PCA Case Nº 2013-19

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF THE PHILIPPINES

- and -

THE PEOPLE'S REPUBLIC OF CHINA

AWARD ON JURISDICTION AND ADMISSIBILITY

Arbitral Tribunal:

Judge Thomas A. Mensah (Presiding Arbitrator)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred H.A. Soons
Judge Rüdiger Wolfrum

Registry:

Permanent Court of Arbitration

29 October 2015

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REPRESENTATIVES OF THE PARTIES

REPUBLIC OF THE PHILIPPINES

AGENT

Mr. Florin T. Hilbay
Solicitor General of the Philippines
replacing Solicitor General Francis H. Jardeleza,
as of 2 March 2015

COUNSEL AND ADVOCATES

Mr. Paul S. Reichler
Mr. Lawrence H. Martin
Foley Hoag LLP, Washington, DC

Professor Bernard H. Oxman
University of Miami School of Law, Miami

Professor Philippe Sands QC
Matrix Chambers, London

Professor Alan Boyle
Essex Court Chambers, London

PEOPLE'S REPUBLIC OF CHINA

No agents or representatives appointed

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The figures in this Award have been taken from the Philippines' Memorial and are included for illustrative purposes only. Their use in this Award is not an indication that the Tribunal endorses the figures or adopts any associated arguments from the Philippines.

GLOSSARY OF DEFINED TERMS

ASEAN	The Association of Southeast Asian Nations
CBD	The Convention on Biological Diversity
China	The People's Republic of China
China's 2006 Declaration	The Declaration of the People's Republic of China under Article 298 of the 1982 United Nations Convention on the Law of the Sea, dated 25 August 2006
China's Position Paper	The Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, published on 7 December 2014
Chinese Ambassador's First Letter	The Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, dated 6 February 2015
Chinese Ambassador's Second Letter	The Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, dated 1 July 2015
Chinese Embassy	The Embassy of the People's Republic of China in the Kingdom of the Netherlands
Convention	The 1982 United Nations Convention on the Law of the Sea (or "UNCLOS")
DOC	The China–ASEAN Declaration on the Conduct of Parties in the South China Sea, dated 4 November 2002
Hearing on Jurisdiction	The Hearing held from 7 to 13 July 2015 pursuant to Procedural Order No. 4, to consider the matter of the Tribunal's Jurisdiction and, as necessary, the admissibility of the Philippines' submissions
ICJ	The International Court of Justice
ITLOS	The International Tribunal for the Law of the Sea
Memorial	The Memorial of the Philippines, filed on 30 March 2014
Notification and Statement of Claim	The Notification and Statement of Claim of the Republic of the Philippines, filed on 22 January 2013
PCA	The Permanent Court of Arbitration
Philippines	The Republic of the Philippines
Request for Further Written Argument	The Tribunal's Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure, annexed to Procedural Order No. 3, dated 16 December 2014.
Submissions	The Submissions of the Philippines set out at pp. 271-272 of its Memorial
Supplemental Written Submission	The Supplemental Written Submission of the Philippines, filed on 16 March 2015, pursuant to Article 25 of the Rules of Procedure and Procedural Order No. 3.
Treaty of Amity	The Treaty of Amity and Cooperation in Southeast Asia, concluded on 24 February 1976
UNCLOS	The 1982 United Nations Convention on the Law of the Sea (or "Convention")
Viet Nam	The Socialist Republic of Viet Nam
Viet Nam's Statement	The Statement of the Ministry of Foreign Affairs of Viet Nam for the attention of the Tribunal in the Proceedings between the Republic of the Philippines and the People's Republic of China, dated 5 December 2014

GLOSSARY OF GEOGRAPHIC NAMES MENTIONED IN THIS AWARD

For ease of reference, and without prejudice to any State's claims, the Tribunal uses throughout this Award the common English designation for the following geographic features, the translations for which were provided in the Philippines' Memorial:

