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The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility

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Abstract

China claims “historic rights” over the islands and other maritime features in the South China Sea. The Philippines contests these claims on the ground that they are incompatible with the 1982 Convention on the Law of the Sea. It initiated arbitration under Annex VII of the (UNCLOS) for a declaratory judgment to that effect. China rejected the arbitral procedure in part because of its 2006 Declaration which excludes all such disputes from the compulsory dispute settlement procedure of the Convention. This paper examines the recent award of the Arbitral Tribunal accepting jurisdiction over the some of the submissions made by the Philippines. It finds that the UN Convention on the Law of the Sea has very little to offer to decide on issues of sovereignty and associated issues of overlapping maritime entitlements.

I. The scope of the present paper

1. It is now widely known that the South China Sea is rife with disputes concerning maritime entitlements of coastal States bordering that area. China claims “historic

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rights” and sovereignty and sovereign rights over the islands and other maritime features. Philippines, one of the States with conflicting claims with China, initiated arbitration under Annex VII of the 1982 Convention on the Law of the Sea (UNCLOS or the Convention on the 1982 Convention)¹ questioning China’s claims to much of the South China Sea maritime area as incompatible with the 1982 UNCLOS. Both the Philippines and China are parties to the UNCLOS. In 2006, China submitted a declaration excluding all disputes that might involve questions of sovereignty and issues of delimitation of maritime boundaries from the procedure of compulsory settlement of disputes specified under Section 2 of Part XV, which is subject to the limitations and exceptions specified under Section 3 of Part XV of the Convention. The Arbitral Tribunal was constituted in accordance with Annex VII of the UNCLOS, which is provided as a default procedure under article 287(3), to consider the submissions of the Philippines. China refused to participate in its proceedings, citing its declaration. The Tribunal accordingly had to first settle matters concerning its jurisdiction. The Tribunal then rendered its award that it has jurisdiction on some of the Philippines’ submissions and suspended its decision on others, linking them to the merits.

2. The following paper is set out with a limited scope. Its main focus is to review the decision of the Tribunal on jurisdiction and admissibility in the light of the reservations of China. It goes without saying that issues on merits of the dispute between China and the Philippines are outside the purview of this paper, even if the treatment of the subject matter sometimes makes it opportune to glance at them.

II. The context

3. The South China Sea is a semi-enclosed sea in the western Pacific Ocean “spanning an area of almost 3.5 million square kilometers”. It is a “crucial shipping lane, a rich fishing ground, and believed to hold substantial oil and gas resources”. It abuts several States. It lies to the “south of China and the islands of Hainan and Taiwan; to the west of the Philippines; to the east of Vietnam; and to the north of Malaysia, Brunei, Singapore and Indonesia”.² It includes hundreds of geographical features, either above or below water.³ Five states have competing claims. It is of interest to note that

- 1 The Convention entered into force on 16 November 1994, in accordance with article 308(1). As of 17 April 2016, there are 157 Signatories, and 167 Parties to the Convention. For the text of the Convention, United Nations Treaty Series, vol. 1833, 3.
- 2 For a brief description of the South China Sea, see the case, the Republic of Philippines v. The Republic of China, PCA case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, para 3, p.2 (hereinafter, Award).
- 3 For the purpose of the case between the Philippines and China, the Award lists some geographic features indicating their names in English, Chinese and the

China claims sovereignty and historic rights over all the islands and other maritime features of South China Sea which lie beyond the 12 mile territorial sea limit of China as well as that of any other coastal State.⁴ China claims to have exercised authority and control historically over the entire South China Sea prior to and during the period of its colonization and occupation by Japan.⁵ These “historic rights” are illustrated by a map depicting what has since come to be known as the dotted/nine-dash line. The dotted line encloses the main island features of the South China Sea: the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands. The dotted line also captures James Shoal which is as far south as 4 degrees north latitude. On its significance, it is noted in an essay that,

The study carried out here reveals that, though termed differently, the nine-dash line can be best defined, in view of China’s long-standing practice, as a line to preserve both its title to territory and its historic rights. It has three meanings. First, it represents the title to the island groups that it encloses. In

Filipino languages. These are in English: Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson (south) Reef, Macclesfield Bank, McKennan Reef (incl. Hughes Reef), Mischief Reef, Namyit Island, Reed Bank, Scarborough Shoal, Second Thomas Shoal, Sin Cowe Island and Subi Reef. All these are part of Spratly Island group (Nansha Quando, in Chinese or, in part, Kalayaan Islands in Filipino).

- 4 These are Paracel Islands [Xisha Islands=Chinese name for Paracel Islands, Hoang Sa Islands=Vietnamese name for Paracel Islands, Yong Xing=Chinese name for Woody Island]; Spratly Islands [Nansha Islands=Chinese name for Spratly Islands, Kalayaan Island Group (KIG)=Philippine name for group in the Spratly Islands, Truong Sa Islands=Vietnamese name for Spratly Islands, Tai Ping=new Chinese name for Itu Aba]; Dongsha Islands=Chinese name for Pratas Islands; Zhongsha Islands=Chinese name embracing Macclesfield Bank and certain rocks, sandbanks, and reefs; and Huang Yan=Chinese name for Scarborough Shoal or Reef. See for the presentation, Lori Fisler Damrosch and Bernard H. Oxman, *Agora: the South China Sea*, editors’ introduction, 107 AJIL (2013), 95-97 at 97. Taiwan’s claims are similar to the one asserted by China.
- 5 It is noted that “Chinese activities in the South China Sea dates back 2000 years ago”. Further, “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”. Following the end of World War II, stating that China actively resumed its activities over the area and by 1948, after conducting necessary surveys and renaming the islands, it was able to publish “an official map which displayed a dotted line in the South China Sea”. The People’s Republic of China, founded on 1 October 1949, maintained sovereignty of China over the South China Sea and officially pronounced as part of its 1958 Declaration on the Territorial Sea and 1992 Law of the People’s Republic of China on the Territorial Sea and Contiguous Zone that “the territory of People’s Republic of China includes, among others, the Dongsha islands, the Xisha islands, the Zhongsha islands, and the Nansha islands”. See the Position Paper of the People’s Republic of China, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml, para.4.

other words, within the nine-dash line in the South China Sea, China has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights, and jurisdiction—in accordance with UNCLOS—over the waters and seabed and subsoil adjacent to those islands and insular features. Second, it preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line. Third, it is likely to allow for such residual functionality as to serve as potential maritime delimitation lines.⁶

4. Vietnam also claims historic titles and rights to parts of the South China Sea. In addition, China, Vietnam, Malaysia, Indonesia, Brunei, and the Philippines have coastal projections into the South China Sea with maritime claims and overlapping entitlements under the 1982 Convention. Malaysia and Vietnam have filed a joint submission before the Commission on the Limits of the Continental Shelf. China opposed this consideration by a *note verbale* of 7 May 2009 attaching a copy of its claim as represented by “nine-dash” line.⁷

6 For an analysis of the nine-dash line, see Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 *AJIL* (2013), 98-124 at 124. For an earlier analysis of the nine-dash line, see LI Jinming and LI Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 *Ocean Development & International Law* (2003), 287–295, at 294, where the authors stated: “the dotted line then defined the sphere and the sovereignty, or the ownership, of the Paracel and the Spratly Islands. Nevertheless, the dotted line shown on the Chinese map is also China’s maritime boundary in the South China Sea because of two characteristics of the dotted line. First, the location of the dotted line followed the international principles regarding maritime boundaries then in existence in that it was drawn as an equidistance/median line between the isles and reefs at the outer edge of China’s South China Sea islands and the coastline of neighboring adjacent states. Second, the dotted line was the manner of designating a claimed national boundary line. Thus, ‘the nine-dotted line’ had a dual nature. Not only did it define China’s sovereignty over the South China Sea Islands, but it also played the role of China’s claimed ocean boundary in the South China Sea. The lines therefore can be called the Chinese traditional maritime boundary line in the South China Sea.”

7 See https://en.wikipedia.org/wiki/Spratly_Islands_dispute for a statement of the dispute involving the Spratlys and the claims of different States involved and for a description of the Spratly islands and associated “maritime features” (reefs, banks, cays, etc.) located in the South China Sea. Only China (PRC), Taiwan (ROC), and Vietnam have made claims based on historical sovereignty of the islands. The Philippines, however, claims part of the area as its territory under the UNCLOS. For summary of the territorial claims of countries involved see www.globalsecurity.org/military/world/war/spratly-claims.htm. See also for a list of islands in the Spratly group and various incidents or claims or assertion of authority and control, https://en.wikipedia.org/wiki/List_of_maritime_features_in_the_Spratly_Islands.

Given the complex nature of geography of the South China Sea, the number of claimants involved and conflicting legal bases of claims made, the countries of the region and in particular the States having conflicting claims have been engaged in active consultations on the best possible means of resolving the disputes in a peaceful manner. As part of these consultations, China and the South East Asian Nations concluded on 4 November 2002 a Declaration on Code of Conduct (DOC) in this respect under the auspices of the Association of South East Asian Nations (ASEAN). In accordance with paragraph 4 of the DOC, the parties agreed “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 Convention on the Law of the Sea”.⁸

All the countries abutting the South China Sea are parties to the Convention. China in particular also made a declaration on 25 August 2006 to state that it 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)-(c) of Article 298 of the Convention.⁹ The Philippines, which also submitted an “understanding”,¹⁰ however initiated arbitration under Annex VII of the Convention on 22 January 2013

8 Ibid., para.35.

9 For the full text of the Chinese Declarations see UN Treaty Series, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6. It states:

Declaration:

(1) In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People’s Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.

(2) The People’s Republic of China will effect, through consultations, the delimitation of 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 equitable principle.

(3) 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 Contiguous Zone which was promulgated on 25 February 1992.

(4) The People’s Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.

25 August 2006

Declaration under article 298:

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.

10 For the full text of the Philippines’ Understanding, see *ibid.*, Philippines’ Understanding made upon signature and confirmed upon ratification:

against China seeking to resolve a dispute over the Parties' respective "maritime entitlements"¹¹ and the lawfulness of Chinese activities in the South China Sea.

5. The Philippines in particular sought a declaratory award on three interrelated matters: First, that China's claims regarding the rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea, on the basis of historic rights and as depicted in the map containing the nine-dash line, are invalid because they are inconsistent with the Convention. According to the Philippines the dispute it has with China is solely governed by the Convention. Second, it seeks determination as to whether, under the Convention, certain maritime features claimed by both China and the Philippines "are properly characterized as islands, rocks, low-tide elevations, submerged banks"; and on the type of maritime rights they are capable of generating. The Philippines focused in this connection, in particular, on Scarborough Shoal and eight specific features in the Spratly Island group. The main

- (1) The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;
- (2) Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of January 2, 1930;
- (3) Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of August 30, 1951, and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party.

11 "Entitlement" literally means a right a person or a subject or State has under law. This is not the same as a claim a State like the Philippines makes against the claims of China. Entitlement is a broader concept than a claim which is a demand based on what the subject considers as its rights under law. Entitlement could be seen as a right in favor of one party, objectively determinable, and arises after the settlement of conflicting claims. Entitlement in that sense is an accrued right as opposed to a claim which requires judging and deciding upon merits. Accordingly, in respect of issues of sovereignty and maritime delimitation, which are the subject matter of a dispute, to use the term maritime "entitlement" tends to confuse the real issue involved, that is, determination of respective rights of parties as an outcome of resolution of conflicting claims. The Philippine memorials and the Tribunal appear to use the term "maritime entitlements" more in the sense of "maritime claims". Throughout this presentation, wherever the term "maritime entitlement(s)" is used it is employed with the understanding that it refers only to claims and not to accrued rights. It is entirely a different matter where different types of entitlements or rights accrued to two or more States could come into conflict. For example, the exercise of sovereign rights or entitlements by a coastal State in its exclusive economic zone could come in conflict with the entitlements or rights of third States in respect of the exercise of the freedoms of the high seas.

objective of the Philippines in raising these two issues is to question Chinese claims to sovereignty over these maritime features and using them as a basis for its maritime entitlements. Third, “the Philippines seek declarations that China violated the Convention by interfering with the exercise of the Philippines sovereign rights and freedoms under the Convention and through construction and fishing activities that have harmed the marine environment”¹².

