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The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique

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Abstract

The Tribunal in the case brought by the Philippines against China in relation to the South China Sea has recently given its decision on whether it has jurisdiction to entertain the claims. Although it only found unequivocally that it has jurisdiction over three of the fifteen claims, this paper explains why in a number of respects the argumentation used by the Tribunal is weak. In particular it questions whether the Tribunal was right to proceed when issues of maritime delimitation and disputes over territorial sovereignty are outside its jurisdiction. The paper also criticizes the manner in which the Tribunal reached the conclusion that there was no undertaking to solve any disputes in the South China Sea through other means.

I. Background

1. The South China Sea lies in South-East Asia and is around 3,500,000 square kilometres in extent. It is bounded on the north by China, in the west by Vietnam, in the east by the Philippines and in the south by Malaysia and Brunei. There are numerous small islands and other maritime features, but there are two principal groups of islands, the Paracels which lie south of Hainan Island and the Spratleys which lie west of the Philippine island of Palawan. One other important feature is Scarborough Shoal, which lies west of the main Philippine island of Luzon.

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2. The territorial sovereignty over the islands and other features in the South China Sea has long been claimed by China; Vietnam however also claims the Paracels and the Spratleys, and the Philippines claims part of the Spratleys as well as Scarborough Shoal, whilst Malaysia and Brunei claim the features lying off the north-west coast of Borneo.

3. In circumstances which will be discussed in more detail later in this paper, the Philippines has brought proceedings against China under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS), and there has recently been a decision by a Tribunal constituted under Annex VII of UNCLOS on the question of its jurisdiction to hear the claims made by the Philippines.¹ The Tribunal consisted of President Mensah and Arbitrators Cot, Pawlak, Soons and Wolfrum. It is the purpose of this paper to give some of the background to the UNCLOS issues raised by the proceedings and to provide a critique of the Award itself.

II. The South China Sea and UNCLOS

4. The Award says that the South China Sea is a “semi-enclosed sea”,² and although the point is not elaborated, this is presumably intended as a reference to Part IX of UNCLOS which deals with enclosed and semi-enclosed seas³; this is highly relevant because Part IX emphasises the importance of cooperation between the coastal States surrounding an enclosed or semi-enclosed sea. The term “enclosed or semi-enclosed sea” is defined in Article 122 of UNCLOS as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”. This definition consists of four elements; the first two are cumulative: there must be a “gulf, basin or sea” and it must be “surrounded by two or more States”. It would seem clear that the South China Sea fulfils both of these requirements.

5. The third and fourth elements are alternatives; either the sea must be “connected to another sea or the ocean by a narrow outlet” or it must “consist . . . entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”. Both of these elements are not free from ambiguity. In particular, as to the third element, how “narrow” does the outlet have to be to qualify? And does the sea have to be only connected to the ocean or another sea by only one narrow outlet? As to the fourth element, there are seas which are “entirely” composed of the territorial

1 Award on Jurisdiction and Admissibility (hereafter referred to as “the Award”), available on the website of the Permanent Court of Arbitration (www.pca-cpa.org).

2 Award, paragraph 3.

3 See the analysis in M. Grbec, *Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective* (Routledge, 2014), Chapter 2.

seas and exclusive economic zones of States, the North Sea being one example, but is it enough that fifty per cent of the sea is composed of territorial seas and exclusive economic zones for it to be “primarily” so composed?

6. In the case of the South China Sea it would be generally accepted that the Strait of Malacca, connecting the Sea to the Indian Ocean, is “narrow”. But there are also outlets from the South China Sea through the Karimata Strait between Sumatra and Borneo, which is 150 kilometres wide, through the Taiwan Strait between the island of Taiwan and the Chinese mainland, which is 180 kilometres wide, and through the Luzon Strait between Taiwan and the Philippine island of Luzon, which is 250 kilometres wide. The question is therefore whether it suffices that the South China Sea is connected to an ocean through one outlet which is clearly narrow, namely the Strait of Malacca, and whether it matters that there are three other outlets. It is submitted that it is reasonable to think that the intention cannot have been that there must be only one narrow outlet for a sea to fall within the definition, as otherwise the numbers of the world’s seas covered by Part IX would be very small. Alternatively, it can be argued that the three other outlets, the largest being 250 kilometres wide, can also, in the context of the oceans as a whole, be regarded as “narrow”.

7. As to the fourth element, namely that the sea consists entirely or primarily of the continental shelf or EEZ of the coastal States, this is difficult to apply since there are, as we have seen, significant disputes over the sovereignty over the territorial features in the South China Sea, with the result that few if any of the various maritime boundaries have been delimited. Furthermore, there are disputes as to the status of some of the features in the South China Sea, and in particular whether they are “rocks” which do not generate a continental shelf or exclusive economic zone. Nevertheless, the fact is that, even only taking account of the mainland features, more than 50% of the waters of the South China Sea consists of the territorial seas or exclusive economic zones of the coastal States, and so presumably the South China Sea can legitimately be regarded as “primarily” so composed.⁴ And so, on this basis, the South China Sea can be treated as an “enclosed or semi-enclosed sea” for the purposes of UNCLOS.⁵

8. But what does that entail? This is set out in Article 123. The first sentence sets out a general requirement to cooperate between the coastal States, but the verb used is “should cooperate” and the better view is that this does not involve a legal obligation, but is instead hortatory.⁶ The second sentence of Article 123 is couched in mandatory terms, but the obligation upon the coastal States is, in three cases, only to “endeavour . . . to coordinate” activities relating to living resources, marine environment and scientific research, and in the fourth case to “endeavour . . . to invite” other

4 This seems clear from the map at pages 7 and 9 of the Award.

5 In agreement with C. Linebaugh, 52 *Columbia JTL* (2014), page 542, at page 553.

6 See the analysis in my forthcoming article in the *International Journal of Marine and Coastal Law*.

interested States and organisations to cooperate; but clearly these are obligations of conduct, rather than of result. One final point to note is that there is no requirement that there should be a completed delimitation of the various maritime zones between the coastal States surrounding the sea before the requirement to cooperate arises⁷; on the contrary, it may be more important that coastal States cooperate in circumstances where there is as yet no delimitation between them.

9. So, on the one hand, the requirements of Article 123 are not particularly onerous, but nevertheless the important point is that UNCLOS encourages cooperation amongst the coastal States surrounding an enclosed or semi-enclosed sea, such as the South China Sea. Although the point is not adverted to in the Award in the *Philippines v. China* case it is nevertheless a significant backdrop to the issues with which the Tribunal is concerned.

III. Entitlement to Maritime Zones under UNCLOS

10. As we shall see later, the Philippines asserts strongly that the case it has brought is not about territorial sovereignty, but only about the status of various features in the South China Sea. It is important therefore to understand what entitlements to maritime zones are enjoyed under UNCLOS by different features.