English Name	Chinese Name	Filipino Name
Cuarteron Reef	Huayang Jiao 华阳礁	Calderon Reef
Fiery Cross Reef	Yongshu Jiao 永暑礁	Kagitingan Reef
Gaven Reef	Nanxun Jiao 南薰礁	Burgos
Johnson (South) Reef	Chigua Jiao 赤瓜礁	Mabini Reef
Macclesfield Bank	Zhongsha Qundao 中沙群岛	
McKennan Reef (incl. Hughes Reef)	Ximen Jiao 西门礁 (McKennan) Dongmen Jiao 东门礁 (Hughes)	Chigua Reef
Mischief Reef	Meiji Jiao 美济礁	Panganiban
Namyit Island	Hongxiu Dao 鸿庥岛	Binago Island
Reed Bank	Liyue Tan 礼乐滩	Recto
Scarborough Shoal	Huangyan Dao 黄岩岛	Panatag Shoal or Bajo de Masinloc
Second Thomas Shoal	Ren'ai Jiao 仁爱礁	Ayungin Shoal
Sin Cowe Island	Jinghong Dao 景宏岛	Rurok Island
South China Sea	Nan Hai 南海	West Philippine Sea
Spratly Island Group ("Spratlys")	Nansha Qundao 南沙群岛	Kalayaan Islands
Subi Reef	Zhubi Jiao 渚碧礁	Zamora Reef

I. INTRODUCTION

1. The Parties to this arbitration are the Republic of the Philippines (the "**Philippines**") and the People's Republic of China ("**China**"). Both States are parties to the 1982 United Nations Convention on the Law of the Sea (the "**Convention**" or "**UNCLOS**"), the Philippines having ratified the Convention on 8 May 1984, and China on 7 June 1996.

2. The Convention establishes a comprehensive legal order for the world's seas and oceans. An integral part of the Convention is the system for dispute settlement set out in its Part XV. It was pursuant to Part XV of the Convention that the Philippines initiated this arbitration against China on 22 January 2013, to resolve a dispute over the Parties' respective "maritime entitlements" and the lawfulness of Chinese activities in the South China Sea.

3. The South China Sea is a semi-enclosed sea in the western Pacific Ocean spanning an area of almost 3.5 million square kilometres. It is a crucial shipping lane, a rich fishing ground, and believed to hold substantial oil and gas resources. The South China Sea abuts seven States, five of which have competing claims to its waters. As shown in Figure 1 on page 3 below, the South China Sea lies to the south of China and the islands of Hainan and Taiwan; to the west of the Philippines; to the east of Viet Nam; and to the north of Malaysia, Brunei, Singapore, and Indonesia. The South China Sea includes hundreds of geographical features, either above or below water. Some of these are the subject of long-standing territorial disputes amongst the coastal States.

4. In this arbitration the Philippines seeks rulings in respect of three inter-related matters. First, it seeks declarations that the Parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the Convention and that China's claims based on "historic rights" encompassed within its so-called "nine-dash line" are inconsistent with the Convention and therefore invalid. China's "nine-dash line", as depicted in a map submitted by China to the Secretary General of the United Nations in 2009, is reproduced at Figure 2 on page 5 below.

5. Second, the Philippines seeks determinations as to whether, under the Convention, certain maritime features claimed by both China and the Philippines are properly characterised as islands, rocks, low tide elevations, or submerged banks. According to the Philippines, if these features are "islands" for the purposes of the Convention, they could generate an exclusive economic zone or entitlement to a continental shelf extending as far as 200 nautical miles. If, however, the same features are "rocks" within the meaning of Article 121(3) of the Convention, they would only be capable of generating a territorial sea no greater than 12 nautical miles. If

they are not islands, but merely low-tide elevations or submerged banks, then pursuant to the Convention they would be incapable of generating any such entitlements. The Philippines states that no amount of artificial reclamation work can change the status of the features for the purposes of the Convention. The Philippines focuses in particular on Scarborough Shoal (highlighted in Figure 3 on page 7 below) and eight features in the Spratly Island Group (highlighted in Figure 4 on page 9 below).

6. Third, the Philippines seeks declarations that China has 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.

7. The requests of the Philippines are formally set out in 15 specific submissions at the end of the Philippines' Memorial of 30 March 2014 (the "**Memorial**").

8. Conscious that the Convention is not concerned with territorial disputes, the Philippines has stated at all stages of this arbitration that it is not asking this Tribunal to rule on the territorial sovereignty aspect of its disputes with China. Similarly, conscious that in 2006 China made a declaration, in accordance with the Convention, to exclude maritime boundary delimitations from its acceptance of compulsory dispute settlement procedures under the Convention, the Philippines has stated that it is not asking this Tribunal to delimit any maritime boundaries.