III. Issues before the Tribunal and the positions of the Parties

6. Against the above general background, the Arbitral Tribunal constituted under Annex VII of UNCLOS examined the various claims submitted by the Philippines amounting to no fewer than 15 submissions.¹³

Submissions 1 and 2 relate to the broader claim of China that it has maritime entitlements in the South China Sea which in the view of the Philippines go beyond those provided by UNCLOS. Further, the Philippines sought a declaration from the Tribunal that the Chinese claims based on the nine-dash line are inconsistent with UNCLOS and invalid. Submission 3 deals with the nature of Scarborough shoal (whether it is a sand bank or a mere rock or, as the Chinese claim, it is an island, capable of generating maritime zones); Submission 4 relates to Mischief Reef, Second Thomas Shoal, and Subi Reef, and the claim of the Philippines that they are low-tide elevations and incapable of generating maritime zones, while China considers them to be part of Nansha Islands and capable of generating maritime zones; Submission 5 relates to the Philippines claim that the Mischief Reef and Second Thomas Reef are part of its EEZ and continental shelf. China considers them to be part of Nansha Islands. Also this claim relates to the question whether the Spratly Islands can generate an EEZ and

12 See Award, above n.2, paras.4-6, 1-2.

13 For a comment on these Submissions as part of the Notification and Statement of Claim by the Philippines as of 3 June 2014; and for the view that they are all sovereignty-delimitation related, that is, either incidental to claims of sovereignty or historic titles over one major island or the other in the Nansha group of Islands or Huangyan Dao or could be legally determinable only as part of or in consequence of maritime delimitation, and hence could not be treated as proper and valid claims concerning the interpretation and application of the Convention under article 288(1) or cannot provide jurisdiction to the Tribunal in view of the 2006 Declaration of China or by the Understanding of the Philippines being disputes excluded from the procedures of compulsory settlement of disputes, see, Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 *Chinese Journal of International Law* (2014), 663-739, at 688 (“It does not take too much for one to imagine that the dispute does contain two aspects—sovereignty over islands and reefs and other features and maritime delimitation between China and the Philippines”). For a more detailed analysis of the various Submissions, see 688-736, summary, 736-739.

continental shelf. Submission 6 is about the Gaven Reef and McKennan Reef (including Hughes Reef), the claim of the Philippines being that they are low-tide elevations; Submission 7 is about Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, raising the issue whether they do or do not generate an entitlement to EEZ and continental shelf; Submission 8 relates to the claim of the Philippines that China is unlawfully interfering with its legitimate rights under UNCLOS within its EEZ; Submission 9 relates to claims of fishing rights being exercised by China in an area in which the Philippines considers it has sovereign rights; Submission 10 is related to the rights of the Philippines' fishermen within the territorial sea of Scarborough Shoal; Submission 11 concerns the claim of the Philippines that Chinese acts cause damage and do not protect and preserve the marine environment surrounding the Scarborough Shoals and the Second Thomas Shoal; Submission 12 relates to Mischief Reef, a low tide elevation, claimed by the Philippines as part of the seabed and subsoil of its EEZ and continental shelf. It may be noted that China claims the same feature and is engaged in construction and other activities there. Submission 13 is about law enforcement activities of China which the Philippines assert as a violation of its obligations under the Convention on International Regulations for the prevention of collisions at Sea and UNCLOS; Submission 14 is about the Chinese activities at Second Thomas Shoal, claimed by the Philippines as preventing it from exercising its right of stationing its forces on the shoal and navigation around it.

7. The Submissions of the Philippines, as noted above, could be broadly summed up. As the Tribunal noted that Submissions 1 to 7 "concern various aspects of the Parties' dispute over the sources and extent of maritime entitlements in the South China Sea". Submissions 8 to 14 "concern a series of disputes regarding Chinese activities in the South China Sea",¹⁴ the lawfulness of which is disputed by the Philippines.

8. China rejected the recourse to arbitration by the Philippines and adhered to the position of neither accepting nor participating in these proceedings. It maintains further that the Tribunal does not enjoy jurisdiction in the absence of its consent as the issues concerning interpretation and application of the Convention could arise only after a State's "sovereignty over maritime features is determined". "When not subject to State sovereignty", China points out, "a maritime feature per se possesses no maritime rights or entitlements whatsoever".¹⁵ China also objects to the selection of certain maritime features for the purpose of assessing their eligibility to generate

14 See *ibid.*, para. 173, 68. The activities in question relate to Parties' respective petroleum and survey activities, fishing (those engaged in by the Chinese and those activities of Philippines Chinese obstruct), Chinese installations on Mischief Reef, the actions of Chinese law enforcement vessels, and the Philippines' military presence on Second Thomas Shoal.

15 See the Position Paper of China, *ibid.*, para.17.

maritime zones, whereas its claim is for sovereignty over the entire Nansha (Spratly) Islands group which is an archipelago comprising several islands, in particular the “Taiping Dao”, the largest island, and other maritime features. “Taiping Dao” (Itu Abu Island) in the Nansha (Spratly) Islands group, is currently controlled by the Taiwan authorities. The Philippines’ submission in this regard also excluded some other parts of Nansha Islands (Spratly Islands group). China considers the parts of islands thus excluded by the Philippines to be under illegal occupation by the Philippines; and this exclusion amounted to a distortion of the “nature and scope of the China-Philippines disputes in the South China Sea”.¹⁶ Concerning the third category of claims put forward by the Philippines, “China maintains that the legality of China’s actions in the waters of Nansha (Spratly) Islands and Huangyan Dao (Scarborough Shoal) rests on both its sovereignty over relevant maritime features and the maritime rights derived therefrom”.¹⁷

9. Before we proceed to further analyze the arbitral award on jurisdiction and admissibility, it may be necessary to review the scheme of settlement of disputes under UNCLOS to put the Chinese declaration on exclusion of disputes concerning its rights in the South China Sea in perspective.

IV. Settlement of disputes under UNCLOS: limitations

10. The 1982 UNCLOS, which came into force in 1994, provides for an elaborate system for settlement of disputes. Part XV contains three sections. Section 1 provides for settlement of disputes involving interpretation and application of the Convention. “Free choice of means of settlement” is the basic norm, and the only obligation is that these should be “peaceful” and should in no way endanger “international peace and security, and justice”; and parties in a dispute can choose from among the means indicated under Article 33 of the UN Charter.¹⁸ The system of settlement of disputes

16 See *ibid.*, para.22. It is also noted that seven of the maritime features, excluding the eighth maritime feature, the Scarborough Shoal, which the Philippines considers as rocks, reefs, low tide elevations or submerged features, are well within 200 miles from the Taiping Dao (Ita Abu Island). Measured from the Yongxing Dao (the Woody Island), the Huangyan Dao (Scarborough Shoal) is situated at a distance of 301 miles but within the extended continental shelf of China. The situation of these features is the same even when they are measured from Zhongye Dao (Thitu Island), according to China illegally occupied by the Philippines; except that the Huangyan Dao (the Scarborough Shoal) is at a distance of 315 miles. See Sienho Yee, above n.13, 698-699.

17 See *ibid.*, para.26.

18 These include various means noted thereunder but first of all by negotiation in the order of priority and other means, such as enquiry, mediation, conciliation, arbitration, judicial settlement; as well as resort to regional agencies or arrangements, or other peaceful means of their own choice (articles 279, 280 and 284).

under Part XV is a default system. It comes into operation according to article 281(1) of Section 1 only if the parties to a dispute did not by a separate agreement commit themselves to any other means of settlement of the dispute of their own choice. However, if in spite of the recourse to the chosen means of settlement, the dispute is not settled, the procedure under Part XV would apply unless parties to the agreement also excluded “any further procedure”. According to Article 281(2) any return to the procedure under Part XV of the Convention is also subject to any time-limit agreed by the parties. Article 282 also excludes Section 1 procedure in the case the parties to a dispute have accepted a compulsory binding settlement of the dispute through a general, regional, or bilateral agreement unless that agreement provides for Part XV procedures. In case of a dispute concerning the interpretation and application of the Convention, the parties are obliged under article 283 to “exchange views”.

11. Whether parties are required to engage in formal negotiations on specific aspects of the dispute as a precondition for submitting matters to the compulsory procedures is a separate issue, partly connected to a finding on the existence of “dispute” and partly to be dealt with as one of the means of settlement by way of free choice available to the parties to the dispute. The arbitral Tribunal in the present case spent considerable time to identify any exclusions or objections to its jurisdiction. A related question in this regard is where a party pleads that any one or more means of settlement of disputes freely chosen by the parties excluded recourse to Part XV procedures, whether it is also required to show that such exclusion is express.

12. States parties are offered under Section 2 of Part XV a choice of four forums to elect for submission of a dispute, in case it remains unresolved by recourse to Section 1. These are: the International Tribunal for the Law of the sea, the International court of Justice, an arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (article 287(1)(a)).¹⁹ According to article 287(1)(a), arbitration in accordance with Annex VII will be the applicable forum if no other forum is chosen by the parties by a declaration or in case the parties did not choose the same forum under declaration they filed. Any declaration made in this regard is without prejudice or is not affected by the obligation of a State Party “to accept the jurisdiction of the Sea-Bed Dispute Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5”.

13. Section 2 of Part XV provides for compulsory settlement of disputes concerning the interpretation and application of the Convention. But this is subject to the limitations prescribed under article 297, Section 3 of Part XV. First, with respect to

19 These relate to fisheries, protection and preservation of the marine environment, marine scientific research, or navigation including pollution from vessels and by dumping (Article 1, Annex VIII).

disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction, only the following claims are subject to the compulsory procedure:

- (a) that the coastal State acted in contravention of the provisions on freedoms of the high seas specified under article 58; or
- (b) that a State exercising those freedoms under article 58 “acted in contravention of the provisions” of UNCLOS; or
- (c) that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

So also under article 297(2), claims concerning the interpretation and application of provisions concerning marine scientific research are subject to the compulsory procedure. However, in this regard, disputes concerning (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253, may be submitted, at the request of either party, to conciliation under Annex V, section 2 of UNCLOS. Even then the conciliation commission so constituted is not authorized to question “the exercise by the coastal State of its discretion to designate specific areas referred to in article 246, paragraph 6 or of its discretion to withhold consent in accordance with article 246, paragraph 5”.

14. Further, section 2 compulsory procedures are also applicable under article 297(3)(a) to disputes involving interpretation and application of provisions concerning fisheries. However, claims concerning the exercise by the coastal State of its sovereign rights with respect to living resources within its economic zone; or the exercise of such rights including the exercise of its discretionary powers for determining “the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions in its conservation and management laws and regulations” are not open to compulsory settlement procedures. In such cases, however, at the request of one of the parties, the dispute may be submitted to the compulsory conciliation procedure provided in Annex V, section 2 of UNCLOS, if it is alleged that,

- (i) the coastal State manifestly failed to comply with its obligation, through proper conservation and management, to prevent serious endangerment to the maintenance of living resources in its EEZ; or
- (ii) arbitrarily refused to determine the allowable catch and its capacity to harvest living resources with respect to stocks in which another State party is interested in fishing even when that State so requested; or

- (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69, and 70, the whole or part of the surplus it has declared to exist, under conditions and terms established by it consistent with UNCLOS.²⁰

15. In arriving at any findings concerning the matters so noted, the conciliation commission concerned is not authorized to substitute its discretion to that of the coastal State.

16. In addition to the above, under article 298 of section 3, Part XV, States Parties to UNCLOS are competent to exclude by express declarations at the time of signing, ratifying or acceding to the Convention, the following category of disputes concerning,

- (i) “the interpretation and application of articles 15, 74, 83 relating to sea boundary delimitations or those involving historic bays or titles”; or
- (ii) “military activities including military activities by government vessels and aircraft engaged in non-commercial service and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under articles 297, paragraph 2 or 3”.

