorial sovereignty and maritime delimitation as the exchange of views regarding matters raised in the Philippines' submissions, and considered the exchange of views obligation under Article 283 had been fulfilled. Another example is that the Tribunal deliberately altered "China's Nansha Islands is" into "China's Nansha Islands [are]", when quoting China's note verbale, in order to establish its jurisdiction. However, when dealing with the merits, the Tribunal considered China's possible treatment of Nansha Qundao as a unit and addressed this issue substantively, but did not revisit the implication of what it did at the merits phase on its jurisdiction.

914. Second, the Tribunal, without the slightest disguise, sided with the Philippines during the proceedings. For example, the Tribunal repeatedly granted the Philippines leave to amend its submissions in a significant manner, all the way till the end of the merits hearing, by which time 33 months had elapsed since the inception of the Arbitration. This is extremely rare in international arbitration. To take another example, the Tribunal violated the principle of *non ultra petita* and Article 10 of Annex VII to the Convention that "[t]he award of the arbitral tribunal shall be confined to the subject-matter of the dispute", by deciding in the *dispositif* on some matters that were not asked for by the Philippines in its submissions. This shows obvious partiality toward the Philippines. For still another example, the Tribunal originally declared that it would release the Award on Jurisdiction in November 2015, but then issued it, without notice, on 29 October 2015, ahead of the announced schedule. The Tribunal held hearings on merits on 24 to 26 and on 30 November 2015, which was only less than a month after the release of its Award on Jurisdiction. On 29 June 2016, the day when the then Philippine President Aquino III stepped down, the Tribunal declared that it would release its award on the merits and remaining issues

26 Aznar Gomez, Article 2, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.233, at 240, para.11.

of jurisdiction and admissibility on 12 July 2016. Such arrangements show anything but impartiality.

915. Third, some of the arbitrators' positions on key legal issues in this Arbitration, as reflected in the awards, are inconsistent with the views they had held consistently in the past. For example, the relationship between the status and maritime entitlements of maritime features and maritime delimitation is an issue with important jurisdictional implications in this Arbitration. Two of the arbitrators in this case, Alfred H. A. Soons and Jean-Pierre Cot, had written that these two are integral and inseparable. Soons and his co-author said early in 1990: "The definition of rocks and their entitlement to maritime spaces, like the definition and entitlement of islands in general, forms an inherent part of maritime boundary delimitation between opposite/adjacent States and, as State practice clearly evidences, these issues will not give rise to controversies unless such delimitation is in dispute."[27] Soons and his co-author said again in 2011: "In fact, with a single exception of Okinotorishima, the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations, often intertwined with disputes over sovereignty [ … ]."[28] Jean-Pierre Cot also noted in 2012: "Definition of the legal entitlement of the coastal State to adjacent waters and their extent outwards, towards the high seas, is one thing. Delimitation between opposing claims between States with adjacent or opposite coasts is another. Yet the two operations, distinct as they may be, are interrelated."[29] In this Arbitration, however, both of them stealthily switched to endorse the view that the status and maritime entitlements of maritime features can be addressed separately from maritime delimitation. No explanation was given for this reversal of position. The impartiality of these arbitrators is thus questionable.

### *I.4 The Tribunal improperly and unprecedentedly allowed a number of States to attend the arbitral hearings as observers*

916. Neither the Convention and Annex VII thereto nor the Rules of Procedure adopted by the Tribunal provide for any arrangements for observers at the hearings. While making practical arrangements for the jurisdictional hearing, the Tribunal raised, on its own initiative, the issue of observers, and said that it did not intend to

27 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands Yearbook of International Law (1990), p.139, at 181.

28 Barbara Kwiatkowska and Alfred H.A. Soons, Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3), The Global Community: Yearbook of International Law and Jurisprudence (2011), pp.111, at 114 (internal footnotes omitted).

29 Jean-Pierre Cot, The Dual Function of Base Points, in Holger Hestermeyer, et al. (eds.), Coexistence, Cooperation and Solidarity: *Liber Amicorum* Rüdiger Wolfrum (Martinus Nijhoff, 2012), p.807, at 820.

open the hearing to the public, but would consider allowing representatives of interested States to attend the hearing as observers upon request.[30] After that, Malaysia, Indonesia, Viet Nam, Thailand and Japan were allowed to attend the jurisdictional hearing as observers;[31] and Australia, Singapore, Malaysia, Indonesia, Viet Nam, Thailand, Japan and the United Kingdom were allowed to attend the merits hearing as observers.[32] The United Kingdom eventually decided not to attend.[33] The Tribunal's decision to allow such observers is obviously flawed.

917. First, the Tribunal's approach is inconsistent with international arbitral practice. States jealously safeguard the confidentiality and privacy of inter-State arbitral proceedings, especially those in which territorial sovereignty and maritime delimitation are at issue. Naturally, it is rare, if ever, for a tribunal to allow a non-disputant State to attend the hearing. In fact, no precedent was offered by the Tribunal, nor can we find one. Yet the Tribunal gave no reason and allowed a number of States to attend the hearing. The Tribunal's move and the motivation behind it are beyond our ken.

918. Second, the Tribunal failed to give proper effect to China's position. Article 1 (2) of the Rules of Procedure provides, "To the extent that any question of procedure is not expressly governed by these Rules or by Annex VII or other provisions of the Convention, and the Parties have not otherwise agreed, the question shall be determined by the Arbitral Tribunal after seeking the views of the Parties."

As stated above, China has maintained the non-acceptance and non-participation position throughout this Arbitration, and opposed any move to push forward the proceedings. This position undoubtedly includes the objection to the Tribunal's arrangement for observers at the hearings. In a letter dated 6 February 2015 from the Chinese Ambassador to the Netherlands to Rüdiger Wolfrum, Stanislaw Pawlak, Alfred H.A. Soons, Jean-Pierre Cot, and Thomas A. Mensah, China stated:

> 3. Based on its "non-acceptance and non-participation" position, China does not respond to or comment on any issue raised by the Arbitral Tribunal. This shall not be understood or interpreted by anyone in any sense as China's acquiescence in or non-objection to any and all procedural or substantive matters already or might be raised by the Arbitral Tribunal; nor shall it be capitalized upon as a basis for any and all procedural or substantive arrangements, suggestions, orders, decisions or awards that the Arbitral Tribunal may make. The Chinese Government underlines that China opposes the initiation of the

30 See Award on Jurisdiction, paras.69, 73.

31 See ibid., paras.78, 84.

32 See Award of 12 July, paras.65, 67, 68. The United States of America requested to send a representative to observe the hearing, but the Tribunal declined to this request because the U.S is not one of the States parties to the Convention.

33 See ibid., para.68.

> arbitration and any measures to push forward the arbitral proceeding, holds an omnibus objection to all procedural applications or steps that would require some kinds of response from China, such as "intervention by other States", "*amicus curiae* submissions" and "site visit". China firmly opposes any attempt to obstinately push forward the arbitral proceeding by taking advantage of its position of not accepting or participating in the arbitration.
>
> [ … ]
>
> 5. An explicit consent of the parties is the prerequisite for international arbitration which shall also fully respect their will. Under the circumstances that China has stated its "non-acceptance and non-participation" position and elaborated that the Arbitral Tribunal manifestly had no jurisdiction, the relevant actors still continually push forward the arbitral proceeding, and even attempt to apply other procedures which are inconsistent with the general practices of international arbitration, such as "intervention by other States" and "*amicus curiae* submissions". China is seriously concerned about and firmly opposes such moves.[34]

Obviously, China was making clear its omnibus objection to all arbitral proceedings and steps, including those regarding the participation of observers in the hearings.

919. In a letter dated 1 July 2015 from the Chinese Ambassador to the Kingdom of the Netherlands to Rüdiger Wolfrum, Stanislaw Pawlak, Alfred H.A. Soons, Jean-Pierre Cot, and Thomas A. Mensah, China reiterated its omnibus objection to the arbitral proceedings, and reemphasized that "China opposes any moves to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures".[35]

920. It is inconceivable that the Tribunal, although fully aware that it should seek the views of the parties when considering requests for an observer status, disregarded China's clear omnibus objection to any steps to push forward the arbitral proceedings, and allowed a number of observers. The act of the Tribunal to seek the views of the parties was simply perfunctory. What the Tribunal did obviously has done violence to the fundamental principle of party autonomy and privacy in inter-State arbitral proceedings.[36]

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34 Letter from the Ambassador of the People's Republic of China to the Kingdom of the Netherlands to the individual members of the Tribunal (6 February 2015).

35 Letter from the Ambassador of the People's Republic of China to the Kingdom of the Netherlands to the individual members of the Tribunal (1 July 2015).

36 That the principle of party autonomy should be respected in arbitral procedures is reflected in arbitration rules. When drafting the Model Rules on Arbitral Procedure 1958, the ILC pointed out that "the Commission was anxious to preserve what it considers to be the essential feature of international arbitration as distinguished from the more institutionalized procedure of international judicial settlement. That essential feature is the autonomy of the will of the parties both with regard to the choice of the arbitrators, the law to be applied and the procedure of the arbitral tribunal".

## II. Evidence

921. Article 9 of Annex VII to the Convention provides in part: "Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law." The Rules of Procedure that the Tribunal adopted includes the rules of evidence which are, however, very general and skeletal. Therefore, when dealing with the issue of evidence, it is necessary for the Tribunal to resort to general international law and the relevant rules and/or practice of international courts and tribunals in general.

922. The Tribunal failed to properly fulfill the task of ascertaining that the claims are well founded in fact under Article 9 of Annex VII to the Convention. The Tribunal's approach in dealing with the issue of evidence was inconsistent with international jurisprudence. In particular, the Tribunal's treatment of burden of proof, standard of proof, and weight of evidence, etc., was flawed in many instances.

*II.1 The Tribunal acted in contravention to the basic requirements regarding burden of proof*

923. Pursuant to the general rules and international jurisprudence on evidence, it is the duty of a party to produce the evidence that will prove the claim it makes. When producing its evidence to support its claims, that party shall comply with certain specific, managerial rules such as those relating to the observance of time-limits. The determination of fact should then be effected by international courts and tribunals in a reasonable and appropriate manner.

924. Although international courts and tribunals enjoy some discretion in dealing with evidential matters, the Tribunal in this Arbitration abused this discretion when it took the initiative to seek evidence, allowed the Philippines to submit supplemental evidential materials, and appointed experts, and did so in a manner contrary to the basic requirements on burden of proof.

*II.1.A. The Tribunal abused its discretion by obtaining important evidential materials on its own initiative, taking over the Philippines' burden of production*

925. In accordance with the general principle of *onus probandi incumbit actori*, a party shall assume the burden of producing evidence for and proving its claims of fact. On this point, Durward Sandifer said:

> Although it is undoubtedly sound practice to vest in the arbitrator discretionary power to require the production of evidence in addition to that submitted by the parties, a procedure is not well conceived which makes it possible to place

See Report of the International Law Commission covering the work of its fifth session, 1 June-14 August 1953, Yearbook of the International Law Commission, 1953, Vol. II, p.200, at para.48. Furthermore, Article 32(2) of 2006 ICSID Arbitration Rules provides that unless either party objects, the Tribunal may allow other persons to attend or observe the hearings.

> the primary burden upon the arbitrator to determine what evidence shall be produced by a party to make out its case. The right of the arbitrator to demand further evidence should always be an exceptional power designed to enable him to supplement the evidence submitted by the parties, not to place upon him the burden of determining what contentions made by the parties shall be supported by evidence.[37]

926. On burden of proof, Chitharanjan F. Amerasinghe observed that an international court or tribunal "is neither permitted to take a position in favour of or against either of the parties before final judgment nor expected to acquire and adduce evidence for or against them".[38] He continued:

> The basic concept which underlies the practice of international tribunals is that it is the obligation of each of the parties to a dispute before an international tribunal to prove its claims of fact to the satisfaction of, and in accordance with principles relating to proof acceptable to, the tribunal".[39]

927. When commenting on relevant articles of the Statute of ICJ and the jurisprudence of the Court, Markus Benzing said:

> It is [ … ] evident from the Statute and the case law of the Court that it is primarily the responsibility of the parties to provide evidence in support of their factual assertions. The reluctant use of its evidentiary competences by the Court indicates that it considers its powers as secondary in character, relying on the parties to adduce the evidence necessary to prove their claims.
>
> [ … ]
>
> [ … ] It is the parties who define the scope of the dispute and bear the primary responsibility for asserting and proving specific facts. Moreover, the Court has to date refrained from searching out facts that the parties have not alleged. These parameters show that the Court's procedure is firmly based on the adversarial model in that the primary responsibility for gathering and presenting evidence lies with the parties.[40]

928. In its practice, the ICJ's role in this regard has been a passive one. It has requested the parties to provide supplementary evidence, but has seldom taken the

37 Durward Sandifer, Evidence before International Tribunals (University Press of Virginia, 1975), p.67.

38 Chittharanjan F. Amerasinghe, Evidence in International Litigation (Martinus Nijhoff Publishers, 2005), at 34.

39 Ibid., at 37.

40 Markus Benzing, Evidentiary Issues, in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary, 2nd edition (Oxford University Press, 2012), p.1234, at 1239, para.12.

initiative to collect evidence, not to mention to assert and determine facts not claimed by the parties.[41]

929. The above basic requirements on burden of proof are also reflected in the Rules of Procedure adopted by the Tribunal. Article 22(1) of the Rules of Procedure provides, "Each Party shall have the burden of proving the facts relied on to support its claim or defence."

930. The Tribunal's treatment of evidential matters in many instances in this Arbitration was contrary to its Rules of Procedure and the general rule of *onus probandi incumbit actori*. This is well illustrated in the following two instances.

931.With regard to the Philippines' submissions on the status of certain features, the Tribunal based its determination of key facts not on the evidential materials provided by the Philippines, but those it acquired on its own initiative. With respect to Submissions No. 4 and 6, in determining whether certain maritime features were low-tide elevations, the Tribunal did not rely on, after analysis, evidential materials provided by the Philippines such as satellite imagery and nautical charts, but sought certain evidential materials on its own.[42] During the course of the proceedings, the Tribunal asked the Philippines to confirm "whether it has sought and been able to obtain copies of hydrographic survey plans (fair charts), relating in particular to those surveys undertaken by the United Kingdom in the Nineteenth Century and by Japan in the period leading up to the Second World War", to which the Philippines replied that it had not, and that it did not consider necessary to do so.[43] After that, the Tribunal said in a letter that it considered it appropriate to have reference, to the greatest extent possible, to original records based on the direct observation of the features in question, and planned to seek records from the archives of the United Kingdom Hydrographic Office ("UKHO").[44] Then it proceeded to acquire certain archival materials from the UKHO. It was based on those materials collected on its own initiative that the Tribunal determined whether certain features were low-tide elevations.

932. In determining whether certain islands in the South China Sea, such as Taiping Dao, are capable of sustaining human habitation or economic life of its own, the Tribunal again did not use the Philippines' evidence, but relied on the evidence acquired on its own initiative. For instance, on 26 May 2016, the Tribunal informed the Philippines and China that it considered it appropriate to consult French material from the 1930s. It provided the two States with the documents obtained from the *Bibliothèque Nationale de France* (the National Library of France) and the *Archives*

41 See James Gerard Devaney, Fact-Finding before the International Court of Justice (Cambridge University Press, 2016), pp.118-126.

42 Award of 12 July, para.331.

43 Ibid., para.140.

44 Ibid., paras.89.

*Nationales d'Outre-Mer* (the National Overseas Archives).[45] The Tribunal based its findings on relevant issues on the above French material.

933. In the above instances, the evidence provided by the Philippines evidently carried no weight. The Tribunal should have decided that the Philippines' submissions were not founded in fact. But it collected certain evidence on its own initiative and decided, based thereon, in favor of the Philippines. The Tribunal abused its discretion to assume, in effect, the burden of proof in place of the Philippines. Indeed, the Tribunal was more diligent and more pious a counsel for the Philippines than its own team.

*II.1.B. The Tribunal improperly allowed, many times, the Philippines to submit supplemental evidential materials well beyond reasonable time-limits*

934. For the good administration of justice, international courts and tribunals generally do not admit new evidence produced by the parties after the written proceedings are closed.

935. This time-limit requirement is reflected in Article 22(3) and (5) of the Rules of Procedure adopted by the Tribunal. According to this principle, relevant evidence shall be submitted together with the respective Memorial and Counter-Memorial.

936. Of course, there are some exceptions. For example, according to Article 52 of the ICJ Statute, Article 56 of its Rules of Court, and Practice Direction IX of its Practice Directions, a party may present new evidence after the closure of written proceedings, if the other party agrees or the Court considers it necessary in exceptional circumstances. Despite these provisions on the exception, the Court has rarely admitted new evidence that a party may desire to present after the closure of written proceedings, if the other party does not agree.

937. In this Arbitration, Article 22(4) of the Rules of Procedure also provides for exceptions: "Pursuant to Article 6 of Annex VII to the Convention, the Arbitral Tribunal may, at any time during the arbitral proceedings, require the Parties to produce documents, exhibits or other evidence within such a period of time as the Arbitral Tribunal shall determine." Whatever intended for the inclusion of "at any time" in this provision, it cannot be interpreted as allowing the Tribunal to go against international jurisprudence and general international law, disregard fairness and impartiality, or act arbitrarily.

938. In *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya, 1985)*, the Court, when interpreting the term "at any time" in Article 50 of the Statute of the ICJ,[46] said that "this provision must be

45 Ibid., paras.99.

46 The Statute of the ICJ, in Article 50, provides: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."

read in relation to the terms in which jurisdiction is conferred upon the Court in a specific case".[47] This makes clear that the term "at any time", which vests certain discretion in international courts and tribunals, cannot be interpreted broadly. This discretion is limited by the principles of fairness and transparency. China's non-acceptance of and non-participation in this Arbitration is no license for the Tribunal to interpret the term "at any time" in a manner so as to allow the Rules of Procedure to deviate from the Convention and general principles of international law, including the general practice in international jurisprudence.

939. In this Arbitration, the Tribunal interpreted and applied "at any time" in Article 22(4) of the Rules of Procedure broadly, and permitted and even requested the Philippines, many times, to submit supplementary evidence beyond the reasonable time-limit.

940. The dates for the Philippines to submit its Memorial was 30 March 2014. The Tribunal requested the Philippines to make supplemental submissions and allowed China until 16 June 2015 to comment on them. Accordingly, 16 June 2015 can be considered the closure date of the written proceedings. Yet, the Philippines was allowed to submit a large volume of new evidence not just after that date, but long after the closure of oral proceedings on the merits on 30 November 2015 and all the way until about one month before the issuance of the Award of 12 July:

- On 11 March 2016, the Philippines submitted certain comments, accompanied by 30 new annexes, including two new expert reports;[48]
- On 25 April 2016, the Philippines filed certain comments relating to Taiping Dao, accompanied by 21 new annexes, including two supplemental reports;[49]
- On 26 April 2016, the Philippines submitted an updated report and a supplemental declaration from two experts respectively;[50] and
- On 3 June 2016, only about one month before the issuance of the Award of 12 July, the Philippines again submitted supplemental materials.[51]

These new evidential materials were all accepted by the Tribunal, explicitly or implicitly.

47 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, p.192, at para.65.

48 Award of 12 July, para. 86.

49 Ibid., para. 92.

50 Ibid., para. 93.

51 Ibid., para. 99.

*II.1.C. The Tribunal's appointment of independent experts is obviously flawed*

941. In this Arbitration, the Tribunal appointed five independent experts: an expert hydrographer from Australia; an expert on navigational safety issues from the United Kingdom; and three experts on coral reef issues from Germany, the United Kingdom and Australia.

942. In its over 70 years of history, the ICJ only exercised the authority under Article 50 of its Statute to appoint experts in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania, 1949)* and *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, currently pending.[52] In a number of other cases, the Court received requests for appointing independent experts, but declined to exercise this authority.[53] It is clear that the ICJ is rather cautious with the appointment of experts. In stark contrast, this Tribunal appointed a number of experts in several installments.

943. Leaving aside the question whether the Tribunal should have appointed the experts, the procedures for the appointment were seriously flawed; the appointment was made at the very late stage of the proceedings and the procedures of appointment were opaque.

944. On 15 March 2016, the Tribunal appointed one expert to assess the impact of China's construction activities on the marine environment in the South China Sea;[54] On 12 April 2016, it appointed another two experts to assist his work;[55] On 29 April 2016, their report entitled "Assessment of the Potential Environmental Consequences of Construction Activities on Seven Reefs in the Spratly Islands in the South China Sea" was forwarded to China and the Philippines.[56] The Tribunal did not disclose the basis on which the independent experts were selected, or the procedures for the selection.

945. It is obviously inappropriate for the Tribunal to appoint the experts after the closure of oral proceedings on 30 November 2015. In particular, four months after this date and only around three months before the issuance of the Award of 12 July, the three experts on coral reef issues were appointed. And their report was not subjected to any rigorous examination by the Tribunal.

52 See The Court's Annual Report presented to the 71th session of the United Nations General Assembly, H.E. Judge Ronny Abraham, President of the International Court of Justice, http://www.icj-cij.org/files/press-releases/6/18766.pdf.

53 E.g. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p.351, at paras.22, 65; See also Military and Paramilitary Activities in and against Nicaragua, Judgment, I.C.J. Reports 1986, p.14, at para.61.

54 Award of 12 July, para.88.

55 Ibid., para.90.

56 Ibid., para.95.

946. Examination helps international courts and tribunals to evaluate the reliability of their reports.[57] They do not admit expert reports without prudent evaluation, examination or inquiry, in particular when complex technical issues are involved.[58] Anna Riddell and Brendan Plant, both specialists in international law of evidence, pointed out that even the conclusions of authoritative experts are not absolutely right, and need to be examined and evaluated carefully.[59] In this Arbitration, it is beyond belief that the Tribunal admitted the expert reports without any examination or evaluation, and relied heavily on the reports in deciding on environmental protection issues.

947. It must also be noted that the expert reports on environmental issues were produced within a very short span of time. The Tribunal clearly knew the complexity of environmental issues in the South China Sea, such that it appointed three experts successively to assess them. However, it was only no more than 17 days after the appointment of the latter two experts that the expert report was submitted. It is astonishing that the three experts could complete an expert report on such complex issues within such a short time. The hasty manner in which the report was produced cast doubt on the appropriateness of appointing independent experts at the late stage of the proceedings.