11. First, under UNCLOS, “islands” are entitled to the full range of maritime zones prescribed by the Convention.⁸ An island is defined as “a naturally formed area of land, surrounded by water, which is above water at high tide”.⁹ However, certain kinds of islands, namely those consisting of “rocks which cannot sustain human habitation or economic life of their own”,¹⁰ are not entitled to a continental shelf or exclusive economic zone. This definition of the islands which fall into the category of “rocks” is unclear, and the International Court of Justice has twice avoided the issue when it might have given guidance.¹¹

7 Ibid; Grbec (footnote 3 above), pages 29-30.

8 Article 121(2) of UNCLOS.

9 Article 121(1) of UNCLOS.

10 Article 121(3) of UNCLOS.

11 *Romania v. Ukraine*, ICJ Reports 2009, page 61, at paragraph 187; *Nicaragua v. Colombia*, ICJ Reports 2012, page 624, at paragraph 180. The only judicial consideration of the issue appears to be that by Vice-President Vukas in his Declaration in The “Volga”, ITLOS Case No 11, relating to Heard Island and the McDonald Islands; see also Judge Vukas’ Declaration in The “Monte Confurco”, ITLOS Case No. 6, relating to Kerguelen, although note footnote 1 to Judge Anderson’s Dissenting Opinion in the same case. Note that Australia and France have delimited a boundary between Kerguelen and Heard Island and McDonald Islands on the basis that they do generate maritime zones beyond the territorial sea: International Maritime Boundaries, Volume II, Report 6-1, page 1185 (Martinus Nijhoff, 1993).

12. There is however a further category of maritime feature mentioned in UNCLOS and that is the “low-tide elevation”. UNCLOS defines this as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide”¹² and prescribes that it may be used as a baseline for the measurement of the territorial sea where it is situated within the limits of the territorial sea.¹³ There is some question as to whether “low-tide elevations” can be the subject of territorial appropriation by States. In the case of *Nicaragua v. Colombia* the International Court of Justice stated flatly that “low-tide elevations cannot be appropriated”.¹⁴ However, the Court in that case had immediately prior to that referred to its earlier decision in *Qatar v. Bahrain* where, however, the Court had expressed itself in more guarded terms; it said: “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”.¹⁵ In fact, the Court in *Qatar v. Bahrain* was keen to emphasise that: “the decisive question for the present case is whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State”¹⁶; that is obviously a rather special situation and it is submitted that it was premature for the Court in the subsequent *Nicaragua v. Colombia* case to deduce any general rule from what had been said in *Qatar v. Bahrain*. The better view would seem to be that the question whether low-tide elevations can be appropriated remains open.

13. Finally, in view of some reports in the media, it is worth mentioning a final category, namely artificial islands. Under UNCLOS, “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.”¹⁷ There is no definition of “artificial island” in UNCLOS and at some stage the question may arise as to whether if a State

12 Article 13(1) of UNCLOS.

13 Articles 13(1) and (2) of UNCLOS.

14 ICJ Reports 2007, page 832, paragraph 26.

15 ICJ Reports 2001, page 40, Paragraph 205; cited with approval in *Nicaragua v. Honduras*, ICJ Reports 2007, page 659, at page 703, paragraph 141.

16 *Ibid.*, paragraph 204. The Court stated that low-tide elevations are not to be treated as “islands” (paragraphs 206-7), although this point seems in any event clear from the respective definitions in UNCLOS: an island is “above water at high tide” (Article 121(1)), whereas a low-tide elevation is “submerged at high tide” (Article 13(1)).

17 Article 60(8) of UNCLOS for the exclusive economic zone and Article 80 for the continental shelf.

(say) takes a natural feature with a circumference of a few metres and extends it by building on it to a circumference of several kilometres, the feature then becomes an “artificial island” for the purposes of UNCLOS. There seems to be no international jurisprudence on this issue, but it may come to be a question in relation to some of the features in the South China Sea.¹⁸

IV. The Proceedings Brought by Philippines against China

14. The arbitration proceedings were initiated by the Philippines under UNCLOS on 22 January 2013. Since neither Philippines nor China had made a specific choice of procedure for the settlement of disputes, this meant that they were deemed to have accepted arbitration in accordance with Annex VII of the Convention.¹⁹ But of course this acceptance of arbitration is subject to the provisions of Part XV of the Convention, including in particular the preconditions, limitations and exceptions in Sections 1 and 3. The importance of respecting the limitations in Part XV was emphasised by Judges Cot and Wolfrum in their Joint Separate Opinion in the *ARA Libertad Case*, where they said: “the competences of the Tribunal under article 288 of the Convention are limited to disputes concerning the interpretation and application of the Convention. Such limitation is the counterpart of and in fact balances the obligatory character of the dispute settlement system under Part XV of the Convention. Any attempt to broaden the jurisdictional power of the Tribunal and that of arbitral tribunals under Annex VII going beyond what is prescribed in article 288 of the Convention is not in keeping with the basic philosophy governing the dispute settlement system of the Convention. It undermines the understanding reached at the Third UN Conference on the Law of the Sea, namely that the dispute settlement system under the Convention will be mandatory but limited as far its scope is concerned. This limitation is not only reflected in the wording of article 288 of the Convention but equally in Section 3 of Part XV enumerating various limitations and exceptions”.²⁰ This point is also emphasised by China in its Position Paper,²¹ which states that: “As a State Party to the Convention, China has accepted the provisions of Part 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

18 Paragraph 5 of the Award records the Philippines as mentioning “artificial reclamation work”, which is presumably a reference to this activity.

19 Article 287(3) of UNCLOS; Award, paragraph 109.

20 Joint Separate Opinion in *ARA Libertad Case* (ITLOS Case No.20), paragraph 6.

21 Available on the official website of the Ministry of Foreign Affairs of the People’s Republic of China (www.fmprc.gov.cn/mfa).

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".²²

15. China has declined to appear in the proceedings, but this is not an unusual situation. Writing in 1984, Elkind²³ identified 12 such cases, beginning, interestingly enough, with the failure of the Republic of China to appear in a case brought by Belgium in the Permanent Court of International Justice.²⁴ And in the proceedings under Annex VII immediately prior to that commenced by the Philippines, the Russian Federation declined to appear.²⁵ The non-appearance of a party is catered for in Annex VII of UNCLOS, Article 9 of which provides that in such an eventuality the other side may ask for the proceedings to continue, but the tribunal must satisfy itself that it has jurisdiction over the claim and that it is "well founded in law and fact".²⁶ It is also relevant that under Article 5 of Annex VII the tribunal must afford both parties an opportunity to present their case; this obligation must apply even if one party fails to appear.

16. The Philippines specifically disclaimed any wish to seek a ruling on either the sovereignty of land territory or maritime delimitation.²⁷ Of the Philippines' 15 separate submissions the Tribunal went through them in turn to decide whether it had jurisdiction over each of them.²⁸ In two submissions, the Philippines argued that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef) were low-tide elevations and the Tribunal indicated that it had jurisdiction "subject to a caveat with respect to the possible effects of any overlapping entitlements" between the Philippines and China (numbers 4 and 6). In two other submissions, the Philippines complained about Chinese activities taking place near Scarborough Shoal and the Tribunal limited its jurisdiction to events occurring within the territorial waters of that feature (numbers 10 and 13). In the case of seven of the Philippines' submissions, the Tribunal joined its consideration of the jurisdictional objection to the merits; this was either because the submission involves a consideration of China's claim to historic rights, which is a question of substance (numbers 1 and 2), or because a decision on the submission would depend upon a ruling about whether or not particular features constitute "islands" for the purpose of

22 Ibid., paragraph 79.

23 J B Elkind, *Non-Appearance before the International Court of Justice: Functional and Comparative Analysis* (Martinus Nijhoff, 1984).

24 *Sino-Belgian Treaty Case*, PCIJ, Ser. A, No. 8 (1927), page 6.

25 *The Arctic Sunrise case: Order on Preliminary Measures: ITLOS Case No. 22; Award on Jurisdiction* (available on the old website of the Permanent Court of Arbitration, www.archive.pca-cpa.org).