17. Disputes concerning sea boundary delimitations, or those involving historic bays or titles arising subsequent to the entry into force of this Convention (that is 16 November 1994), however, could be submitted under article 298(1)(a)(i) to the compulsory conciliation procedures under Annex V, section 2, where no agreement is reached within a reasonable period of time in negotiations between the parties, at the

20 There was no controversy over the concept of optimum utilization of fishery resources as all States “accepted that this principle contributes to satisfy the food needs of humanity and avoids the waste of renewable resources”. It is further noted that “modalities of access by third States to the surplus [. . .] was [sic] the object of difficult and arduous negotiations. The resulting compromise is reflected in articles 61 and 62. Its main elements are: 1) the coastal State’s right to determine the maximum allowable catch within its zone, as well as its own harvesting capacity thus guaranteeing its right to exploit totality of the allowable catch if it has the capacity to do so; and 2) the coastal State’s obligation to allow for foreign fishing of the surplus subject to its terms and conditions. Among these are the discretionary power to attribute the surplus and the payment of fees and other forms of remuneration or compensation, in the field of financing, equipment and technology”. For a first-hand account the negotiation history concerning the rights and duties of the coastal State and the rights of third States within the EEZ, see Jorge Castaneda, *Negotiations on the Exclusive Economic Zone at the Third United Conference on the Law of the Sea*, in: Makarczyk, J. (ed.), *Essays in International Law in honor of Judge Manfred Lachs* (Institute of the State and Law of the Polish Academy of Sciences, Martinus Nijhoff Publishers, Kluwer Academic Publishers Group, The Hague, 1984), 605-623, Reprinted by the Ministry of External Relations, Government of Mexico, (New York, 2002), 42-43.

request of any party to the dispute. The overall obligation to submit to a compulsory conciliation procedure under 298(1)(a)(i) will however not apply in respect of a maritime boundary dispute which “necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over the continental shelf or insular territory”.²¹ In other words, obligation contained in article 298(1)(a)(i) to submit a conciliation procedure is subject to three conditions: (i) the dispute should have arisen after the Convention entered into force; (ii) no agreement could be reached between the parties settling the dispute within a reasonable period of time; and (iii) that the dispute did not involve “the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental shelf or insular land territory”.

Further, after the mandatory procedure of conciliation is triggered in the absence of any of the three limitations noted above, the parties are required under article 298 (1) (a)(ii) to negotiate settlement of the dispute on the basis of recommendations made by the Conciliation Commission which are not binding. If these negotiations were not to result in any agreement, within a reasonable period of time, the parties shall, *by mutual consent*, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree” (emphasis added). Thus, if the dispute were to remain unsettled even after negotiations between the parties on the basis of the report of the conciliation commission, as required by article 298(1)(a)(ii), any further recourse to settlement of dispute procedure is, strictly, subject to “mutual consent” of the parties.

18. In sum, States could exclude from the compulsory means of settlement of disputes, under articles 297 and 298, issues concerning historic bays or titles. It is also given that coastal States could exercise the option of excluding issues concerning maritime delimitation from this scheme of settlement of disputes. Further, those maritime disputes that concurrently require consideration of any unsettled dispute concerning sovereignty or other rights over the continental shelf or insular territory are excluded even from the compulsory conciliation procedure. The Conciliation Commission, by its very nature, could only investigate the dispute and propose the terms of settlement but its report containing its findings and recommendations are not binding.²² But they could be used as a basis for settling the dispute or resolve the conflicting claims if the parties are so disposed. This was for example the case when

21 For an analysis of the maritime boundary dispute settlement procedures under UNCLOS see M.C.W. Pinto, *Maritime Boundary Issues and Their Resolution: An Overview*, in: Nisuke Ando, Edward McWhinney and Rudiger Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), 1115-1142. He noted that article 298(1)(a) indicates that the Convention seems to concede that this type of dispute “is to remain wholly outside the ambit of even compulsory conciliation” (at 1130).

22 See M.N. Shaw, *International Law* (Cambridge, 5th ed., 2003), 926.

the dispute between Norway and Iceland in relation to the continental shelf around Jan Mayen Island was settled on the basis of recommendations made by a Conciliation Commission.²³ But if one of the parties is not favorably disposed towards the compulsory procedure and decided not to participate in its proceedings, finding facts on the basis of unilateral submissions of one of the parties and suggesting terms of settlement might create more problems than it attempts to solve.²⁴ Matters in such a case are subject to the obligations of the parties to settle the dispute by peaceful means, refraining from the threat or use of force as provided under the UN Charter and, in particular, under Article 2(3) and (4) and Chapter VI.

19. In view of the above, the compulsory means of settlement of disputes under UNCLOS is confined essentially to disputes arising in respect of sovereign rights and duties of coastal States on the one hand and the right to enjoy freedoms of the high sea accorded to third States on the other in the exclusive economic zone and the continental shelf. It is clear also that the sovereign rights assigned to coastal States within the EEZ and the continental shelf are inseparable from the duties entrusted to them in respect of protection and preservation of marine environment, advancing the cause of marine scientific research, and protection and conservation of fisheries in these maritime zones. The coastal States are further obliged to determine allowable catch and allocate to third States, including the landlocked States, under articles 62, 69, and 70, the whole or any part of surplus over and above their own harvesting capacity. Compulsory settlement of disputes, with arbitration under Annex VII as the default system and compulsory conciliation procedure as a supplementary mechanism, is designed to deal with the disputes which might arise in this connection.

20. In return, as part of developing a “package deal” or by way of further balancing the rights and obligations of all concerned, the Convention provides that the system of settlement of disputes will not apply to matters that relate to,

- (i) the exercise by the coastal State of a right or discretion in accordance with article 246 on marine scientific research²⁵; or
- (ii) decisions of the coastal State concerning orders of suspension or cessation of a research project in accordance with article 253; and

23 In this case the solution proposed by the Commission was for a joint development zone, “an idea that would have been unlikely to come from a judicial body reaching a decision solely on the basis of legal rights of the parties”. *Ibid.*, 927.

24 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Third Edition (Manchester University, 1998), 450, 454.

25 Reference here is to the exercise by the coastal State of its discretion to designate specific areas referred to in article 246, paragraph 6 or of its discretion to withhold consent in accordance with article 246, paragraph 5.

- (iii) finally, the exercise by the coastal State of its sovereign rights with respect to living resources; or the exercise of such rights including the exercise of its discretionary powers within its economic zone.

21. Further, where disputes in respect of some of these matters, as noted above, are required to be submitted to a conciliation commission, that commission is not empowered to substitute its own discretion to that of the coastal State.

22. Coastal States have accepted the obligations in respect of settlement of disputes not only as a price to be paid to achieve necessary consensus in negotiations in setting up the legal regime governing the EEZ and the continental shelf but also as a duty towards the international community.²⁶ Article 59 of UNCLOS reflects this important compromise to resolve conflicts or disputes arising in respect of matters not specifically included either within the scope of exclusive jurisdiction of the coastal State or within the rights to be enjoyed by third States within the EEZ and the superjacent waters of the continental shelf.²⁷

- 26 The sovereignty a coastal State enjoys over its territorial sea is significantly different from the sovereign rights and exclusive jurisdiction it has over the EEZ. As noted, the principle of exclusive economic zone “struck a perfect compromise between coastal State and maritime powers by establishing an area with a special legal status, different from that of the territorial sea and of the high seas”. The principal aim of negotiators was to “ensure that the use and exploitation of the oceans would benefit all nations in a way that was fair”. This objective “could only be accomplished by accommodating the specific interests of the two main group of countries represented at the conference”. As a result of these efforts, “the idea of an Exclusive Economic Zone [...] incorporated the notion of the necessary coexistence of distinct rights and obligations within different maritime areas in the proper use of the oceans by all States”, Churchill and Lowe, above n. 24, 11. In other words, EEZ is “not territorial sea with some exceptions in favor of third States nor the high seas with some exceptions in favor of the coastal State”, *ibid.*, 30.
- 27 Article 59 states that, “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole”. This article is based on a compromise worked out by Mexico and supported widely within the “Evensen Group” that largely represented a large group of coastal States which claimed and favored 200-mile resource zone, *ibid.*, 28, 38. Further, article 59 must be read with article 55 which defines EEZ as having a *sui generis* legal status; as well as article 58(1) referring to various freedoms of the high seas including those rights that are “compatible with the other provisions of this Convention”. These articles incorporate compromise proposals offered by “Castaneda-Vindenes Group” on article 55 and Elliott Richardson (USA) on article 58. The issue here is about dealing with residual rights, not attributed to any one specific authority and control. These are related to the new and future uses of the sea made possible by

V. Jurisdiction of the Tribunal: possible objections under article 281(1) of UNCLOS

23. Before it examined admissibility of the various submissions made by the Philippines for the purpose of its jurisdiction, the Tribunal considered possible objections on other grounds²⁸ to its jurisdiction on the basis of communications received from, and the “position paper” made public by, China. First, it may be recalled that China expressed its view that the Tribunal lacked jurisdiction on the ground that the parties agreed to exclude the same as part of their commitments under the 2002 China-ASEAN Declaration on the code of conduct (DOC) and various joint statements to settle the disputes between them peacefully and by negotiations. The Tribunal rejected this objection on the ground that the joint statements are political in nature and not legally binding agreements. Second, it noted that years of discussions aimed at resolving the Parties’ disputes did not result in any settlement. Third, it held that in any case the DOC did not expressly “exclude any further procedure” as required by article 281(1) for the procedure under Part XV to be excluded.²⁹

24. The issue to what extent and under what conditions obligations of compulsory settlement of disputes binding on parties to UNCLOS would prevail over other means agreed to by the parties to settle disputes concerning the interpretation and application of UNCLOS arose earlier in the context of a dispute raised by Australia and New Zealand against Japan in respect of conservation of Southern Bluefin Tuna (SBT) under the 1993 Convention on the Conservation of the Southern Bluefin Tuna. This is an issue that engaged the Arbitral Tribunal in the SBT case between Australia and New Zealand vs. Japan, a Tribunal that was constituted, for the first time, under Annex VII of the LOS Convention to which all three States are also parties. Japan opposed the jurisdiction of the Tribunal, invoking article 281(1), on the ground that it was superseded by the procedure of settlement of disputes agreed to by the parties as part of the 1993 Convention. Earlier, it may be noted, when the International Tribunal for the Law of the Sea (ITLOS) was approached by New Zealand and Australia seeking provisional measures in connection with the same dispute, it granted them, rejecting the Japanese objections on the same ground and

development of science and technology and the maritime military uses not contemplated in the Convention but traditionally practiced by military powers in the high seas; *ibid.*, 44-50.

28 See Award, for possible objections under article 281(1) paras.193-291; under article 282, paras. 292-321. The lack of express exclusion of the Convention procedures as well as in some cases, like the 2006 ASEAN Declaration on code of conduct and the 1976 Treaty of Amity, the lack of any binding dispute settlement procedures were cited by the Tribunal for rejecting any possible objections to its jurisdiction.

29 See Award, paras.218-229, 248, and 251.

holding that, in the absence of an express exclusion under 1993 Convention, *prima facie*, the Tribunal constituted under Annex VII enjoyed jurisdiction.

25. The SBT arbitral tribunal, on the other hand, first observed that lack of express exclusion of the LOS procedure for the application of Article 288(1) within the 1993 Convention was not decisive. It then relied on article 16(2) of the 1993 Convention to decline its jurisdiction on the ground that article was decisive first to “stress the consensual nature of any [reference to arbitration]”; and second to “remove proceedings under that Article from the reach of the compulsory procedure of peaceful settlement of UNCLOS”. In the process the SBT arbitral tribunal also emphasized that the dispute arose in the context of implementation of the 1993 Convention and that it provided for its own procedure for setting up an arbitration panel. The arbitral tribunal also annulled the interim measures issued by the ITLOS earlier. Judge Keith appended his dissent on the point taking the view that an express exclusion of procedures under the LOS Convention was an imperative.