948. Furthermore, the procedures for the appointment of experts lacked transparency. Although this issue was not addressed in the Tribunal's Rules of Procedure, the practice of international courts and tribunals sheds some light on it. In the Dispute Settlement Mechanism of the World Trade Organization (WTO), the panel, before appointing experts, would hear the parties' views on the appointment, including the necessity, manner, number and other requirements to be complied with.[60] Specialized international organizations dealing with the areas of expertise are invited by the panel to produce a list of suitable individual experts.[61] This model is also reflected in the Convention. Article 2 of Annex VIII to the Convention provides:

> Article 2 Lists of experts
>
> 1. A list of experts shall be established and maintained in respect of each of the fields of (1) fisheries, (2) protection and preservation of the marine

57 See Giorgio Gaja, Assessing expert evidence in the I.C.J., 15 The Law and Practice of International Courts and Tribunals (2016), p.409, at 412.

58 See Anna Riddell and Brendan Plant, Evidence before the International Court of Justice (British Institute of International and Comparative law, 2009), pp.198-200, 343-345.

59 See ibid., p.198.

60 See Caroline E. Foster, Science and the Precautionary Principle in International Courts and Tribunals (Cambridge University Press, 2011), pp.108-122.

61 See Daniel Peat, The Use of Court-Appointed Experts by the International Court of Justice, 84 The British Yearbook of International Law (2014), p.271, at 290-294; see also, Caroline E. Foster, ibid., pp.108-122.

environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping.

2. The lists of experts shall be drawn up and maintained, in the field of fisheries by the Food and Agriculture Organization of the United Nations, in the field of protection and preservation of the marine environment by the United Nations Environment Programme, in the field of marine scientific research by the Intergovernmental Oceanographic Commission, in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization, or in each case by the appropriate subsidiary body concerned to which such organization, programme or commission has delegated this function.

Although there is no such provision in Annex VII, it is without doubt that the procedures for the selection of experts in an Annex VII arbitration need to be open and transparent.[62] The appropriate approach is to obtain parties' consent in advance, and then resort to the specialized international organizations for the selection of appropriate experts. The jurisdiction of international courts and tribunals is based on State consent, and thus it is important to gain consent and cooperation from the parties. Obviously, it is not an easy task for persons not in the field of an expert to appreciate his or her authoritativeness; it is specialized international organizations having expertise in that field that can offer valuable guidance to international courts or tribunals and the parties.[63] In this Arbitration, the Tribunal, while fully aware of China's omnibus objection to the procedures, appointed the five experts. It did not say a word about whether the experts were recommended by any international organizations or institutions specialized in marine environment and navigation, or how they were selected. Therefore, in the appointment of experts the Tribunal improperly exercised its authority.

62 There have been a number of international lawyers and practitioners calling for openness and transparency of the procedures for the appointment of experts. See for example, James Crawford and Amelia Keene, Editorial, 7 Journal of International Dispute Settlement (2016), p. 225, at 229; Daniel Peat, The Use of Court-Appointed Experts by the International Court of Justice, 84 The British Yearbook of International Law (2014), p.271, at 288.

63 See Daniel Peat, The Use of Court-Appointed Experts by the International Court of Justice, 84 The British Yearbook of International Law (2014), p.271, at 301; Joost Pauelyn, The use of experts in WTO dispute settlement, 51 International and Comparative Law Quarterly (2002), p.325, at 325-364.

*II.2. The Tribunal erred in its treatment of standard of proof*

949. Standard of proof refers to the degree of persuasiveness needed by adjudicators to consider a fact proven. Choosing and applying a particular standard of proof should conform to the general practice of international courts and tribunals.[64]

950. In this Arbitration, the Rules of Procedure does not address the standard of proof explicitly. However, Article 9 of Annex VII to the Convention and Article 25 (1) of the Rules of Procedure provide some guidance for establishing the standard of proof. Article 9 of Annex VII provides:

> If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

This is reiterated in Article 25(1) of the Rules of Procedure.

951. In the case of default of appearance by one party, international courts and tribunals would adopt a more prudent attitude to the issue of standard of proof. In this Arbitration, the Tribunal also said that "Article 9 of Annex VII seeks to balance the risks of prejudice that could be suffered by either party in a situation of non-participation."[65] The Tribunal's treatment of this issue, however, was inconsistent with the above provisions of the Convention and the Rules of Procedure, as well as the spirit reflected therein.

*II.2.A. The Annex VII, Article 9 requirement that the Tribunal must satisfy itself that the claim is well founded in fact and law reflects a high standard of proof*

952. Article 9 of Annex VII to Convention provides that under the circumstance that "one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case", "the arbitral tribunal must satisfy itself [ … ] that the claim is well founded in fact and law". Article 25(1) of the Rules of Procedure repeats this language. This provision is almost a replica of Article 53(2) of the Statute of the ICJ and Article 28 of the Statute of the ITLOS.

953. International jurisprudence has provided some guidance for applying the above provisions in connection with standard of proof. With respect to the formula "satisfy itself [ … ] that the claim is well founded in fact and law" in Article 53(2) of the Statute of the ICJ, the Court, in *Military and Paramilitary Activities in and against*

64 See Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (Brill, 1996), pp.351-352.

65 Award of 12 July, para.119.

*Nicaragua* case *(Nicaragua v. United States of America, 1986),* in which the United States did not appear in the merits phase, stated:

> The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.[66]

954. Rüdiger Wolfrum, an arbitrator in this Arbitration, was a judge in *SAIGA (No. 2) Case (Saint Vincent and the Grenadines v. Guinea, 1999)*. In his separate opinion in that case, he made the following observation, on the relationship between the requirement that the ITLOS "must satisfy itself [ … ] that the claim is well founded in fact and law" and standard of proof:

> Traditionally, in international adjudication, apart from prima facie evidence which is reserved for preliminary proceedings, two standards of proof are applied, proof beyond reasonable doubt, which requires a high degree of cogency, and preponderance of evidence. The latter means that the appreciation of evidence points into a particular direction although there remains reasonable or even more than reasonable doubt. International courts or tribunals have not confined themselves strictly to these standards but have combined or modified them where justifiable under the circumstances of the respective case. "[W]ell founded in fact and law" as referred to in article 28 of the Statute is not a standard of proof in the sense of "preponderance of evidence", it is rather comparable to the standard of proof in the sense of "proof beyond reasonable doubt" as applied in many national legal systems.[67]

In his view, where one of the parties to the dispute does not appear before the Tribunal, the requirement the ITLOS must "satisfy itself [ … ] that the claim is well founded in fact and law" represents a high standard of proof, one comparable to "proof beyond reasonable doubt".

955. It is clear from the above that the requirement that a court or tribunal must "satisfy itself [ … ] that the claim is well founded in fact and law", whether read as requiring "convincing evidence" or "proof beyond reasonable doubt", represents a standard of proof higher than or at least equivalent to "preponderance of evidence" which is used in general.

66 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986, p.14, at para.29.

67 The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Separate opinion of Vice-President Wolfrum, ITLOS Case No. 2, at para.12

*II.2.B. The Tribunal deliberately lowered the standard of proof*

956. On the standard of proof, the Tribunal said: "With respect to the duty to satisfy itself that the Philippines' claims are well founded in fact and law, the Tribunal notes that Article 9 of Annex VII does not operate to change the burden of proof or to raise or lower the standard of proof normally expected of a party to make out its claims or defenses."[68] The Tribunal did not further specify the standard of proof applied in its awards. An examination of its reasoning reveals that the Tribunal in effect applied a standard of proof lower than that of "preponderance of evidence", which is generally applied by international courts and tribunals.

957. For example, when addressing the Philippines' Submissions No. 4 to 6, the Tribunal applied a standard of proof lower than that of "preponderance of evidence" in determining the tidal range at certain component features of Nansha Qundao. It considered that although tidal patterns and tidal regimes in the South China Sea were complicated, it would not affect its determination of the average tidal range at high tide in Nansha Qundao. The Tribunal selected old materials in its determination, and concluded based on them that "the average range between Higher High Water and Lower Low Water for tides in the Spratlys is on the order of 0.85 metres, increasing to 1.2 metres".[69] However, the data contained in these old materials are inconsistent. The data recorded in the 1868 China Sea Directory of the Admiralty Hydrographic Office, the 1864 fair chart of Spratly Island and Amboyna Cay, the 1926 fair chart of North Danger Reef, and the 1966 Royal Navy Fleet Charts are significantly inconsistent with those in the Charts of Imperial Japanese Navy in North Danger Reef and the charts of Imperial Japanese Navy in Tizard Bank.[70] Thus, the Tribunal based its findings on the relevant facts on an application of outdated and inconsistent evidential materials, and applied a standard of proof that is obviously lower than that of "preponderance of evidence".

*II.3. The Tribunal based its findings of important facts on evidence lacking relevance, materiality or probative value*

958. Article 22(7) of the Rules of Procedure provides, "The Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence adduced." This provision is consistent with the general practice of international courts and tribunals in dealing with evidential issues, but its application in this Arbitration is full of defects in the Tribunal's treatment of the relevance, materiality and probative value of the specific evidence.

959. The relevance requirement means that the evidence must have *prima facie* relevance, rather than merely "possible" relevance, to the fact. In many cases, whether a

68 Award of 12 July, para.131.

69 Ibid., para.316.

70 Ibid., paras.314-315.

piece of documentary evidence is relevant depends on the objective connection between the evidence and the legal determination yet to be made, or claims presented.[71] And the materiality of evidence means that there must exist a material connection between the evidence and the fact to be determined, and the "arbitral tribunal must deem it necessary that the document is needed as an element to allow a complete consideration as to whether a factual allegation is true or not".[72] "Necessary" here does not mean that the facts related to the case cannot be determined without this evidential material, but that the factual allegations cannot be optimally proved if the evidential material is absent. A material documentary evidence is one that "would have a tendency to influence the tribunal's determination of issues in dispute".[73]

960. In this Arbitration, the Tribunal admitted a large amount of documentary evidence, including official documents, notes verbales, technical data, nautical charts, expert reports, affidavits, academic literatures, news reports, and historical materials. Some of the materials that the Tribunal used to determine certain key facts lacked relevance and materiality, and were given improper probative value.

961. As discussed in Chapter Five, Section III of this Study, the Tribunal acquired, on its own initiative, and admitted historical survey data, including records of measurements and surveys, published nautical charts and sailing directions relating to the relevant component features and waters of China's Nansha Qundao, done by some naval powers in the 1860s, the 1920s, and the 1930s. On the basis of these materials, the Tribunal found that certain component features of China's Nansha Qundao were low-tide elevations or high-tide features. Yet, on the very same issue, the ICJ did not consider, in *Territorial and Maritime Dispute (Nicaragua v. Colombia, 2012)*, that surveys conducted many years before the proceedings were relevant in resolving the issue whether there were features above water at high tide. Furthermore, it did not consider that the charts had much probative value with respect to that issue, as those charts were prepared in order to "show dangers to shipping" at the relevant area, not to "distinguish between those features which were just above, and those which were just below, water at high tide".[74] The Tribunal in this Arbitration admitted sailing survey reports, sailing directions and nautical charts produced over 80 years ago and even over 100 years ago. What the Tribunal did obviously departed from the jurisprudence of the ICJ precisely on point. The Tribunal did not give any reason for this departure.

962. As discussed in Chapter Four of this Study, with respect to the Philippines' Submissions No. 1 and 2 concerning historic rights, the Tribunal selectively

71 Jeffrey Waincymer, Procedure and Evidence in International Arbitration (Wolters Kluwer, 2012), p.858.

72 Ibid., p.859.

73 Ibid.

74 See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, p.624, at para.35.

examined four separate events that happened after 2009, with one in 2011, two in 2012 and one in 2015.[75] The Tribunal, based on the four events, made a characterization of China's claim of historic rights in the South China Sea.

963. China's historic rights in the South China Sea have formed through the long-standing and continuous activities of Chinese people and the Chinese government in successive periods. To properly characterize a State's claim of historic rights, one should evaluate the State's practice as a whole. A characterization based on incomplete and limited materials relating to recent events is obviously untenable. The Tribunal took the four pieces of evidence as reflecting the whole picture or the nature of China's historic rights in the South China Sea. This clearly mistook part as whole. The four events clearly do not carry sufficient weight so as to prove the full nature of China's historic rights in the South China Sea.

964. As discussed in Chapter Six of this Study, with respect to the Philippines' Submission No.10 alleging that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal", the Tribunal, based on the memorandum from the Commander of the Philippine Navy and the four affidavits from Philippine fishermen,[76] found that "since May 2012, Chinese Government vessels have acted to prevent entirely fishing by Filipino fishermen at Scarborough Shoal for significant, but not continuous, periods of time. [ … ] Filipino fishermen have testified to being driven away by Chinese vessels employing water cannon."[77] Three out of the four affidavits,[78] as well as the Memorandum from the FRPLEU/QRT Chief, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, constituted the evidence the Tribunal specifically highlighted for its finding that "some of the fishing carried out at Scarborough Shoal has been of a traditional, artisanal nature".[79]

965. The probative value of affidavits is limited. As Anna Riddell and Brendan Plant, both experts of the law of evidence, pointed out, "an affidavit is testimonial evidence in written form", but its probative value is inferior to that of direct witness testimony.[80] Moreover, a witness' testimony, in itself, usually cannot be used as the main and direct basis for the determination of relevant facts. In *Military and Paramilitary*

75 Award of 12 July, paras.208-212, and footnotes thereto.

76 Affidavit of T.D. Forones; Affidavit of J.P. Legaspi; Affidavit of C.D Talatagod; Affidavit of C.O. Taneo. See Award of 12 July, para.810 and footnote 862.

77 Award of 12 July, para.810.

78 They are affidavit of T.D. Forones, affidavit of J.P. Legaspi and affidavit of C. D Talatagod.

79 Ibid., para.807.

80 See Anna Riddell and Brendan Plant, Evidence before the international court of justice (London: British Institute of International and Comparative law, 2009), pp.279-280.

*Activities in and against Nicaragua (Nicaragua v. United States of America, 1986)*, the ICJ commented on this issue:

> The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight.[81]

966. In addition, the particular characteristics of certain affidavits—such as who made the affidavits, time and place of production—may further reduce their probative value. The three affidavits admitted by the Tribunal in this Arbitration were all produced outside the court by Philippine fishermen in 2015, two years after the initiation of the Arbitration. With respect to the affidavit produced out of court subsequent to the initiation of proceedings by individuals who have close interests in the outcome of the case, the ICJ has noted that "witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings [ … ]",[82] and that "the Court will treat with caution evidentiary materials specially prepared for this case".[83] Similarly, the tribunal in *Walfish Bay Boundary Case (Germany/Great Britain,1911)* observed, "[a]ll the evidence alluded to has been produced out of court, in the sense that the arbitrator has not been able to conduct an [*sic*] cross-examination and without being disputed [ … ] certainly diminish the value of the evidence."[84]

967. Therefore, the affidavits procured by the Philippines specially for the purpose of this Arbitration do not have any probative value.

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81 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14, at para.68.

82 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p.659, at para.244.

83 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p.168, at para.61.

84 The Walfish Bay Boundary Case (Germany/Great Britain), RIAA, Vol. XI, p. 263, at 312, also see, Chittharanjan F. Amerasinghe, Evidence in International Litigation (Martinus Nijhoff Publishers, 2005), pp.198-199.

*II.4 The Tribunal erred in making inferences of fact*

968. International courts and tribunals have the power to make inferences of fact. But such inferences must be based on established facts. As a scholar said, "[b]ased upon general experience, judges may draw conclusions from certain established facts."[85] The inferences based on wrongly or inaccurately established facts are naturally erroneous.

969. Many times the Tribunal had recourse to inferences of fact to draw its conclusions, but its inferences and conclusions are clearly erroneous. For instance, while addressing the Philippines' Submission No. 9, the Tribunal attempted to make an inference on "the activities of Chinese fishing at Meiji Jiao and Ren'ai Jiao". The Tribunal acknowledged that the evidence provided by the Philippines was insufficient:

> With respect to Chinese activities at Mischief Reef and Second Thomas Shoal, the Tribunal notes that it has limited evidence before it. The record of Chinese fishing at these features is restricted to reports from the Armed Forces of the Philippines and confined to a single period in May 2013.[86]

970. The Tribunal considered that the information recorded in the reports of the Philippine Armed Forces was correct and acceptable, and found that China tolerated and protected the fishing by Chinese fishermen at Meiji Jiao and Ren'ai Jiao. The Tribunal gave two reasons for this finding. First, China has asserted sovereign rights and jurisdiction in the South China Sea, generally, and has apparently not accepted Meiji Jiao and Ren'ai Jiao as part of the Philippines' exclusive economic zone. China has also issued a "Nansha Certification of Fishing Permit" to its nationals. Second, the pattern of Chinese fishing activities at Meiji Jiao and Ren'ai Jiao were consistent with those exhibited at Zhubi Jiao and Huangyan Dao for which the Tribunal had information. The only evidential material used by the Tribunal to support this finding was an internal report from the Philippine Armed Forces.[87]

971. That China issued the "Nansha Certification of Fishing Permit" to its nationals does not naturally follow that Chinese fishermen have carried out fishing activities at Meiji Jiao and Ren'ai Jiao. And the report of the Philippine Armed Forces could in no way support that the Chinese fishing activities were of a set pattern. If there is no conclusive evidence on fishing locations, even if a set pattern characterized Chinese fishing activities in the whole South China Sea, the issuance of "Nansha Certification of Fishing Permit" cannot give rise to an inference on fishing location, i.e., cannot

85 Rüdiger Wolfrum and Mirka Möldner, International Courts and Tribunals, Evidence, MPEPIL, last updated August 2013, para.68.

86 Award of 12 July, para.745.

87 See Award of 12 July, paras.747-748.

support the inference that Chinese fishermen have carried out fishing activities at Meiji Jiao and Ren'ai Jiao. Any further inferences can only be considered mistakes built upon existing mistakes.

972. Leaving aside the question of authenticity and accuracy of the information provided by the Philippines unilaterally, the Tribunal's inferences based on the alleged pattern were clearly problematic. Even if Chinese fishermen's fishing activities in the South China Sea were characterized by a set pattern, for one to validly infer that the same pattern also applied to the fishing activities at Meiji Jiao and Ren'ai Jiao, there must be acts found to have taken place at these locations that were similar to those considered to constitute the set pattern. The Tribunal offered no such acts found to have taken place at Meiji Jiao and Ren'ai Jiao. Therefore, it is too farfetched an inference that the Chinese fishing activities at these locations followed the alleged pattern.

## Conclusion

973. In this Arbitration, the Tribunal failed to comply faithfully with the rules and practice with respect to due process and evidence.

974. With respect to due process, the Tribunal erred at least in the following respects:

First, the Tribunal decided upon certain procedural matters without stating the reasons. Making its decisions without providing indispensable reasoning in support, or without giving any reasons, or without properly stating its reasons, the Tribunal violated Article 10 of Annex VII to the Convention, and breached the basic rule that "the award shall state the reasons on which it is based".

Second, the composition of the Tribunal lacks representativeness. Four out of the five members of the Tribunal are from Europe, none from Asia, and the one from Africa had spent the better part of his life in Europe. Therefore, they do not represent the main forms of civilization and the principal legal systems of the world. This problematic constitution resulted in a tribunal that lacked meaningful cognizance of and thus took little account of Asian civilization, diplomatic and legal traditions, and other regional factors which should have informed its decision making in the Arbitration. This led to many further errors in its decisions.

Third, the Tribunal's treatment of due process and certain procedural issues shows partiality. There are contradictory findings in the Tribunal's awards in respect of jurisdiction. Certain procedural arrangements were clearly biased. Some arbitrators' positions on certain important legal issues in this Arbitration contradicted those they had been holding consistently. All these redounded to the benefit of the Philippines.

Fourth, the Tribunal improperly allowed a number of States to attend the hearings as observers. Neither the Convention nor the Rules of Procedure having provided for procedures regarding observers, the Tribunal raised the issue on its own initiative and allowed a number of States to attend the hearings as observers, in disregard of China's omnibus objection to any step to push forward the arbitral proceedings. This is inconsistent with the general rules and practice in international arbitration.

975. With respect to evidence, the Tribunal erred at least in the following respects:

First, the Tribunal acted in contravention to the basic requirements regarding burden of proof. In disregard of the elementary rule that the parties bear the burden of proof, the Tribunal sought important evidential materials for the determination of facts in place of the Philippines, and decided in favour of the Philippines based on those materials. The Tribunal, in violation of the requirement on the time-limits for submitting evidence, allowed the Philippines to submit supplementary evidence many times not just after the closure of written proceedings, but long after the closure of oral proceedings on the merits on 30 November 2015 and all the way until about one month before the issuance of the Award of 12 July. The Tribunal appointed experts after the oral proceedings, without any open and transparent procedures, and accepted their reports without any cross-examination.

Second, the Tribunal deliberately lowered the standard of proof. The Convention and the Rules of Procedure establish a standard of proof higher than or at least equivalent to the "preponderance of evidence" standard. However, the Tribunal in effect applied a standard lower than that standard, and made important determinations in favour of the Philippines.

Third, the Tribunal determined important facts based on evidence lacking relevance, materiality or probative value, including: deciding on the status of certain features based on age-old materials produced not for this purpose; resorting to selective use of evidential materials for the purpose of characterizing China's historic rights in the South China Sea; and ascertaining Philippine fishermen's traditional fishing at Huangyan Dao on the basis of materials with limited probative value.

Fourth, the Tribunal, without sufficient evidence on fishing locations, improperly drew the inference that China engaged in the kind of fishing activities at Meiji Jiao and Ren'ai Jiao, as alleged.

976. In sum, these errors with respect to due process and evidence destroy the Tribunal's impartiality and the validity of its awards.

## General Conclusion: The Tribunal's many errors deprive its awards of validity and threaten to undermine the international rule of law

977. After this thorough and critical study of the awards, we have come to the following conclusions.

### I. The Tribunal manifestly had no jurisdiction over the Philippines' submissions, and its awards are groundless both in fact and in law, thus null and void

978. First, the Tribunal acted *ultra vires* by effectively addressing the territorial and maritime delimitation dispute between China and the Philippines.

The subject-matter of the Philippines' submissions is in essence one about territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention. The subject-matter also constitutes an integral part of the maritime delimitation dispute between China and the Philippines, which has been excluded from compulsory procedures by China's 2006 Declaration. Over the years, China and the Philippines also have reached agreement on resolving their territorial and maritime delimitation dispute in the South China Sea through negotiation.