9. The Philippines refers to a long history of attempts by the Parties to resolve their disputes by negotiation. Ultimately, the Philippines considered that those efforts had failed or become futile and resorted to commencing this arbitration, pursuant to the dispute settlement provisions of the Convention and its Annex VII concerning arbitration.

10. China, however, has consistently rejected the Philippines' recourse to arbitration and adhered to the position of neither accepting nor participating in these proceedings. It has articulated this position in public statements and in many diplomatic Notes Verbales both to the Philippines and to the Permanent Court of Arbitration (the "**PCA**"), which serves as the Registry in this arbitration. China's position of non-acceptance of and non-participation in the arbitration was also reaffirmed by the Chinese Ministry of Foreign Affairs in its 7 December 2014 "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" ("**China's Position Paper**") and later in two letters sent to the members of the Tribunal from the Chinese Ambassador to the Netherlands. The Chinese Government has consistently stated that the aforementioned communications shall by no means be interpreted as China's participation in the arbitral proceeding in any form.

Figure 1: The South China Sea (Memorial, Figure 2.1)

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MAP ATTACHED TO CHINA'S NOTES VERBALES
Nos. CML/17/2009 & CML/18/2009
(7 May 2009)

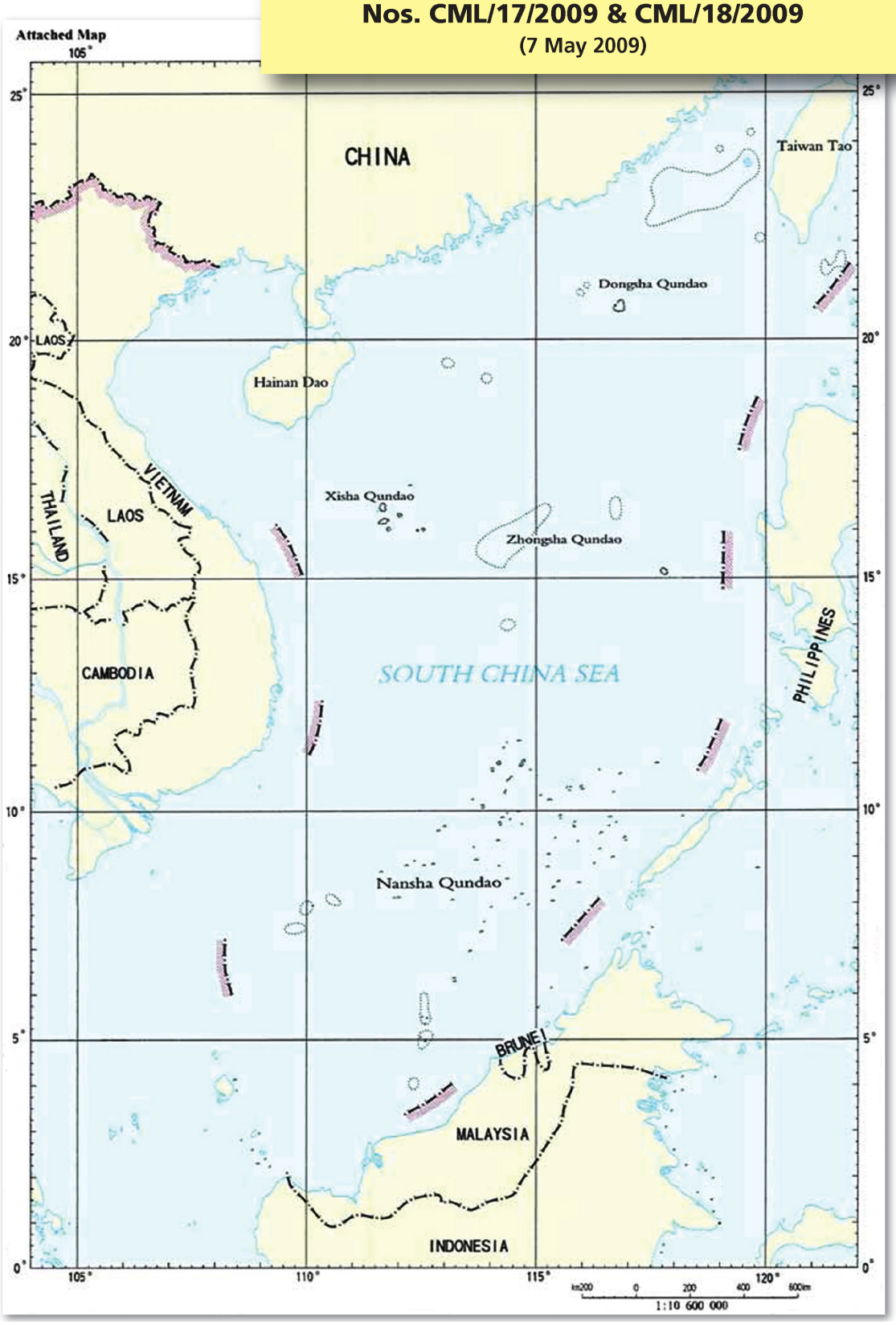

Figure 2: Map attached to China's Notes Verbales to the United Nations Secretary General, Nos. CML/17/2009 and CML/18/2009 (showing so-called "Nine-Dash Line") (Memorial, Figure 1.1)

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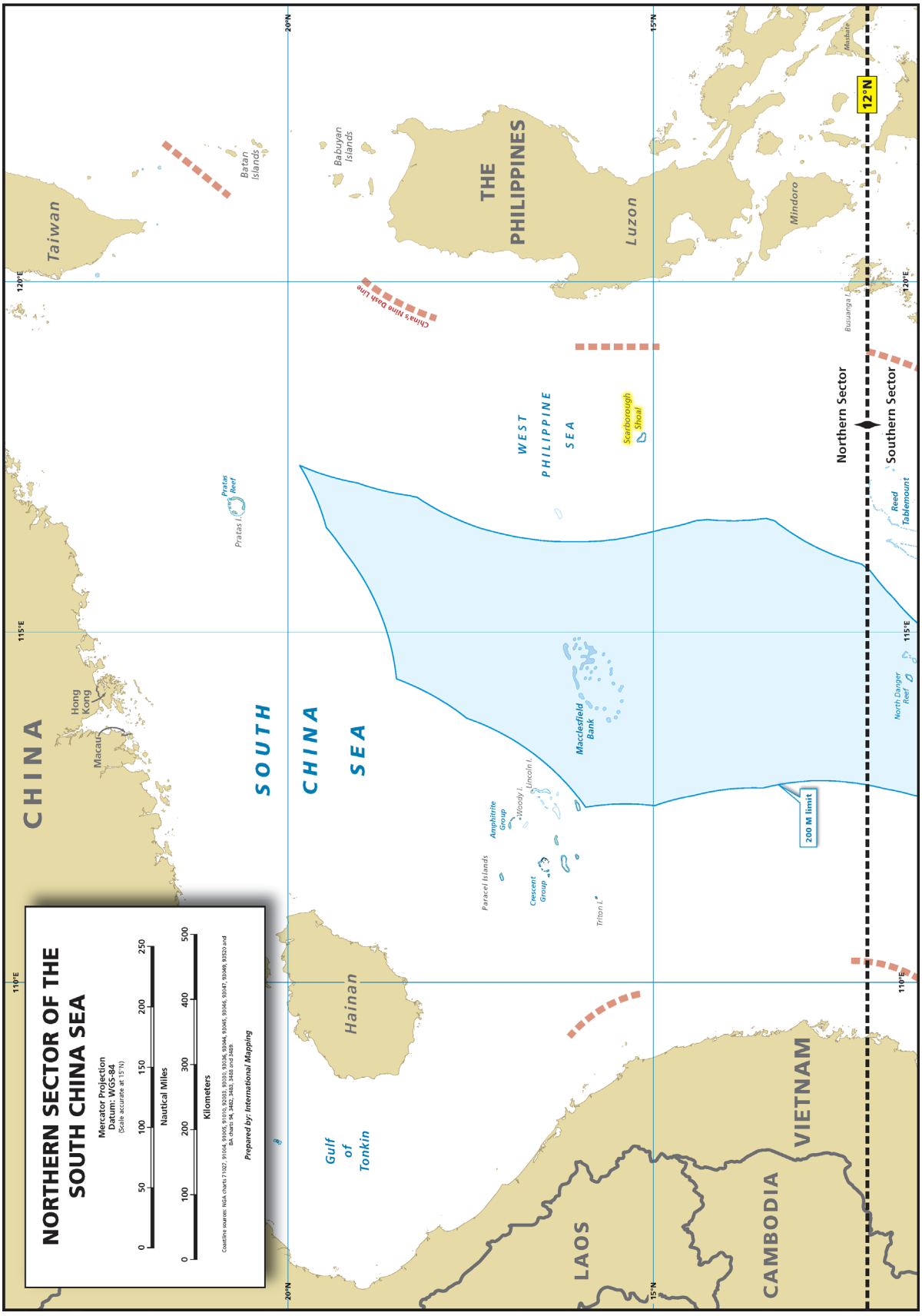