26 Award, paragraphs 12, 113 and 115.

27 Award, paragraphs 8, 26 and 153.

28 Award, paragraphs 397–412.

UNCLOS (numbers 5, 8 and 9), or because a decision would depend upon a ruling on the status of Mischief Reef and/or Second Thomas Shoal, as well as on whether China's activities were of a military character and therefore excluded from the Tribunal's jurisdiction (numbers 12 and 14). Finally, the Tribunal asked the Philippines to clarify its submission that the Tribunal should order that "China shall desist from further unlawful claims and activities" (number 15), it being unclear to the Tribunal to what precise activities this could potentially relate. Perhaps surprisingly, the result is that the Tribunal found unequivocally that it has jurisdiction over only three of the Philippines' submissions, ie two concerning the status of Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef (numbers 3 and 7), and one concerning the protection of the marine environment at Scarborough Shoal and Second Thomas Shoal (number 11).

17. It is important to understand the geographical position of the various features referred to in the submissions made by the Philippines.²⁹ Scarborough Shoal lies less than 200 nautical miles from the coast of Luzon, whilst Mischief Reef, Second Thomas Shoal, McKennan Reef (including Hughes Reef) and Johnson Reef lie within 200 nautical miles of the coast of Palawan; Subi Reef, Gaven Reef, Cuarteron Reef and Fiery Cross Reef lie more than 200 nautical miles from the coast of Palawan, but considerably less than 400 nautical miles from it. It follows that, assuming that all of these features generate an exclusive economic zone and a continental shelf and that all belong to China, then a delimitation agreement would have to be reached between China and the Philippines in accordance with Articles 74 and 83 of UNCLOS.

V. The "Interpretation or Application" of UNCLOS

18. Part XV of UNCLOS deals with the settlement of disputes, but the disputes which are covered by that Part are limited to those concerning the "interpretation or application" of UNCLOS; that phrase appears in each of Articles 279 to 284 as well as in Articles 286 to 288. In fact, this phrase is used extensively, indeed almost invariably, in multilateral treaties to describe the category of disputes which are covered by their dispute settlement procedures. Surprisingly, however, the phrase has been the subject of little judicial consideration. In the case of *DRC v. Rwanda (New Application: 2002)*,³⁰ it was argued that Rwandan military operations in the Congo involved a breach of Rwanda's obligations under a number of multilateral treaties, most of which seemed at first glance to have limited relevance to the issues in the case; but disappointingly the International Court of Justice did not consider whether the complaints in question were indeed ones concerning the interpretation or

29 The maps attached to the Award at pages 7 and 9 show this clearly.

30 ICJ Reports 2006, page 39.

application of the treaties in question, but preferred to dismiss the claims on the basis that in none of the cases were the preconditions for utilisation of the compromissory clause in question fulfilled.

19. In the case of *Georgia v. Russia*,³¹ where the applicant State argued that Russian military operations in the Caucasus involved a breach of the Convention on the Elimination of All Forms of Racial Discrimination, the majority in the International Court of Justice again failed to engage with the question whether the complaint could legitimately be seen as involving a question of the interpretation or application of that Convention. Judge Greenwood did mention the point in his separate opinion, but the fullest treatment of it was given by Judge Koroma who in his separate opinion cautioned that there must be a link between the dispute and the subject-matter of the treaty, as otherwise “States could use [such a] clause as a vehicle for forcing an unrelated dispute with another State before the Court”.³² It is submitted that the wise words of Judge Koroma are ones of which international tribunals ought to take careful note. When a State participates in a multilateral treaty, like the Constitutions of the World Health Organisation or of the UN Educational, Scientific and Cultural Organisation, which were in issue in the *DRC v. Rwanda* case, that State cannot be taken to have accepted a wide-ranging, indeed potentially comprehensive, obligation to submit disputes to compulsory arbitration.

20. The approach of the Tribunal in the *Philippines v. China* case was to consider what was the “real issue” in the proceedings, and whether it concerned the “interpretation or application” of UNCLOS. The Tribunal referred to a number of cases where the International Court of Justice has had to ask itself what was the “real issue” in a case for the purpose of establishing whether it had jurisdiction. The Tribunal also referred³³ to the very recent case of *Mauritius v. UK*, which was highly relevant since it raised squarely the question whether a State might make use of Part XV of UNCLOS to make a claim relating to sovereignty over land territory. Rightly, it is submitted, the Tribunal in that case ruled that if sovereignty was the “real issue” then this could not be raised in an arbitration under Part XV.³⁴

21. The Tribunal in the *Philippines v. China* case adopted the view of the International Court of Justice that it should “determine on an *objective basis* the

31 ICJ Reports 2011, page 70.

32 Separate Opinion of Judge Abdul Koroma in *Georgia v. Russian Federation*, ICJ Reports 2011, p. 183 at p. 185, para. 7.

33 Award, paragraph 153.

34 *Mauritius v. UK*, Award, paragraphs 212 and 221 (available on the old website of the Permanent Court of Arbitration, www.archive.pca-cpa.org). On the *Mauritius v. UK* Award, see Wensheng Qu, 47 *Ocean Development and International Law* (2016), page 40.

dispute dividing the parties”³⁵ (emphasis added). This must mean that the Tribunal should not decide this question upon the basis of what either of the parties asserts, but on its own independent, ie objective, view. In other words, it is not a case of accepting what the Philippines or China says. It is submitted that it follows that, in order for a tribunal to discover what the “real issue” is, the nature of the quest is to get below the surface of the claims to discover the fundamental issue between the parties. The Tribunal in the *Mauritius v. UK* case successfully did this in concluding that what Mauritius really wanted was to ventilate its claims to sovereignty over British Indian Ocean Territory. However, the Tribunal in the *Philippines v. China* case said that the decision in *Mauritius v. UK* was “distinct” because “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”.³⁶

22. In the *Philippines v. China* case, the Tribunal took the view that it “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”.³⁷ However, the position of the Tribunal was based upon the Philippines’ disclaimer of any wish to seek a ruling on sovereignty and the Tribunal’s conclusion that it “does not see that success on [its] submissions would have any effect on the Philippines’ sovereignty claims”.³⁸ But one must question whether this is sufficient. In particular, this position seems to rely heavily upon the statements of the Philippines, which the “objective view” mandated by the precedents would suggest cannot be accepted as enough. Furthermore, the Tribunal failed to recognise that the fundamental dispute is about the sovereignty over the features in the South China Sea, and that the status of the features, such as whether they are low-tide elevations or “rocks”, is a question which can only logically be answered once the sovereignty dispute has been resolved. To put it succinctly: the Tribunal should have got below the surface of the Philippines’ claims, but it did not.

VI. Maritime Delimitation

23. Under Article 298 of UNCLOS, States may when becoming a party exclude certain disputes from the provisions in UNCLOS for compulsory settlement of disputes.

35 Paragraph 150 of the Award, quoting the Fisheries Jurisdiction Case, ICJ Reports 1998, page 432, at paragraph 30; recently reaffirmed by the International Court of Justice in the case of *Bolivia v. Chile*, ICJ Reports 2015, page 1, at paragraph 26.

36 Award, paragraph 153.

37 Ibid.

38 Ibid.

One of the categories of disputes which may be so excluded are “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles”.³⁹ China has exercised her right to exclude such disputes, and this was recognised by the Tribunal.