The Tribunal manifestly had no jurisdiction over the Philippines' submissions. However, it turned a blind eye to the fact that the Philippines' submissions concern the territorial and maritime delimitation dispute between China and the Philippines, disregarded the agreement that exists between the two States on settling relevant disputes through negotiation, and acted *ultra vires* by exercising its jurisdiction over and deciding upon the submissions. This is the most fundamental error committed by the Tribunal in this Arbitration.

The Tribunal exceeded its power by addressing the Philippines' Submissions No. 1 and 2. It disregarded the fact that China's historic rights in the South China Sea is inseparable from the territorial and maritime delimitation dispute between China and the Philippines in the South China Sea, and ignored publicly available materials when characterizing China's claim of historic rights. The Tribunal not only erroneously exercised jurisdiction over these two submissions, but also erroneously found, in violation of the *non ultra petita* rule, that China did not have historic rights in the South China Sea.

The Tribunal exceeded its power by addressing the Philippines' Submissions No. 3 to 7. It disregarded the territorial and maritime delimitation dispute that exists between China and the Philippine in the South China Sea, distorted China's position that it has territorial sovereignty over and maritime entitlements based on Nansha Qundao and Zhongsha Qundao each as a unit, and addressed the status of some of

their component features in isolation, in effect dismembering the two archipelagos. The Tribunal erroneously found that Meiji Jiao and Ren'ai Jiao, which constitute an integral part of China's Nansha Qundao, were part of the Philippines' exclusive economic zone and continental shelf, and that neither Huangyan Dao of Zhongsha Qundao nor any "high-tide features" of Nansha Qundao could generate entitlements to an exclusive economic zone or continental shelf. In so doing, the Tribunal has decided on, in effect, the territorial and maritime delimitation dispute between China and the Philippines, which is beyond its jurisdiction.

The Tribunal exceeded its power by addressing the Philippines' Submissions No. 8 to 14, and erroneously found China's activities in the South China Sea infringed the Philippines' sovereign rights and jurisdiction. In the face of the fact that there clearly exists a territorial and maritime delimitation dispute between China and the Philippines in relevant maritime areas, the Tribunal should have stayed its hand; instead, it proceeded to exercise jurisdiction over the submissions. The Tribunal's addressing of the legality of China's activities was based on the premise that the relevant maritime areas were already ascertained to be part of the Philippines' exclusive economic zone and continental shelf. Such a premise is erroneous and based on the Tribunal's *ultra vires* decision on the Philippines' Submissions No. 1 to 7.

979. Second, the Tribunal erred in fact finding, and law interpretation and application.

(1) The Tribunal disregarded the fact that the Philippines failed to prove that there existed positively opposed views between China and the Philippines on each of the issues involved in the Philippines' submissions, and asserted that there existed various disputes between the two States which did concern the interpretation and application of the Convention, but not the territorial and maritime delimitation dispute between them.

(2) The Tribunal disregarded the fact that there exists a territorial and maritime delimitation dispute between China and the Philippines in relevant areas of the South China Sea, severed the inherent connection between the issue of maritime entitlement and that of territorial sovereignty and maritime delimitation, and erroneously took the areas as already ascertained to be within the Philippines' jurisdiction.

(3) The Tribunal turned a blind eye to the ordinary meaning of terms such as "concerning", "relating to" and "involving", and misinterpreted "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles" in Article 298(1) of the Convention.

(4) The Tribunal misinterpreted the term "agreement" in Article 281 of the Convention as an instrument taking the form of a treaty, and rewrote, in effect, "exclude" in the provision as "expressly exclude". It disregarded the fact that China and the Philippines have agreed, through the DOC and a series of bilateral instruments,

to settle their dispute through negotiations and consultations and exclude any other means.

(5) The Tribunal deliberately lowered the threshold for fulfilment of the obligation to exchange views under Article 283 of the Convention. It disregarded the fact that China and the Philippines had never exchanged views on the matters as formulated in the Philippines' submissions, and erroneously concluded that the Philippines had fulfilled its obligation to exchange views.

(6) The Tribunal misread the relationship between the Convention and historic rights, resorted to selective and arbitrary use of materials, erroneously characterized China's historic rights, and erroneously decided that China did not enjoy such historic rights in the South China Sea.

(7) The Tribunal disregarded the well-established regime of outlying archipelagos of continental States under customary international law, and erred in applying certain provisions in the Convention on individual features to certain component features of China's Nansha Qundao and Zhongsha Qundao separately. It further erroneously found that some component features of China's Nansha Qundao were "low-tide elevations" and could not be appropriated as territory.

(8) The Tribunal misinterpreted and misapplied Article 121 of the Convention, and created a standard that departs from the intent of negotiating States as well as State practice. It erroneously found that neither Huangyan Dao of China's Zhongsha Qundao nor any features of China's Nansha Qundao could sustain human habitation or economic life of their own.

(9) The Tribunal disregarded the Philippines' provocations that challenged China's sovereignty and jurisdiction in the areas of Meiji Jiao, Ren'ai Jiao, Huangyan Dao and Liyue Tan, and erroneously took China's legitimate activities to affirm and safeguard its sovereignty as actions to protect the alleged illegal fishing activities of its fishermen, and considered them as illegally endangering navigation safety and impeding the Philippines' exercise of sovereign rights.

(10) The Tribunal erroneously found that "other rules of international law" in Article 2(3) of the Convention covered traditional fishing rights and incorporated such rights into the regime of the territorial sea, and erroneously found that Philippine fishermen enjoyed traditional fishing rights at Huangyan Dao.

(11) The Tribunal disregarded the fact that China's construction activities caused no significant pollution or harm to the marine environment in the South China Sea on the basis of which, islands and reefs, and that China has the discretion on whether or not to conduct an environmental impact assessment. It erred in applying Article 206 of the Convention to China.

(12) The Tribunal erred in taking China's construction activities in Nansha Qundao as the construction of artificial islands, installations, and structures within the already ascertained exclusive economic zone and continental shelf of the

Philippines, and in applying Articles 60 and 80 of the Convention to these activities.

(13) The Tribunal erred in incorporating, through Article 94 of the Convention, the COLREGS into the regime of the territorial sea under the Convention, and in applying it to waters under the sovereignty of China.

(14) The Tribunal misinterpreted the obligation not to aggravate or extend a dispute in international law, paying no regard to the various limitations on the application of this obligation, erroneously found that Articles 279, 296 and 300 of the Convention contain this obligation, and erroneously decided that China's construction activities on its own territory aggravated and extended the dispute.

980. Third, the Tribunal's awards on certain important issues failed to state the reasons on which they were based:

(1) The Tribunal turned a blind eye to the ordinary meaning of the terms "concerning", "relating to" and "involving" in Article 298(1) of the Convention, without stating any reason;

(2) The Tribunal asserted that Articles 293, 309 and 311 of the Convention embodied the rule that treaties prevail over general rules of international law, without stating any specific reason;

(3) The Tribunal held that *Geng Lu Bu* concerned only the territorial sovereignty over islands and reefs in the South China Sea and was irrelevant to China's rights and entitlements to relevant sea areas, without stating any reason;

(4) The Tribunal addressed separately the component features of China's Zhongsha Qundao and Nansha Qundao, in effect dismembering the two archipelagos, without stating any reason;

(5) The Tribunal held that low-tide elevations formed part of the "submerged landmass" of a coastal State, without stating any reason;

(6) The Tribunal, without examining the relevant State practice and *opinio juris*, asserted that the practice of continental States in employing straight baselines to their outlying archipelagos had not amounted to a rule of customary international law that may depart from the express provisions of the Convention, without stating any reason;

(7) The Tribunal applied Article 94 of the Convention, a provision on the regime of high seas, to the territorial sea, without stating any reason; and

(8) The Tribunal asserted that Articles 279, 296 and 300 of the Convention contained an obligation not to aggravate or extend a dispute, without stating any reason.

981. It is clear from the above, the Tribunal failed to discharge its duty to satisfy itself that it did have jurisdiction over the dispute and that the Philippines' submissions

were well founded in fact and law, and failed to state the reasons on which its awards were based. The Tribunal's relevant findings contravene the law. The Chinese government is well justified to conclude that the Tribunal's awards are null and void.[88] Therefore, these awards do not affect China's territorial sovereignty and maritime rights and interests in the South China Sea.

## II. The Tribunal's awards threaten to undermine the international rule of law

982. The Tribunal's awards contravene the law, set an ill precedent, and threaten to undermine the international rule of law.

First, the Tribunal's exercise of jurisdiction *ultra vires* deepened the concern about "judicial activism". The Tribunal abused its competence to decide jurisdiction, and attempted to circumvent optional exceptions declarations made under Article 298 by China and therefore other States parties, by misreading the choice of means of dispute settlement made by China and the Philippines and therefore other States parties and deliberately lowering the threshold for initiating compulsory procedures under the Convention. This act undermined the States parties' right to choose, on their own, means of the peaceful settlement of their disputes.

Second, the Tribunal infringed the principle of sovereignty and territorial integrity. The Tribunal disregarded the fact that the subject-matter of the Philippines' submissions concerns China's territorial sovereignty in the South China Sea, erred in addressing the legal status of component features of China's Nansha Qundao and Zhongsha Qundao, and attempted to jeopardize China's territorial sovereignty in the South China Sea. The Tribunal infringed a State's territorial sovereignty in the name of interpretation and application of the Convention. Such a trick violates fundamental principles of international law, and goes against the object and purpose of the Convention.

Third, the Tribunal erroneously concluded that the Convention superseded any historic rights in excess of the limits imposed by the regimes of exclusive economic zone and continental shelf under the Convention. This would put in risk the historic rights enjoyed by States under general international law.

Fourth, the Tribunal erroneously denied the regime of continental States' outlying archipelagos under customary international law. This jeopardized the legitimate rights and interests of continental States possessing outlying archipelagos.

Fifth, the Tribunal performed an act of law-making, by interpreting and applying Article 121 of the Convention (its paragraph 3 in particular) in an arbitrary manner. This jeopardized the legitimate rights and interests of States having sovereignty over islands.

88 See ILC Model Rules on Arbitral Procedure 1958, Articles 35, 29.

Sixth, the Tribunal undermined the credibility of the dispute settlement mechanism under the Convention. The Tribunal's exercise of jurisdiction *ultra vires*, its decision making in contravention of the law, and its law-making give a bad name to Annex VII arbitration and even the whole dispute settlement mechanism under the Convention.

Seventh, the Tribunal jeopardized the integrity and authority of the Convention. When interpreting and applying relevant provisions of the Convention, the Tribunal did so out of context, distorted the true meaning and spirit of the Convention, rewrote some provisions, broke the delicate balance in the Convention as well as the balance of interests between States parties, and went against the object and purpose of the Convention. It usurped, in effect, the law-making power which belongs to the States parties to the Convention.

983. As shown in international practice, negotiation and consultation are the most effective means for the peaceful settlement of territorial and maritime delimitation disputes. Since its founding in 1949, the People's Republic of China has successfully resolved boundary disputes with 12 out of its 14 land neighbours, delimiting and demarcating approximate 20,000 kilometres of land boundaries, which account for over 90% of the total length of its land boundaries. China and Viet Nam have delimited through negotiations and consultations their maritime boundary in Beibu Bay. In addition, China and the Republic of Korea have commenced the negotiation on maritime delimitation.

984. We are confident that the Tribunal's awards do not affect China's territorial sovereignty and maritime rights and interests in the South China Sea. China's policies and practice show that China has been making strong efforts to uphold the integrity and authority of the Convention, champion the international rule of law, and promote a peaceful and stable regional maritime order, and that this position will strengthen.

ANNEXES

# ANNEX I
# 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

7 December 2014

## I. Introduction

1. On 22 January 2013, the Department of Foreign Affairs of the Republic of the Philippines presented a note verbale to the Embassy of the People's Republic of China in the Philippines, stating that the Philippines submitted a Notification and Statement of Claim in order to initiate compulsory arbitration proceedings under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea ("Convention") with respect to the dispute with China over "maritime jurisdiction"in the South China Sea. On 19 February 2013, the Chinese Government rejected and returned the Philippines' note verbale together with the attached Notification and Statement of Claim. The Chinese Government has subsequently reiterated that it will neither accept nor participate in the arbitration thus initiated by the Philippines.

2. This Position Paper is intended to demonstrate that the arbitral tribunal established at the request of the Philippines for the present arbitration ("Arbitral Tribunal") does not have jurisdiction over this case. It does not express any position on the substantive issues related to the subject-matter of the arbitration initiated by the Philippines. No acceptance by China is signified in this Position Paper of the views or claims advanced by the Philippines, whether or not they are referred to herein. Nor shall this Position Paper be regarded as China's acceptance of or participation in this arbitration.

3. This Position Paper will elaborate on the following positions:

- The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
- China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;
- Even assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two

countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, inter alia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures;

- Consequently, the Arbitral Tribunal manifestly has no jurisdiction over the present arbitration. Based on the foregoing positions and by virtue of the freedom of every State to choose the means of dispute settlement, China's rejection of and non-participation in the present arbitration stand on solid ground in international law.

## II. The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which does not concern the interpretation or application of the Convention

4. China has indisputable sovereignty over the South China Sea Islands (the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands) and the adjacent waters. Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them. From the 1930s to 1940s, Japan illegally seized some parts of the South China Sea Islands during its war of aggression against China. At the end of the Second World War, the Chinese Government resumed exercise of sovereignty over the South China Sea Islands. Military personnel and government officials were sent via naval vessels to hold resumption of authority ceremonies. Commemorative stone markers were erected, garrisons stationed, and geographical surveys conducted. In 1947, China renamed the maritime features of the South China Sea Islands and, in 1948, published an official map which displayed a dotted line in the South China Sea. Since the founding of the People's Republic of China on 1 October 1949, the Chinese Government has been consistently and actively maintaining its sovereignty over the South China Sea Islands. Both the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provide that the territory of the People's Republic of China includes, among others, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands. All those acts affirm China's territorial sovereignty and relevant maritime rights and interests in the South China Sea.

5. Prior to the 1970s, Philippine law had set clear limits for the territory of the Philippines, which did not involve any of China's maritime features in the South China Sea. Article 1 of the 1935 Constitution of the Republic of the Philippines, entitled "The National Territory", provided that "The Philippines comprises all the territory ceded to the United States by the Treaty of Paris concluded between the United States and Spain on the tenth day of December, eighteen hundred and ninety-eight, the limits which are set forth in Article III of said treaty, together with all the islands embraced in the treaty concluded at Washington between the United States and Spain on the seventh day of

November, nineteen hundred, and the treaty concluded between the United States and Great Britain on the second day of January, nineteen hundred and thirty, and all territory over which the present Government of the Philippine Islands exercises jurisdiction." Under this provision, the territory of the Philippines was confined to the Philippine Islands, having nothing to do with any of China's maritime features in the South China Sea. Philippine Republic Act No. 3046, entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines", which was promulgated in 1961, reaffirmed the territorial scope of the country as laid down in the 1935 Constitution.

6. Since the 1970s, the Philippines has illegally occupied a number of maritime features of China's Nansha Islands, including Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling Jiao. Furthermore, it unlawfully designated a so-called "Kalayaan Island Group" to encompass some of the maritime features of China's Nansha Islands and claimed sovereignty over them, together with adjacent but vast maritime areas. Subsequently, it laid unlawful claim to sovereignty over Huangyan Dao of China's Zhongsha Islands. In addition, the Philippines has also illegally explored and exploited the resources on those maritime features and in the adjacent maritime areas.

7. The Philippines' activities mentioned above have violated the Charter of the United Nations and international law, and seriously encroached upon China's territorial sovereignty and maritime rights and interests. They are null and void in law. The Chinese Government has always been firmly opposed to these actions of the Philippines, and consistently and continuously made solemn representations and protests to the Philippines.

8. The Philippines has summarized its claims for arbitration in three categories:

First, China's assertion of the "historic rights" to the waters, sea-bed and subsoil within the "nine-dash line" (i.e., China's dotted line in the South China Sea) beyond the limits of its entitlements under the Convention is inconsistent with the Convention.

Second, China's claim to entitlements of 200 nautical miles and more, based on certain rocks, low-tide elevations and submerged features in the South China Sea, is inconsistent with the Convention.

Third, China's assertion and exercise of rights in the South China Sea have unlawfully interfered with the sovereign rights, jurisdiction and rights and freedom of navigation that the Philippines enjoys and exercises under the Convention.

9. The subject-matter of the Philippines' claims is in essence one of territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention. Consequently, the Arbitral Tribunal has no jurisdiction over the claims of the Philippines for arbitration.

10. With regard to the first category of claims presented by the Philippines for arbitration, it is obvious that the core of those claims is that China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention. However,

whatever logic is to be followed, only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention.

11. It is a general principle of international law that sovereignty over land territory is the basis for the determination of maritime rights. As the International Court of Justice ("ICJ") stated, "maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea'" (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, I.C.J. Reports 2001, p. 97, para. 185; cf. also North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, p. 51, para. 96; Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment of 19 December 1978, I.C.J. Reports 1978, p. 36, para. 86). And, "[i]t is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State" (Qatar v. Bahrain, I.C.J. Reports 2001, para. 185; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, I.C.J. Reports 2007, p. 696, para. 113). Recently the ICJ again emphasized that "[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea", and that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward" (Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012, p. 51, para. 140).

12. The preamble of the Convention proclaims "the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans". It is apparent that "due regard for the sovereignty of all States" is the prerequisite for the application of the Convention to determine maritime rights of the States Parties.

13. As far as the present arbitration is concerned, without first having determined China's territorial sovereignty over the maritime features in the South China Sea, the Arbitral Tribunal will not be in a position to determine the extent to which China may claim maritime rights in the South China Sea pursuant to the Convention, not to mention whether China's claims exceed the extent allowed under the Convention. But the issue of territorial sovereignty falls beyond the purview of the Convention.

14. The Philippines is well aware that a tribunal established under Article 287 and Annex VII of the Convention has no jurisdiction over territorial sovereignty disputes. In an attempt to circumvent this jurisdictional hurdle and fabricate a basis for institution of arbitral proceedings, the Philippines has cunningly packaged its case in the present form. It has repeatedly professed that it does not seek from the Arbitral Tribunal a determination of territorial sovereignty over certain maritime features claimed by both countries, but rather a ruling on the compatibility of China's maritime claims with the provisions of

the Convention, so that its claims for arbitration would appear to be concerned with the interpretation or application of the Convention, not with the sovereignty over those maritime features. This contrived packaging, however, fails to conceal the very essence of the subject-matter of the arbitration, namely, the territorial sovereignty over certain maritime features in the South China Sea.

15. With regard to the second category of claims by the Philippines, China believes that the nature and maritime entitlements of certain maritime features in the South China Sea cannot be considered in isolation from the issue of sovereignty.

16. In the first place, without determining the sovereignty over a maritime feature, it is impossible to decide whether maritime claims based on that feature are consistent with the Convention.

17. The holder of the entitlements to an exclusive economic zone ("EEZ") and a continental shelf under the Convention is the coastal State with sovereignty over relevant land territory. When not subject to State sovereignty, a maritime feature per se possesses no maritime rights or entitlements whatsoever. In other words, only the State having sovereignty over a maritime feature is entitled under the Convention to claim any maritime rights based on that feature. Only after a State's sovereignty over a maritime feature has been determined and the State has made maritime claims in respect thereof, could there arise a dispute concerning the interpretation or application of the Convention, if another State questions the compatibility of those claims with the Convention or makes overlapping claims. If the sovereignty over a maritime feature is undecided, there cannot be a concrete and real dispute for arbitration as to whether or not the maritime claims of a State based on such a feature are compatible with the Convention.

18. In the present case, the Philippines denies China's sovereignty over the maritime features in question, with a view to completely disqualifying China from making any maritime claims in respect of those features. In light of this, the Philippines is putting the cart before the horse by requesting the Arbitral Tribunal to determine, even before the matter of sovereignty is dealt with, the issue of compatibility of China's maritime claims with the Convention. In relevant cases, no international judicial or arbitral body has ever applied the Convention to determine the maritime rights derived from a maritime feature before sovereignty over that feature is decided.

19. Secondly, in respect of the Nansha Islands, the Philippines selects only a few features and requests the Arbitral Tribunal to decide on their maritime entitlements. This is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole.

20. The Nansha Islands comprises many maritime features. China has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof. In 1935, the Commission of the Chinese Government for the Review of Maps of Land and Waters published the Map of Islands in the South China Sea. In 1948, the Chinese Government published the Map of the Location of the South China Sea Islands. Both maps placed under China's sovereignty what are now known as the Nansha Islands as well as the Dongsha Islands, the Xisha Islands and the Zhongsha Islands. The

Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 declared that the territory of the People's Republic of China includes, inter alia, the Nansha Islands. In 1983, the National Toponymy Commission of China published standard names for some of the South China Sea Islands, including those of the Nansha Islands. The Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 again expressly provides that the Nansha Islands constitutes a part of the land territory of the People's Republic of China.

21. In Note Verbale No. CML/8/2011 of 14 April 2011 addressed to Secretary-General of the United Nations, the Permanent Mission of China to the United Nations stated that "under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf." It is plain that, in order to determine China's maritime entitlements based on the Nansha Islands under the Convention, all maritime features comprising the Nansha Islands must be taken into account.

22. The Philippines, by requesting the Arbitral Tribunal to determine the maritime entitlements of only what it describes as the maritime features "occupied or controlled by China", has in effect dissected the Nansha Islands. It deliberately makes no mention of the rest of the Nansha Islands, including those illegally seized or claimed by the Philippines. Its real intention is to gainsay China's sovereignty over the whole of the Nansha Islands, deny the fact of its illegal seizure of or claim on several maritime features of the Nansha Islands, and distort the nature and scope of the China-Philippines disputes in the South China Sea. In addition, the Philippines has deliberately excluded from the category of the maritime features "occupied or controlled by China" the largest island in the Nansha Islands, Taiping Dao, which is currently controlled by the Taiwan authorities of China. This is a grave violation of the One-China Principle and an infringement of China's sovereignty and territorial integrity. This further shows that the second category of claims brought by the Philippines essentially pertains to the territorial sovereignty dispute between the two countries.