Figure 3: "Northern Sector of the South China Sea" (including Scarborough Shoal) (Memorial, Figure 2.4)

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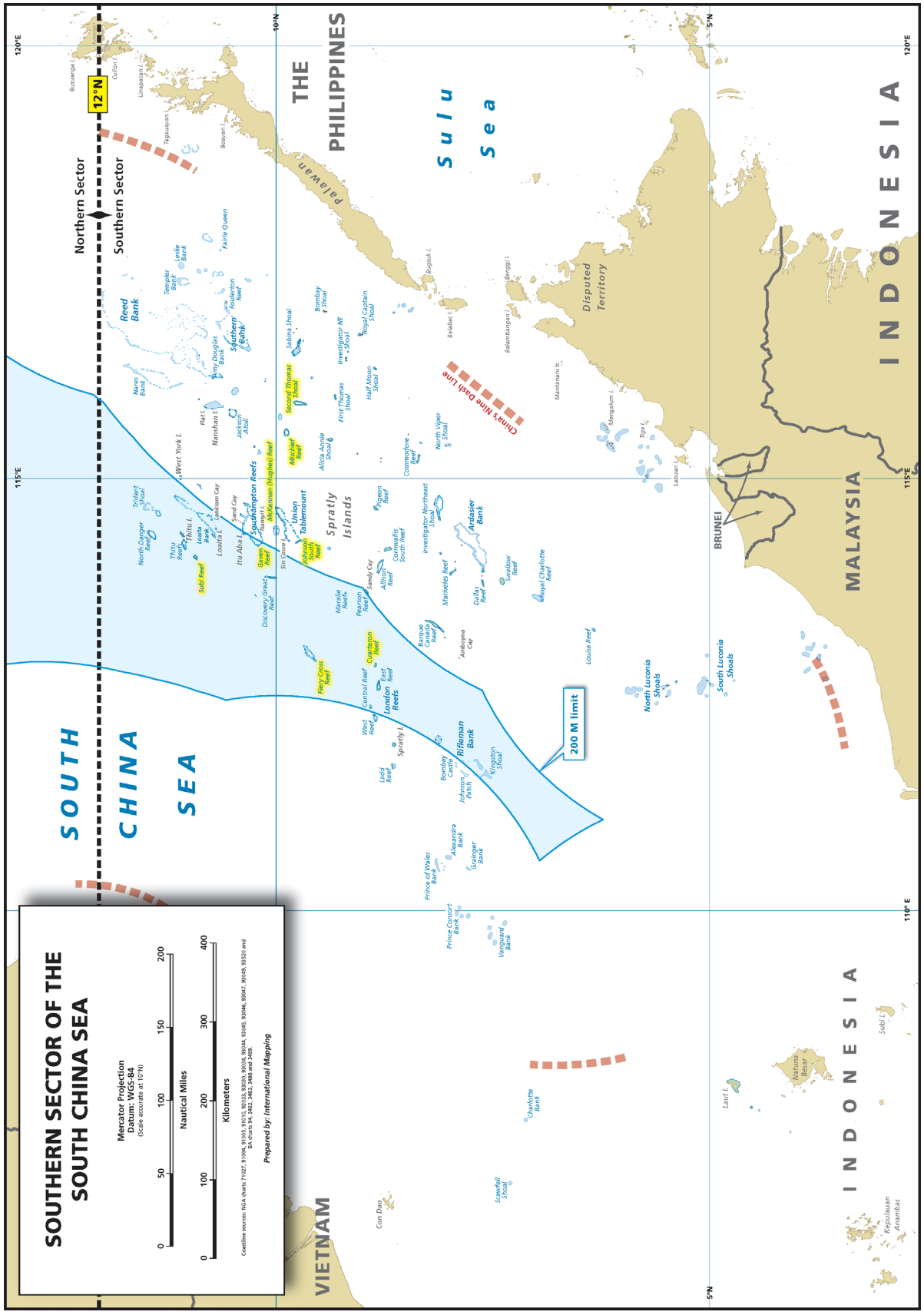