24. In the Award,⁴⁰ the Tribunal refers to the exclusion as involving cases of “maritime boundary delimitation”, but this shorthand does not capture the full force of what UNCLOS says. This is particularly clear when one looks at the *travaux préparatoires*. The original proposal at the Law of the Sea Conference in 1974 was to refer to “sea boundary delimitations”⁴¹, but this was changed to the current wording in a paper from the Chairman of Negotiating Group 7 in 1979.⁴² It is submitted that, whilst the ambit of the 1974 formula suggests that it might be confined to the actual process of delimitation, ie drawing a line on a map, it must follow that the 1979 formula is wider, encompassing not only that issue, but also whether Articles 15, 74 and/or 83 apply at all.⁴³

25. Furthermore, Article 298 refers to “disputes concerning the interpretation or application of articles 15, 74 and 83” (my emphasis). The word “concerning” is a term of wide ambit. Thus, in the *M/V Louisa Case*, the International Tribunal for the Law of the Sea stated that: “It is appropriate to underline that the declaration of Saint Vincent and the Grenadines refers to disputes ‘concerning the arrest or detention’ of vessels. In the view of the Tribunal, the 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”⁴⁴ (again my emphasis).

26. It is therefore important to understand the broad effect of Articles 15, 74 and 83. Whilst Article 15 encompasses a substantive rule of law about the delimitation of the territorial sea between opposite or adjacent States, the essential thrust of Articles 74 and 83 (which are identical, *mutatis mutandis*) is to provide that the delimitation of the continental shelf and EEZs of States with opposite or adjacent coasts should be done by agreement; those two Articles provide for almost no substantive rules about how States are to effect the delimitation – except to refer to its being done “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” – a gap which has had to be filled by a number of decisions of international tribunals.

39 Article 298(1)(a)(i) of UNCLOS.

40 See particularly Award, paragraph 155.

41 A/CONF.62/L.7 (1974), volume III, Official Records, page 85, at page 92.

42 A/CONF.62/91 (1979), volume XII, Official Records, page 71 at page 107.

43 The Philippines seemed to argue that the 1979 formula is narrower, but it is not clear why (Award, paragraph 374).

44 ITLOS Case No. 18, Judgment, paragraph 83.

27. So what questions concerning the interpretation or application of Articles 15, 74 and/or 83 might arise? One would, of course, be whether indeed two States are in a geographical position where they are obliged under Articles 74 and/or 83 to agree a delimitation; in other words, whether one or both of those two Articles applies at all. For example, one State might assert that its EEZ extends to overlap with that of an opposite State and that accordingly a delimitation agreement is required, but the latter State might argue to the contrary on the basis that the first State has failed to draw baselines in accordance with UNCLOS and that properly measured the first State's EEZ does not extend to overlap with the other's. It is submitted that this is clearly a case where there is a dispute about whether Article 74 applies, which would therefore be covered by Article 298(1)(a)(i).

28. Furthermore, there is inevitably an intimate connection between the status of a feature and its relevance to a delimitation.⁴⁵ One only has to look at the detailed delimitation made by the International Court of Justice in the case of *Nicaragua v. Colombia*⁴⁶ to see the connection between the status of a feature and a delimitation of maritime boundaries. This was also emphasised by Arbitrator Soons himself when writing in 1990,⁴⁷ and the articles by Derek Bowett and by Victor Prescott and Gillian Triggs in the International Maritime Boundaries series demonstrate the point vividly from the practical perspective of drawing maritime boundaries.⁴⁸ To take an example, if there are two States with opposite coasts just more than 400 nautical miles apart, but in between there is located a tiny maritime feature, a dispute over the status of that feature will inevitably raise questions whether the two States are "States with opposite . . . coasts" within the meaning of Articles 74 and/or 83 and whether those Articles apply. Thus, to use the words of the International Tribunal for the Law of the Sea in the *M/V Louisa Case*, the question whether these features are "rocks" within the meaning of Article 121(3) of UNCLOS unavoidably has "a bearing" on the application of Articles 74 and/or 83.

29. It follows that the statements in the Award that "the status of a feature as a 'low-tide elevation', 'island', or a 'rock' relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap",⁴⁹ cannot be supported. Inevitably, a decision by the Tribunal about the status of any of the features referred to in the Philippines' submissions will raise a question about the application of Articles 74 and/or 83, and thus it seems clear

45 Recognised by the International Court of Justice in *Nicaragua v. Colombia*, ICJ Reports 2007, page 832, paragraph 139.

46 See the map at ICJ Reports 2012, page 624, at page 714.

47 B Kwiatkowska and A H A Soons, 21 *Netherlands YIL* (1990), page 139, at page 181.

48 *International Maritime Boundaries*, volume I, page 131; volume V, page 3245.

49 Award, paragraphs 401 and 403.

that those submissions should be excluded from the Tribunal's jurisdiction because of China's declaration under Article 298(1)(a)(i).

30. Finally, it is submitted that the jurisprudence analysed above, about the "real issue", is equally relevant to this question whether the Philippines' claims fall within Article 298(1)(a)(i). To be precise the Tribunal should have asked whether, considered "on an objective basis", the "real issue" concerned the application of Articles 15, 74 and/or 83. However, all that the Tribunal says is that "it does not follow, however, that a dispute over an issue that may be considered in the course of maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself".⁵⁰ This rather laconic statement fails to address two points. First, as has been stated, Article 298(1)(a)(i) is concerned, *inter alia*, with whether Articles 74 and 83 apply, and that is a question in relation to which the status of maritime features is highly relevant. And second, the Tribunal recognised that the maritime boundary process is "an integral and systematic" one,⁵¹ which must mean that questions of status and delimitation – and occasionally of territorial sovereignty as well – are inextricably intertwined; from this, it must follow that to extract one of these elements is inappropriate. In other words, whilst the Philippines stated that its interest was in the status of certain features, that does not take away from the fact that status and delimitation are intimately connected, so that any decision by the Tribunal about the status of a feature in the South China Sea will inevitably raise a question as to whether Articles 15, 74 and 83 apply and thus have an impact upon any eventual delimitation around that feature.

31. Furthermore, in assessing what "the real issue" is in the case brought by the Philippines, it is appropriate to look at the final submissions made by the Philippines at the oral hearing on the substantive issues. In his final statement,⁵² the Solicitor General of the Philippines asked the Tribunal to rule that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef "generate no entitlement to an exclusive economic zone or continental shelf", and that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef) "do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf". The Tribunal has said that it is unable to rule on the sovereignty of the various features, and one presumes that the Tribunal will continue to work on the assumption that these features are under the sovereignty of China – as it did at the jurisdiction and admissibility stage, at the suggestion of the Philippines.⁵³ Accordingly, if the Tribunal were to accede to the Philippines' submission, that would inevitably have an impact upon any subsequent agreement between the Philippines and China

50 Award, paragraph 155.

51 *Ibid.*

52 Permanent Court of Arbitration, Day 4: Merits Hearing, 30 November 2015, pages 201-5; available at <http://www.pcacases.com/web/sendAttach/1550>.

53 Award, paragraphs 143, 145 and 153.

as to the delimitation between those features and the Philippines islands of Luzon and Palawan. In other words, any decision by the Tribunal in favour of the Philippines on these submissions will involve a decision on whether Articles 74 and 83 apply; thus these claims made by the Philippines are covered by Article 298(1)(a)(i) and are accordingly excluded from the Tribunal's jurisdiction.