23. Finally, whether or not low-tide elevations can be appropriated is plainly a question of territorial sovereignty.

24. The Philippines asserts that some of the maritime features, about which it has submitted claims for arbitration, are low-tide elevations, thus being incapable of appropriation as territory. As to whether those features are indeed low-tide elevations, this Position Paper will not comment. It should, however, be pointed out that, whatever nature those features possess, the Philippines itself has persisted in claiming sovereignty over them since the 1970s. By Presidential Decree No. 1596, promulgated on 11 June 1978, the Philippines made known its unlawful claim to sovereignty over some maritime features in the Nansha Islands including the aforementioned features, together with the adjacent but

vast areas of waters, sea-bed, subsoil, continental margin and superjacent airspace, and constituted the vast area as a new municipality of the province of Palawan, entitled "Kalayaan". Notwithstanding that Philippine Republic Act No. 9522 of 10 March 2009 stipulates that the maritime zones for the so-called "Kalayaan Island Group" (i.e., some maritime features of China's Nansha Islands) and "Scarborough Shoal" (i.e., China's Huangyan Dao) be determined in a way consistent with Article 121 of the Convention (i.e., the regime of islands), this provision was designed to adjust the Philippines' maritime claims based on those features within the aforementioned area. The Act did not vary the territorial claim of the Philippines to the relevant maritime features, including those it alleged in this arbitration as low-tide elevations. In Note Verbale No. 000228, addressed to Secretary-General of the United Nations on 5 April 2011, the Philippine Permanent Mission to the United Nations stated that, "the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG." The Philippines has maintained, to date, its claim to sovereignty over 40 maritime features in the Nansha Islands, among which are the very features it now labels as low-tide elevations. It is thus obvious that the only motive behind the Philippines' assertion that low-tide elevations cannot be appropriated is to deny China's sovereignty over these features so as to place them under Philippine sovereignty.

25. Whether low-tide elevations can be appropriated as territory is in itself a question of territorial sovereignty, not a matter concerning the interpretation or application of the Convention. The Convention is silent on this issue of appropriation. In its 2001 Judgment in Qatar v. Bahrain, the ICJ explicitly stated that, "International treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations" (Qatar v. Bahrain, I.C.J. Reports 2001, pp. 101-102, para. 205). "International treaty law" plainly includes the Convention, which entered into force in 1994. In its 2012 Judgment in Nicaragua v. Colombia, while the ICJ stated that "low-tide elevations cannot be appropriated" (Nicaragua v. Colombia, I.C.J. Reports 2012, p. 641, para. 26), it did not point to any legal basis for this conclusory statement. Nor did it touch upon the legal status of low-tide elevations as components of an archipelago, or sovereignty or claims of sovereignty that may have long existed over such features in a particular maritime area. On all accounts, the ICJ did not apply the Convention in that case. Whether or not low-tide elevations can be appropriated is not a question concerning the interpretation or application of the Convention.

26. As to the third category of the Philippines' claims, China maintains that the legality of China's actions in the waters of the Nansha Islands and Huangyan Dao rests on both its sovereignty over relevant maritime features and the maritime rights derived therefrom.

27. The Philippines alleges that China's claim to and exercise of maritime rights in the South China Sea have unlawfully interfered with the sovereign rights, jurisdiction and rights and freedom of navigation, which the Philippines is entitled to enjoy and exercise under the Convention. The premise for this claim must be that the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas. The fact is, however, to the contrary. China and the Philippines have not delimited the maritime space between them. Until and unless the sovereignty over the relevant maritime features is ascertained and maritime delimitation completed, this category of claims of the Philippines cannot be decided upon.

28. It should be particularly emphasized that China always respects the freedom of navigation and overflight enjoyed by all States in the South China Sea in accordance with international law.

29. To sum up, by requesting the Arbitral Tribunal to apply the Convention to determine the extent of China's maritime rights in the South China Sea, without first having ascertained sovereignty over the relevant maritime features, and by formulating a series of claims for arbitration to that effect, the Philippines contravenes the general principles of international law and international jurisprudence on the settlement of international maritime disputes. To decide upon any of the Philippines' claims, the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea. Besides, such a decision would unavoidably produce, in practical terms, the effect of a maritime delimitation, which will be further discussed below in Part IV of this Position Paper. Therefore, China maintains that the Arbitral Tribunal manifestly has no jurisdiction over the present case.

## III. There exists an agreement between China and the Philippines to settle their disputes in the South China Sea through negotiations, and the Philippines is debarred from unilaterally initiating compulsory arbitration

30. With regard to disputes concerning territorial sovereignty and maritime rights, China has always maintained that they should be peacefully resolved through negotiations between the countries directly concerned. In the present case, there has been a long-standing agreement between China and the Philippines on resolving their disputes in the South China Sea through friendly consultations and negotiations.

31. Under the Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation, issued on 10 August 1995, both sides "agreed to abide by" the principles that "[d]isputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect" (Point 1); that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes" (Point 3); and that "[d]isputes shall be settled by

the countries directly concerned without prejudice to the freedom of navigation in the South China Sea" (Point 8).

32. The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures, issued on 23 March 1999, states that the two sides reiterated their commitment to "[t]he understanding to continue to work for a settlement of their difference through friendly consultations" (para. 5), and that "the two sides believe that the channels of consultations between China and the Philippines are unobstructed. They have agreed that the dispute should be peacefully settled through consultation" (para. 12).

33. The Joint Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century, issued on 16 May 2000, states in Point 9 that, "The two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 joint statement between the two countries on the South China Sea … ".

34. The Joint Press Statement of the Third China-Philippines Experts' Group Meeting on Confidence-Building Measures, dated 4 April 2001, states in Point 4 that, "The two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound development of China-Philippines relations and peace and stability of the South China Sea area."

35. The mutual understanding between China and the Philippines to settle relevant disputes through negotiations has been reaffirmed in a multilateral instrument. On 4 November 2002, Mr. Wang Yi, the then Vice Foreign Minister and representative of the Chinese Government, together with the representatives of the governments of the member States of the Association of Southeast Asian Nations ("ASEAN"), including the Philippines, jointly signed the Declaration on the Conduct of Parties in the South China Sea ("DOC"). Paragraph 4 of the DOC explicitly states that, "The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means … through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea."

36. Following the signing of the DOC, the leaders of China and the Philippines have repeatedly reiterated their commitment to the settlement of disputes by way of dialogue. Thus, a Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines was issued on 3 September 2004 during the State visit to China by the then Philippine President Gloria

Macapagal-Arroyo, which states in paragraph 16 that, "They agreed that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation."

37. Between 30 August and 3 September 2011, President Benigno S. Aquino III of the Philippines paid a State visit to China. On 1 September 2011, the two sides issued a Joint Statement between the People's Republic of China and the Republic of the Philippines, which, in paragraph 15, "reiterated their commitment to addressing the disputes through peaceful dialogue" and "reaffirmed their commitments to respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002". The Joint Statement, consequently, reaffirmed Paragraph 4 of the DOC relating to settlement of relevant disputes by negotiations.

38. The bilateral instruments between China and the Philippines repeatedly employ the term "agree" when referring to settlement of their disputes through negotiations. This evinces a clear intention to establish an obligation between the two countries in this regard. Paragraph 4 of the DOC employs the term "undertake", which is also frequently used in international agreements to commit the parties to their obligations. As the ICJ observed in its Judgment in Bosnia and Herzegovina v. Serbia and Montenegro, "[t]he ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties … . It is not merely hortatory or purposive" (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, p. 111, para. 162). Furthermore, under international law, regardless of the designation or form the above-mentioned instruments employ, as long as they intend to create rights and obligations for the parties, these rights and obligations are binding between the parties (Cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment of 1 July 1994, I.C.J. Reports 1994, pp. 120-121, paras. 22-26; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equitorial Guinea intervening), Judgment of 10 October 2002, I. C.J. Reports 2002, pp. 427, 429, paras. 258, 262-263).

39. The relevant provisions in the aforementioned bilateral instruments and the DOC are mutually reinforcing and form an agreement between China and the Philippines. On that basis, they have undertaken a mutual obligation to settle their relevant disputes through negotiations.

40. By repeatedly reaffirming negotiations as the means for settling relevant disputes, and by emphasizing that negotiations be conducted by sovereign States directly concerned, the above-quoted provisions of the bilateral instruments and Paragraph 4 of the DOC obviously have produced the effect of excluding any means of third-party

settlement. In particular, the above-mentioned Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation of 10 August 1995 stipulates in Point 3 that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes". The term "eventually" in this context clearly serves to emphasize that "negotiations" is the only means the parties have chosen for dispute settlement, to the exclusion of any other means including third-party settlement procedures. Although the above-mentioned bilateral instruments and Paragraph 4 of the DOC do not use such an express phrase as "exclude other procedures of dispute settlement", as the arbitral tribunal in the Southern Bluefin Tuna Case stated in its Award, "the absence of an express exclusion of any procedure … is not decisive" (Australia and New Zealand v. Japan, Award on Jurisdiction and Admissibility, 4 August 2000, p.97, para. 57). As discussed earlier, in respect of disputes relating to territorial sovereignty and maritime rights, China always insists on peaceful settlement of disputes by means of negotiations between the countries directly concerned. China's position on negotiations was made clear and well known to the Philippines and other relevant parties during the drafting and adoption of the aforementioned bilateral instruments and the DOC.

41. Consequently, with regard to all the disputes between China and the Philippines in the South China Sea, including the Philippines' claims in this arbitration, the only means of settlement as agreed by the two sides is negotiations, to the exclusion of any other means.

42. Even supposing that the Philippines' claims were concerned with the interpretation or application of the Convention, the compulsory procedures laid down in section 2 of Part XV of the Convention still could not be applied, given the agreement between China and the Philippines on settling their relevant disputes through negotiations.

43. Article 280 of the Convention states that, "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." Article 281 (1) provides that, "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure."

44. As analysed above, through bilateral and multilateral instruments, China and the Philippines have agreed to settle their relevant disputes by negotiations, without setting any time limit for the negotiations, and have excluded any other means of settlement. In these circumstances, it is evident that, under the above-quoted provisions of the Convention, the relevant disputes between the two States shall be resolved through negotiations and there shall be no recourse to arbitration or other compulsory procedures.

45. The Philippines claims that, the two countries have been involved in exchanges of views since 1995 with regard to the subject-matter of the Philippines' claims for arbitration, without however reaching settlement, and that in its view, the Philippines is justified in believing that it is meaningless to continue the negotiations, and therefore the Philippines has the right to initiate arbitration. But the truth is that the two countries have never engaged in negotiations with regard to the subject-matter of the arbitration.

46. Under international law, general exchanges of views, without having the purpose of settling a given dispute, do not constitute negotiations. In Georgia v. Russian Federation, the ICJ held that, "Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' … requires - at the very least - a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, I.C.J. Reports 2011, p. 132, para. 157). In addition, the ICJ considered that "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question" (Ibid., p. 133, para. 161).

47. The South China Sea issue involves a number of countries, and it is no easy task to solve it. Up to the present, the countries concerned are still working together to create conditions conducive to its final settlement by negotiations. Against this background, the exchanges of views between China and the Philippines in relation to their disputes have so far pertained to responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation. They are far from constituting negotiations even on the evidence presented by the Philippines.

48. In recent years, China has on a number of occasions proposed to the Philippines the establishment of a China-Philippines regular consultation mechanism on maritime issues. To date, there has never been any response from the Philippines. On 1 September 2011, the two countries issued a Joint Statement between the People's Republic of China and the Republic of Philippines, reiterating the commitment to settling their disputes in the South China Sea through negotiations. But, before negotiations could formally begin, the Philippines sent on 10 April 2012 a naval vessel to the waters of China's Huangyan Dao to seize Chinese fishing boats together with the Chinese fishermen on board. In the face of such provocations, China was forced to take response measures to safeguard its sovereignty. Thereafter, China once again proposed to the Philippine Government that the two sides restart the China-Philippines consultation mechanism for confidence-building measures. That proposal again fell on deaf ears. On 26 April 2012, the Philippine Department of Foreign Affairs delivered a note verbale to the Chinese Embassy in the Philippines, proposing that the issue of Huangyan Dao be referred to a

third-party adjudication body for resolution and indicating no willingness to negotiate. On 22 January 2013, the Philippines unilaterally initiated the present compulsory arbitration proceedings.

49. The previous exchanges of views regarding the South China Sea issue between the two countries did not concern the subject-matter of the Philippines' claims for arbitration. For instance, the Philippines cited a statement released by the Chinese Foreign Ministry on 22 May 1997 regarding Huangyan Dao, in order to show that there exists between the two countries a dispute concerning the maritime rights of Huangyan Dao and that the two countries had exchanged views with regard to that dispute. However, the Philippines deliberately omitted a passage from that statement, which reads: "The issue of Huangyandao is an issue of territorial sovereignty; the development and exploitation of the EEZ is a question of maritime jurisdiction, the nature of the two issues are different and hence the laws and regulations governing them are also different, and they should not be discussed together. The attempt of the Philippine side to use maritime jurisdictional rights to violate the territorial sovereignty of China is untenable." This passage makes clear the thrust of the statement: the Philippines shall not negate China's sovereignty over Huangyan Dao on the pretext that it is situated within the EEZ of the Philippines. This shows that the exchange of views in question was centred on the issue of sovereignty.

50. It should be further noted that, the Philippines has attempted to show that the subject-matter of the exchanges of views between China and the Philippines since 1995 concerns the interpretation or application of the Convention, but nothing could be farther from the truth than this. Historically, the Philippines, by Republic Act No. 3046 of 17 June 1961, proclaimed as part of its territorial sea the vast areas of sea between the most outlying islands in the Philippine archipelago and the treaty limits established in the Treaty of Paris concluded between the United States and Spain in 1898, among other international treaties, thus claiming a belt of territorial sea far beyond 12 nautical miles. By Presidential Decree No. 1596 promulgated on 11 June 1978, the Philippines made its claim for sovereignty over the so-called "Kalayaan Island Group" (i.e., some maritime features of China's Nansha Islands), together with the adjacent but vast areas of waters, seabed, subsoil, continental margin, and superjacent airspace. As conceded by the Philippines itself, only with the adoption on 10 March 2009 of Republic Act No. 9522 did it begin the ongoing process to harmonize its domestic law with the Convention, with a view to eventually relinquishing all its maritime claims incompatible with the Convention. That Act provided, for the first time, that the maritime areas of the so-called "Kalayaan Island Group" (i.e., some maritime features of China's Nansha Islands) and "Scarborough Shoal" (i.e., China's Huangyan Dao) "shall be determined" so as to be "consistent with Article 121" of the Convention (i.e., the regime of islands). Therefore, given that the Philippines itself considers that only in 2009 did it start to abandon its former maritime claims in conflict with the Convention, how could it have started in 1995

to exchange views with China on matters concerning the interpretation or application of the Convention that are related to the present arbitration?

51. The Philippines claims that China cannot invoke Paragraph 4 of the DOC to exclude the jurisdiction of the Arbitral Tribunal, given its own grave breach of the terms of the DOC. This is groundless. In support of its allegations against China, the Philippines claims that China has taken measures including the threat of force to drive away Philippine fishermen from the waters of Huangyan Dao in spite of their long-standing and continuous fishing activities in those waters, and that China has blocked the Philippines from resupplying a naval ship which ran and has stayed aground at Ren'ai Jiao and certain navy personnel on board. But the fact is that, regarding the situation at Huangyan Dao, it was the Philippines that first resorted to the threat of force by dispatching on 10 April 2012 a naval vessel to detain and arrest Chinese fishing boats and fishermen in the waters of Huangyan Dao. Regarding the situation at Ren'ai Jiao, which is a constituent part of China's Nansha Islands, the Philippines illegally ran a naval ship aground in May 1999 at that feature on the pretext of "technical difficulties". China has made repeated representations to the Philippines, demanding that the latter immediately tow away the vessel. The Philippines, for its part, had on numerous occasions made explicit undertaking to China to tow away the vessel grounded due to "technical difficulties". However, for over 15 years, instead of fulfilling that undertaking, the Philippines has attempted to construct permanent installations on Ren'ai Jiao. On 14 March 2014, the Philippines even openly declared that the vessel was deployed as a permanent installation on Ren'ai Jiao in 1999. China has been forced to take necessary measures in response to such provocative conduct. In light of these facts, the Philippines' accusations against China are baseless.

52. While it denies the effect of Paragraph 4 of the DOC for the purpose of supporting its institution of the present arbitration, the Philippines recently called on the parties to the DOC to comply with Paragraph 5 of the DOC and to provide "the full and effective implementation of the DOC", in a proposal made in its Department of Foreign Affairs statement dated 1 August 2014. This selective and self-contradictory tactic clearly violates the principle of good faith in international law.

53. The principle of good faith requires all States to honestly interpret agreements they enter into with others, not to misinterpret them in disregard of their authentic meaning in order to obtain an unfair advantage. This principle is of overriding importance and is incorporated in Article 2(2) of the Charter of the United Nations. It touches every aspect of international law (Cf. Sir Robert Jennings and Sir Arthur Watts (eds.), Oppenheim's International Law, 9th ed., 1992, vol. 1, p. 38). In the Nuclear Tests Case, the ICJ held that, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation" (Nuclear Tests Case (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 268, para. 46).

54. On this occasion, China wishes to emphasize that the DOC is an important instrument, adopted by China and the ASEAN member States following many years of arduous negotiations on the basis of mutual respect, mutual understanding and mutual accommodation. Under the DOC, the parties concerned undertake to resolve their territorial and jurisdictional disputes through friendly consultations and negotiations by sovereign States directly concerned. In addition, the parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 Convention, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations. The Parties commit themselves to exploring ways for building trust and confidence in accordance with the abovementioned principles and on the basis of equality and mutual respect; reaffirm their respect for and commitment to the freedom of navigation in, and overflight above, the South China Sea as provided for by universally recognized principles of international law, including the 1982 Convention; and undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features, and to handle their differences in a constructive manner. The DOC also lists a number of ways to build trust and areas of cooperation for the Parties concerned to seek and explore pending the peaceful settlement of territorial and jurisdictional disputes. As a follow-up to the DOC, the parties have undertaken to negotiate a "Code of Conduct in the South China Sea".

55. The DOC has played a positive role in maintaining stability in the South China Sea, and in enhancing maritime cooperation, building trust and reducing misgivings between China and the ASEAN member States. Every provision of the DOC constitutes an integral part of the document. To deny the significance of the DOC will lead to a serious retrogression from the current relationship of cooperation between China and the ASEAN member States in the South China Sea.

56. As a member of the ASEAN and having been involved throughout the consultations on the DOC, the Philippines should have fully appreciated the significance of the DOC for the peaceful settlement of the disputes in the South China Sea through negotiations. At present, in order to maintain stability in the region and create conditions for peaceful settlement of the South China Sea issue, China and the ASEAN member States have established working mechanisms to effectively implement the DOC, and have been engaged in consultations regarding the "Code of Conduct in the South China Sea". By initiating compulsory arbitration at this juncture, the Philippines is running counter to the common wish and joint efforts of China and the ASEAN member States. Its underlying goal is not, as the Philippines has proclaimed, to seek peaceful resolution of the South China Sea issue, but rather, by resorting to arbitration, to put political pressure on China, so as to deny China's lawful rights in the South China Sea through the so-called

"interpretation or application" of the Convention, and to pursue a resolution of the South China Sea issue on its own terms. This is certainly unacceptable to China.

## IV. Even assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would still be an integral part of maritime delimitation and, having been excluded by the 2006 Declaration filed by China, could not be submitted for arbitration

57. Part XV of the Convention establishes the right for the States Parties to file a written declaration to exclude specified categories of disputes from the compulsory dispute settlement procedures as laid down in section 2 of that Part. In 2006 China filed such a declaration in full compliance with the Convention.

58. On 25 August 2006, China deposited, pursuant to Article 298 of the Convention, with Secretary-General of the United Nations a written declaration, stating that,"The Government of the People's Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention". In other words, as regards disputes concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, the Chinese Government does not accept any of the compulsory dispute settlement procedures laid down in section 2 of Part XV of the Convention, including compulsory arbitration. China firmly believes that the most effective means for settlement of maritime disputes between China and its neighbouring States is that of friendly consultations and negotiations between the sovereign States directly concerned.

59. China and the Philippines are maritime neighbours and "States with opposite or adjacent coasts" in the sense of Articles 74 and 83 of the Convention. There exists an issue of maritime delimitation between the two States. Given that disputes between China and the Philippines relating to territorial sovereignty over relevant maritime features remain unresolved, the two States have yet to start negotiations on maritime delimitation. They have, however, commenced cooperation to pave the way for an eventual delimitation.

60. On 3 September 2004, the two sides issued a Joint Press Statement of the Government of the People's Republic of China and the Government of the Republic of the Philippines, stating that "[t]he two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area" (para. 16).

61. Two days before the issuance of the Joint Press Statement, upon approval by both governments and in the presence of the Heads of State of the two countries, China

National Offshore Oil Corporation and Philippine National Oil Company signed the "Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea". On 14 March 2005, the agreement was expanded to a tripartite agreement, with the participation of Vietnam Oil and Gas Corporation. This is a good example of the constructive efforts made by the States concerned to enhance cooperation and create conditions for a negotiated settlement of the disputes in the South China Sea. The maritime area covered by that agreement is within that covered in the present arbitration initiated by the Philippines.

62. On 28 April 2005, during a State visit to the Philippines by the then Chinese President Hu Jintao, China and the Philippines issued a Joint Statement of the People's Republic of China and the Republic of the Philippines, in which the two sides "agreed to continue efforts to maintain peace and stability in the South China Sea and … welcomed the signing of the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea by China National Offshore Oil Corporation, Vietnam Oil and Gas Corporation and Philippine National Oil Company" (para. 16).

63. On 16 January 2007, during the official visit to the Philippines by the then Chinese Premier Wen Jiabao, China and the Philippines issued a Joint Statement of the People's Republic of China and the Republic of the Philippines, which stated that "the Tripartite Joint Marine Seismic Undertaking in the South China Sea serves as a model for cooperation in the region. They agreed that possible next steps for cooperation among the three parties should be explored to bring collaboration to a higher level and increase the momentum of trust and confidence in the region" (para. 12).

64. In light of the above, it is plain that China and the Philippines have reached mutual understanding to advance final resolution of the issue of maritime delimitation through cooperation. In any event, given China's 2006 declaration, the Philippines should not and cannot unilaterally initiate compulsory arbitration on the issue of maritime delimitation.

65. To cover up the maritime delimitation nature of the China-Philippines dispute and to sidestep China's 2006 declaration, the Philippines has split up the dispute of maritime delimitation into discrete issues and selected a few of them for arbitration, requesting the Arbitral Tribunal to render the so-called "legal interpretation" on each of them.

66. It is not difficult to see that such legal issues as those presented by the Philippines in the present arbitration, including maritime claims, the legal nature of maritime features, the extent of relevant maritime rights, and law enforcement activities at sea, are all fundamental issues dealt with in past cases of maritime delimitation decided by international judicial or arbitral bodies and in State practice concerning maritime delimitation. In short, those issues are part and parcel of maritime delimitation.