26. The ITLOS accepted the position of Australia and New Zealand, basing its decision first on the ground of “presumption of parallelism of compromissory clauses”; and second, because it “is a commonplace of international law and state practice for more than one treaty to bear upon a particular dispute”. The SBT arbitral tribunal, it is worth noting, was careful in neither disputing the position of the ITLOS nor that of the Applicants, Australia and New Zealand, on this point. In fact it accepted that there “is frequently a parallelism of treaties both in substantive content and in provisions for settlement of disputes arising thereunder”.³⁰

27. Following some lengthy discussion,³¹ the Tribunal in the present case agreed, as noted above, with the ITLOS and shared the dissenting opinion of Judge Keith of New Zealand in the *Southern Bluefin Tuna Case*. Accordingly, it held that an express exclusion is necessary.³² The view of the Tribunal may have some justification in considering the commitment under the DOC as not sufficient enough to deny it jurisdiction in the matter, in view of the lack of consensus on the matter of exclusion of further procedures thereunder between China and the Philippines and other parties to that Declaration. 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.

30 For a succinct analysis of the decision of the Tribunal in this case see Stephen M. Schwebel (President of the Tribunal), “The Southern Bluefin Tuna Case” in N. Ando et.al (eds.), above n.16, 743-748.

31 See Award, above n.2, at paras.221-225.

32 Award, above n.2, 87, para.223.

VI. Jurisdiction of the Tribunal: the obligation to “Exchange Views” under article 283 of UNCLOS and generally to enter into negotiations

28. Furthermore, the Tribunal held that the terms of the Treaty of Amity and Cooperation in South East Asia and the Convention on Biological Diversity to which China and the Philippines are also parties are no bar for the exercise of its jurisdiction because: (i) they do not provide for a “binding mechanism”; and (ii) they do not “exclude further procedures” within the meaning of article 281(1) of the Convention.³³ It also held that the Philippines satisfied the requirement under article 283 of the Convention concerning the obligation to “exchange views”.³⁴

29. The Tribunal considered as a follow-up the question whether, independently of article 283, the Convention nevertheless imposed an obligation on States parties to engage in negotiations prior to resorting to compulsory settlement.³⁵ In this connection, it noted that,

The Tribunal also recognizes that the Parties’ many discussions and consultations did not address all of the matters in dispute with the same level of specificity that is now reflected in the Philippines’ Submissions. This is to be expected and constitutes no bar to the Philippines’ claims. Even an express obligation to negotiate requires only that “the subject-matter of the negotiations must relate to the subject-matter of the dispute” and the Convention does not require the Parties to set out the specifics of their legal claims in advance of dispute settlement.³⁶

Further, the Tribunal noted that there is no need for the Philippines to engage at any length in any formal negotiations when it considered “that the possibility of a negotiated solution has been exhausted”.³⁷ It concluded, accordingly, and for the

33 On lack of any exclusion of dispute settlement procedures of the Convention under the 1976 Treaty of Amity to which both China and Philippines are Parties, 101, para.268; and under the 1992 Convention on Biological Diversity in relation to Submissions 11 and 12 (b) and the compulsory conciliation procedure provided under article 27 of the CBD, 105, para.286.

34 See *ibid.*, 112-120, paras.322-343.

35 See *ibid.*, 120-123, paras.344-352.

36 See *ibid.*, 123, para.351.

37 See para.350.i: The Tribunal, while noting that “Article 279 calls on the Parties to ‘seek a solution’ through means that may include negotiations”, added that “As was stated by ITLOS in *Land Reclamation by Singapore in and around the Straits of Johor*, ‘a State Party is not obliged to pursue procedures under Part XV, Section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”. Moreover, even an obligation to negotiate “does not imply an obligation to reach an agreement”, and “the States concerned [...] are in the best position to

reasons noted above, “that neither Article 283, nor the obligation to seek a solution through pacific means, including negotiation, poses any bar to the Tribunal’s consideration of the Submissions presented by the Philippines”.

VII. Concretization of a dispute through negotiations: a necessary requirement for the exercise of jurisdiction by the Tribunal

30. Nevertheless, the question remains whether the Tribunal should not have required the Philippines to engage in negotiations as a precondition for it to proceed to deal with the dispute on merits. At least two good reasons commend themselves for the Tribunal to take such a course. First, it is suggested that the map depicting the nine-dash line, in so far as it does not have any precise coordinates, could be taken as having only “informative, rather than probative value”.³⁸ The map is certainly not the only and sole evidence for the case of China. Its purpose may even be only to be illustrative or informative. But the real evidence supporting the Chinese assertion of sovereignty over various groups of islands and associated maritime features and their maritime entitlement not only under the Convention but also under “historic titles” could only come from China in negotiations.

31. Second, the Tribunal spent considerable effort as part of its duty to satisfy itself that there is a “dispute” between the Philippines and China. In this connection, it concluded, among other things, that the Philippines made the necessary effort to “exchange views” on the means of settling the dispute with China as required under article 283 of the Convention. But it also admitted that “the Parties’ many discussions and consultations did not address all of the matters in dispute with the same level of specificity that is now reflected in the Philippines’ Submissions”.³⁹ As the Tribunal so rightly emphasized, resolving the issues of sovereignty, historic titles and rights and the maritime delimitation require direct negotiations. Only such negotiations would have given both the Philippines and China the opportunity they needed to appreciate their respective claims in concrete terms and to engage in right earnest to resolve them. Unless some rounds of negotiations took place, no party to the dispute could have legitimately claimed and established in good faith that it exhausted all the possibilities for a negotiated settlement of the dispute.⁴⁰

judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation”.

38 See Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China’s Historic Rights Claim in The South China Sea*, 107 AJIL (2013), 124-141, at 132.

39 See Award, above, n.2, 123, para.351.

40 The ICJ noted that a negotiation can be said as a matter of law to have been tried and to have been exhausted once the negotiating process experiences “failure [...] or become[s] futile or deadlocked”, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian*

32. In fact, articles 74(2) and 83(2) of the 1982 United Nations Convention on the Law of the Sea, specifically require States with opposite or adjacent coasts to reach agreement with each other as regards the delimitation of, respectively, the exclusive economic zone and the continental shelf within a “reasonable period of time”. While there are no “hard and fast” rules regarding the meaning of a “reasonable period of time”, each case having to be assessed on the basis of particular facts and circumstances, it is worth noting that the Tribunal in the 2006 arbitral award in *Barbados v. Trinidad and Tobago* found that negotiations related to the delimitation of the exclusive economic zone and the continental shelf over the course of roughly 25 years that failed to result in an agreement between the States satisfied the criterion of a reasonable period of time.⁴¹ In the more recent case of maritime boundary delimitation in the Bay of Bengal between Bangladesh and India, the parties were engaged in negotiations for nearly 40 years before the matter got resolved through arbitration. Under the circumstances, one would think it is not only open but would have been appropriate for the Tribunal to have insisted that the Parties actually engage in negotiations over the proper subject matter of the dispute including the various Submissions made by the Philippines, even if it felt that there is no immediate bar for exercising its jurisdiction.⁴²

Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, 70, para.159, at 133. The Court clarified that it could be said that negotiation had been tried and had been exhausted when the “basic positions [of the parties to a dispute had] not subsequently evolved”. See Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422, para.59, at 446.

On the question of when negotiations exhausted possibilities of a settlement, “The law of negotiation does not focus on temporal concerns as such; these are secondary. Rather, it looks at good faith and related considerations. In a word, the focus is on whether, considering all of the facts and circumstances at issue, the negotiation is, or can be said to have been, meaningful. The concern is with conduct, not result, on process, not conclusive resolution. It is a question of due diligence, as well.” See Robert P. Barnidge, Jr., *The International Law of Negotiations as a Means of Dispute Settlement*, 36 *Fordham ILJ* (2013), 545-573, at 560.

41 See: In *The Matter of Arbitration Between: Barbados and The Republic of Trinidad and Tobago*, The Hague, 11 April 2006. Also available as *Delimitation of Exclusive Economic Zone and Continental Shelf (Barb. v. Trin. & Tobago)*, 27 *R.I.A.A.* 147, 204 (Perm. Ct. Arb. 2006).

42 In the 1924 case *Mavrommatis Palestine Concessions (Mavrommatis)*, the Permanent Court of International Justice (“PCIJ”) famously defined a “dispute” as a “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”. See *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 *P.C.I.J.* (ser. A) No. 2, at 11 (Aug. 30); cited in Robert P. Barnidge, Jr., above, n. 40, at 545. That case hinged upon whether there was a dispute between the United Kingdom and Greece and if so, whether the U.K., as Mandatory Power, had violated certain of its international legal obligations related to concessions that had

After all, negotiation is the primary and agreed method of resolution of claims between the Parties as part of consultations and exchange of views between the ASEAN and China. This is duly reflected in the Declaration on the code of conduct. Negotiations are equally emphasized as a primary means of settlement of disputes under international law and state practice. Compulsory settlement of disputes which is dependent upon the consent of all the parties to a dispute is an exception, and more so in the case of disputes concerning the interpretation and application of the Convention. Such a consent and consensus is not readily available and even when it was made available, it was often subjected to specific conditions. Even when treaties are concluded at the bilateral level, there is so much room for interpretation and application given the fact that “the plain and natural” meaning of the agreement is never so “plain and natural” as to not allow the parties some room to justify their political choices. Constructive ambiguity is the hallmark of all agreements. This problem is more complicated in the case of multilateral treaties which admit declarations and reservations.

33. The LOS Convention is a case which best illustrates the importance of settling differences and disputes arising from its interpretation and application by negotiation, it being acknowledged universally as a “package deal” with several controversial issues involving sovereignty and associated rights and principles governing maritime delimitation remaining inconclusive or wrapped-up in vague compromise formulae. For the very same reasons, issues concerning these matters are excluded from the scope of compulsory settlement of disputes provided under the Convention.

34. The case law and agreements governing maritime delimitations make one point abundantly clear. That each settlement of maritime boundary is a Unicom with specific set of facts and choices made taking into consideration the special circumstance and the relevant factors peculiar to the particular context of the dispute.⁴³

been granted to Greek national *Mavrommatis* in Palestine. In his dissenting opinion, Judge Moore built upon the PCIJ’s understanding of the nature of a dispute in describing it as a “pre-existent difference, certainly in the sense and to the extent, that the government which professes to have been aggrieved should have stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing”. Quotation is from Barnidge, *ibid.*, 545-556. The *Mavrommatis* test for determining “whether a disagreement simpliciter can be regarded as a legally-cognizable dispute is usually seen as reflecting general international law”. Further, “[a] dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another”, J.G. Merrills, *International Dispute Settlement* (5th ed. 2011), 1, cited in Barnidge, *ibid.*, fn.3, 556. “The existence of a dispute, of course, is an absolute prerequisite for the application of the international law of dispute settlement”; *ibid.*

43 This is particularly so in the case of settlement of different claims in the South China Sea. Not all facts necessary for resolving sovereignty issues are known.

Exercise of maritime delimitation requires parties or decision-makers to select appropriate base points, assign necessary value to rocks, reefs and low tide-elevations and islands, and make adjustments to a provisional equidistance line strictly constructed on the basis of geographical features and the general direction and length of coastlines of respective parties to achieve “an equitable result”. The so-called “margin of appreciation” the decision-makers enjoy in the process is wide and varies from case to case and from judge to judge or decision-maker to decision-maker.

35. Ultimately the name of the game is compromise. It is never easy for States to yield to third party decisions in matters which are as vital and grave to their national interests as issues of sovereignty and maritime delimitation. It is therefore reasonable and common for a State party to a dispute to insist that it be settled by direct negotiation; or, failing agreement, by only such other peaceful means as are mutually agreed to achieve not only an “equitable result” but a durable settlement of the dispute.