Figure 4: "Southern Sector of the South China Sea" (including Spratly Islands and highlighting features identified in the Philippines' Submissions) (Memorial, Figure 2.5)

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11. Article 9 of Annex VII to the Convention expressly addresses the situation of a non-participating party, providing that: "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings." Thus the non-participation of China does not bar this Tribunal from proceeding with the arbitration. China is still a party to the arbitration, and pursuant to the terms of Article 296(1) of the Convention and Article 11 of Annex VII, it shall be bound by any award the Tribunal issues.

12. China's non-participation does, however, impose a special responsibility on the Tribunal. The Tribunal does not simply adopt the Philippines' claims, and there can be no default judgment as a result of China's non-appearance. Rather, under the terms of Article 9 of Annex VII, the Tribunal "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law" before making any award.

13. In its written arguments, the Philippines attempted to anticipate and address possible objections to the Tribunal's jurisdiction that China might have raised had it participated. The Philippines also suggested that the Tribunal take into account statements by officials and review the academic literature. The Tribunal itself has actively sought to satisfy itself as to whether it has jurisdiction over the dispute. Following China's decision not to make a formal submission in this arbitration, the Tribunal requested the Philippines to provide further written argument on certain questions relating to jurisdiction and posed questions to the Philippines both prior to and during an oral hearing held in July 2015 at the Peace Palace in The Hague, the Netherlands.

14. The publication of China's Position Paper in December 2014 facilitated the Tribunal's task to some extent, because in it, China expounded three main reasons why it considers that the Tribunal "does not have jurisdiction over this case." China summarises these as follows:

> - The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention.
>
> - China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;
>
> - Even assuming, arguendo, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlements.

15. In its Procedural Order No. 4 of 21 April 2015, the Tribunal decided to treat the Position Paper and certain communications from China as constituting, in effect, a plea concerning jurisdiction.

Under the Tribunal's Rules of Procedure, this meant that the Tribunal would conduct a hearing dedicated to jurisdiction and rule on any plea concerning jurisdiction as a preliminary question, unless it determines that any objection to jurisdiction "does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits." Accordingly, the Tribunal held a hearing from 7 to 13 July 2015 focused on issues of jurisdiction and admissibility. In line with its duty to satisfy itself that it has jurisdiction, the Tribunal did not limit the hearing to the three issues raised in China's Position Paper, but invited the Philippines to address other possible jurisdictional questions. China did not attend the hearing, but was provided with daily transcripts and all documents submitted during the course of the hearing. In addition to a large delegation from the Philippines, representatives from Malaysia, the Republic of Indonesia, the Socialist Republic of Viet Nam, the Kingdom of Thailand, and Japan attended the hearing as observers.

16. In this Award, the Tribunal only addresses matters of jurisdiction and admissibility; it does not address the merits of the Philippines' claims. If the Tribunal finds it has no jurisdiction, the matter ends here. If the Tribunal finds it has jurisdiction over any of the Philippines' claims, it will hold a subsequent hearing on the merits of those claims. If it finds that any of the jurisdictional issues are so closely intertwined with the merits that they cannot be decided as "preliminary questions", the Tribunal will defer those jurisdictional issues for decision after hearing from the Parties on the merits.

17. This Award is structured as follows.

18. **Chapter II** sets out the **Procedural History** of the arbitration. Under Article 5 of Annex VII, the Tribunal has a duty to "assure each party a full opportunity to be heard and to present its case." In line with this duty, and as the Procedural History demonstrates, the Tribunal has communicated to the Philippines and China all developments in this arbitration and provided them with the opportunity to comment on substance and procedure. The Tribunal has reminded China that it remains open to it to participate in these proceedings at any stage. The Tribunal has also taken steps to ensure that the Philippines is not disadvantaged by China's non-appearance and has conducted the proceedings in line with its duty under Article 10 of the Rules of Procedure, "so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute."