VII. Disputes over Territorial Sovereignty

32. The Philippines was adamant that it was not seeking a ruling on the disputes about territorial sovereignty over the various features in the South China Sea, and the Tribunal accepted this as the basis for its decision; nevertheless the Tribunal considered that it could still decide upon the status of those features.⁵⁴ However, it is noteworthy that there seems to be no precedent for an international tribunal to consider the status of a feature when the territorial sovereignty over that feature is disputed, indeed hotly contested. During the hearing Judge Pawlak asked the Philippines' legal team whether they could quote any precedent "when entitlements to maritime features were decided separately from sovereignty over them".⁵⁵ The Philippines' team promised to revert on this point, but there is no sign in the Award that they were able to discover a precedent.

33. However, at paragraph 141 of the Award, the Tribunal records an argument from the Philippines that "sovereignty claims over maritime features raise no impediment to the determination of their maritime entitlements", and in support of this proposition the Philippines quote three cases in the International Court of Justice and one decision of an *ad hoc* arbitral tribunal. But in all four of these cases, the ICJ or the *ad hoc* tribunal possessed an independent jurisdiction to decide upon disputes about territorial sovereignty, in addition to its jurisdiction to prescribe a maritime boundary. In *Nicaragua v. Honduras*, the International Court of Justice considered that the dispute over the sovereignty over certain islands was admissible as it was "inherent in the original claim" made by Nicaragua in its application to the Court; importantly, Honduras did not contest the jurisdiction of the Court to entertain this dispute and indeed in its final submissions Honduras specifically asked the Court to rule on it.⁵⁶ In *Qatar v. Bahrain*, the Court possessed jurisdiction to decide a dispute over territorial sovereignty by virtue of the agreement seizing the Court.⁵⁷ And in *Nicaragua v. Colombia*, the Court held that the Pact of Bogota gave it jurisdiction to

54 Award, paragraph 153.

55 Permanent Court of Arbitration, Day 3: Hearing on Jurisdiction and Admissibility, 13 July 2015, page 62, lines 10–13; available at <http://www.pccases.com/web/sendAttach/1401>.

56 ICJ Reports 2007, page 659, paragraphs 114–116.

57 Judgment of 15 February 1995 on Jurisdiction and Admissibility, ICJ Reports 1995, page 6, paragraphs 47–8.

rule on a dispute about the sovereignty over a number of islands.⁵⁸ Finally, the Philippines quotes the award of the arbitral tribunal in *Dubai v. Sharjah*; however, the principal issue in that case was about the validity of an earlier decision on the land boundary, with the Tribunal also being asked “to fix the maritime boundary *de novo*”.⁵⁹ Thus, unlike the Tribunal in *Philippines v. China*, in none of those four cases was the judicial body debarred from ruling on territorial sovereignty, and so none of them can be regarded as an appropriate precedent.

34. It is also worth making the point here, although it is perhaps obvious, that there is an intimate connection between maritime rights and sovereignty over land territory. Indeed, as the International Court of Justice has said: “maritime rights derive from the coastal State’s sovereignty over the land, a principle which can be summarized as “the land dominates the sea”. . . It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State”.⁶⁰ In *Nicaragua v. Honduras*,⁶¹ the applicant State proposed during the hearing that the International Court of Justice should also decide upon the territorial sovereignty of a number of islands; the Court took the view that this was a new claim, but since it was implicit in the original application by Nicaragua and Honduras agreed to the Court taking jurisdiction, the Court was prepared to rule on that issue.⁶² The Court was quite explicit that it would have had to decide on the sovereignty of the islands *before* it could effect a maritime delimitation; the Court said that “to draw a single maritime boundary line in an area of the Caribbean Sea where a number of islands and rocks are located the Court would have to consider what influence these maritime features might have on the course of that line. To plot that line the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area”.⁶³ It is noteworthy that the Court then decided the sovereignty over the disputed islands first, before moving on to prescribe the maritime boundary.⁶⁴ A similar issue came up in the case of *Cameroon v. Nigeria*, where the parties were in dispute not only over the delimitation of maritime zones, but also over the territorial sovereignty of a coastal feature, the Bakassi Peninsula. The

58 Judgment of 13 December 2007, Preliminary Objections, ICJ Reports 2007, page 832, paragraphs 97 and 104. (Indeed, in relation to these three ICJ cases, the point is clear from the titles assigned to the cases, all of which include the word “Territorial” in them.)

59 *Dubai v. Sharjah*, (1981) 91 International Law Reports, page 543; the quotation here is from the article by Derek Bowett (counsel for Dubai) in (1994) 65 BYIL 103 at page 125.

60 *Qatar v. Bahrain*, ICJ Reports 2001, page 40, paragraph 185.

61 ICJ Reports 2007, page 659.

62 *Ibid.*, paragraphs 114-116.

63 *Ibid.*, paragraph 114.

64 The same course was taken in *Nicaragua v. Colombia*, ICJ Reports 2012, page 624.

International Court of Justice accepted that it would be “impossible” to effect a delimitation whilst the sovereignty over Bakassi was undecided; it held, however, that both disputes were within its jurisdiction, thereby avoiding any problem, although it did make clear that it would have to decide the dispute over the sovereignty over Bakassi first.⁶⁵ Another practical example is provided by the delimitation agreement between Australia and Papua New Guinea, which was facilitated by the acceptance by Australia that it had been mistaken for 99 years in considering that it had sovereignty over three uninhabited islands lying close to the coast of Papua New Guinea; the Treaty between the two States provides not only for a maritime boundary, but also for the mutual recognition of their respective sovereignty over the various islands in the Torres Strait.⁶⁶ In this context, it is important to repeat that the Tribunal in its Award in the *Philippines v. China* case was clear that it could not rule on questions of disputed sovereignty over land territory, and that the Philippines disclaimed any wish to seek such a ruling.⁶⁷ But these precedents demonstrate that there is an integral connection between issues of territorial sovereignty and maritime delimitation, and in turn, as has been demonstrated above, there is a similarly intimate connection between maritime delimitation and the status of features. So it must be questionable whether it is appropriate for the Tribunal to attempt to decide on the status of features when it cannot rule on questions of territorial sovereignty or maritime delimitation.

VIII. Should the Tribunal Have Proceeded?

35. As we have seen there appears to be no precedent for an international tribunal deciding upon the status of a maritime feature when the sovereignty over that feature is disputed. It may of course be said that there seems to be no precedent the other way, i.e., where a tribunal declined to give its decision on the status of a feature when there was a dispute over sovereignty. However, given that UNCLOS has now been in force for over twenty years, it is reasonable to suppose that one reason for the lack of a precedent is that States did not believe that it would be possible to bring proceedings under Part XV of UNCLOS about the status of a feature when there was a dispute over the territorial sovereignty over that feature. In such circumstances, and bearing in mind the crucial importance of consent in establishing the jurisdiction of international tribunals, one might expect an international tribunal to proceed with circumspection, knowing that it is moving into uncharted territory.

65 *Cameroon v. Nigeria*, Preliminary Objections, ICJ Reports 1998, page 275, at paragraph 106ff.

66 *International Maritime Boundaries*, volume I (Martinus Nijhoff, 1993), page 929, Report Number 5-3.

67 Award, paragraphs 8, 26 and 153.

36. What the above survey demonstrates is that questions of territorial sovereignty, status of features and maritime delimitation are inextricably linked; to consider only one element out of these three is unreal and artificial, and worse it risks producing a distorted result. In the case of the South China Sea the Tribunal accepted that it could not consider two of these elements, namely territorial sovereignty and maritime delimitation, but that it could consider the third, namely the status of features. In those circumstances, was it wise for the Tribunal to proceed? Was it appropriate for the Tribunal to embark upon the case when two of the three intertwined elements are outside its jurisdiction? I have described this elsewhere as putting the status cart before the sovereignty horse. In other words, should the Tribunal, as a judicial body, have declined to decide the posterior question, ie the status of the features, when it cannot decide the anterior question, ie sovereignty? And indeed when the anterior question is hotly disputed.