67. Maritime delimitation is an integral, systematic process. Articles 74 and 83 of the Convention stipulate that maritime delimitation between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in

Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". Both international jurisprudence and State practice have recognized that all relevant factors must be taken into account to achieve an equitable solution. In this light, the international law applicable to maritime delimitation includes both the Convention and general international law. Under this body of law, maritime delimitation involves a consideration of not only entitlements, effect of maritime features, and principles and methods of delimitation, but also all relevant factors that must be taken into account, in order to attain an equitable solution.

68. The issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines, and, as such, can only be considered under the overarching framework of maritime delimitation between China and the Philippines, and in conjunction with all the relevant rights and interests the parties concerned enjoy in accordance with the Convention, general international law, and historical or long-standing practice in the region for overall consideration. The Philippines' approach of splitting its maritime delimitation dispute with China and selecting some of the issues for arbitration, if permitted, will inevitably destroy the integrity and indivisibility of maritime delimitation and contravene the principle that maritime delimitation must be based on international law as referred to in Article 38 of the ICJ Statute and that "all relevant factors must be taken into account". This will adversely affect the future equitable solution of the dispute of maritime delimitation between China and the Philippines.

69. Ostensibly, the Philippines is not seeking from the Arbitral Tribunal a ruling regarding maritime delimitation, but instead a decision, inter alia, that certain maritime features are part of the Philippines' EEZ and continental shelf, and that China has unlawfully interfered with the enjoyment and exercise by the Philippines of sovereign rights in its EEZ and continental shelf. But that obviously is an attempt to seek a recognition by the Arbitral Tribunal that the relevant maritime areas are part of the Philippines' EEZ and continental shelf, in respect of which the Philippines is entitled to exercise sovereign rights and jurisdiction. This is actually a request for maritime delimitation by the Arbitral Tribunal in disguise. The Philippines' claims have in effect covered the main aspects and steps in maritime delimitation. Should the Arbitral Tribunal address substantively the Philippines' claims, it would amount to a de facto maritime delimitation.

70. The exclusionary declarations filed by the States Parties to the Convention under Article 298 of the Convention must be respected. By initiating the present compulsory arbitration as an attempt to circumvent China's 2006 declaration, the Philippines is abusing the dispute settlement procedures under the Convention.

71. China's 2006 declaration, once filed, automatically comes into effect. Its effect, as prescribed under Article 299 of the Convention, is that, without the consent of China, no State Party can unilaterally invoke any of the compulsory procedures specified in section 2 of Part XV against China in respect of the disputes covered by that declaration. In return, China simultaneously gives up the right to unilaterally initiate compulsory

procedures against other States Parties in respect of the same disputes. The rights and obligations are reciprocal in this regard.

72. The Philippines claims that, having chosen none of the four compulsory dispute settlement procedures listed under Article 287 of the Convention, China as a State Party shall therefore be deemed to have accepted compulsory arbitration. This is a deliberately misleading argument. The purpose and the effect of China's 2006 declaration is such that the disputes listed therein are fully excluded from the compulsory settlement procedures under the Convention. Whether or not China has selected any of the four compulsory procedures under Article 287, as long as a dispute falls within the scope of China's 2006 declaration, China has already explicitly excluded it from the applicability of any compulsory procedures under section 2 of Part XV of the Convention, including compulsory arbitration.

73. Although the Philippines professes that the subject-matter of the arbitration does not involve any dispute covered by China's 2006 declaration, since China holds a different view in this regard, the Philippines should first take up this issue with China, before a decision can be taken on whether or not it can be submitted for arbitration. Should the Philippines' logic in its present form be followed, any State Party may unilaterally initiate compulsory arbitration against another State Party in respect of a dispute covered by the latter's declaration in force simply by asserting that the dispute is not excluded from arbitration by that declaration. This would render the provisions of Article 299 meaningless.

74. Since the entry into force of the Convention, the present arbitration is the first case in which a State Party has unilaterally initiated compulsory arbitration in respect of a dispute covered by a declaration of another State Party under Article 298. If this twisted approach of the Philippines could be accepted as fulfilling the conditions for invoking compulsory arbitration, it could be well imagined that any of the disputes listed in Article 298 may be submitted to the compulsory procedures under section 2 of Part XV simply by connecting them, using the Philippines' approach, with the question of interpretation or application of certain provisions of the Convention. Should the above approach be deemed acceptable, the question would then arise as to whether the provisions of Article 298 could still retain any value, and whether there is any practical meaning left of the declarations so far filed by 35 States Parties under Article 298. In light of the foregoing reasons, China can only conclude that, the unilateral initiation by the Philippines of the present arbitration constitutes an abuse of the compulsory procedures provided in the Convention and a grave challenge to the solemnity of the dispute settlement mechanism under the Convention.

75. To sum up, even assuming that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, it would still be an integral part of the dispute of maritime delimitation between the two States. Having been excluded by China's 2006 declaration, it could not be submitted to compulsory arbitration under the Convention.

## V. China's right to freely choose the means of dispute settlement must be fully respected, and its rejection of and non-participation in the present arbitration is solidly grounded in international law

76. Under international law, every State is free to choose the means of dispute settlement. The jurisdiction of any international judicial or arbitral body over an inter-State dispute depends on the prior consent of the parties to the dispute. This is known as the principle of consent in international law. It was on the basis of this principle that the States participating in the Third United Nations Conference on the Law of the Sea reached, after extended and arduous negotiations, a compromise on Part XV relating to dispute settlement as a package deal.

77. The compulsory dispute settlement procedures provided in Part XV of the Convention apply only to disputes concerning the interpretation or application of the Convention. States Parties are entitled to freely choose the means of settlement other than those set out in Part XV. Articles 297 and 298 of the Convention, moreover, provide for limitations on and optional exceptions to the applicability of the compulsory procedures with regard to specified categories of disputes.

78. The balance embodied in the provisions of Part XV has been a critical factor for the decision of many States to become parties to the Convention. At the second session of the Third United Nations Conference on the Law of the Sea, Ambassador Reynaldo Galindo Pohl of El Salvador, co-chair of the informal group on the settlement of disputes, on introducing the first general draft on dispute settlement, emphasized the need for exceptions from compulsory jurisdiction with respect to questions directly related to the territorial integrity of States. Otherwise, as has been noted, "a number of States might have been dissuaded from ratifying the Convention or even signing it" (Shabtai Rosenne and Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, 1989, vol. v, p. 88, para. 297.1). It follows that the provisions of Part XV must be interpreted and applied in such a manner so as to preserve the balance in and the integrity of Part XV.

79. China highly values the positive role played by the compulsory dispute settlement procedures of the Convention in upholding the international legal order for the oceans. As a State Party to the Convention, China has accepted the provisions of section 2 of Part XV on compulsory dispute settlement procedures. But that acceptance does not mean that those procedures apply to disputes of territorial sovereignty, or disputes which China has agreed with other States Parties to settle by means of their own choice, or disputes already excluded by Article 297 and China's 2006 declaration filed under Article 298. With regard to the Philippines' claims for arbitration, China has never accepted any of the compulsory procedures of section 2 of Part XV.

80. By virtue of the principle of sovereignty, parties to a dispute may choose the means of settlement of their own accord. This has been affirmed by the Convention. Article 280 provides that, "Nothing in this Part impairs the right of any States Parties to agree at any

time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."

81. The means thus chosen by the States Parties to the Convention takes priority over the compulsory procedures set forth in section 2 of Part XV. Article 281(1) of section 1 of Part XV provides that, "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure." Article 286 states that, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Accordingly, where parties to a dispute have already chosen a means of settlement and excluded other procedures, the compulsory procedures of the Convention shall not apply to the dispute in question.

82. The priority and significance of the means of dispute settlement chosen by States Parties to the Convention have been further affirmed in the arbitral award in the Southern Bluefin Tuna Case. The tribunal recognized that the Convention "falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions", and that "States Parties … are permitted by Article 281(1) to confine the applicability of compulsory procedures of section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures" (Australia and New Zealand v. Japan, pp. 102-103, para. 62). Were the provisions of section 1 of Part XV not complied with faithfully, it would result in deprivation of the right of the States Parties to freely choose means of peaceful settlement based on State sovereignty. That would entail a breach of the principle of consent and upset the balance in and integrity of Part XV.

83. In exercise of its power to decide on its jurisdiction, any judicial or arbitral body should respect the right of the States Parties to the Convention to freely choose the means of settlement. Article 288(4) of the Convention provides that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". China respects that competence of judicial or arbitral bodies under the Convention. Equally important, China would like to emphasize, the exercise of judicial or arbitral power shall not derogate from the right of the States Parties to choose the means of settlement of their own accord, or from the principle of consent which must be followed in international adjudication and arbitration. China holds that this is the constraint that the Arbitral Tribunal must abide by when considering whether or not to apply Article 288(4) in determining its jurisdiction in the present arbitration. After all, "the parties to the dispute are complete masters of the procedure to be used to settle it" (Shabtai Rosenne and Louis B. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, 1989, vol. v, p. 20, para. 280.1).

84. China respects the right of all States Parties to invoke the compulsory procedures in accordance with the Convention. At the same time, it would call attention to Article 300 of the Convention, which provides that, "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." While being fully aware that its claims essentially deal with territorial sovereignty, that China has never accepted any compulsory procedures in respect of those claims, and that there has been an agreement existing between the two States to settle their relevant disputes by negotiations, the Philippines has nevertheless initiated, by unilateral action, the present arbitration. This surely contravenes the relevant provisions of the Convention, and does no service to the peaceful settlement of the disputes.

85. In view of what is stated above and in light of the manifest lack of jurisdiction on the part of the Arbitral Tribunal, the Chinese Government has decided not to accept or participate in the present arbitration, in order to preserve China's sovereign right to choose the means of peaceful settlement of its own free will and the effectiveness of its 2006 declaration, and to maintain the integrity of Part XV of the Convention as well as the authority and solemnity of the international legal regime for the oceans. This position of China will not change.

## VI. Conclusions

86. It is the view of China that the Arbitral Tribunal manifestly has no jurisdiction over this arbitration, unilaterally initiated by the Philippines, with regard to disputes between China and the Philippines in the South China Sea.

Firstly, the essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea, which is beyond the scope of the Convention and is consequently not concerned with the interpretation or application of the Convention.

Secondly, there is an agreement between China and the Philippines to settle their disputes in the South China Sea by negotiations, as embodied in bilateral instruments and the DOC. Thus the unilateral initiation of the present arbitration by the Philippines has clearly violated international law.

Thirdly, even assuming that the subject-matter of the arbitration did concern the interpretation or application of the Convention, it has been excluded by the 2006 declaration filed by China under Article 298 of the Convention, due to its being an integral part of the dispute of maritime delimitation between the two States.

Fourthly, China has never accepted any compulsory procedures of the Convention with regard to the Philippines' claims for arbitration. The Arbitral Tribunal shall fully respect the right of the States Parties to the Convention to choose the means of dispute settlement of their own accord, and exercise its competence to decide on its jurisdiction within the confines of the Convention. The initiation of the present arbitration by the Philippines is an abuse of the compulsory dispute settlement procedures under the

Convention. There is a solid basis in international law for China's rejection of and non-participation in the present arbitration.

87. China consistently adheres to the policy of friendly relations with its neighbouring States, and strives for fair and equitable solution in respect of disputes of territorial sovereignty and maritime delimitation by way of negotiations on the basis of equality and the Five Principles of Peaceful Co-existence. China holds that negotiations is always the most direct, effective, and universally used means for peaceful settlement of international disputes.

88. After years of diplomatic efforts and negotiations, China has successfully resolved land boundary disputes with twelve out of its fourteen neighbours, delimiting and demarcating some 20,000 kilometres in length of land boundary in the process, which accounts for over 90% of the total length of China's land boundary. On 25 December 2000, China and Vietnam concluded, following negotiations, the Agreement between the People's Republic of China and the Socialist Republic of Viet Nam on the Delimitation of the Territorial Seas, the Exclusive Economic Zones and Continental Shelves in Beibu Bay, establishing a maritime boundary between the two States in Beibu Bay. On 11 November 1997, the Agreement on Fisheries between the People's Republic of China and Japan was signed. On 3 August 2000, the Agreement on Fisheries between the Government of the People's Republic of China and the Government of the Republic of Korea was signed. On 24 December 2005, the Agreement between the Government of the People's Republic of China and the Government of the Democratic People's Republic of Korea for Joint Development of Oil Resources at Sea was signed. All these are provisional arrangements pending the maritime delimitation between China and those States.

89. The facts show that, as long as States concerned negotiate in good faith and on the basis of equality and mutual benefit, territorial and maritime delimitation disputes can be resolved properly between them. This principle and position of China equally apply to its disputes with the Philippines in the South China Sea.

90. China does not consider submission by agreement of a dispute to arbitration as an unfriendly act. In respect of disputes of territorial sovereignty and maritime rights, unilateral resort to compulsory arbitration against another State, however, cannot be taken as a friendly act, when the initiating State is fully aware of the opposition of the other State to the action and the existing agreement between them on dispute settlement through negotiations. Furthermore, such action cannot be regarded as in conformity with the rule of law, as it runs counter to the basic rules and principles of international law. It will not in any way facilitate a proper settlement of the dispute between the two countries. Instead it will undermine mutual trust and further complicate the bilateral relations.

91. In recent years, the Philippines has repeatedly taken new provocative actions in respect of Huangyan Dao and Ren'ai Jiao. Such actions have gravely hindered mutual political trust between China and the Philippines, and undermined the amicable atmosphere for China and ASEAN member States to implement the DOC and consult on the

proposed Code of Conduct in the South China Sea. In fact, in the region of Southeast Asia, it is not China that has become "increasingly assertive"; it is the Philippines that has become increasingly provocative.

92. The issue of the South China Sea involves a number of States, and is compounded by complex historical background and sensitive political factors. Its final resolution demands patience and political wisdom from all parties concerned. China always maintains that the parties concerned shall seek proper ways and means of settlement through consultations and negotiations on the basis of respect for historical facts and international law. Pending final settlement, all parties concerned should engage in dialogue and cooperation to preserve peace and stability in the South China Sea, enhance mutual trust, clear up doubts, and create conditions for the eventual resolution of the issue.

93. The unilateral initiation of the present arbitration by the Philippines will not change the history and fact of China's sovereignty over the South China Sea Islands and the adjacent waters; nor will it shake China's resolve and determination to safeguard its sovereignty and maritime rights and interests; nor will it affect the policy and position of China to resolve the relevant disputes by direct negotiations and work together with other States in the region to maintain peace and stability in the South China Sea.

# Annex II

## Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines

2015/10/30

The award rendered on 29 October 2015 by the Arbitral Tribunal established at the request of the Republic of the Philippines (hereinafter referred to as the "Arbitral Tribunal") on jurisdiction and admissibility of the South China Sea arbitration is null and void, and has no binding effect on China.

I. China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China's sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China's domestic laws on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (UNCLOS). With regard to the issues of territorial sovereignty and maritime rights and interests, China will not accept any solution imposed on it or any unilateral resort to a third-party dispute settlement.

II. The Philippines' unilateral initiation and obstinate pushing forward of the South China Sea arbitration by abusing the compulsory procedures for dispute settlement under the UNCLOS is a political provocation under the cloak of law. It is in essence not an effort to settle disputes but an attempt to negate China's territorial sovereignty and maritime rights and interests in the South China Sea. In the 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, which was released by the Chinese Ministry of Foreign Affairs on 7 December 2014 upon authorization, the Chinese government pointed out that the Arbitral Tribunal manifestly has no jurisdiction over the arbitration initiated by the Philippines, and elaborated on the legal grounds for China's non-acceptance of and non-participation in the arbitration. This position is clear and explicit, and will not change.

III. As a sovereign state and a State Party to the UNCLOS, China is entitled to choose the means and procedures of dispute settlement of its own will. China has all along been committed to resolving disputes with its neighbors over territory and maritime jurisdiction through negotiations and consultations. Since the 1990s, China and the Philippines have repeatedly reaffirmed in bilateral documents that they shall resolve relevant disputes through negotiations and consultations. The Declaration on the Conduct of Parties in the South China Sea (DOC) explicitly states that the sovereign states directly concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means through friendly consultations and negotiations. All these documents demonstrate that

China and the Philippines have chosen, long time ago, to settle their disputes in the South China Sea through negotiations and consultations. The breach of this consensus by the Philippines damages the basis of mutual trust between states.

IV. Disregarding that the essence of this arbitration case is territorial sovereignty and maritime delimitation and related matters, maliciously evading the declaration on optional exceptions made by China in 2006 under Article 298 of the UNCLOS, and negating the consensus between China and the Philippines on resolving relevant disputes through negotiations and consultations, the Philippines and the Arbitral Tribunal have abused relevant procedures and obstinately forced ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a State Party to the UNCLOS, completely deviated from the purposes and objectives of the UNCLOS, and eroded the integrity and authority of the UNCLOS. As a State Party to the UNCLOS, China firmly opposes the acts of abusing the compulsory procedures for dispute settlement under the UNCLOS, and calls upon all parties concerned to work together to safeguard the integrity and authority of the UNCLOS.

V. The Philippines' attempt to negate China's territorial sovereignty and maritime rights and interests in the South China Sea through arbitral proceeding will lead to nothing. China urges the Philippines to honor its own commitments, respect China's rights under international law, change its course and return to the right track of resolving relevant disputes in the South China Sea through negotiations and consultations.

# Annex III

## Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines

2016/07/12

With regard to the award rendered on 12 July 2016 by the Arbitral Tribunal in the South China Sea arbitration established at the unilateral request of the Republic of the Philippines (hereinafter referred to as the "Arbitral Tribunal"), the Ministry of Foreign Affairs of the People's Republic of China solemnly declares that the award is null and void and has no binding force. China neither accepts nor recognizes it.

1. On 22 January 2013, the then government of the Republic of the Philippines unilaterally initiated arbitration on the relevant disputes in the South China Sea between China and the Philippines. On 19 February 2013, the Chinese government solemnly declared that it neither accepts nor participates in that arbitration and has since repeatedly reiterated that position. On 7 December 2014, the Chinese government released the 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, pointing out that the Philippines' initiation of arbitration breaches the agreement between the two states, violates the United Nations Convention on the Law of the Sea (UNCLOS), and goes against the general practice of international arbitration, and that the Arbitral Tribunal has no jurisdiction. On 29 October 2015, the Arbitral Tribunal rendered an award on jurisdiction and admissibility. The Chinese government immediately stated that the award is null and void and has no binding force. China's positions are clear and consistent.

2. The unilateral initiation of arbitration by the Philippines is out of bad faith. It aims not to resolve the relevant disputes between China and the Philippines, or to maintain peace and stability in the South China Sea, but to deny China's territorial sovereignty and maritime rights and interests in the South China Sea. The initiation of this arbitration violates international law. First, the subject-matter of the arbitration initiated by the Philippines is in essence an issue of territorial sovereignty over some islands and reefs of Nansha Qundao (the Nansha Islands), and inevitably concerns and cannot be separated from maritime delimitation between China and the Philippines. Fully aware that territorial issues are not subject to UNCLOS, and that maritime delimitation disputes have been excluded from the UNCLOS compulsory dispute settlement procedures by China's 2006 declaration, the Philippines deliberately packaged the relevant disputes as mere issues concerning the interpretation or application of UNCLOS. Second, the Philippines' unilateral initiation of arbitration infringes upon China's right as a state party to UNCLOS to choose on its own will the procedures and means for dispute settlement. As early as in 2006, pursuant to Article 298 of UNCLOS, China excluded from the

compulsory dispute settlement procedures of UNCLOS disputes concerning, among others, maritime delimitation, historic bays or titles, military and law enforcement activities. Third, the Philippines' unilateral initiation of arbitration violates the bilateral agreement reached between China and the Philippines, and repeatedly reaffirmed over the years, to resolve relevant disputes in the South China Sea through negotiations. Fourth, the Philippines' unilateral initiation of arbitration violates the commitment made by China and ASEAN Member States, including the Philippines, in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) to resolve the relevant disputes through negotiations by states directly concerned. By unilaterally initiating the arbitration, the Philippines violates UNCLOS and its provisions on the application of dispute settlement procedures, the principle of "pacta sunt servanda" and other rules and principles of international law.

3. The Arbitral Tribunal disregards the fact that the essence of the subject-matter of the arbitration initiated by the Philippines is issues of territorial sovereignty and maritime delimitation, erroneously interprets the common choice of means of dispute settlement already made jointly by China and the Philippines, erroneously construes the legal effect of the relevant commitment in the DOC, deliberately circumvents the optional exceptions declaration made by China under Article 298 of UNCLOS, selectively takes relevant islands and reefs out of the macro-geographical framework of Nanhai Zhudao (the South China Sea Islands), subjectively and speculatively interprets and applies UNCLOS, and obviously errs in ascertaining facts and applying the law. The conduct of the Arbitral Tribunal and its awards seriously contravene the general practice of international arbitration, completely deviate from the object and purpose of UNCLOS to promote peaceful settlement of disputes, substantially impair the integrity and authority of UNCLOS, gravely infringe upon China's legitimate rights as a sovereign state and state party to UNCLOS, and are unjust and unlawful.

4. China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China opposes and will never accept any claim or action based on those awards.

5. The Chinese government reiterates that, regarding territorial issues and maritime delimitation disputes, China does not accept any means of third party dispute settlement or any solution imposed on China. The Chinese government will continue to abide by international law and basic norms governing international relations as enshrined in the Charter of the United Nations, including the principles of respecting state sovereignty and territorial integrity and peaceful settlement of disputes, and continue to work with states directly concerned to resolve the relevant disputes in the South China Sea through negotiations and consultations on the basis of respecting historical facts and in accordance with international law, so as to maintain peace and stability in the South China Sea.

# Annex IV
## Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea

2016/07/12

To reaffirm China's territorial sovereignty and maritime rights and interests in the South China Sea, enhance cooperation in the South China Sea with other countries, and uphold peace and stability in the South China Sea, the Government of the People's Republic of China hereby states as follows:

I. China's Nanhai Zhudao (the South China Sea Islands) consist of Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands). The activities of the Chinese people in the South China Sea date back to over 2,000 years ago. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have exercised sovereignty and jurisdiction over them continuously, peacefully and effectively, thus establishing territorial sovereignty and relevant rights and interests in the South China Sea.