36. It is, however, understood that it is not an abuse of the legal process for the Philippines to resort unilaterally to the procedure of arbitration. Further admitting that the Philippines is in any case not obliged under international law to conclude an agreement by negotiations,⁴⁴ it is nevertheless obliged, as the International Court of Justice so often insisted of a party to a dispute, to show that it engaged in “negotiations” in right earnest and in good faith before it could turn to more compulsory or third party means of settlement. It is apt, in this connection, to recall the observation of the International Court of Justice in the *North Sea Continental Shelf Cases* (1969). In that landmark case, the Court, while pointing out that, “it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field”, noted that:

the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an

Historic titles, treaty transfers, conquest, occupation and prescription all come to play a part in dealing with the issues. Straight baselines, archipelagic baselines are another issue which will figure in maritime boundary delimitation in this area. See J. Charney, *Central East Asian Maritime Boundaries and the LOS Convention*, 89 AJIL (1995), 724-749.

44 The PCIJ made this clear in 1931, when, in rejecting Poland’s argument that Lithuania was bound to negotiate with it until a legally-binding agreement had been reached, it stated that although the law of negotiation requires that the parties to a negotiation “pursue them [negotiations] as far as possible, with a view to concluding agreements [, . .] an obligation to negotiate does not imply an obligation to reach an agreement. Barnidge, above n.40, 549.

obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it [...] ⁴⁵

In the absence of such negotiations, it is difficult to judge whether there is a “dispute” of the kind the Tribunal could consider as appropriate for its consideration and to satisfy for itself that in respect of that dispute it has jurisdiction.

VIII. Jurisdiction of the Tribunal: submissions of the Philippines and issues of sovereignty and maritime boundary

37. Having disposed of objections to its jurisdiction in terms of article 281(1) and rejected the ground that the Philippines did not fulfil the general obligation first to engage in negotiations to settle the dispute with China in good faith, the Tribunal turned to the various submissions made by the Philippines and examined whether it is entitled to exercise jurisdiction in respect of any or all of them in view of the Chinese declaration which excluded all disputes concerning its sovereignty and maritime boundaries. To deal with the issue of jurisdiction thus faced by the Tribunal, it rightly found it necessary to “isolate the real issue in the case and to identify the object of the claim”. ⁴⁶

45 See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports 1969, 3, at 47, para.85.

46 Citing *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports 1974, 457 at 466, para.30, and *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction of the Court, ICJ Reports 1998, 432 at 448, para.30. See also the more recent pronouncement of the Court in the case on *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile), Preliminary Objection, Judgment, 24 September 2015, para.26, 12, available at www.icj-cij.org/docket/files/153/18746.pdf. In this case Chile objected to the jurisdiction of the Court on the ground that the “true subject-matter of Bolivia’s claim” is “territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean”; and not merely a right of negotiation of a treaty for an access to the sea but a treaty with a predetermined legal outcome, that is, securing a “sovereign right” of access to the sea. The Court admitted that even though that might be the ultimate objective of Bolivia, it does not seek a declaration from the Court to that effect, and that the Court in finding that it has jurisdiction in the matter takes no view “about the existence, nature or content of any alleged obligation to negotiate on the part of Chile”, para.36. The Court found its jurisdiction and in this connection took note that “The Application does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access”, para.32; the Court concludes that “the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean, and, if such an obligation exists, whether Chile has breached it”, paragraph 34; and that the dispute so narrowly or strictly defined is not covered by any settlement under any other treaty nor

38. At the outset, to circumvent the objections raised by China to the jurisdiction of the Tribunal, the Philippines submitted that entitlements that maritime “feature may generate is [...] a matter for objective determination”; and this “does not require any prior determination of which state has sovereignty over the feature”. In its view, “the same feature could not be a ‘rock’ if it pertains to one State but an island capable of generating entitlement to an EEZ and continental shelf, if it pertains to another”. “Thus”, it adds, “sovereignty is wholly irrelevant”.⁴⁷

39. The Philippines further submitted that that even if one agreed, for argument’s sake, that China has sovereignty over the entire Spratly Group of Islands, the extent of maritime jurisdiction it claimed in the Northern portion of the South China Sea could not correspond to the entitlements States are allowed or permitted under UNCLOS in respect of their maritime zones.

Proceeding from that assumption,

The Philippines notes that the Convention includes provisions on the maximum extent of maritime entitlements and submits that such entitlements emanate exclusively from maritime features. According to the Philippines, “*even assuming that China is sovereign over all of the insular features it claims*, its claims to ‘historic rights’ within the areas encompassed by the nine-dash line exceeds the limits of its potential entitlement under the Convention.”⁴⁸

With respect to the issue concerning maritime delimitation, Philippines argued that these would not arise unless and until it is determined that there are overlapping maritime entitlements. Further, the fact that resolution of the 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.⁴⁹

40. The Tribunal, noting the requirement in article 288 of UNCLOS, observed that it “is not empowered to act except in respect of one or more actual disputes between the Parties”, which are disputes concerning the “interpretation and application of the Convention”.⁵⁰ Noting that there are disputes of different kinds between the Philippines and China, including disputes on questions of sovereignty, the Tribunal

governed by any other arrangements. Note also that the Court reserved its position on the purely preliminary character of Chile’s objection for further proceedings (“reserve its decision on this issue for further proceedings”), para.53.

47 Award, 50, at para.144(a).

48 Ibid., 49 at para.143.

49 Ibid., 53, at para.146.

50 Ibid., 57, at para.148. For the criteria to determine what would constitute a dispute, See *Mavrommatis Palestine Concessions* case, jurisdiction, Judgment, 30 August 1924, PCIJ series A, No.2, 6 at para.11: “a dispute is a disagreement on a point of law or fact, a conflict of views or of interests between two parties”. Cited at *ibid.*, para.149.

noted that the decision the former is seeking does not “require the Tribunal to first render a decision on sovereignty” either explicitly or even implicitly. Accordingly, “the Tribunal does not accept the objection set out in China’s Position Paper that the disputes presented by the Philippines concern sovereignty over maritime features”.⁵¹ However, the Tribunal stressed that it “is fully conscious of 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”.⁵²

41. In the same vein, the Tribunal held that this “is not a dispute over maritime boundaries”. Even if maritime boundary delimitation is an “integral and systemic process” involving “a wide variety of potential issues arising between the parties to a dispute”, the Tribunal adds “that a dispute concerning the existence of an entitlement to a maritime zone is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements overlap”. It pointed out that 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”.⁵³

42. However, accepting that it is not entitled to deal with disputes concerning delimitation of maritime boundaries, it pointed out that it will address certain of the Submissions of the Philippines on one condition. It may be recalled that the Philippines requested the Tribunal, in terms of Submissions 5, 8, and 9, to declare that specific maritime features are part of its exclusive economic zone and the continental shelf; and that certain Chinese activities interfered with its sovereign rights in its exclusive economic zone. The Tribunal held that even if it is recognized that they involved actual disputes between the Parties, it will accept them for consideration only if the exclusive economic zone and the continental shelf of the Philippines did not form part of “any potential overlapping entitlement” with that of the Chinese entitlements in the same maritime area.⁵⁴

43. The Tribunal then turned to the question whether there is an actual dispute between the Parties, given their differences concerning the source of their entitlements. In this connection it noted that “China’s claimed entitlements appear to be based on an understanding of historic rights existing independently of . . . the Convention”.⁵⁵ On the other hand, the Philippines took the view that “UNCLOS supersedes and nullifies any ‘historic rights’ that may have existed prior to the

51 *Ibid.*, 60 at para.153.

52 *Ibid.*

53 *Ibid.*, 60-61 at paras.155 and 156.

54 *Ibid.*, 61, at para.157.

55 *Ibid.*, 66, at para.168.

Convention”,⁵⁶ and thus requested the Tribunal in terms of its Submissions 1 and 2 to declare that China is not entitled to claim rights “beyond those permitted” by the Convention.⁵⁷ It is of the view that “the Philippines’ Submissions 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”.⁵⁸ Submission 5 of the Philippines does present a dispute in as much as it wanted the Tribunal to declare that Mischief Reef and Second Thomas Shoal are “low-tide elevations” falling within its exclusive economic zone and the continental shelf. In so doing it has presented a dispute concerning the status of every maritime feature claimed by China within 200 nautical miles of those two maritime features.⁵⁹

44. Further, Submissions 8-14 are, according to the Tribunal, disputes regarding the Chinese activities in the South China Sea “implicating provisions of the Convention” concerning their respective rights over petroleum and survey activities, fishing, Chinese installations on Mischief Reef, the actions of Chinese law enforcement vessels, and the Philippines’ military presence on Second Thomas Shoal.⁶⁰ The Tribunal did not find it difficult to accept that Submissions 11 and 12(b) are also matters of dispute essentially within the meaning of articles 192 and 194 of the Convention concerning allegations that China’s activities in the South China Sea have caused environmental harm, even if in examining this matter the Tribunal might have to consider relevant provisions of the Convention on Biological Diversity (CBD).⁶¹

45. In short, the arguments of the Philippines on jurisdiction turn on two essential assumptions. One that holds that none of the 750 maritime features in the Scarborough Shoal and the Spratly features are capable of “generating an EEZ and continental shelf entitlement”, suggesting thereby that they are “rocks” and low tide elevations or other insular features not amounting to land or islands, capable of appropriation by way of assertion of “historic rights”.⁶² The other assumption is that Philippines is entitled to 200 mile EEZ and continental shelf and most of these features fall within its EEZ or the continental shelf which do not have any potential overlap with the true maritime entitlements of China under the same UNCLOS.

46. Having concluded thus there are actual disputes between the Parties on the interpretation and application of UNCLOS, the Tribunal proceeded to indicate its decision on the question of its jurisdiction. Of the 14 Submissions made by the

56 Ibid.

57 Ibid., 34, para. 101(1).

58 Ibid., 66, at para.169.

59 Ibid., 67-68 at para.172.

60 Ibid., 68, at para.173.

61 Ibid., 69, para.176.

62 See Award, 50, at para.144 (b), and 60, at para.153.

Philippines, the Court decided that it has jurisdiction on Submissions 3, 4, 6, 7, 10, 11, and 13. On seven others, Submissions 1, 2, 5, 8, 9, 12, and 14, it decided to link its ruling on its jurisdiction to the merits phase as the issues involved “do not possess an exclusively preliminary character”.⁶³ It directed the Philippines to narrow down Submission 15 and reserved consideration of its jurisdiction on that Submission also to the merits phase.⁶⁴ As the Tribunal explained, Submission 2 would require the Tribunal to decide on the nature and validity of historic rights claimed by China in the South China Sea. The Tribunal noted that it cannot decide on this matter if the claims involved were otherwise “covered by the exclusion from jurisdiction of ‘historic bays or titles’ in Article 298”. In addition, the existence of any overlapping entitlements, the Tribunal noted, would, in turn, “potentially impact the application of other limitations and exceptions in Article 297 and 298”.⁶⁵

47. There are other Submissions on the status of certain maritime features. Any decision on them would also be barred, the Tribunal pointed out, “in the light of Article 298 and the China’s Declaration”, if contrary to the position taken by the Philippines, “any maritime feature in the Spratly Islands constitute an ‘island’ within the meaning of Article 121 of UNCLOS, generating an entitlement to an exclusive economic zone or continental shelf [. . .]”. In that case, the Tribunal admitted that it would not be able to decide on Submissions 5, 8, and 9 without first determining the Parties’ overlapping entitlements, which is excluded from its jurisdiction in the light of article 298.⁶⁶

48. Similarly, according to the Tribunal, the validity of Submissions 8, 9, 10, and 13 which relate to Chinese law enforcement activities in maritime zones, would depend upon the determination whether “such law enforcement activities took place within China’s exclusive economic zone or in an area in which the Parties possess overlapping entitlements to an exclusive economic zone”.⁶⁷ In turn, it was noted, these are matters which are excluded from the jurisdiction of the Tribunal under article 298.

63 The Tribunal relied on the same criterion enunciated by the International Court of Justice in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Preliminary Objections, Judgment, ICJ Reports 2007, 832 at 852, para.51, when it noted that a party raising a preliminary objection to its jurisdiction “will have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the question raised or answering the preliminary objection would determine the dispute, or some elements thereof, on the merits”. See *ibid.*, 139 (fn.379), para.390.

64 Award, 147, para.412.

65 *Ibid.*, 139, para.393.

66 *Ibid.*, para.394.