37. The International Court of Justice said in a recent case that it “and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies”.⁶⁸ In a similar vein, in another case in which the Court was asked to give an advisory opinion, it stressed that it must not only “protect the integrity of the Court’s judicial function”, but also “satisfy itself as to the propriety of the exercise of its judicial function”.⁶⁹ And in a third case, the Court said that it must consider whether answering the request for an advisory opinion “would render the existence of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function”.⁷⁰ One might argue that the same underlying theme can be seen where the ICJ has referred to “the fundamental principles of its Statute”⁷¹ when declining to adjudicate upon a dispute when not all necessary parties are before the Court. And when the ICJ referred to the “proper interpretation of its judicial function” when deciding not to proceed further with a case which had become moot.⁷²

38. The question is whether these statements reflect a wider principle of judicial behaviour. Might they be generalised to suggest that in a case such as this a tribunal

68 Judgment No. 2867 of the Administrative Tribunal of the International Labour Organisation, ICJ Reports 2012, page 10, at page 19, paragraph 34; see also the eloquent view of Judge Greenwood in his Declaration, *ibid.*, page 88, at page 89, paragraph 3.

69 Accordance with International Law of the Unilateral Declaration of Independence, ICJ Reports 2010, page 403, at pages 415-6, paragraphs 29 and 31.

70 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, page 136, at page 156, paragraph 43.

71 East Timor, ICJ Reports 1995, page 90, at page 101, paragraph 26; affirming Monetary Gold Removed from Rome in 1943, ICJ Reports 1954, page 19, at page 33.

72 Nuclear Tests cases, ICJ Reports 1974, pages 253 and 457, at paragraphs 57 and 60, respectively.

should have declined jurisdiction? The point was not made to the Tribunal, but one does wonder, if it had been, whether it might have caused them to pause.

IX. Settlement by other Means

39. China has consistently stated that any disputes relating to the South China Sea should be settled by means other than through litigation and refers in this context especially to the Declaration on the Code of Conduct of Parties in the South China Sea, which was signed between China and the members of ASEAN, including the Philippines, in November 2002.⁷³ In particular, under Article 4 of the Declaration the participants “undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognised principles of international law, including the 1982 UN Convention on the Law of the Sea”.

40. The Tribunal addresses this point by reference to Article 281 of UNCLOS,⁷⁴ which reads as follows: “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.” The Tribunal asked itself whether the 2002 Declaration could be regarded as an “agreement” for the purposes of Article 281 of UNCLOS, and reached the conclusion, probably rightly, that the 2002 Declaration it is not as such legally binding, and that that in itself was sufficient to mean that Article 281 did not apply.⁷⁵

41. However, the Tribunal went on to consider, albeit very briefly, whether the 2002 Declaration and/or various bilateral statements between China and the Philippines might raise an estoppel.⁷⁶ It should be added here that, in a seminal article written in 1986, the hugely experienced member of the Legal Advisers at the United Kingdom’s Foreign and Commonwealth Office, Tony Aust,⁷⁷ pointed out how non-legally binding documents generate legal obligations through the operation of the international legal rules relating to unilateral statements and/or to estoppel. So, it would not be at all surprising if the 2002 Declaration were held to give rise to an estoppel – indeed, it might be expected that it would do so.

73 Available on the ASEAN official website (www.asean.org) under the heading ASEAN Documents Series 2002.

74 See Bing Bing Jia, 46 *Ocean Development and International Law* (2015), page 266.

75 Award, paragraph 219.

76 Award, paragraphs 249-251.

77 A Aust, 35 *ICLQ* (1986) 787.

42. So, what are the elements which must be present for an estoppel to arise? The Tribunal referred⁷⁸ to the full and interesting exposition of the international law rules about estoppel in the *Mauritius v. UK* case,⁷⁹ in which the four necessary elements were summarised as follows: “estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely”.⁸⁰

43. But in the *Mauritius v. UK* case, no very strong evidence of detriment and reliance was required. As regards reliance, the Tribunal said that it “does not consider that a representation must take the form of a binding unilateral declaration before a State may legitimately rely on it”.⁸¹ And as regards detriment, the Tribunal indicated that the foregoing by Mauritius of the possibility of pressing its sovereignty claim was sufficient.⁸² It is hard to see that this amounts to much more than saying that a State might have argued its case more forcefully if it had not been for the representations made by the other State; in other words, it seems that there is no need for any specific evidence of detriment and/or reliance, but that these elements can be assumed to be present. It is also to be noted that in the *Mauritius v. UK* case this estoppel arose in relation to certain *unilateral* statements made by the UK, but which the Tribunal did not regard as binding. In the *Mauritius v. UK* case, the Tribunal held that the effect of the estoppel was that the UK could not deny the binding character of these unilateral statements.

44. If one then applies the analysis in the *Mauritius v. UK* case to the 2002 Declaration, it can be argued that, by entering into the Declaration, the Philippines has made representations which China can be assumed to have relied upon to the latter’s detriment. The undertaking to resolve disputes through consultations and negotiations appears in the Declaration, a mutually negotiated document signed at a high level, rather than as a unilateral statement; thus, it might be expected to be more likely that the participants in the Declaration would feel entitled to rely upon it, even if it were not technically legally binding. Therefore, the argument that it creates an estoppel would seem stronger than in the *Mauritius v. UK* case. An alternative argument might be that the Philippines is estopped from denying that the Declaration

78 Award, paragraph 250.

79 *Mauritius v. UK*, Award, paragraphs 434-7 (footnote 31 above).

80 *Ibid.*, paragraph 438.

81 *Ibid.*, paragraph 446.

82 *Ibid.*, paragraph 443.

constitutes an agreement for the purposes of Article 281; or perhaps the effect of the estoppel might be that there is deemed to be an agreement for those purposes.

45. However, the Tribunal takes a rather different line. It does not suggest that China did not rely upon the undertakings in the 2002 Declaration. Rather, the Tribunal first says that there is no evidence that the Philippines made any representations⁸³ (ie focussing on element (a) in the *Mauritius v. UK* analysis). This is very difficult to understand: it is hard to see that Article 4 of the 2002 Declaration is not a representation; it is contained in a formal document signed at a high level and certainly it is considerably more precise and clear than the unilateral statements at issue in the *Mauritius v. UK* case.

46. Second, the Tribunal argues that the reference to UNCLOS in Article 4 of the Declaration somehow brings in Part XV,⁸⁴ but this seems untenable as a matter of the English language, as it is the negotiations and consultations which have to be conducted in accordance, *inter alia*, with UNCLOS; that cannot reasonably be regarded as bringing in Part XV by the backdoor.

47. Furthermore, the Chinese view of Article 4 as set out above is not simply its own. In its Note Verbale of 18 August 2009, in response to two Notes from the Philippines concerning its submissions to the Commission on the Limits of the Continental Shelf, Viet Nam stated 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”.⁸⁵

48. The Tribunal concludes that Article 4 of the Declaration cannot “be construed as a representation that the Philippines would not bring compulsory proceedings against China” (Award, para.251).⁸⁶ This conclusion seems to relate back to its earlier view about the proper interpretation of Article 281, where the Tribunal states that an express exclusion of recourse to Part XV is necessary for a document to come within that Article.⁸⁷ That however seems unduly formalistic; one would think that it is the intention of the parties which should be decisive. Indeed, as regards Article 4 of the Declaration, if it was not the intention to preclude the parties from resorting to the procedures in Part XV of UNCLOS, it is difficult to see what its purpose was.