Following the end of the Second World War, China recovered and resumed the exercise of sovereignty over Nanhai Zhudao which had been illegally occupied by Japan during its war of aggression against China. To strengthen the administration over Nanhai Zhudao, the Chinese government in 1947 reviewed and updated the geographical names of Nanhai Zhudao, compiled Nan Hai Zhu Dao Di Li Zhi Lüe (A Brief Account of the Geography of the South China Sea Islands), and drew Nan Hai Zhu Dao Wei Zhi Tu (Location Map of the South China Sea Islands) on which the dotted line is marked. This map was officially published and made known to the world by the Chinese government in February 1948.

II. Since its founding on 1 October 1949, the People's Republic of China has been firm in upholding China's territorial sovereignty and maritime rights and interests in the South China Sea. A series of legal instruments, such as the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea, the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf and the 1996 Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea, have further reaffirmed China's territorial sovereignty and maritime rights and interests in the South China Sea.

III. Based on the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and in accordance with national law and international law, including the United

Nations Convention on the Law of the Sea, China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia:

i. China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
ii. China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao;
iii. China has exclusive economic zone and continental shelf, based on Nanhai Zhudao;
iv. China has historic rights in the South China Sea.

The above positions are consistent with relevant international law and practice.

IV. China is always firmly opposed to the invasion and illegal occupation by certain states of some islands and reefs of China's Nansha Qundao, and activities infringing upon China's rights and interests in relevant maritime areas under China's jurisdiction. China stands ready to continue to resolve the relevant disputes peacefully through negotiation and consultation with the states directly concerned on the basis of respecting historical facts and in accordance with international law. Pending final settlement, China is also ready to make every effort with the states directly concerned to enter into provisional arrangements of a practical nature, including joint development in relevant maritime areas, in order to achieve win-win results and jointly maintain peace and stability in the South China Sea.

V. China respects and upholds the freedom of navigation and overflight enjoyed by all states under international law in the South China Sea, and stays ready to work with other coastal states and the international community to ensure the safety of and the unimpeded access to the international shipping lanes in the South China Sea.

## Annex V

# China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea

2016/07/13



## Contents

## Introduction

1. Situated to the south of China's mainland, and connected by narrow straits and waterways with the Pacific Ocean to the east and the Indian Ocean to the west, the South China Sea is a semi-closed sea extending from northeast to southwest. To its north are the mainland and Taiwan Dao of China, to its south Kalimantan Island and Sumatra Island, to its east the Philippine Islands, and to its west the Indo-China Peninsula and the Malay Peninsula.

2. China's Nanhai Zhudao (the South China Sea Islands) consist of Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands). These Islands include, among others, islands, reefs, shoals and cays of various numbers and sizes. Nansha Qundao is the largest in terms of both the number of islands and reefs and the geographical area.

3. The activities of the Chinese people in the South China Sea date back to over 2,000 years ago. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them. China's sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea have been established in the long course of history, and are solidly grounded in history and law.

4. As neighbors facing each other across the sea, China and the Philippines have closely engaged in exchanges, and the two peoples have enjoyed friendship over generations. There had been no territorial or maritime delimitation disputes between the two states until the 1970s when the Philippines started to invade and illegally occupy some islands and reefs of China's Nansha Qundao, creating a territorial issue with China over these islands and reefs. In addition, with the development of the international law of the sea, a maritime delimitation dispute also arose between the two states regarding certain maritime areas of the South China Sea.

5. China and the Philippines have not yet had any negotiation designed to settle their relevant disputes in the South China Sea. However, the two countries did hold multiple rounds of consultations on the proper management of disputes at sea and reached consensus on resolving through negotiation and consultation the relevant disputes, which has been repeatedly reaffirmed in a number of bilateral documents. The two countries have also made solemn commitment to settling relevant disputes through negotiation and consultation in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) that China and the ASEAN Member States jointly signed.

6. In January 2013, the then government of the Republic of the Philippines turned its back on the above-mentioned consensus and commitment, and unilaterally initiated the South China Sea arbitration. The Philippines deliberately mischaracterized and packaged the territorial issue which is not subject to the United Nations Convention on the Law of the Sea (UNCLOS) and the maritime delimitation dispute which has been excluded from the UNCLOS dispute settlement procedures by China's 2006 optional exceptions declaration pursuant to Article 298 of UNCLOS. This act is a wanton abuse of the UNCLOS dispute settlement procedures. In doing so, the Philippines attempts to deny China's territorial sovereignty and maritime rights and interests in the South China Sea.

7. This paper aims to clarify the facts and tell the truth behind the relevant disputes between China and the Philippines in the South China Sea, and to reaffirm China's consistent position and policy on the South China Sea issue, in order to get to the root of the issue and set the record straight.

## I. Nanhai Zhudao are China's Inherent Territory

### i. China's sovereignty over Nanhai Zhudao is established in the course of history

8. The Chinese people have since ancient times lived and engaged in production activities on Nanhai Zhudao and in relevant waters. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them, thus establishing sovereignty over Nanhai Zhudao and the relevant rights and interests in the South China Sea.

9. As early as the 2nd century BCE in the Western Han Dynasty, the Chinese people sailed in the South China Sea and discovered Nanhai Zhudao in the long course of activities.

10. A lot of Chinese historical literatures chronicle the activities of the Chinese people in the South China Sea. These books include, among others, Yi Wu Zhi (An Account of Strange Things) published in the Eastern Han Dynasty (25-220), Fu Nan Zhuan (An Account of Fu Nan) during the period of the Three Kingdoms (220-280), Meng Liang Lu (Record of a Daydreamer) and Ling Wai Dai Da (Notes for the Land beyond the Passes) in the Song Dynasty (960-1279), Dao Yi Zhi Lüe (A Brief Account of the

Islands) in the Yuan Dynasty (1271-1368), Dong Xi Yang Kao (Studies on the Oceans East and West) and Shun Feng Xiang Song (Fair Winds for Escort) in the Ming Dynasty (1368-1644) and Zhi Nan Zheng Fa (Compass Directions) and Hai Guo Wen Jian Lu (Records of Things Seen and Heard about the Coastal Regions) in the Qing Dynasty (1644-1911). These books also record the geographical locations and geomorphologic characteristics of Nanhai Zhudao as well as hydrographical and meteorological conditions of the South China Sea. These books record vividly descriptive names the Chinese people gave to Nanhai Zhudao, such as "Zhanghaiqitou" (twisted atolls on the rising sea), "Shanhuzhou" (coral cays), "Jiuruluozhou" (nine isles of cowry), "Shitang" (rocky reefs), "Qianlishitang" (thousand-li rocky reefs), "Wanlishitang" (ten thousand-li rocky reefs), "Changsha" (long sand cays), "Qianlichangsha" (thousand-li sand cays), and "Wanlichangsha" (ten thousand-li sand cays).

11. The Chinese fishermen have developed a relatively fixed naming system for the various components of Nanhai Zhudao in the long process of exploration and exploitation of the South China Sea. Under this system, islands and shoals have become known as "Zhi"; reefs "Chan", "Xian", or "Sha"; atolls "Kuang", "Quan" or "Tang"; and banks "Shapai". Geng Lu Bu (Manual of Sea Routes), a kind of navigation guidebook for Chinese fishermen's journeys between the coastal regions of China's mainland and Nanhai Zhudao, came into being and circulation in the Ming and Qing Dynasties, and has been handed down in various editions and versions of handwritten copies and is still in use even today. It shows that the Chinese people lived and carried out production activities on, and how they named Nanhai Zhudao. Geng Lu Bu records names for at least 70 islands, reefs, shoals and cays of Nansha Qundao. Some were named after compass directions in Chinese renditions, such as Chouwei (Zhubi Jiao) and Dongtou Yixin (Pengbo Ansha); some were named after local aquatic products in the surrounding waters such as Chigua Xian (Chigua Jiao, "chigua" means "red sea cucumber") and Mogua Xian (Nanping Jiao, "mogua" means "black sea cucumber"); some were named after their shapes, such as Niaochuan (Xian'e Jiao, "niaochuan" means "bird string") and Shuangdan (Xinyi Jiao, "shuangdan" means "shoulder poles"); some were named after physical objects, such as Guogai Zhi (Anbo Shazhou, "guogai" means "pot cover") and Chenggou Zhi (Jinghong Dao, "chenggou" means "steelyard hook"); still some were named after waterways such as Liumen Sha (Liumen Jiao, "liumen" means "six doorways").

12. Some of the names given by the Chinese people to Nanhai Zhudao were adopted by Western navigators and marked in some authoritative navigation guidebooks and charts published in the 19th and 20th centuries. For instance, Namyit (Hongxiu Dao), Sin Cowe (Jinghong Dao) and Subi (Zhubi Jiao) originate from "Nanyi", "Chenggou" and "Chouwei" as pronounced in Hainan dialects.

13. Numerous historical documents and objects prove that the Chinese people have explored and exploited in a sustained way Nanhai Zhudao and relevant waters. Starting from the Ming and Qing Dynasties, Chinese fishermen sailed southward on the

northeasterly monsoon to Nansha Qundao and relevant waters for fishery production activities and returned on the southwesterly monsoon to the mainland the following year. Some of them lived on the islands for years, going for fishing, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. Chinese and foreign historical literature as well as archaeological finds show that there were crops, wells, huts, temples, tombs and tablet inscriptions left by Chinese fishermen on some islands and reefs of Nansha Qundao.

14. Many foreign documents also recorded the fact that during a long period of time only Chinese lived and worked on Nansha Qundao.

15. The China Sea Directory published in 1868 by order of the Lords Commissioners of the Admiralty of the United Kingdom, when referring to Zhenghe Qunjiao of Nansha Qundao, observed that "Hainan fishermen, who subsist by collecting trepang and tortoise-shell, were found upon most of these islands, some of whom remain for years amongst the reefs", and that "[t]he fishermen upon Itu-Aba island [Taiping Dao] were more comfortably established than the others, and the water found in the well on that island was better than elsewhere." The China Sea Directory published in 1906 and The China Sea Pilot in its 1912, 1923 and 1937 editions made in many parts explicit records of the Chinese fishermen living and working on Nansha Qundao.

16. The French magazine Le Monde Colonial Illustré published in September 1933 contains the following records: Only Chinese people (Hainan natives) lived on the nine islands of Nansha Qundao and there were no people from other countries. Seven were on Nanzi Dao (South West Cay), two of them were children. Five lived on Zhongye Dao (Thitu Island); four lived on Nanwei Dao (Spratly Island), one person more over that of 1930. There were worship stands, thatched cottages and wells left by the Chinese on Nanyao Dao (Loaita Island). No one was sighted on Taiping Dao (Itu Aba Island), but a tablet scripted with Chinese characters was found, which said that, in that magazine's rendition, "Moi, Ti Mung, patron de jonque, suis venu ici à la pleine lune de mars pour vous porter des aliments. Je n'ai trouvé personne, je laisse le riz à l'abri des pierres et je pars." Traces were also found of fishermen living on the other islands. This magazine also records that there are abundant vegetation, wells providing drinking water, coconut palms, banana trees, papaya trees, pineapples, green vegetables and potatoes as well as poultry on Taiping Dao, Zhongye Dao, Nanwei Dao and other islands, and that these islands are habitable.

17. Japanese literature Boufuu No Shima (Stormy Island) published in 1940 as well as The Asiatic Pilot, Vol. IV, published by the United States Hydrographic Office in 1925 also have accounts about Chinese fishermen who lived and worked on Nansha Qundao.

18. China is the first to have continuously exercised authority over Nanhai Zhudao and relevant maritime activities. In history, China has exercised jurisdiction in a continuous, peaceful and effective manner over Nanhai Zhudao and in relevant waters through measures such as establishment of administrative setups, naval patrols, resources development, astronomical observation and geographical survey.

19. For instance, in the Song Dynasty, China established a post of Jing Lüe An Fu Shi (Imperial Envoy for Management and Pacification) in the regions now known as Guangdong and Guangxi to govern the southern territory. It is mentioned in Zeng Gongliang's Wujing Zongyao (Outline Record of Military Affairs) that, in order to strengthen defense in the South China Sea, China established naval units to conduct patrols therein. In the Qing Dynasty, Ming Yi's Qiongzhou Fuzhi (Chronicle of Qiongzhou Prefecture), Zhong Yuandi's Yazhou Zhi (Chronicle of Yazhou Prefecture) and others all listed "Shitang" and "Changsha" under the items of "maritime defense".

20. Many of China's local official records, such as Guangdong Tong Zhi (General Chronicle of Guangdong), Qiongzhou Fu Zhi (Chronicle of Qiongzhou Prefecture) and Wanzhou Zhi (Chronicle of Wanzhou), contain in the section on "territory" or "geography, mountains and waters" a statement that "Wanzhou covers 'Qianlichangsha' and 'Wanlishitang'" or something similar.

21. The successive Chinese governments have marked Nanhai Zhudao as Chinese territory on official maps, such as the 1755 Tian Xia Zong Yu Tu (General Map of Geography of the All-under-heaven) of the Huang Qing Ge Zhi Sheng Fen Tu (Map of the Provinces Directly under the Imperial Qing Authority), the 1767 Da Qing Wan Nian Yi Tong Tian Xia Tu (Map of the Eternally Unified All-under-heaven of the Great Qing Empire), the 1810 Da Qing Wan Nian Yi Tong Di Li Quan Tu (Map of the Eternally Unified Great Qing Empire) and the 1817 Da Qing Yi Tong Tian Xia Quan Tu (Map of the Unified All-under-heaven of the Great Qing Empire).

22. Historical facts show that the Chinese people have all along taken Nanhai Zhudao and relevant waters as a ground for living and production, where they have engaged in exploration and exploitation activities in various forms. The successive Chinese governments have exercised jurisdiction over Nanhai Zhudao in a continuous, peaceful and effective manner. In the course of history, China has established sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea. The Chinese people have long been the master of Nanhai Zhudao.

### ii. China has always been resolute in upholding its territorial sovereignty and maritime rights and interests in the South China Sea

23. China's sovereignty over Nanhai Zhudao had never been challenged before the 20th century. When France and Japan invaded and illegally occupied by force some islands and reefs of China's Nansha Qundao in the 1930s and 1940s, the Chinese people rose to fight back strenuously and the Chinese government took a series of measures to defend China's sovereignty over Nansha Qundao.

24. In 1933, France invaded some islands and reefs of Nansha Qundao and declared "occupation" of them in an announcement published in Journal Officiel, creating the "Incident of the Nine Islets". The French aggression triggered strong reactions and large scale protests from all walks of life across China. The Chinese fishermen living on Nansha Qundao also took on-site resistance against the French aggression. Chinese

fishermen Fu Hongguang, Ke Jiayu, Zheng Landing and others cut down the posts flying French flags on Taiping Dao, Beizi Dao, Nanwei Dao, Zhongye Dao and others.

25. Shortly after this Incident happened, the Chinese Ministry of Foreign Affairs made clear through its spokesperson, referring to the relevant islands of Nansha Qundao, that "no other people but Chinese fishermen live on the islands and they are recognized internationally as Chinese territory". The Chinese government made strong representations to the French government against its aggression. And in response to the French attempt to trick Chinese fishermen into hanging French flags, the government of Guangdong Province instructed that administrators of all counties should issue public notice forbidding all Chinese fishing vessels operating in Nansha Qundao and relevant waters from hanging foreign flags, and Chinese national flags were distributed to them to be hung on Chinese fishing vessels.

26. China's Committee for the Examination for the Land and Sea Maps, which was composed of representatives of the Ministry of Foreign Affairs, Ministry of the Interior, Ministry of the Navy and other institutions, reviewed and approved the names of individual islands, reefs, banks and shoals of Nanhai Zhudao, compiled and published Zhong Guo Nan Hai Ge Dao Yu Tu (Map of the South China Sea Islands of China) in 1935.

27. Japan invaded and illegally occupied Nanhai Zhudao during its war of aggression against China. The Chinese people fought heroically against the Japanese aggression. With the advance of the World's Anti-Fascist War and the Chinese People's War of Resistance against Japanese Aggression, China, the United States and the United Kingdom solemnly demanded in the Cairo Declaration in December 1943 that all the territories Japan had stolen from the Chinese shall be restored to China. In July 1945, China, the United States and the United Kingdom issued the Potsdam Proclamation. That Proclamation explicitly declares in Article 8: "The terms of the Cairo Declaration shall be carried out."

28. In August 1945, Japan announced its acceptance of the Potsdam Proclamation and its unconditional surrender. In November and December 1946, the Chinese government dispatched Colonel Lin Zun and other senior military and civil officials to Xisha Qundao and Nansha Qundao to resume exercise of authority over these Islands, with commemorative ceremonies held, sovereignty markers re-erected, and troops garrisoned. These officials arrived at these islands on four warships, namely Yongxing, Zhongjian, Taiping and Zhongye. Subsequently, the Chinese government renamed four islands of Xisha Qundao and Nansha Qundao after the names of those four warships.

29. In March 1947, the Chinese government established on Taiping Dao Nansha Qundao Office of Administration and placed it under the jurisdiction of Guangdong Province. China also set up a meteorological station and a radio station on Taiping Dao, which started broadcasting meteorological information in June of that year.

30. On the basis of a new round of geographical survey of Nanhai Zhudao, the Chinese government commissioned in 1947 the compilation of Nan Hai Zhu Dao Di Li Zhi Lüe (A Brief Account of the Geography of the South China Sea Islands), reviewed

and approved Nan Hai Zhu Dao Xin Jiu Ming Cheng Dui Zhao Biao (Comparison Table on the Old and New Names of the South China Sea Islands), and drew Nan Hai Zhu Dao Wei Zhi Tu (Location Map of the South China Sea Islands) on which the dotted line is marked. In February 1948, the Chinese government officially published Zhong Hua Min Guo Xing Zheng Qu Yu Tu (Map of the Administrative Districts of the Republic of China) including Nan Hai Zhu Dao Wei Zhi Tu (Location Map of the South China Sea Islands).

31. In June 1949, the Chinese government promulgated Hai Nan Te Qu Xing Zheng Zhang Guan Gong Shu Zu Zhi Tiao Li (Regulations on the Organization of the Office of the Chief Executive of the Hainan Special District), which placed Hainan Dao, Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, Nansha Qundao and some other islands under the jurisdiction of the Hainan Special District.

32. Since its founding on 1 October 1949, the People's Republic of China has repeatedly reiterated and further upheld its sovereignty over Nanhai Zhudao and relevant rights and interests in the South China Sea by measures such as adopting legislations, establishing administration and making diplomatic representations. China has never ceased carrying out activities such as patrolling and law enforcement, resources development and scientific survey on Nanhai Zhudao and in the South China Sea.

33. In August 1951, Foreign Minister Zhou Enlai, in his Statement on the United States-British Draft Peace Treaty with Japan and the San Francisco Conference, pointed out that "as a matter of fact, just like all the Nan Sha Islands, Chung Sha Islands and Tung Sha Islands, Si Sha Islands (the Paracel Islands) and Nan Wei Island (Spratly Island) have always been China's territory, occupied by Japan for some time during the war of aggression waged by Japanese imperialism, they were all taken over by the then Chinese Government, following Japan's surrender", "Whether or not the United States-British Draft Treaty contains provisions on this subject and no matter how these provisions are worded, the inviolable sovereignty of the People's Republic of China over Nan Wei Island (Spratly Island) and Si Sha Islands (the Paracel Islands) will not be in any way affected."

34. In September 1958, China promulgated the Declaration of the Government of the People's Republic of China on China's Territorial Sea, explicitly providing that the breadth of China's territorial sea shall be twelve nautical miles, that the straight baselines method shall be employed to determine the baselines of territorial sea and that such provisions shall apply to all territories of the People's Republic of China, including "Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, Nansha Qundao and all the other islands belonging to China".

35. In March 1959, the Chinese government set up, on Yongxing Dao of Xisha Qundao, the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao. In March 1969, the Office was renamed the Revolutionary Committee of Xisha Qundao, Zhongsha Qundao and Nansha Qundao of Guangdong Province. In October 1981, the

name of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao was restored.

36. In April 1983, China Committee on Geographical Names was authorized to publish 287 standard geographical names for part of Nanhai Zhudao.

37. In May 1984, the Sixth National People's Congress decided at its Second Session to establish the Hainan Administrative District with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant maritime areas, among others.

38. In April 1988, the Seventh National People's Congress decided at its First Session to establish Hainan Province with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant maritime areas, among others.

39. In February 1992, China promulgated the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, establishing China's basic system of territorial sea and contiguous zone. This Law explicitly states: "The land territory of the People's Republic of China includes [ … ] Dongsha Qundao; Xisha Qundao; Zhongsha Qundao; Nansha Qundao; as well as all the other islands belonging to the People's Republic of China." In May 1996, the Standing Committee of the Eighth National People's Congress made the decision at its Nineteenth Session to ratify UNCLOS, and at the same time declared that, "The People's Republic of China reaffirms its sovereignty over all its archipelagoes and islands as listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone which was promulgated on 25 February 1992."

40. In May 1996, the Chinese government announced the baselines of the part of the territorial sea adjacent to the mainland which are composed of all the straight lines joining the 49 adjacent base points from Gaojiao of Shandong to Junbijiao of Hainan Dao, as well as the baselines of the territorial sea adjacent to Xisha Qundao which are composed of all the straight lines joining the 28 adjacent base points, and declared it would announce the remaining baselines of the territorial sea at another time.

41. In June 1998, China promulgated the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, establishing China's basic system of exclusive economic zone and continental shelf. This Law explicitly states: "The provisions in this Law shall not affect the historic rights that the People's Republic of China enjoys."

42. In June 2012, the State Council approved the abolition of the Office of Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the simultaneous establishment of prefecture-level Sansha City with jurisdiction over Xisha Qundao, Nansha Qundao and Zhongsha Qundao and the relevant waters.

43. China attaches great importance to ecological and fishery resource preservation in the South China Sea. In 1999, China began to enforce summer fishing moratorium in the South China Sea and has done so since that time. By the end of 2015, China had established six national aquatic biological nature reserves and six such reserves at

provincial level, covering a total area of 2.69 million hectares, as well as seven national aquatic germplasm resources conservation areas with a total area of 1.28 million hectares.

44. Since the 1950s, the Taiwan authorities of China have maintained a military presence on Taiping Dao of Nansha Qundao. For a long time, they have also maintained civil service and administration bodies and carried out natural resources development on the island.

### iii. China's sovereignty over Nanhai Zhudao is widely acknowledged in the international community

45. After the end of the Second World War, China recovered and resumed the exercise of sovereignty over Nanhai Zhudao. Many countries recognize that Nanhai Zhudao are part of China's territory.