67 *Ibid.*, 140, para.395.

49. Further, the Tribunal pointed out that the Philippines' Submissions 12 and 14, raising objections to certain Chinese activities, would also be excluded from its jurisdiction, if it were determined that they are military in nature.⁶⁸

50. In the event, the Tribunal decided to examine: whether Scarborough Shoal is an island or a rock within the meaning of article 121 of UNCLOS (Submission 3); the status of Mischief Reef and Second Thomas Shoal, whether they are "low-tide elevations" within the meaning of article 13 of UNCLOS, subject to a caveat that they do not fall in a maritime area where China and the Philippines might possess overlapping entitlements (Submission 4); subject to the same caveat, whether Gaven Reef and Mckennon Reef (including Hughes Reef) are "low-tide elevations" within the meaning of article 13 (Submission 6); and whether Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are "islands" or "rocks" within the meaning of article 121 (Submission 7).⁶⁹

In addition, noting that "traditional fishing rights might exist even within the territorial waters of another State", the Tribunal also found jurisdiction to consider matters raised by the Philippines' Submission 10 "to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal".⁷⁰ In this connection the Tribunal is of the view that for the consideration of this matter, it is irrelevant whether Scarborough Shoal is a rock or island pursuant to article 121. It also noted that articles 297 and 298 have no application in the territorial sea. Similarly, the Tribunal found no impediment for it to consider matters raised by Submission 11 (on matters of the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal and the application of articles 192 and 194 of UNCLOS)⁷¹ and Submission 13 (concerning operation of China's law enforcement activities in the vicinity of Scarborough Shoal and the application of articles 21, 24, and 94 of UNCLOS "to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal").⁷²

IX. Jurisdiction of the Tribunal: assessment of the award

51. If the objective of the whole exercise of the Tribunal is only to assess the geology of the maritime features in dispute, it would either amount to an academic exercise or an exercise without real value. China, as has been noted, is not contesting the provisions of UNCLOS concerning maritime entitlements of States. This is a matter that

68 Ibid., para. 396

69 See *ibid.*, 141-142, paras. 400; 142, para.401; and 143, para.404.

70 *Ibid.*, 145, para.407.

71 *Ibid.*, para.408.

72 *Ibid.*, 147, para.410.

is well settled under the Convention.⁷³ There is neither a dispute between the Philippines and China nor could there be one over these provisions in the abstract or in vacuum. The dispute is only about the kind of rights China has or could be asserting over them. The Tribunal is aware of this and even acknowledged that it could be so on further examination. Nevertheless it takes a curious position straining its logic, by citing a view of the ICJ in the case concerning the *Land and Maritime Boundary (Cameroon v. Nigeria)*, that it is entitled to deal with the dispute “even if the exact scope of this cannot be determined”.⁷⁴

52. China’s case, as it repeatedly emphasized, is that it acquired historic rights over several of these maritime features through exercise of acts *à titre de souverain*. The Chinese case then cannot be disputed or disproved merely by looking at the geological nature of the maritime features in question and the entitlements they can or cannot generate in terms of the relevant provisions of UNCLOS. They can be assessed only by examining the nature of acts and functions of sovereignty China claims to have performed from times immemorial or through history.

53. The Tribunal admits this as much when it avers that the case of China based on its historic rights might be one covered by claims of sovereignty, and hence outside the purview of the jurisdiction of the Tribunal.⁷⁵ But in the same breath, it adds that the dispute is concerned with, as presented by the Philippines in its Submissions 1 and 2, the status of those historic rights within the framework of UNCLOS; and is therefore one that pertains to the interpretation and application of UNCLOS; hence within its jurisdiction. Accordingly it considers Submissions 1 and 2 to 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.⁷⁶

54. The Tribunal is not very convincing when it thus suggests that there could be a conflict between “historic rights” claimed by China and the rights claimed by the Philippines under UNCLOS and sets out to settle them in terms of UNCLOS. In so attempting to do, it appears to give the provisions of UNCLOS hierarchically a status higher than the general or customary law concerning acquisition of sovereignty over territory or other insular features by States; a status which is not evident from any of

73 In order to generate maritime entitlements under the Convention, an island should be “a naturally formed area of land, surrounded by water, which is above water at high tide” (article 121(1)). “Rocks which cannot sustain human habitation or economic life of their own”, however “shall have no exclusive economic zone or continental shelf” (article 121 (2)). They could otherwise generate entitlement to territorial sea. The coastal State could claim jurisdiction over the submerged features that fall within its territorial sea or exclusive economic zone and continental shelf.

74 Award, above, n.2, 67 at para.172.

75 Ibid., 66, para.168.

76 Ibid., 64, para.164.

its provisions. While it is agreed that UNCLOS has set out a regime on law of the sea which is generally considered as binding on all the parties to it, it is not considered to have status similar to that of the Charter of the UN nor does it have an article comparable to Article 103 of the UN Charter specifying priority for member States of obligations incurred thereunder over obligations contracted or potentially to be engaged under other treaties. Its provisions, which are the sum of a package deal, do not certainly have the status of *jus cogens* to stump all other rights and obligations acquired by States under either customary law or other conventions. Above all, it is not even clear, considering that it is a package deal, to what extent UNCLOS can be said to reflect customary law itself. Churchill and Lowe do suggest rather cautiously that the provisions of UNCLOS “may be binding on States as customary law”. However, they quickly added that a different view is taken by others that consistent practice in respect of the provisions of UNCLOS may not provide them the status of customary law as they are all part of a package deal.⁷⁷

X. Inapplicability of the UNCLOS to the issues of sovereignty or historic titles and rights

55. As the case between the Philippines and China at its core relates to issues of historic titles and rights in the South China Sea, it would be necessary for the Tribunal at the merits stage, as a preliminary matter, to investigate the facts and possible legal justifications the conflicting claims attract. China claims “indisputable sovereignty over the islands in the South China Sea and the adjacent waters”.⁷⁸ Under international

77 See H. Caminos and M.R. Molitor, *Progressive Development of International Law and the Package Deal*, 79 AJIL 871-90 (1985) cited by Churchill and Lowe, above n.24.

78 See the note verbale (CML/17/2009) of 7 May 2009. This is repeated. It is noted that in response to the protest note of the Philippines of 2011, lodged against China’s earlier note, China reiterated on April 14, 2011 its claim and indicated that “China’s sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.” China further pointed out that “prior to the 1970s, the Republic of Philippines had never made any claims to Nansha [that is, Spratly] Islands or any of its components,” and that “[s]ince 1930s, the Chinese Government has given publicity several times [to] the geographical scope of China’s Nansha Islands and the names of its components”. This “confirms China’s perception that the limits of its sovereignty must be assessed by reference to historical evidence”. See Florian Dupuy and Pierre-Marie Dupuy, above, n.38, 130.

China first expressed its intentions regarding the South China Sea in the international arena in its 4 September 1958 Declaration on China’s Territorial Sea. Although paragraph 1 clearly indicates that China considered the Pratas Islands, Paracel Islands, Macclesfield Bank, and Spratly Islands to belong to its territories, the declaration provided no legal explanation. Its sole purpose was, it seems, to define the limits of its sovereignty as a pure fact.

law, historic titles and rights with respect to unclaimed or unoccupied islands which are outside the limits of territorial waters of other coastal States, are evaluated by principles of discovery, effective occupation, or *effectivités*, that is, exercise of sovereign functions and powers over the island in question in proportion to the nature of the territory involved.⁷⁹ This depends on one or more factors such as: how large is the island or insular land feature, how well is it populated, its ability to support human habitation and economic activity or the kind or type of authority and control exercised, as for example, for the establishment and maintenance of a light house.

56. More importantly, it is not uncommon for States to invoke “an ancient, original or historic title”; particularly in Asia, “where traditional boundaries play a significant role”.⁸⁰ This is evident in the case of Malaysia and Singapore involving a dispute over a rocky insular land, which is half the size of a foot-ball field, referred to as Palau Batu Puteh/Pedra Branca.⁸¹ In regard to the title over the Palau Batu Puteh/Pedra Branca, the ICJ held that while Malaysia had the original title on the basis of historic title⁸² as of 1844, it concluded, that commencing from the construction of a light house by the United Kingdom on Pedra Branca/Pulau Batu Puteh in 1844 “especially by reference to the conduct of Singapore and its predecessors *à titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore”.⁸³

Similarly, in promulgating the 1992 Law on the Territorial Sea and the Contiguous Zone, China merely reiterated (in Article 2, quoted earlier) its position regarding its sovereignty over land features in the South China Sea and their surrounding waters, without explaining the legal basis for such a position. Yet again, in its 1996 declaration upon ratifying UNCLOS, China reiterated its claim by reference to Article 2 of the 1992 Law but provided no further elaboration. The first chronological reference to “historic rights” is found in China’s Exclusive Economic Zone and Continental Shelf Act of 26 June 1998. *Ibid.*, 129.

- 79 See Ian Brownlie, *Principles of Public International Law* (Oxford U.P., 6th ed., 2003), chp. 7, 123-161, at 131-139.
- 80 *Ibid.*, 141, citing *Kaikobad*, 54 BYBIL (1983), 130-134 .
- 81 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008, 12.
- 82 The Court concluded “that Malaysia has established to the satisfaction of the Court that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor”, *ibid.*, para.117. Malaysia claimed title to Pulau Batu Puteh from “time immemorial”.
- 83 *Ibid.*, para.276. The Court summarized various acts of Singapore and response or lack of response to those acts by Malaysia which provided a basis for its conclusion. It noted that, “Without being exhaustive, the Court recalls their investigation of marine accidents, their control over visits, Singapore’s installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de*

57. This case of sovereignty over Pedra Branca between Malaysia/Singapore illustrates two points: States can claim historic rights to small and uninhabited or even seemingly uninhabitable maritime features. Second, it is clear that a mere assertion of title to an island or insular land feature on the basis of “historic rights” or mere control is not enough. It has to be supported by continuous and uninterrupted, and one might add unopposed, exercise of sovereign functions in proportion to the nature of the maritime feature, particularly in the face of any adverse claim or claims to title. Further, a State which has effective authority and control over the insular land feature, island or large rock can use the same for such uses as it considers appropriate and suitable in furtherance of its effective control to serve its legitimate interests. In the case of Pedra Branca, a light house was established and maintained for several decades, and more recently Singapore undertook land reclamation around the island to better its utilization. In assessing the relative merits of adversarial claims, the case involving sovereignty over Pedra Branca took into consideration principles such as prescription,⁸⁴

souverain, the bulk of them after 1953. Malaysia and its predecessors did not respond in any way to that conduct, or the other conduct with that character identified earlier in this Judgment, of all of which (but for the installation of the naval communication equipment) it had notice.

Further, the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more. And, when official visits (in the 1970s for instance) were made, they were subject to express Singapore permission. Malaysia’s official maps of the 1960s and 1970s also indicate an appreciation by it that Singapore had sovereignty. Those maps, like the conduct of both Parties which the Court has briefly recalled, are fully consistent with the final matter the Court recalls. It is the clearly stated position of the Acting Secretary of the State of Johor in 1953 that Johor did not claim ownership of Pedra Branca/Pulau Batu Puteh. That statement has major significance”, *ibid.*, paras.274-275.

84 For a reference to acquisitive prescription, see the joint dissenting opinion of Judges Simma and Abraham. As for the conditions to which the implementation of acquisitive prescription is subject, the judges noted that “we know that there are four”. “First, the State which relies on it must exercise authority over the territory concerned *à titre de souverain*, which implies, on the one hand, the effective exercise of the attributes of sovereignty (*corpus*), and, on the other hand, sovereign intent (*animus*). Second, the exercise of authority must be peaceful and continuous. Third, the exercise of sovereignty must be public, which is to say visible, an essential condition for establishing the acquiescence—through failure to respond—of the State holding the original title. Fourth and last, the exercise of authority must continue in the conditions just described for quite a long period. Although it did not mention prescription, as we have said, the Court would not seem to have intended to apply criteria other than those in the present case”, *ibid.*, 122, para.17.