83 Award, paragraph 251.

84 Award, paragraph 228.

85 See http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_phl_2009re_vnm.pdf. It is of course difficult to reconcile the subsequent statement by Viet Nam that it has “no doubt that the Tribunal has jurisdiction in these proceedings” (Award, paragraph 54).

86 Award, para.251.

87 Award, paras 223-5.

Furthermore, if on the contrary the intention had been to preserve the right of the participants to resort to those procedures, it would have been easy to say so – and there was a precedent before the negotiators of the Declaration in the form of Article 17 of the Treaty of Amity and Cooperation, which preserves the right of the parties to resort to the procedures set out in Article 33 of the United Nations Charter. On the whole, it seems more sensible, and more consonant with treaty-drafting practice at least in the writer's experience, to conclude that rights need to be expressly preserved if they are incompatible with a general statement, rather than that they should be regarded as continuing to be available even though not so compatible. It follows that *pace* the Tribunal, it seems more appropriate to treat Article 4 as meaning what it says: disputes have to be resolved through negotiations and consultations, not through other means.

49. Thus, it has to be said that the Tribunal's argument is not convincing, and it follows that there is a strong case for saying that the Philippines was estopped from ignoring the Declaration and proceeding to the institution of legal proceedings. Indeed, it is submitted that it is potentially destabilising to the general course of international business that the Tribunal accepted that the Philippines could resile from the undertakings in a formal document like the Declaration. Furthermore, if, contrary to the apparent view of the Tribunal, the intention behind the Declaration was indeed designed to preclude resort to Part XV of UNCLOS, the Tribunal's decision means that China and the members of ASEAN laboured in vain, since according to the Tribunal's view the Declaration was from the start ineffective to fulfil that purpose.

50. Finally, one other point should be addressed. In its Award, the Tribunal stated that "the mere fact of unilaterally initiating an arbitration under Part XV in itself cannot constitute an abuse of rights"⁸⁸ and the Tribunal referred to Article 300 of UNCLOS, which requires States to fulfil their obligations under the Convention in good faith and without abusing their rights. However, the Tribunal's statement cannot be accepted in its full breadth; one can imagine a scenario where a representative of a State assures a representative of another State that the first State will not initiate proceedings under Part XV, only for the first State immediately to do so. Such behaviour would seem to involve bad faith and an abuse of rights,⁸⁹ especially, one has to say, if the State to whom the assurance has been made has made clear its consistent view that recourse to litigation should be avoided. Furthermore, it is noteworthy that in the *Cameroon v. Nigeria* case, the International Court of Justice accepted that "an estoppel would . . . arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone", although on the facts the Court held that no estoppel

88 Award, paragraph 126.

89 See also the Dissenting Opinion of Vice-President Weeramantry in *Cameroon v. Nigeria*, Preliminary Objections, ICJ Reports 1998, page 275, at page 375.

arose in that case.⁹⁰ In the same way it does not seem unreasonable to say that, if the Philippines were estopped by the 2002 Declaration from controverting the Chinese view that problems relating to the South China Sea should be exclusively settled through consultations and negotiations without recourse to Part XV, it would be a breach of the principle of good faith and of Article 300 for the Philippines nevertheless to initiate proceedings.

X. Prior Exchange of Views

51. As a precondition to the right to institute proceedings under Part XV, the parties are under an obligation to exchange views. But unlike some other multilateral agreements, Article 283 of UNCLOS specifies quite precisely what issues should be covered in the parties' exchange of views. Article 283(1) reads as follows: "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*" (my emphasis). One point to note, which is perhaps easy to overlook, is that the word "its" relates back to "a dispute . . . concerning the interpretation or application of [the] Convention", so that it is that dispute whose settlement the parties have to discuss.

52. The International Court of Justice has emphasised the importance of States punctiliously complying with any preconditions before activating dispute settlement procedures. Thus, in *DRC v. Rwanda (New Application: 2002)* the Court said that its "jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon".⁹¹ With specific reference to Article 283, Judge Anderson in the *Arctic Sunrise* case said that "the emphasis is more upon the expression of views regarding the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties".⁹² To like effect are statements from the Tribunals in the *Mauritius v. UK* case and the *Arctic Sunrise* case⁹³.

53. In the *Philippines v. China* case, the Tribunal sets out the contents of some of the exchanges between China and the Philippines, and then concludes that Article

90 *Cameroon v. Nigeria*, Preliminary Objections, ICJ Reports 1998, page 275, at paragraph 57; referred to at paragraph 251 of the Award.

91 ICJ Reports 2006, p. 39, para. 88.

92 *The Arctic Sunrise*, Provisional Measures (ITLOS Case No. 22), Declaration of Judge Anderson, paragraph 3.

93 Quoted at paragraph 333 of the Award.

283 has been complied with.⁹⁴ There are a number of points to be made here. First, the Tribunal was concerned to avoid a formalistic approach; following the decisions in a number of other cases, the Tribunal emphasised the importance of the substance of the exchanges, rather than whether there was some formal invocation of UNCLOS. Second, clearly the exchange of views cannot drag on for ever; at some point it has to be appropriate to say that a halt should be called. And third the South China Sea issue is a complex one, involving a number of States and raising points in a number of different areas (territorial sovereignty, maritime delimitation and exploitation of natural resources to name the obvious ones).

54. On the other hand, as Judge Greenwood said in his Separate Opinion in *Georgia v. Russia*, “the statements relied upon by the Applicant to demonstrate the existence of a Convention dispute must be sufficiently clear to enable the other Party to appreciate that a claim is being made against it regarding the interpretation or application of the Convention. Where those statements are made in the context of a wider dispute, and especially where the statements deal with the issues of that wider dispute, the need for clarity is particularly marked. In such a case, it must have been possible for the other Party to discern that, whatever other matters were also being raised and whatever other allegations were being made, the statements in question were making a claim regarding the interpretation or application of the Convention even if they did not mention the Convention by name”.⁹⁵ In other words, the existence of the wider dispute places an especially strong obligation upon the State seeking to have recourse to a dispute settlement procedure to make clear that it wishes to do so. Furthermore, with particular reference to the necessary exchange of views pursuant to Article 283, the parties are required to discuss, as Judge Anderson says, “the most appropriate peaceful means of settlement” of the dispute under UNCLOS. It follows that a degree of specificity is required in order to demonstrate that the exchange of views fulfils the terms of Article 283.

55. The question is therefore whether the Philippines did indeed sufficiently make clear to China that it wished to resort to the procedures in Part XV and that it wished to discuss the means of settling a dispute under UNCLOS. From the Award, it would appear that the bilateral exchanges between China and the Philippines were concerned much more with the overall dispute, which of course is fundamentally one about the sovereignty over land territory, than about a dispute about UNCLOS. In other words, the exchanges referred to by the Philippines do not seem to have the necessary specificity, as stipulated by Judges Anderson and Greenwood, to justify the conclusion that Article 283 has been fulfilled.

94 Award, paragraphs 337 and following, with the conclusion in paragraph 342.

95 *Georgia v. Russia*, ICJ Reports 2011, Separate Opinion of Judge Greenwood, page 323, at paragraph 9.