46. In 1951, it was decided at the San Francisco Peace Conference that Japan would renounce all right, title and claim to Nansha Qundao and Xisha Qundao. In 1952, the Japanese government officially stated that it had renounced all right, title, and claim to Taiwan, Penghu, as well as Nansha Qundao and Xisha Qundao. In the same year, Xisha Qundao and Nansha Qundao, which Japan renounced under the San Francisco Peace Treaty, together with Dongsha Qundao and Zhongsha Qundao, were all marked as belonging to China on the 15th map, Southeast Asia, of the Standard World Atlas recommended by the then Japanese Foreign Minister Katsuo Okazaki with his signature.

47. In October 1955, the International Civil Aviation Organization held a conference in Manila, which was attended by representatives from the United States, the United Kingdom, France, Japan, Canada, Australia, New Zealand, Thailand, the Philippines, the authorities from South Vietnam and China's Taiwan authorities. The Filipino and French representatives served as chair and vice chair respectively. It was requested in Resolution No. 24 adopted at the conference that China's Taiwan authorities should enhance meteorological observation on Nansha Qundao, and no opposition or reservation was registered.

48. On 4 September 1958, the Chinese government promulgated the Declaration of the Government of the People's Republic of China on China's Territorial Sea, proclaiming a twelve-nautical-mile territorial sea breadth, and stipulating that, "This provision applies to all territories of the People's Republic of China, including [ … ] Dongsha Qundao, Xisha Qundao, Zhongsha Qundao, Nansha Qundao, and all other islands belonging to China." On 14 September, Prime Minister Pham Van Dong of the Vietnamese government sent a diplomatic note to Zhou Enlai, Premier of the State Council of China, solemnly stating that "the government of the Democratic Republic of Vietnam recognizes and supports the declaration of the government of the People's Republic of China on its decision concerning China's territorial sea made on 4 September 1958" and "the government of the Democratic Republic of Vietnam respects this decision."

49. In August 1956, First Secretary Donald E. Webster of the United States institution in Taiwan made an oral request to China's Taiwan authorities for permission for the United States military personnel to conduct geodetic survey in Huangyan Dao, Shuangzi Qunjiao, Jinghong Dao, Hongxiu Dao and Nanwei Dao of Zhongsha Qundao and Nansha Qundao. China's Taiwan authorities later approved the above request.

50. In December 1960, the United States government sent a letter to China's Taiwan authorities to "request permission be granted" for its military personnel to carry out survey at Shuangzi Qunjiao, Jinghong Dao and Nanwei Dao of Nansha Qundao. China's Taiwan authorities approved this application.

51. In 1972, Japan reiterated its adherence to the terms of Article 8 of the Potsdam Proclamation in the Joint Communiqué of the Government of the People's Republic of China and the Government of Japan.

52. It was reported by AFP that, on 4 February 1974, the then Indonesian Foreign Minister Adam Malik stated that, "si nous regardons les cartes actuelles, elles montrent que les deux archipels des Paracels [Xisha Qundao] et des Spratleys [Nansha Qundao] appartiennent à la Chine", and that because we recognize the existence of only one China, "cela signifie que, pour nous, ces archipels appartiennent à la République populaire de Chine".

53. The 14th Assembly of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, held from 17 March to 1 April 1987, deliberated on the Global Sea-Level Observing System Implementation Plan 1985-1990 (IOC/INF-663 REV) submitted by the Commission's Secretariat. The Plan integrated Xisha Qundao and Nansha Qundao into the Global Sea-Level Observing System, and explicitly listed these two Islands under "People's Republic of China". For the implementation of this Plan, the Chinese government was commissioned to build five marine observation stations, including one on Nansha Qundao and one on Xisha Qundao.

54. Nanhai Zhudao have long been widely recognized by the international community as part of China's territory. The encyclopedias, yearbooks and maps published in many countries mark Nansha Qundao as belonging to China. For example this is done in, among others, the 1960 Worldmark Encyclopedia of the Nations by the Worldmark Press published in the United States, the 1966 New China Yearbook by the Far Eastern Booksellers published in Japan; the Welt-Atlas published in 1957, 1958 and 1961 in the Federal Republic of Germany, the 1958 Atlas Zur Erd-Und Länderkunde and the 1968 Haack Großer Weltatlas published in the German Democratic Republic, the Atlas Mira from 1954 to 1959 and the 1957 Administrativno-territorialnoe Delenie Zarubezhnyh Stran published in the Soviet Union, the 1959 Világatlasz and the 1974 Képes Politikai és Gazdasági Világatlasz published in Hungary, the 1959 Malý Atlas Světa published in Czechoslovakia, the 1977 Atlas Geografic Scolar published in Romania, the 1965 Atlas international Larousse politique et économique, the 1969 Atlas moderne Larousse published by Libraire Larousse in France, the maps in the 1972 and 1983 World

Encyclopedia, the 1985 Grand Atlas World by Heibon Sha, and the 1980 Sekai to Sono Kunikuni published by Japan Geographic Data Center in Japan.

## II. Origin of the Relevant Disputes Between China and the Philippines in the South China Sea

55. The core of the relevant disputes between China and the Philippines in the South China Sea lies in the territorial issues caused by the Philippines' invasion and illegal occupation of some islands and reefs of China's Nansha Qundao. In addition, with the development of the international law of the sea, a maritime delimitation dispute also arose between the two states regarding certain sea areas of the South China Sea.

### i. The Philippines' invasion and illegal occupation caused disputes with China over some islands and reefs of Nansha Qundao

56. The territory of the Philippines is defined by a series of international treaties, including the 1898 Treaty of Peace between the United States of America and the Kingdom of Spain (the Treaty of Paris), the 1900 Treaty between the United States of America and the Kingdom of Spain for Cession of Outlying Islands of the Philippines (the Treaty of Washington), and the 1930 Convention between His Majesty in Respect of the United Kingdom and the President of the United States regarding the Boundary between the State of North Borneo and the Philippine Archipelago.

57. The Philippines' territory so defined has nothing to do with China's Nanhai Zhudao.

58. In the 1950s, the Philippines attempted to take moves on China's Nansha Qundao but eventually stopped because of China's firm opposition. In May 1956, Tomás Cloma, a Filipino, organized a private expedition to some islands and reefs of Nansha Qundao and unlawfully named them "Freedomland". Afterwards, Philippine Vice President and Foreign Minister Carlos Garcia expressed support for Cloma's activities. In response, the spokesperson of the Chinese Foreign Ministry issued a stern statement on 29 May, pointing out that Nansha Qundao "has always been a part of China's territory. The People's Republic of China has indisputable sovereignty over these islands [ … ] and will never tolerate the infringement of its sovereignty by any country with any means and under any excuse." At the same time, China's Taiwan authorities sent troops to patrol Nansha Qundao and resumed stationing troops on Taiping Dao. Afterward, the Philippine Department of Foreign Affairs said that the government of the Philippines did not know about Cloma's activities or give him the consent before he took his moves.

59. Starting in the 1970s, the Philippines invaded and illegally occupied by force some islands and reefs of China's Nansha Qundao and raised illegal territorial claims. The Philippines invaded and illegally occupied Mahuan Dao and Feixin Dao in August and September 1970, Nanyao Dao and Zhongye Dao in April 1971, Xiyue Dao and Beizi Dao in July 1971, Shuanghuang Shazhou in March 1978 and Siling Jiao in July

1980. In June 1978, Philippine President Ferdinand Marcos signed Presidential Decree No. 1596, which designated some islands and reefs of China's Nansha Qundao and large areas of their surrounding waters as "Kalayaan Island Group" ("Kalayaan" in Tagalog means "Freedom"), set up "Municipality of Kalayaan" and illegally included them in the Philippine territory.

60. The Philippines has also enacted a series of national laws to lay its own claims of territorial sea, exclusive economic zone and continental shelf, part of which conflicted with China's maritime rights and interests in the South China Sea.

61. The Philippines has concocted many excuses to cover up its invasion and illegal occupation of some islands and reefs of China's Nansha Qundao in order to pursue its territorial pretensions. For instance, it claims that: "Kalayaan Island Group" is not part of Nansha Qundao but terra nullius; Nansha Qundao became "trust territory" after the end of the Second World War; the Philippines has occupied Nansha Qundao because of "contiguity or proximity" and out of "national security" considerations; "some islands and reefs of Nansha Qundao are located in the exclusive economic zone and continental shelf of the Philippines"; the Philippines' "effective control" over the relevant islands and reefs has become the "status quo" that cannot be changed.

### ii. The Philippines' illegal claim has no historical or legal basis

62. The Philippines' territorial claim over part of Nansha Qundao is groundless from the perspectives of either history or international law.

63. First, Nansha Qundao has never been part of the Philippine territory. The territorial scope of the Philippines has already been defined by a series of international treaties. The United States, administrator of the Philippines at the relevant time, was clearly aware of these facts. On 12 August 1933, ex-Senator Isabelo de los Reyes of the United States-governed Philippines wrote a letter to Governor-General Frank Murphy in an attempt to claim that some Nansha islands formed part of the Philippine Archipelago on the ground of geographical proximity. That letter was referred to the Department of War and the Department of State. On 9 October, the United States Secretary of State replied that, "These islands [ … ] lie at a considerable distance outside the limits of the Philippine Islands which were acquired from Spain in 1898". In May 1935, the United States Secretary of War George Dern wrote a letter to Secretary of State Cordell Hull, seeking the views of the State Department on the "validity and propriety" of the Philippines' territorial claims over some islands of Nansha Qundao. A memorandum of the Office of Historical Adviser in the State Department, signed by S.W. Boggs, pointed out that, "There is, of course, no basis for a claim on the part of the United States, as islands constituting part of the Philippine Archipelago". On 20 August, Secretary Hull officially replied in writing to Secretary Dern, stating that, "the islands of the Philippine group which the United States acquired from Spain by the treaty of 1898, were only those within the limits described in Article III", and that, referring to the relevant Nansha islands, "It may be observed that [ … ] no mention has been found of Spain having exercised sovereignty

over, or having laid claim to, any of these islands". All these documents prove that the Philippines' territory never includes any part of Nanhai Zhudao, a fact that has been recognized by the international community, including the United States.

64. Second, the claim that "Kalayaan Island Group" is "terra nullius" discovered by the Philippines is groundless. The Philippines claims that its nationals "discovered" the islands in 1956, and uses this as an excuse to single out some islands and reefs of China's Nansha Qundao and name them "Kalayaan Island Group". This is an attempt to create confusion over geographical names and concepts, and dismember China's Nansha Qundao. As a matter of fact, the geographical scope of Nansha Qundao is clear, and the so-called "Kalayaan Island Group" is part of China's Nansha Qundao. Nansha Qundao has long been an integral part of China's territory and is by no means "terra nullius".

65. Third, Nansha Qundao is not "trust territory" either. The Philippines claims that after the Second World War, Nansha Qundao became "trust territory", the sovereignty over which was undetermined. This claim finds no support in law or reality. The post-War trust territories were all specifically listed in relevant international treaties or the documents of the United Nations Trusteeship Council. Nansha Qundao was never included in them and was thus not trust territory at all.

66. Fourth, neither "contiguity or proximity" nor national security is a basis under international law for acquiring territory. Many countries have territories far away from their metropolitan areas, in some cases even very close to the shores of other countries. When exercising colonial rule over the Philippines, the United States had a dispute with the Netherlands regarding sovereignty over an island which is close to the Philippine Archipelago, and the United States' claim on the basis of contiguity was ruled as having no foundation in international law. Furthermore, it is just absurd to invade and occupy the territory of other countries on the ground of national security.

67. Fifth, the Philippines claims that some islands and reefs of China's Nansha Qundao are located within its exclusive economic zone and continental shelf and therefore should fall under its sovereignty or form part of its continental shelf. This is an attempt to use maritime jurisdiction provided for under UNCLOS to deny China's territorial sovereignty. This runs directly counter to the "land dominates the sea" principle, and goes against the purpose of UNCLOS, as stated in its preamble, to "establish [ … ] with due regard for the sovereignty of all States, a legal order for the seas and ocean". Therefore, a coastal state can only claim maritime jurisdiction under the precondition of respecting the territorial sovereignty of another state. No state can extend its maritime jurisdiction to an area under the sovereignty of another; still less can it use such jurisdiction as an excuse to deny another state's sovereignty or even to infringe upon its territory.

68. Sixth, the Philippines' so-called "effective control" on the basis of its illegal seizure is null and void. The international community does not recognize "effective control" created through occupation by force. The Philippines' "effective control" is mere occupation by naked use of force of some islands and reefs of China's Nansha Qundao. Such occupation violates the Charter of the United Nations and the basic norms governing

international relations and is unequivocally prohibited by international law. This so-called "effective control" based on illegal seizure cannot change the basic fact that Nansha Qundao is China's territory. China firmly opposes any attempt to treat the seizure of some islands and reefs of China's Nansha Qundao as a so-called "fait accompli" or "status quo". China will never recognize such a thing.

### iii. The development of the international law of the sea gave rise to the dispute between China and the Philippines over maritime delimitation

69. With the formulation and entering into effect of UNCLOS, the relevant disputes between China and the Philippines in the South China Sea have gradually intensified.

70. Based on the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and pursuant to China's national law and under international law, including the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea, the 1992 Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, the 1996 Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea, the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, and the 1982 United Nations Convention on the Law of the Sea, China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. In addition, China has historic rights in the South China Sea.

71. The Philippines proclaimed its internal waters, archipelagic waters, territorial sea, exclusive economic zone and continental shelf according to, among others, the Philippines' Republic Act No. 387 of 1949, Republic Act No. 3046 of 1961, Republic Act No. 5446 and Presidential Proclamation No. 370 of 1968, Presidential Decree No. 1599 of 1978, and Republic Act No. 9522 of 2009.

72. In the South China Sea, China and the Philippines are states possessing land territory with opposite coasts, the distance between which is less than 400 nautical miles. The maritime areas claimed by the two states overlap, giving rise to a dispute over maritime delimitation.

## III. China and the Philippines Have Reached Consensus on Settling Their Relevant Disputes in the South China Sea

73. China firmly upholds its sovereignty over Nanhai Zhudao, resolutely opposes the Philippines' invasion and illegal occupation of China's islands and reefs, and resolutely opposes the unilateral acts taken by the Philippines on the pretext of enforcing its own claims to infringe China's rights and interests in waters under China's jurisdiction. Still, in the interest of sustaining peace and stability in the South China Sea, China has exercised great restraint, stayed committed to peacefully settling the disputes with the

Philippines in the South China Sea, and made tireless efforts to this end. China has conducted consultations with the Philippines on managing maritime differences and promoting practical maritime cooperation, and the two sides have reached important consensus on settling through negotiation relevant disputes in the South China Sea and properly managing relevant disputes.

### i. It is the consensus and commitment of China and the Philippines to settle through negotiation their relevant disputes in the South China Sea

74. China has dedicated itself to fostering friendly relations with all countries on the basis of the Five Principles of Peaceful Coexistence, namely, mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.

75. In June 1975, China and the Philippines normalized their relations, and in the joint communiqué for that purpose, the two governments agreed to settle all disputes by peaceful means without resorting to the threat or use of force.

76. In fact, China's initiative of "pursuing joint development while shelving disputes" regarding the South China Sea issue was first addressed to the Philippines. In a June 1986 meeting with Philippine Vice President Salvador Laurel, Chinese leader Deng Xiaoping pointed out that Nansha Qundao belongs to China, and when referring to the matter of differences, stated that, "This issue can be shelved for now. Several years later, we can sit down and work out a solution that is acceptable to all in a calm manner. We shall not let this issue stand in the way of our friendly relations with the Philippines and with other countries." In April 1988, when meeting with Philippine President Corazón Aquino, Deng Xiaoping reiterated that "with regard to the issue concerning Nansha Qundao, China has the biggest say. Nansha Qundao has been part of China's territory throughout history, and no one has ever expressed objection to this for quite some time"; and "For the sake of the friendship between our two countries, we can shelve the issue for now and pursue joint development". Since then, when handling the relevant South China Sea issue and developing bilateral ties with other littoral countries around the South China Sea, China has all along acted in keeping with Deng Xiaoping's idea: "sovereignty belongs to China, disputes can be shelved, and we can pursue joint development".

77. Since the 1980s, China has put forward a series of proposals and initiatives for managing and settling through negotiation disputes with the Philippines in the South China Sea and reiterated repeatedly its sovereignty over Nansha Qundao, its position on peacefully settling the relevant disputes and its initiative of "pursuing joint development while shelving disputes". China has expressed its clear opposition to intervention by outside forces and attempts to multilateralize the South China Sea issue and emphasized that the relevant disputes should not affect bilateral relations.

78. In July 1992, the 25th ASEAN Foreign Ministers Meeting held in Manila adopted the ASEAN Declaration on the South China Sea. China expressed appreciation for relevant principles outlined in that Declaration. China stated that it has all along stood

for peacefully settling through negotiation the territorial issues relating to part of Nansha Qundao and opposed the use of force, and is ready to enter into negotiation with countries concerned on implementing the principle of "pursuing joint development while shelving disputes" when conditions are ripe.

79. In August 1995, China and the Philippines issued the Joint Statement between the People's Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation in which they agreed that "[d]isputes shall be settled by the countries directly concerned" and that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes." Subsequently, China and the Philippines reaffirmed their consensus on settling the South China Sea issue through bilateral negotiation and consultation in a number of bilateral documents, such as the March 1999 Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures and the May 2000 Joint Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century.

80. In November 2002, China and the ten ASEAN Member States signed the DOC in which the parties solemnly "undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea".

81. Afterwards, China and the Philippines reaffirmed this solemn commitment they had made in the DOC in a number of bilateral documents, such as the September 2004 Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines and the September 2011 Joint Statement between the People's Republic of China and the Republic of the Philippines.

82. The relevant provisions in all the aforementioned bilateral instruments and the DOC embody the following consensus and commitment between China and the Philippines on settling the relevant disputes in the South China Sea: first, the relevant disputes shall be settled between sovereign states directly concerned; second, the relevant disputes shall be peacefully settled through negotiation and consultation on the basis of equality and mutual respect; and third, sovereign states directly concerned shall "eventually negotiat[e] a settlement of the bilateral disputes" in accordance with universally recognized principles of international law, including the 1982 UNCLOS.

83. By repeatedly reaffirming negotiations as the means for settling relevant disputes, and by repeatedly emphasizing that negotiations be conducted by sovereign states directly concerned, the above-mentioned provisions obviously have produced the effect of excluding any means of third party settlement. In particular, the 1995 Joint Statement provides for "eventually negotiating a settlement of the bilateral disputes". The term "eventually" in this context clearly serves to emphasize that "negotiations" is the only means the parties

have chosen for dispute settlement, to the exclusion of any other means including third party settlement procedures. The above consensus and commitment constitutes an agreement between the two states excluding third-party dispute settlement as a way to settle relevant disputes in the South China Sea between China and the Philippines. This agreement must be observed.

### ii. It is the consensus of China and the Philippines to properly manage relevant disputes in the South China Sea

84. It is China's consistent position that, the relevant parties should establish and improve rules and mechanisms, and pursue practical cooperation and joint development, so as to manage disputes in the South China Sea, and to foster a good atmosphere for their final resolution.

85. Since the 1990s, China and the Philippines have reached the following consensus on managing their disputes: first, they will exercise restraint in handling relevant disputes and refrain from taking actions that may lead to an escalation; second, they will stay committed to managing disputes through bilateral consultation mechanisms; third, they commit themselves to pursuing practical maritime cooperation and joint development; and fourth, the relevant disputes should not affect the healthy growth of bilateral relations and peace and stability in the South China Sea region.

86. In the DOC, China and the Philippines also reached the following consensus: to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability; to intensify efforts, pending the peaceful settlement of territorial and jurisdictional disputes, to seek ways, in the spirit of cooperation and understanding, to build trust and confidence; and to explore or undertake cooperative activities including marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operation and combating transnational crime.

87. China and the Philippines have made some progress in managing their differences and conducting practical maritime cooperation.

88. During the first China-Philippines Experts Group Meeting on Confidence-Building Measures held in March 1999, the two sides issued a joint statement, pointing out that, "the two sides agreed that the dispute should be peacefully settled through consultation in accordance with the generally-accepted principles of international law including the United Nations Convention on the Law of the Sea, [ … and to] exercise self-restraint and not to take actions that might escalate the situation."

89. In the Joint Press Statement of the Third China-Philippines Experts Group Meeting on Confidence-Building Measures released in April 2001, it is stated that, "the two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound

development of China-Philippines relations and peace and stability of the South China Sea area."

90. In September 2004, in the presence of the leaders of China and the Philippines, China National Offshore Oil Corporation (CNOOC) and Philippine National Oil Company (PNOC) signed the Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea. In March 2005, national oil companies from China, the Philippines and Vietnam signed, with the consent of both China and the Philippines, the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea. It was agreed that during an agreement term of three year-period, these oil companies should collect and process certain amount of 2D and/or 3D seismic lines in the agreement area covering about 143,000 square kilometers, re-process certain amount of existing 2D seismic lines, and study and assess the oil resources in the area. The 2007 Joint Statement of the People's Republic of China and the Republic of the Philippines states that, "both sides agree that the tripartite joint marine seismic undertaking in the South China Sea serves as a model for cooperation in the region. They agreed that possible next steps for cooperation among the three parties should be explored to bring collaboration to a higher level and increase the momentum of trust and confidence in the region."

91. Regrettably, due to the lack of willingness for cooperation from the Philippine side, the China-Philippines Experts Group Meeting on Confidence-Building Measures has stalled, and the China-Philippines-Vietnam tripartite marine seismic undertaking has failed to move forward.

## IV. The Philippines Has Repeatedly Taken Moves that Complicate the Relevant Disputes

92. Since the 1980s, the Philippines has repeatedly taken moves that complicate the relevant disputes.

### i. The Philippines attempts to entrench its illegal occupation of some islands and reefs of China's Nansha Qundao

93. In China's Nansha Qundao, the Philippines started in the 1980s to build military facilities on some islands and reefs it has invaded and illegally occupied. In the 1990s, the Philippines continued to build airfields and naval and air force facilities on these illegally-occupied islands and reefs; centered on Zhongye Dao, the construction has extended to other islands and reefs, with runways, military barracks, docks and other facilities built and renovated, so as to accommodate heavy transport planes, fighter jets and more and larger vessels. Furthermore, the Philippines made deliberate provocations by frequently sending its military vessels and aircraft to intrude into Wufang Jiao, Xian'e Jiao, Xinyi Jiao, Banyue Jiao and Ren'ai Jiao of China's Nansha Qundao, and destroyed survey markers set up by China.