19. **Chapter III** contains the Parties' requests for relief, including the claims initially made in the Philippines' Amended Statement of Claim, those refined and encapsulated in the 15 submissions in the Philippines' Memorial of 30 March 2015, as well as the specific findings that the Philippines requests the Tribunal to make in this preliminary jurisdictional phase. The

Chapter sets out China's position insofar as can be discerned from communications and public statements, while taking note that China does not accept the arbitration and is not participating in the proceedings.

20. **Chapter IV** deals with a number of preliminary matters. It examines whether the Tribunal has been properly constituted in accordance with the Convention and addresses the legal and practical consequences of China's non-appearance. The Tribunal then considers whether China's allegations that the Philippines' initiation of the arbitration was an "abuse of international legal procedure" or that the Tribunal "manifestly" lacks jurisdiction require any special procedure under Article 294 of the Convention or engage Article 300 on good faith and abuse of rights.

21. **Chapter V** concerns the identification and characterisation of the dispute. The Tribunal examines, first, whether there is a dispute between the Parties concerning the matters raised by the Philippines and, second, whether such a dispute concerns the interpretation or application of the Convention. In so doing, the Tribunal addresses (a) China's contention that the dispute essentially concerns territorial sovereignty and (b) China's characterisation of the dispute as relating to maritime boundaries. For each category of the Philippines' submissions, the Tribunal then identifies whether there is a dispute concerning the interpretation and application of the Convention.

22. In **Chapter VI** the Tribunal addresses whether the Philippines' recourse to arbitration is precluded by the fact that there are other States bordering the South China Sea whose interests may be affected by the arbitration, but who are not parties to the arbitration.

23. In **Chapter VII** the Tribunal considers Section 1 of Part XV of the Convention, which requires States to settle their disputes by peaceful means and preserves their freedom to agree on the means to do so. The Tribunal examines whether the Parties had an agreement, reflected particularly in the 2002 China–ASEAN Declaration on the Conduct of Parties in the South China Sea (the "**DOC**"), that would preclude recourse to arbitration by virtue of Articles 281 and 282 of the Convention. The Tribunal then addresses whether the Parties have engaged in an "exchange of views" as required by Article 283.

24. **Chapter VIII** examines whether the limitations and exceptions set out in Section 3 of Part XV of the Convention (for example relating to "sea boundary delimitations", "historic bays or titles", and "military activities") pose any obstacle to the Tribunal's jurisdiction over the Philippines' 15 submissions. To the extent that the Tribunal is able to make such an assessment now, the Tribunal decides whether it has jurisdiction over certain of the Philippines' submissions. For the

remaining submissions, to the extent that they give rise to jurisdictional questions not of an exclusively preliminary nature (meaning that the Tribunal cannot decide them without also examining the merits), the Tribunal reserves any decision as to whether it has jurisdiction over those submissions for further consideration in conjunction with the merits of the Philippines' claims.

25. **Chapter IX** contains the Tribunal's formal decisions at this stage of the arbitration.

* * *

II. PROCEDURAL HISTORY

A. INITIATION OF THE ARBITRATION

26. By Notification and Statement of Claim dated 22 January 2013, the Philippines initiated arbitration proceedings against China pursuant to Articles 286 and 287 of the Convention and in accordance with Article 1 of Annex VII of the Convention. The Philippines stated that it seeks an Award that:

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

The Philippines also stressed that it:

> does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. The Philippines is conscious of China's Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.[2]

27. In response, China presented a Note Verbale to the Department of Foreign Affairs of the Philippines on 19 February 2013, rejecting the arbitration and returning the Notification and Statement of Claim to the Philippines.[3] In its Note Verbale, China stated that its position on the South China Sea issues "has been consistent and clear" and that "at the core of the disputes between China and the Philippines in the South China Sea are the territorial disputes over some islands and reefs of the Nansha Islands." China noted that "the two countries also have overlapping jurisdictional claims over parts of the maritime area in the South China Sea" and that both sides had agreed to settle the dispute through bilateral negotiations and friendly consultations.