Judges Simma and Abraham also noted that “one idea unmistakably emerges from the jurisprudence: when there is an original sovereign, no exercise of State authority, however continuous and effective, can result in a transfer of sovereignty if it

acquiescence⁸⁵ or estoppel.⁸⁶

58. The Chinese case in respect of its sovereignty over four different island groups would have to be examined like the case of Malay because it claims to have asserted its sovereignty over the islands and other maritime features in the South China Sea from historic times. China pointed out that it promptly reasserted the same since 1948. The claim of ownership of the islands by the Philippines which it asserted since 1970 would have to be weighed against these Chinese claims. The Philippines' claims were opposed by China and other countries. Further, while the Chinese claim the

is not possible to establish that, in one way or another, the original sovereign has consented to the cession of the territory concerned or acquiesced in its transfer to the State having de facto exercised its authority. Without such consent—or acquiescence—original title cannot be ceded, even when confronted by a continuous and effective exercise of authority by a State other than the holder. That is what the Court recently pointed out in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) (see, in particular, the Judgment in ICJ Reports 2002, 346 et seq., paras.62 et seq.). In its Judgment, the Court declined to attach legal effects to the acts of sovereignty performed by Nigeria in the disputed territory, since, as it said in substance, Cameroon held an earlier title to sovereignty and it could not be regarded as having acquiesced to the transfer of that title to Nigeria”, *ibid.*, 120-121, para.13.

85 As the Court in the Malaysia/Singapore case noted, acquiescence “is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent [. . .]. (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, ICJ Reports 1984, 305, para.130)”, *ibid.*, 51, para.121. Further, it is noted that “any passing of sovereignty over territory on the basis of the conduct of the Parties [. . .] must be manifested clearly and without any doubt by that conduct and the relevant facts”. “That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory”. *Ibid.*, para.122.

86 The Court points out that “a party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party’s statement (North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 26, para.30)”, *ibid.*, 81, para.228. More recently the Arbitral Tribunal in *Chagos Marine Protected Area*, observed in this respect as follows: “estoppel is a general principle of law stemming from the general requirement to act in good faith, designed to protect the legitimate expectations of a State that acts in reliance upon the representations of another and to ensure that a State “cannot blow hot and cold”. “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 authorised 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 the State was entitled to rely”. See Award, above n.2, 96, at para.250.

entirety of the Spratly group of islands and the Scarborough Shoal, the Philippines' claims are for parts of that group of islands and the Scarborough Shoal.

59. The Chinese claim to the South China Sea islands and maritime features and their adjacent maritime areas on the face of it predates the emergence of the modern law of the sea which found its final form in the 1982 UNCLOS. Further, in as much as they are based on "historic rights", in some parts, the limits of the maritime areas over which China could lay its claims are governed not by the terms of the UNCLOS but by the long, continuous and effective control it claims to have exercised over these marine areas.⁸⁷ On the other hand, other coastal States including China also acquired maritime entitlements in accordance with the 1982 UNCLOS.

60. Thus the limits set under UNCLOS, instead of creating a conflict, as suggested by the Philippines and envisaged by the Tribunal, could largely result in overlap with the claims of China under "historic rights". To the extent they are coterminous there would be no dispute over titles and only a question of delimitation of maritime boundary where these claims might overlap with similar claims of the Philippines and other coastal States. On the other hand, where titles and resulting maritime entitlements of China based on historic rights are not coterminous with its entitlements under the law of the sea, they could be seen as conflicting with claims of sovereignty of other States in the South China Sea. Thus the Chinese claims based on historic rights could be considered to be in conflict with the claims of Philippines and other coastal States (Indonesia, and Malaysia and Brunei) based on UNCLOS. On the other hand, claims of China are apparently in conflict with Vietnam on grounds both of "historic rights" and UNCLOS.

61. The 1982 Convention is without a doubt a major piece of codification and progressive development of contemporary law of the sea. UNCLOS is binding on all parties not only in terms of the limits it sets for various maritime zones but also in terms of the rights and duties it assigns to the coastal States in relation to the exercise of their sovereign rights, on the one hand,⁸⁸ and third States in respect of the rights and freedoms

87 See for an enunciation and application of this test, see the *Island of Palmas Case* (Netherlands/United States of America), Award of 4 April 1928, RIAA, vol. II (1949), 839. For an analysis of other relevant case law see the *Separate Opinion of Sreenivasa Rao, Judge ad hoc in the case between Malaysia/Singapore*, above n. 81, 155-157, paras. 5-10.

88 Coastal States enjoy sovereignty over the territorial sea, exercise of sovereign rights and exclusive jurisdiction and control over the EEZ and the continental shelf; the right to refuse or withdraw consent to foreign entities or institutions to conduct marine scientific research in its maritime zones, and discretion it enjoys in determining the allowable catch and its own harvesting capacity and allocate any surplus to third parties including the landlocked countries in its region are beyond terms of compulsory dispute settlement. However, they are under a duty to ensure conservation and preservation of fish stocks and protect them from over exploitation and endangerment as a species; protect and preserve marine environment and not deny arbitrarily

they enjoy, on the other hand, in the various maritime zones.⁸⁹ However, 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.

62. It does not appear possible for the Tribunal to declare that merely on the basis of provisions of UNCLOS China cannot appropriate low-tide elevations and equate or assimilate them to the status of islands capable of generating entitlements to different maritime zones. For this it would have to weigh and evaluate the various acts it performed before the dispute with the Philippines arose. In respect of low-tide elevations and “rocks”, there is no express prohibition in customary law of the sea against their appropriation. As the Court in the *Qatar v. Bahrain* case noted,

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.

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.⁹⁰

Any further observations the Court made in that context with respect to the status of low-tide elevations and other maritime features under the law of the sea as developed since 1958 and now incorporated in the relevant provisions of the 1982

allocation of surplus in fish stocks to third parties over and above its own harvesting capacity.

89 Third states enjoy the right of innocent passage and the use and enjoyment of the freedoms of the high sea in the maritime zones which are otherwise under the exclusive jurisdiction and control of the coastal State. They cannot establish any artificial installations in these maritime zones which would come in conflict with the sovereign rights coastal States have over the economic uses to which the maritime zones under its exclusive jurisdiction and control.

90 See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, ICJ Reports 2001, 40, at 101-102, paras.204-205.

UNCLOS⁹¹ cannot be used by the Tribunal as a basis to assess rights China claims to have acquired prior to their conclusion.⁹²

63. It is clear, incidentally, if we go by the jurisprudence of the Court and the law concerning acquisition of sovereignty over islands and other maritime features, the Chinese claims concerning the historic rights must be verified or assessed in terms of the inter-temporal law, that is, law in force at the time it claims to have consolidated those rights⁹³; and on the basis of sovereign acts it performed to consolidate its title

91 The Court, however, went on to add what the law as developed since 1958 and crystallized in the 1982 Convention would suggest, “in the absence of other rules and legal principles”, by way of general principles governing the status of law on low tide elevations and rocks, first for the purpose of appropriation or acquisition and second for the purpose of using them as base points for extending the outer limits of the territorial sea. In both these respects it found that on the basis of the “few existing rules”, a general assumption that “low-tide elevations are territory in the same sense as islands” cannot be justified. Noting that “the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable”, it noted that 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”. Further, referring to paragraph 3 of Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and paragraph 4 of article 7 of the 1982 Convention on the Law of the Sea, the Court noted that “straight baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them”. These provisions, according to the Court, “are another indication that low-tide elevations cannot be equated with islands, which under all circumstances qualify as basepoints for straight baselines”. *Ibid.*, at 102, paras.206-208. Concerning the territoriality of low-tide elevations, see Y. Tanaka, *Low-Tide Elevations in International Law of the Sea: Selected Issues*, 20 *Ocean Yearbook* (2006), 198-207.

92 Judge Oda related the origins of the present law of the sea as incorporated in the 1982 UNCLOS to the development of law to the 1930 Hague Conference for the Codification of International Law. See the separate opinion of Judge Shigeru Oda, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) Merits, Judgment*, ICJ Reports 2001, 40, 119-143, at 124-125, paras.7-8. If we go by this observation, in order to succeed China might have to show exercise of its sovereign functions from a date prior to 1930 to show that it acquired sovereignty or sovereign rights over the maritime features in question.

93 According to Sir Gerald Fitzmaurice, cited by Sir Ian Brownlie, “It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today”. See Ian Brownlie, above n.76, 124-125. This principle was applied by Judge Huber in the *Island of Palmas* case. *Ibid.* On the acquisition of legal title to territory, see Dr. Yoshifumi Tanaka, *Passing of Sovereignty: the Malaysia/Singapore Territorial Dispute before the ICJ*, *The Hague Justice Portal*, 25 August 2008, www.haguejusticportal.net/index.php?id=9665, 11 (fn.48). See also G Distefano, *The*

prior to the “critical date”⁹⁴ on which the dispute between China and the Philippines might be said to have been crystallized.

64. But these are matters for examination on merits concerning the validity of the Chinese claims concerning its historic rights. To that extent they are a central part of issues concern sovereignty and maritime delimitation. Such issues are clearly outside the jurisdiction of the Tribunal.

XI. Nature of the Chinese claims: “*sui generis*” integrally linking historic rights and rights under UNCLOS

65. Based on historic rights which are supplemented by UNCLOS, China claims sovereignty over the islands and other maritime features of the South China Sea and associated maritime entitlements. To that extent its claim is *sui generis* in that it conflates two different legal bases for its claims: one based on historic titles and rights and the other supplemented and enlarged by terms of UNCLOS. In other words it is a complex and interdependent claim and cannot be separated, as one is integrally linked to the other.⁹⁵

66. However, in so far as the Philippines appear to distinguish “historic rights”, which are not referred to in any of the provisions of UNCLOS, from “historic waters” or “historic bays” or “historic titles”, which are referred to in article 15 (“historic title”) and article 10 (“historic bays”), it may be noted that they are all included in the

Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law, 19 *Leiden Journal of International Law* (2006), 1041-1075; H. Post, *International Law Between Dominium and Imperium: Some Reflections on the Foundations of the International Law of Territorial Acquisition*, in: T.D. Gill and W.P. Heere (eds.), *Reflections on Principles and Practice of International Law* (The Hague et al, Kluwer, 2000), 147-173.

94 On the paramount importance of the “critical date” and its significance, see Tanaka, *ibid.*, 3, and foot note 8 for reference to Sir Gerald Fitzmaurice who defined the critical date as “the date after which the actions of the parties can no longer affect the issue”. Sir Gerald Fitzmaurice, 1 *The Law and Procedure of the International Court of Justice* (Cambridge, Cambridge University Press, 1995), 261. According to Thirlway, the critical date purports to enable a judge to exclude from consideration acts which are likely to have been performed in order to consolidate a State’s own view as to its rights in an area where it is known that these are disputed. H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, Part Seven, 66 *British Yearbook of International Law* (1996), 33. See also M.G. Kohen, *Possession contestée et souveraineté territoriale* (Paris, PUF, 1997) 169-183; L.F.E. Goldie, *The Critical Date*, 12 *ICLQ* (1963), 1251-1284.

95 See Sienho Yee, above n.13, 682-685 for a statement on the case of China on the basis of history and for emphasizing that the dispute between the Philippines is a “sovereignty-delimitation combined dispute”.

right of a State party to UNCLOS to exclude any dispute concerning them from UNCLOS compulsory procedures of dispute settlement including compulsory conciliation procedure if it “necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental shelf or insular land territory” (article 298(1(a)(i)).