94. Still worse, on 9 May 1999, the Philippines sent BRP Sierra Madre (LT-57), a military vessel, to intrude into China's Ren'ai Jiao and illegally ran it aground on the pretext of "technical difficulties". China immediately made solemn representations to the Philippines, demanding the immediate removal of that vessel. But the Philippines claimed that the vessel could not be towed away for "lack of parts".

95. Over this matter, China has repeatedly made representations to the Philippines and renewed the same demand. For instance, in November 1999, the Chinese Ambassador to the Philippines met with Secretary of Foreign Affairs Domingo Siazon and Chief of the Presidential Management Staff Leonora de Jesus to make another round of representations. Many times the Philippines promised to tow away the vessel, but it has taken no action.

96. In September 2003, upon the news that the Philippines was preparing to build facilities around that military vessel illegally run aground at Ren'ai Jiao, China lodged immediate representations. The Philippine Acting Secretary of Foreign Affairs Franklin Ebdalin responded that the Philippines had no intention to construct facilities on Ren'ai Jiao and that, as a signatory to the DOC, the Philippines had no desire to and would not be the first to violate the Declaration.

97. But the Philippines did not fulfill its undertaking to tow away that vessel. Instead, it made even worse provocations. In February 2013, cables were lined up around that grounded vessel and people on board bustled around, making preparations for the construction of permanent facilities. In response to China's repeated representations, the Philippine Secretary of National Defense Voltaire Gazmin claimed that the Philippines was simply resupplying and repairing the vessel, and promised that no facilities would be built on Ren'ai Jiao.

98. On 14 March 2014, the Philippine Department of Foreign Affairs issued a statement openly declaring that the vessel it ran aground at Ren'ai Jiao was placed there as a permanent Philippine government installation. This was an apparent attempt to provide an excuse for its continued refusal to fulfill its undertaking to tow away that vessel in order to illegally seize Ren'ai Jiao. China immediately responded that it was shocked by this statement and reiterated that it would never allow the Philippines to seize Ren'ai Jiao by any means.

99. In July 2015, the Philippines stated publicly that the so-called maintenance repair was being done to fortify the vessel.

100. To sum up, by running aground its military vessel at Ren'ai Jiao, then promising repeatedly to tow it away but breaking that promise repeatedly and even fortifying it, the Philippines has proven itself to be the first to openly violate the DOC.

101. Over the years, the Philippines has invaded and illegally occupied some islands and reefs of China's Nansha Qundao and constructed various military facilities thereupon in an attempt to establish a fait accompli of permanent occupation. These moves have grossly violated China's sovereignty over the relevant islands and reefs of Nansha Qundao and violated the Charter of the United Nations and basic norms of international law.

### ii. The Philippines has increasingly intensified its infringement of China's maritime rights and interests

102. Since the 1970s, the Philippines, asserting its unilateral claims, has intruded into, among others, the maritime areas of Liyue Tan and Zhongxiao Tan of China's Nansha Qundao to carry out illegal oil and gas exploratory drilling, including listing the relevant blocks for bidding.

103. Since 2000, the Philippines has expanded the areas for bidding, intruding into larger sea areas of China's Nansha Qundao. A large span of sea areas of China's Nansha Qundao was designated as bidding blocks by the Philippines in 2003. During the fifth "Philippine Energy Contracting Round" launched in May 2014, four of the bidding blocks on offer reached into relevant sea areas of China's Nansha Qundao.

104. The Philippines has repeatedly intruded into relevant waters of China's Nansha Qundao, harassing and attacking Chinese fishermen and fishing boats conducting routine fishing operations. Currently available statistics show that from 1989 to 2015, 97 incidents occurred in which the Philippines infringed upon the safety, life and property of Chinese fishermen: 8 involving shooting, 34 assault and robbery, 40 capture and detention, and 15 chasing. These incidents brought adverse consequences to close to 200 Chinese fishing vessels and over 1,000 Chinese fishermen. In addition, the Philippines treated Chinese fishermen in a violent, cruel and inhumane manner.

105. Philippine armed personnel often use excessive force against Chinese fishermen in utter disregard of the safety of their lives. For example, on 27 April 2006, one armed Philippine fishing vessel intruded into Nanfang Qiantan of China's Nansha Qundao and attacked Chinese fishing boat Qiongqionghai 03012. One Philippine armed motor boat carrying four gunmen approached that Chinese fishing boat. Immediately these gunmen fired several rounds of bullets at the driving panel, killing Chen Yichao and three other Chinese fishermen on the spot, severely wounding two others and causing minor injuries to another. Subsequently a total of 13 gunmen forced their way onboard the Chinese fishing boat and seized satellite navigation and communication equipment, fishing equipment and harvests and other items.

106. The Philippines has repeatedly infringed China's maritime rights and interests in an attempt to expand and entrench its illegal claims in the South China Sea. These actions have grossly violated China's sovereignty and rights and interests in the South China Sea. By doing so, the Philippines has seriously violated its own commitment made under the DOC to exercise self-restraint in the conduct of activities that would complicate or escalate disputes. By firing upon Chinese fishing boats and fishermen, illegally seizing and detaining Chinese fishermen, giving them inhumane treatment and robbing them of their property, the Philippines has gravely infringed upon the personal and property safety and the dignity of Chinese fishermen and blatantly trampled on their basic human rights.

### iii. The Philippines also has territorial pretensions on China's Huangyan Dao

107. The Philippines also has territorial pretensions on China's Huangyan Dao and attempted to occupy it illegally.

108. Huangyan Dao is China's inherent territory, over which China has continuously, peacefully and effectively exercised sovereignty and jurisdiction.

109. Before 1997, the Philippines had never challenged China's sovereignty over Huangyan Dao, nor had it laid any territorial claim to it. On 5 February 1990, Philippine Ambassador to Germany Bienvenido A. Tan, Jr. stated in a letter to German HAM radio amateur Dieter Löffler that, "According to the Philippine National Mapping and Resource Information Authority, the Scarborough Reef or Huangyan Dao does not fall within the territorial sovereignty of the Philippines."

110. A "Certification of Territorial Boundary of the Republic of the Philippines", issued by the Philippine National Mapping and Resource Information Authority on 28 October 1994, stated that "the territorial boundaries and sovereignty of the Republic of the Philippines are established in Article III of the Treaty of Paris signed on December 10, 1898", and confirmed that the "Territorial Limits shown in the official Map No. 25 issued by the Department of Environment and Natural Resources through the National Mapping and Resource Information Authority, are fully correct and show the actual status". As described above, the Treaty of Paris and other two treaties define the territorial limits of the Philippines, and China's Huangyan Dao clearly lies outside those limits. Philippine Official Map No. 25 reflects this. In a letter dated 18 November 1994 to the American Radio Relay League, Inc., the Philippine Amateur Radio Association, Inc. wrote that, "one very important fact remains, the national agency concerned had stated that based on Article III of the Treaty of Paris signed on December 10, 1898, Scarborough Reef lies just outside the territorial boundaries of the Philippines".

111. In April 1997, the Philippines turned its back on its previous position that Huangyan Dao is not part of the Philippine territory. The Philippines tracked, monitored and disrupted an international radio expedition on Huangyan Dao organized by the Chinese Radio Sports Association. In disregard of historical facts, the Philippines laid its territorial claim to Huangyan Dao on the grounds that it is located within the 200-nautical-mile exclusive economic zone claimed by the Philippines. In this regard, China made representations several times to the Philippines, pointing out explicitly that Huangyan Dao is China's inherent territory and that the Philippines' claim is groundless, illegal and void.

112. On 17 February 2009, the Philippine Congress passed Republic Act No. 9522. That act illegally includes into the Philippines' territory China's Huangyan Dao and some islands and reefs of Nansha Qundao. China immediately made representations to the Philippines and issued a statement, reiterating China's sovereignty over Huangyan Dao, Nansha Qundao and the adjacent waters, and declaring in explicit terms that any territorial claim over them made by any other country is illegal and void.

113. On 10 April 2012, the Philippines' naval vessel BRP Gregorio del Pilar (PF-15) intruded into the adjacent waters of China's Huangyan Dao, illegally seized Chinese fishermen and fishing boats operating there and treated the fishermen in a grossly inhumane manner, thus deliberately causing the Huangyan Dao Incident. In response to the Philippines' provocation, China immediately made multiple strong representations to Philippine officials in Beijing and Manila to protest the Philippines' violation of China's territorial sovereignty and harsh treatment of Chinese fishermen, and demanded that the Philippines immediately withdraw all its vessels and personnel. The Chinese government also promptly dispatched China Maritime Surveillance and China Fisheries Law Enforcement vessels to Huangyan Dao to protect China's sovereignty and rescue the Chinese fishermen. In June 2012, after firm representations repeatedly made by China, the Philippines withdrew relevant vessels and personnel from Huangyan Dao.

114. The Philippines' claim of sovereignty over China's Huangyan Dao is completely baseless under international law. The illegal claim that "Huangyan Dao is within the Phlippines' 200-nautical-mile exclusive economic zone so it is Philippine territory" is a preposterous and deliberate distortion of international law. By sending its naval vessel to intrude into Huangyan Dao's adjacent waters, the Philippines grossly violated China's territorial sovereignty, the Charter of the United Nations and fundamental principles of international law. By instigating mass intrusion of its vessels and personnel into waters of Huangyan Dao, the Philippines blatantly violated China's sovereignty and sovereign rights therein. The Philippines' illegal seizure of Chinese fishermen engaged in normal operations in waters of Huangyan Dao and the subsequent inhumane treatment of them are gross violations of their dignity and human rights.

### iv. The Philippines' unilateral initiation of arbitration is an act of bad faith

115. On 22 January 2013, the then government of the Republic of the Philippines unilaterally initiated the South China Sea arbitration. In doing so, the Philippines has turned its back on the consensus reached and repeatedly reaffirmed by China and the Philippines to settle through negotiation the relevant disputes in the South China Sea and violated its own solemn commitment in the DOC. Deliberately packaging the relevant disputes as mere issues concerning the interpretation or application of UNCLOS while knowing full well that territorial disputes are not subject to UNCLOS and that maritime delimitation disputes have been excluded from the UNCLOS compulsory dispute settlement procedures by China's 2006 declaration, the Philippines has wantonly abused the UNCLOS dispute settlement procedures. This initiation of arbitration aims not to settle its disputes with China, but to deny China's territorial sovereignty and maritime rights and interests in the South China Sea. This course of conduct is taken out of bad faith.

116. First, by unilaterally initiating arbitration, the Philippines has violated its standing agreement with China to settle the relevant disputes through bilateral negotiation. In relevant bilateral documents, China and the Philippines have agreed to settle through

negotiation their disputes in the South China Sea and reaffirmed this agreement many times. China and the Philippines made solemn commitment in the DOC to settle through negotiation relevant disputes in the South China Sea, which has been repeatedly affirmed in bilateral documents. The above bilateral documents between China and the Philippines and relevant provisions in the DOC are mutually reinforcing and constitute an agreement in this regard between the two states. By this agreement, they have chosen to settle the relevant disputes through negotiation and to exclude any third party procedure, including arbitration. Pacta sunt servanda. This fundamental norm of international law must be observed. The Philippines' breach of its own solemn commitment is a deliberate act of bad faith. Such an act does not generate any right for the Philippines, nor does it impose any obligation on China.

117. Second, by unilaterally initiating arbitration, the Philippines has violated China's right to choose means of dispute settlement of its own will as a state party to UNCLOS. Article 280 of Part XV of UNCLOS stipulates: "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." Article 281 of UNCLOS provides: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure". Given that China and the Philippines have made an unequivocal choice to settle through negotiation the relevant disputes, the compulsory third-party dispute settlement procedures under UNCLOS do not apply.

118. Third, by unilaterally initiating arbitration, the Philippines has abused the UNCLOS dispute settlement procedures. The essence of the subject-matter of the arbitration initiated by the Philippines is an issue of territorial sovereignty over some islands and reefs of Nansha Qundao, and the resolution of the relevant matters also constitutes an integral part of maritime delimitation between China and the Philippines. Land territorial issues are not regulated by UNCLOS. In 2006, pursuant to Article 298 of UNCLOS, China made an optional exceptions declaration excluding from the compulsory dispute settlement procedures of UNCLOS disputes concerning, among others, maritime delimitation, historic bays or titles, military and law enforcement activities. Such declarations made by about 30 states, including China, form an integral part of the UNCLOS dispute settlement mechanism. By camouflaging its submissions, the Philippines deliberately circumvented the optional exceptions declaration made by China and the limitation that land territorial disputes are not subject to UNCLOS, and unilaterally initiated the arbitration. This course of conduct constitutes an abuse of the UNCLOS dispute settlement procedures.

119. Fourth, in order to push forward the arbitral proceedings, the Philippines has distorted facts, misinterpreted laws and concocted a pack of lies:

- The Philippines, fully aware that its submissions concern China's territorial sovereignty in the South China Sea, and that territorial issue is not subject to UNCLOS, deliberately mischaracterizes and packages the relevant issue as those concerning the interpretation or application of UNCLOS;
- The Philippines, fully aware that its submissions concern maritime delimitation, and that China has made an declaration, pursuant to Article 298 of UNCLOS, excluding disputes concerning, among others, maritime delimitation from the UNCLOS third-party dispute settlement procedures, intentionally detaches the diverse factors that shall be taken into consideration in the process of a maritime delimitation and treat them in an isolated way, in order to circumvent China's optional exceptions declaration;
- The Philippines deliberately misrepresents certain consultations with China on maritime affairs and cooperation, all of a general nature, as negotiations over the subject-matters of the arbitration, and further claims that bilateral negotiations therefore have been exhausted, despite the fact that the two states have never engaged in any negotiation on those subject-matters;
- The Philippines claims that it does not seek a determination of any territorial issue or a delimitation of any maritime boundary, and yet many times in the course of the arbitral proceedings, especially during the oral hearings, it denies China's territorial sovereignty and maritime rights and interests in the South China Sea;
- The Philippines turns a blind eye to China's consistent position and practice on the South China Sea issue, and makes a completely false assertion that China lays an exclusive claim of maritime rights and interests to the entire South China Sea;
- The Philippines exaggerates Western colonialists' role in the South China Sea in history and denies the historical facts and corresponding legal effect of China's longstanding exploration, exploitation and administration in history of relevant waters of the South China Sea;
- The Philippines puts together some remotely relevant and woefully weak pieces of evidence and makes far-fetched inferences to support its submissions;
- The Philippines, in order to make out its claims, arbitrarily interprets rules of international law, and resorts to highly controversial legal cases and unauthoritative personal opinions in large quantity.

120. In short, the Philippines' unilateral initiation of arbitration contravenes international law including the UNCLOS dispute settlement mechanism. The Arbitral Tribunal in the South China Sea arbitration established at the Philippines' unilateral request has, ab initio, no jurisdiction, and awards rendered by it are null and void and have no binding force. China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards. China does not

accept or recognize those awards. China opposes and will never accept any claim or action based on those awards.

## V. China's Policy on the South China Sea Issue

121. China is an important force for maintaining peace and stability in the South China Sea. It abides by the purposes and principles of the Charter of the United Nations and is committed to upholding and promoting international rule of law. It respects and acts in accordance with international law. While firmly safeguarding its territorial sovereignty and maritime rights and interests, China adheres to the position of settling disputes through negotiation and consultation and managing differences through rules and mechanisms. China endeavors to achieve win-win outcomes through mutually beneficial cooperation, and is committed to making the South China Sea a sea of peace, cooperation and friendship.

122. China is committed to maintaining peace and stability in the South China Sea with other countries in the region and upholding the freedom of navigation and overflight in the South China Sea enjoyed by other countries under international law. China urges countries outside this region to respect the efforts in this regard by countries in the region and to play a constructive role in maintaining peace and stability in the South China Sea.

### i. On the territorial issues concerning Nansha Qundao

123. China is firm in upholding its sovereignty over Nanhai Zhudao and their surrounding waters. Some countries have made illegal territorial claims over and occupied by force some islands and reefs of Nansha Qundao. These illegal claims and occupation constitute gross violations of the Charter of the United Nations and basic norms governing international relations. They are null and void. China consistently and resolutely opposes such actions and demands that relevant states stop their violation of China's territory.

124. China has spared no efforts to settle, on the basis of respecting historical facts, relevant disputes with the Philippines and other countries directly concerned, through negotiation in accordance with international law.

125. It is universally recognized that land territorial issues are not regulated by UNCLOS. Thus, the territorial issue in Nansha Qundao is not subject to UNCLOS.

### ii. On maritime delimitation in the South China Sea

126. China maintains that the issue of maritime delimitation in the South China Sea should be settled equitably through negotiation with countries directly concerned in accordance with international law, including UNCLOS. Pending the final settlement of this issue, all relevant parties must exercise self-restraint in the conduct of activities that may complicate or escalate disputes and affect peace and stability.

127. When ratifying UNCLOS in 1996, China stated that, "The People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability." China's positions in this regard are further elaborated in the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf. This Law provides that, "The People's Republic of China shall determine the delimitation of its exclusive economic zone and continental shelf in respect of the overlapping claims by agreement with the states with opposite or adjacent coasts, in accordance with the principle of equitability and on the basis of international law", and that, "The provisions in this law shall not affect the historical rights that the People's Republic of China has been enjoying ever since the days of the past".

128. China does not accept any unilateral action attempting to enforce maritime claims against China. Nor does China recognize any action that may jeopardize its maritime rights and interests in the South China Sea.

### iii. On the ways and means of dispute settlement

129. Based on an in-depth understanding of international practice and its own rich practice, China firmly believes that no matter what mechanism or means is chosen for settling disputes between any countries, the consent of states concerned should be the basis of that choice, and the will of sovereign states should not be violated.

130. On issues concerning territory and maritime delimitation, China does not accept any means of dispute settlement imposed on it, nor does it accept any recourse to third-party settlement. On 25 August 2006, China deposited, pursuant to Article 298 of UNCLOS, with the Secretary-General of the United Nations a declaration, stating that, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention". This explicitly excludes from UNCLOS compulsory dispute settlement procedures disputes concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

131. Since its founding, the People's Republic of China has signed boundary treaties with 12 of its 14 land neighbors through bilateral negotiations and consultations in a spirit of equality and mutual understanding, and about 90% of China's land boundaries have been delimited and demarcated. China and Vietnam have delimited through negotiations the boundary between their territorial seas, exclusive economic zones and continental shelves in the Beibu Bay. China's sincerity in settling disputes through negotiation and its unremitting efforts made in this respect are known to all. It is self-evident that negotiation directly reflects the will of states. The parties directly participate in the

formulation of the result. Practice demonstrates that a negotiated outcome will better gain the understanding and support of the people of countries concerned, will be effectively implemented and will be durable. Only when an agreement is reached by parties concerned through negotiation on an equal footing can a dispute be settled once and for all, and this will ensure the full and effective implementation of the agreement.

### iv. On managing differences and engaging in practical maritime cooperation in the South China Sea

132. In keeping with international law and practice, pending final settlement of maritime disputes, the states concerned should exercise restraint and make every effort to enter into provisional arrangements of a practical nature, including establishing and improving dispute management rules and mechanisms, engaging in cooperation in various sectors, and promoting joint development while shelving differences, so as to uphold peace and stability in the South China Sea region and create conditions for the final settlement of disputes. Relevant cooperation and joint development are without prejudice to the final delimitation.

133. China works actively to promote the establishment of bilateral maritime consultation mechanisms with relevant states, explores joint development in areas such as fishery, oil and gas, and champions the active exploration by relevant countries in establishing a cooperation mechanism among the South China Sea coastal states in accordance with relevant provisions of UNCLOS.

134. China is always dedicated to working with ASEAN Member States to fully and effectively implement the DOC and actively promote practical maritime cooperation. Together the Parties have already achieved "Early Harvest Measures", including the "Hotline Platform on Search and Rescue among China and ASEAN Member States", the "Senior Officials' Hotline Platform in Response to Maritime Emergencies among Ministries of Foreign Affairs of China and ASEAN Member States", as well as the "Table-top Exercise of Search and Rescue among China and ASEAN Member States".

135. China consistently maintains that the Parties should push forward consultations on a "Code of Conduct" (COC) under the framework of full and effective implementation of the DOC, with a view to achieving an early conclusion on the basis of consensus. In order to properly manage risks at sea, pending the final conclusion of a COC, China proposed the adoption of "Preventive Measures to Manage Risks at Sea". This proposal has been unanimously accepted by all ASEAN Member States.

### v. On freedom and safety of navigation in the South China Sea

136. China is committed to upholding the freedom of navigation and overflight enjoyed by all states under international law, and ensuring the safety of sea lanes of communication.

137. The South China Sea is home to a number of important sea lanes, which are among the main navigation routes for China's foreign trade and energy import. Ensuring freedom of navigation and overflight and safety of sea lanes in the South China Sea is crucial to China. Over the years, China has worked with ASEAN Member States to ensure unimpeded access to and safety of the sea lanes in the South China Sea and made important contribution to this collective endeavor. The freedom of navigation and overflight enjoyed by all states in the South China Sea under international law has never been a problem.

138. China has actively provided international public goods and made every effort to provide services, such as navigation and navigational aids, search and rescue, as well as sea conditions and meteorological forecast, through capacity building in various areas, so as to uphold and promote the safety of sea lanes in the South China Sea.

139. China maintains that, when exercising freedom of navigation and overflight in the South China Sea, relevant parties shall fully respect the sovereignty and security interests of coastal states and abide by the laws and regulations enacted by coastal states in accordance with UNCLOS and other rules of international law.

### vi. On jointly upholding peace and stability in the South China Sea

140. China maintains that peace and stability in the South China Sea should be jointly upheld by China and ASEAN Member States.

141. China pursues peaceful development and adheres to a defense policy that is defensive in nature. China champions a new security vision featuring mutual trust, mutual benefit, equality and coordination, and pursues a foreign policy of building friendship and partnership with its neighbors and of fostering an amicable, secure and prosperous neighborhood based on the principle of amity, sincerity, mutual benefit and inclusiveness. China is a staunch force for upholding peace and stability and advancing cooperation and development in the South China Sea. China is committed to strengthening good-neighborliness and promoting practical cooperation with its neighbors and regional organizations including ASEAN to deliver mutual benefit.

142. The South China Sea is a bridge of communication and a bond of peace, friendship, cooperation and development between China and its neighbors. Peace and stability in the South China Sea is vital to the security, development and prosperity of the countries and the well-being of the people in the region. To realize peace, stability, prosperity and development in the South China Sea region is the shared aspiration and responsibility of China and ASEAN Member States, and serves the common interests of all countries.

143. China will continue to make unremitting efforts to achieve this goal.

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