XI. Award

56. Finally, it is noteworthy that the decision of the Tribunal is rendered as an “award”, and under Article 11 of Annex VII to UNCLOS, an award is “final” and “shall be complied with by the parties”. The implication appears to be that even if China now decided to participate in the proceedings, it could not dispute the terms of this Award. One wonders however whether in this respect the Tribunal might have exceeded its powers.⁹⁶

57. To begin with, although Article 26(3) of the Tribunal’s Rules of Procedure allows it to make “interim, interlocutory or partial awards”, Article 20 of the Rules of Procedure, which deals with preliminary questions such as objections to jurisdiction, uses the terms “rule” and “ruling” and does not suggest that a decision on such a question is to be rendered in the form of an award. Furthermore, one might argue that Article 11 of Annex VII, which ought in the event of an inconsistency to prevail over the Rules of Procedure adopted by the Tribunal, should be interpreted as meaning that it is only the final decision of the Tribunal which should be rendered as an award, but that preliminary decisions, such as one like this on jurisdiction, should not be.

58. It is relevant here to consider how this issue is dealt with in related areas. To begin with, it is to be noted that the Rules of both the International Court of Justice and the International Tribunal for the Law of the Sea stipulate specifically that a decision on a preliminary objection should be rendered in the form of a judgment,⁹⁷ but no similar stipulation appears in Annex VII of UNCLOS or in the Tribunal’s Rules of Procedure. Furthermore, the PCA Arbitration Rules 2012, which were drawn up by a distinguished panel of jurists, provide for a plea as to jurisdiction to be ruled on “either as a preliminary question or in an award on the merits”,⁹⁸ thus indicating that decisions on preliminary questions are to be seen as distinct from decisions on the merits. Likewise, the Model Rules on Arbitral Procedure developed by the International Law Commission provide for the award to “constitute a definitive settlement of the dispute”, which is not of course what a decision accepting jurisdiction does, and the Commentary then uses the word “final” to describe the effect of this Article.⁹⁹

96 It is to be noted that the decision on jurisdiction in the Arctic Sunrise case (footnote 23 above) was also rendered as an award.

97 Article 79(9) of the ICJ Rules and Article 96(8) of the ITLOS Rules.

98 The Rules are available on the PCA website (www.pca.cpa.org); the quotation is from Article 23(3).

99 ILCYB 1958, volume II, page 88, paragraph 40; the Model Rules were said to be an “authoritative modern expression of arbitral procedure”, “valuable evidence as to the essential elements of an arbitration”, and to be “indicative of the state of customary

59. There is also jurisprudence which is relevant. In a Decision of the Iran-United States Claims Tribunal, it was stated that “as is generally recognised, a ‘final’ and ‘binding’ award is one with which the parties must comply and which is ripe for enforcement”,¹⁰⁰ which certainly does not apply to the Award of the Tribunal in the *Philippines v. China* case. Finally, in a case involving commercial arbitration, the Paris Cour d’Appel said that, for the purpose of considering which arbitral awards are final so that a domestic court may set them aside, these are only “les décisions des arbitres qui tranchent de manière définitive, en tout ou en partie, le litige qui leur a été soumis, que ce soit sur le fond, sur le compétence ou sur un moyen de procédure qui les conduit à metre fin à l’instance”¹⁰¹; again, the Tribunal’s Award does not resolve the litigation in a definitive manner. Thus, none of these other precedents support the appropriateness of the Tribunal rendering its ruling on jurisdiction in the form of an Award.

60. In this respect, one should analyse the implications of an award being “final”. It is submitted that there are three aspects, first that the award should lead to a decision which is genuinely final, in the sense that it disposes of the dispute; on that basis, a decision on jurisdiction ought not to be regarded as final, unless it holds that the tribunal does not have jurisdiction. The second aspect of finality is that the award cannot be further disputed by the parties; thus, by rendering an award the Tribunal has purported to affect the position of the parties, but as far as can be seen, at no stage did the Tribunal consult the parties on the question of what form its decision should take. And finally one presumes that, if an award is “final”, it cannot be reopened by the Tribunal itself; but as Rosenne explains, in his authoritative work on the International Court of Justice, a decision on preliminary objections is always “non-exhaustive”, “in the sense that whether or not matters of jurisdiction have been raised at the stage envisaged for preliminary objections, they may still be raised later, even by the Court *proprio motu*”¹⁰²; in other words, the question whether the Tribunal does indeed have jurisdiction over the claims made by the Philippines can and indeed should be looked at again by the Tribunal in the context of its examination of the merits of the case. It would obviously be particularly concerning if the Tribunal felt

international law” in the 1950s, in the Dubai/Sharjah Boundary Arbitration (1981) volume 91, International Law Reports, page 543, at page 575.

- 100 Decision Concerning the Interpretation of the Algiers Declaration with respect to whether the United States is obligated to satisfy promptly any Award rendered in favour of Iran against US nationals, 4 May 1987; 26 International Legal Materials, page 1592, at paragraph 10.
- 101 Société ABC International c. Société Diverseylever Ltd [2003] Revue de l’Arbitrage, page 143, at page 159; translated in G Petrochilos, Procedural Law in International Arbitration (OUP, 2004), page 94, paragraph 3.104.
- 102 S Rosenne, The Law and Practice of the International Court 1920-2005 (Martinus Nijhoff, 4th ed, 2006), volume II, page 876, paragraph II.229.

unable to reconsider its decision on jurisdiction, even in the light of way that the Philippines has pleaded its case at the merits phase, for example as to whether the certain of the Philippines' claims are covered by Article 298(1)(a)(i).

61. So, it is submitted that it was inappropriate for the Tribunal to have rendered its decision on jurisdiction in the form of an award, and indeed that it is arguable that the decision as rendered does not, in law, fulfil the requirements to be regarded as an "award" for the purposes of Article 11 of Annex VII of UNCLOS. Although this appears at first sight to be a point of technical interest only, it is of importance because of the implications for the future proceedings in this case, as well as because it might be followed in other cases.

XII. Conclusion

62. This critique has highlighted what seem to be some of the weaknesses in the Tribunal's Award. In particular, did the Tribunal really get down to the "real issue" in the case? Or was the real issue either a dispute about sovereignty over land territory, or about maritime delimitation, or indeed both? Did the Tribunal sufficiently explore whether the Philippines was precluded by an estoppel from instituting proceedings under Part XV, and whether the Philippines was justified in resiling from the undertakings in the 2002 Declaration? Had China and the Philippines indeed fulfilled the obligation to exchange views before instituting proceedings? And did the Tribunal exceed its powers in purporting to set out its ruling on jurisdiction in an "award"? Some of these points go to the very heart of the issues which arise with respect to the South China Sea; other points may appear more technical but could have serious practical implications.

63. Overall, though, the essential point is that Article 9 of Annex VII of UNCLOS requires that "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". In an earlier case, Judge Wolfrum said that "well founded in fact and law' . . . 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".¹⁰³ That is, as any lawyer coming from the common law tradition will know, a high standard of proof. The question therefore is whether in its Award in the *Philippines v. China* case, the Tribunal met that high standard of proof.

103 Vice-President Wolfrum, *M/V Saiga No. 2* (ITLOS Case No.2), Separate Opinion, paragraph 12; he was referring to Article 28 of Annex VI of UNCLOS, which relates to ITLOS, but in this respect is identical to Article 9 of Annex VII.