67. It may be noted in this connection, first, that there is no settled criterion in customary law to define a “bay”. Article 10 of the UNCLOS, as the ICJ in the *Land, Island, and Maritime Frontier* case (1982) noted, “might be found to express general customary law”. In spite of this, the practical application of the criterion noted under article 10 “is not wholly free from difficulty”. It is noted that the “main difficulty is that often it is not obvious which are the ‘natural entrance points’ of an indentation”. Further, the “application of the rules to bays with islands fringing, or lying just seaward of, the mouth may also be problematic”.⁹⁶ If this is the case with “bays”, it is even more problematic to assess the legal validity of claims concerning “historic bays” which are not covered by article 10, “because these bays are likely to be larger than the bays” with which it deals.⁹⁷

68. The legal status of historic bays and historic titles under general international law is not as well settled as the legal status of maritime features and islands and the maritime entitlements they generate under the Convention. Perhaps the most controversial bay on historic grounds was that of Libya, in the Gulf of Sidra (Sirte), which it claimed and drew a baseline of 296 miles. Myanmar also claimed a historic bay and drew a baseline of 222 miles across the Martaban Bay. Vietnam has claimed historic bay status to parts of the Gulf of Thailand and Tonkin. There are several other examples: Russia to the Peter the Great Bay; Canada to the Hudson Bay, and Italy to the Gulf of Taranto. All these claims attracted protests. To sustain a claim to historic bays, and exclusive jurisdiction over the same, effective, open and continuous exercise of authority is needed and the same must have received the acquiescence of other States. These are matters that are required to be established both in fact and in law. In the case of countries which suffered colonialism, evidence can relate to times prior to the colonial period, evidence of functions and acts of colonial power and action by the newly independent State taken soon after regaining independence. The case of Sri Lanka with respect to the Gulf of Mannar is one example.⁹⁸

69. Given the above, it would be highly difficult for the Tribunal to assess the claims of China over various contested maritime features merely in terms of their status as geological features under UNCLOS. In any case disputes concerning “historic bays” can be excluded from the procedures of compulsory settlement of disputes.⁹⁹

96 R.R. Churchill and A.V. Lowe, above n.24, 42-43.

97 *Ibid.*, 45.

98 See Churchill and Lowe, above n.24, 41-46.

99 *Ibid.*, 455.

70. From the above, it is apparent that the attempt to separate issues and evidence concerning historic titles and attempting to focus on interpretation and application of the provisions of the Convention is not possible; and in the end it might turn out to be a futile exercise.

71. In any case, the scheme of compulsory settlement of disputes under UNCLOS does not apply to several important issues such as historic titles and rights, historic bays, military uses and law enforcement activities associated with sovereignty or sovereign rights. Further, the decisions a coastal State is likely to take in pursuance of exercise of its sovereign discretion are also not subject to compulsory dispute settlement. The LOS conference could not achieve any consensus on any of these substantive matters. This is one of the reasons why that dispute settlement mechanism excluded disputes concerning “historic bays and titles” under article 298.

72. In other words, in order for the Tribunal to come to any definitive conclusions over the Submissions of the Philippines, it would have to necessarily engage in evaluating evidence considering historic rights claimed by China. The Tribunal does not hide its frustration or dilemma in this regard, given the objections China raised to its jurisdiction, when it noted that while China is “free to set out its public position as it considers most appropriate”,¹⁰⁰ “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”.¹⁰¹

73. The issue, according to the Tribunal, is not whether there are disputes of different kinds between China and the Philippines implicating one provision or the other of UNCLOS, but about the “source of maritime entitlements in the South China Sea”. However one characterizes the “disputes” identified by the Tribunal for exercising its jurisdiction, these could not be resolved, by its own analysis without appreciating available evidence concerning “historic rights” of China. No provision of the law of the sea could provide a basis for evaluating that evidence. To this extent there is obvious contradiction or lack of consistency in the position of the Tribunal. On the one hand, it declares that it is not empowered to deal with issues of sovereignty and maritime delimitation in view of the Chinese Declaration pertaining to the disputes under the UNCLOS but, on the other hand, it declares itself competent to examine “the source of maritime entitlements of China in the South China Sea”. In that sense, the position of the Tribunal is manifestly self-contradictory.

74. Further the decision to accept jurisdiction with respect to seven of the submissions presented by the Philippines on the working hypothesis that China has sovereignty over the entire Spratly group of islands, debars it from examining any evidence concerning the exercise of sovereignty as contrary to that assumption. The working hypothesis appears to confirm beyond doubt the point that the resolution of the

100 Award, above n.2, para.160

101 Ibid., 65, para.167.

issues submitted for the Tribunal's consideration cannot be separated from issues concerning Chinese sovereignty over the maritime features and sovereign rights over maritime areas in dispute. Further, the very essence of the claims of the Philippines, as has been made plain, is to oppose and defeat the Chinese claim of historic rights and sovereignty over the maritime features of the South China Sea.

75. For the reasons noted above, the decision of the Tribunal to accept several Submissions made by the Philippines on the ground that they do not per se involve determination of issues concerning sovereignty and maritime delimitation is unsustainable and without merit.

XII. The need for the Tribunal to “isolate the real issue in the case and to identify the object of the claim”

76. The real issue, as the Philippines admits, is a mix of issues questioning sovereignty of China over the islands and other maritime features in dispute. Submissions 1 and 2 of the Philippines to the Tribunal note this as much.¹⁰² Admitting that as between the Philippines and China there could be “disputes in respect of several distinct matters”; and that “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 comes to the conclusion, taking support from 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”.¹⁰³ The question however is not whether there is more than one aspect of the matter on which the Parties are in dispute but whether the different aspects or dimensions of the same dispute could be artificially broken down into different disputes for the purpose of jurisdiction. Any such attempt is highly fraught with the risk of affecting by way of adjudication, explicitly or implicitly, directly or indirectly, issues of sovereignty and historic titles which, by common consent, are excluded from the Tribunal's jurisdiction. The Philippines cited cases in “support for the conclusion that sovereignty claims over maritime features raise no

102 That China's “maritime entitlements in the South China Sea extend beyond those permitted by UNCLOS (in opposition to the [Philippines’], submission 1; and equally that its ‘claim to “historic rights”, including sovereign rights and jurisdiction, within the maritime area enclosed by nine-dash line” goes “beyond the limits of its UNCLOS entitlements (in opposition to the [Philippines’] submission 2”. See Award, 54, para.147.

103 Award, 59, para.152. See also *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), Judgment, ICJ Reports 1980, p. 3 at pp. 19-20, para. 36.

impediment to the determination of their maritime entitlements”.¹⁰⁴ But surely these are cases where jurisdictional issues are not central or relevant; and in any case they were not concerned with issues of sovereignty and maritime delimitation mixed up with issues of maritime entitlement of the very same features in terms of UNCLOS.

77. It is beyond any doubt that from a reading of article 298(1)(a)(i), disputes which are mixed up with sovereignty issues are excluded from compulsory dispute settlement procedure including the compulsory conciliation procedure if a State party decided to exclude them by declaration, as China did.¹⁰⁵ In such cases, it is necessary for the Tribunal to desist from an expansive interpretation of its competence to exercise jurisdiction. In the event the Tribunal appeared to have hastily dismissed the main import of the decision in *Chagos Marine Protected Area*, where the majority held against jurisdiction on the ground “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”.¹⁰⁶ It is important to note the emphasis of the Tribunal in the *Chagos* case is on the “implicit decision on sovereignty”, which is also clearly the focus of the Philippines in the present dispute. Thus the Tribunal could not really be oblivious to the impact of findings it is called upon to make, as part of its consideration of merits of the Submissions of the Philippines, on the real and actual dispute which awaits resolution by negotiations between the Parties.

The interests of China in relation to its claims against a third party, Vietnam, would also have to be preserved in the process.¹⁰⁷ Accordingly, the need for the Tribunal to be extra-vigilant at the next stage of merits cannot be overemphasized, it having accepted jurisdiction on issues which are mixed and interdependent with issues of sovereignty and maritime delimitation, and to live up to the promise it made not to affect them either explicitly or implicitly.

104 For the cases cited, see Award, 49, at fns.55, 56 and 57.

105 See Sienho Yee, above n.13, 689-690.

106 See Award, 60, para.154. For the judgment, see *In the Matter of the Chagos Marine Protected Area Arbitration between The Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland*, (PCA, 18 March 2015), at http://pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899.

107 In such matters the ICJ and the Tribunals generally avoid taking jurisdiction and even if they accept jurisdiction would be extra vigilant to protect them. On this point see Sienho Yee, note 13, 691. See also *The Bay of Bengal Maritime Boundary Arbitration between the Republic of Bangladesh and The Republic of India*, page.147, para.477 (Award available at http://archive.pca-cpa.org/BD-IN%2020140707%20Award2890.pdf?fil_id=2705); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624.

XIII. Conclusion

78. The Tribunal at the outset rightly noted that it is “not empowered to act except in respect of one or more *actual disputes* between the Parties”; in addition to being a dispute concerning “the interpretation and application of the Convention”.¹⁰⁸ Second, it also correctly identified its task as one to “isolate the real issue in the case and to identify the object of the claim”. On both these counts the Tribunal’s decision and reasoning on which it is based are open to serious doubt and question. The Tribunal failed to properly assess the real and actual dispute. It is clear from the submissions made by the Philippines that the real object of its exercise is to get a legal direction from the Tribunal requiring China to desist from what it would like the Tribunal to find as “unlawful claims and activities”. To its credit, the Tribunal did not take any view yet on this matter which is put forward by the Philippines as its fifteenth submission. The Tribunal wanted it to clarify its scope and purpose as part of its hearings on merits. It is obvious, and should have been so to the Tribunal as well, that in so submitting the Philippines made clear its real purpose and main objective in submitting the other fourteen Submissions. That is, to get a direction from it against the claims of China based on historic titles and associated maritime entitlements or at least seek to limit them using the Convention as the sole applicable law, knowing full well that the Convention does not encompass in its object and purpose or scope issues of sovereignty, historic titles or bays.

79. The determination by the Court that the dispute could artificially be divided into issues concerning maritime entitlements under law of the sea as opposed to those governed by historic titles is flawed. It failed to recognize that issues of interpretation and application of the Convention in this case are integrally linked to the issues of sovereignty and maritime delimitation, even if they are two separate parts of the same exercise. If the issues concerning maritime delimitation and even more so the rights of sovereignty are outside the jurisdiction of the Tribunal, as agreed to by one and all, its findings on what is left of the various claims submitted by the Philippines are at best likely to emerge as an exercise in the abstract unrelated to the dispute. If, on the other hand, the findings of the Tribunal were to affect issues of sovereignty and maritime delimitation, either directly or indirectly, the whole exercise might be seen as a disingenuous and specious attempt on the part of the Philippines and outside the competence and in excess of the powers conferred on the Tribunal.

80. As for the Tribunal, the summary way in which it dismissed the requirement of “negotiation” as a condition precedent for the exercise of its jurisdiction, made its decision that much less persuasive, despite its studious attention to detail on other grounds. As a practical or pragmatic matter, the Philippines at the end of the day

would in any case have to return to the negotiating table to settle its dispute with China and achieve a mutually acceptable solution.

81. The task before the Tribunal is a delicate one. It places a heavy burden on it to ensure that the legitimate claims of China and that of the third parties are not prejudiced by its judicial findings.¹⁰⁹ It is also hoped that the decisions of this Tribunal would help the Parties to come closer and not drive them further apart than they were before in reconciling their respective claims and legitimate interests.¹¹⁰ One can take some comfort from the fact that the Tribunal itself sees these objectives as of paramount importance forming the core of its mandate.¹¹¹

109 The Tribunal decided against the intervention of Vietnam in the present case which it sought on the ground that it is not an essential or indispensable party to this dispute. It is well-known that Vietnam also has claims of sovereignty and historic rights over the Spratly group of Islands and consequential aspects of maritime delimitation. The Tribunal based its decision on the ground that case between the Philippines and China does not involve issues of sovereignty and historic titles but only interpretation and application of the relevant provisions of UNCLOS.

110 On the potential for prejudice in rendering a judicial decision alongside an ongoing negotiating process, see the dissenting opinions appended to the ICJ's 2011 judgment, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, 644, Dissenting Opinion, 5 (Dec. 5, 2011), Xue, J., dissenting; and Roucouas, J., dissenting, available at www.icj-cij.org/docket/files/142/16835.pdf. Cited also in Robert Barnidge, Jr., above n.40, 552.

111 It is stressed that, "The Tribunal does not see the success on [the Philippines'] Submissions would have an effect on the Philippines's 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", Award, 60, para.153.