1 Notification and Statement of Claim of the Republic of the Philippines, 22 January 2013 (hereinafter "**Notification and Statement of Claim**"), para. 6 (**Annex 1**).

2 Notification and Statement of Claim, para. 7.

3 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, 19 February 2013 (**Annex 3**).

B. CONSTITUTION OF THE TRIBUNAL

28. In its Notification and Statement of Claim, the Philippines appointed Judge Rüdiger Wolfrum, a German national, as a member of the Tribunal in accordance with Article 3(b) of Annex VII to the Convention.

29. China did not appoint a member of the Tribunal within 30 days of receiving the Notification and Statement of Claim. Consequently, on 22 February 2013, the Philippines requested the President of the International Tribunal of the Law of the Sea ("**ITLOS**") to appoint the second arbitrator pursuant to Articles 3(c) and 3(e) of Annex VII to the Convention. On 23 March 2013, the President of ITLOS appointed Judge Stanislaw Pawlak, a national of Poland, as arbitrator.

30. By letter dated 25 March 2013, the Philippines requested the President of ITLOS to appoint the three remaining members of the Tribunal pursuant to Article 3(d) and (e) of Annex VII to the Convention. On 24 April 2013, the President of ITLOS appointed Judge Jean-Pierre Cot, a national of France, and Professor Alfred H.A. Soons, a national of the Netherlands, as arbitrators and Ambassador M.C.W. Pinto, a national of Sri Lanka, as arbitrator and President of the Tribunal.

31. On 21 May 2013, Ambassador Pinto withdrew from the Tribunal. By letter dated 27 May 2013, the Philippines requested that the President of ITLOS fill the vacancy in accordance with Articles 3(e) and (f) of Annex VII to the Convention. On 21 June 2013, the President of ITLOS appointed Judge Thomas A. Mensah, a national of Ghana, as arbitrator and President of the Tribunal, thus constituting the present Tribunal.

C. ADMINISTRATIVE DIRECTIVE NO. 1, PROCEDURAL ORDER NO. 1, AND RULES OF PROCEDURE

32. On 5 July 2013, the President of the Tribunal wrote to the Permanent Court of Arbitration to ascertain whether the PCA was willing to serve as Registry for the Proceedings. On the same date, the PCA responded affirmatively.

33. On 6 July 2013, the President of the Tribunal wrote to the Parties to seek their views about the designation of The Hague as the seat of the arbitration and the PCA as the Registry. On 8 July 2013, the Philippines confirmed that it was comfortable with both designations. China did not respond.

34. On 11 July 2013, a meeting of the Tribunal was held at the Peace Palace in The Hague. Following the meeting, on 12 July 2013, the Tribunal issued Administrative Directive No. 1,

pursuant to which the Tribunal formalised the appointment of the PCA as Registry and set in place arrangements for a deposit to cover fees and expenses. Along with Administrative Directive No. 1, the Tribunal provided the Parties with draft Rules of Procedure and Declarations of Acceptance and Statements of Impartiality and Independence signed by each arbitrator. Both Parties were invited to comment on the draft Rules of Procedure and to provide the Registry with contact details of their Agents, Counsel, or other representatives. The PCA transmitted these materials to the Agent for the Philippines and the Embassy of the People's Republic of China in the Kingdom of the Netherlands (the "**Chinese Embassy**").

35. On 15 July 2013, the Secretary-General of the PCA, in accordance with Administrative Directive No. 1, informed the Tribunal and the Parties that Ms. Judith Levine, PCA Senior Legal Counsel, had been appointed to serve as Registrar in these proceedings.

36. On 31 July 2013, the Philippines submitted its comments on the draft Rules of Procedure.

37. By Note Verbale dated 29 July 2013, China reiterated "its position that it does not accept the arbitration initiated by the Philippines" and returned the Tribunal's letter of 12 July 2013 and accompanying documents. China emphasised that its Note Verbale "shall not be regarded as China's acceptance of or participation in the arbitration procedure." Throughout these proceedings, China has consistently asserted its non-acceptance of, and non-participation in, this arbitration and has returned all subsequent correspondence by way of Notes Verbales substantively similar to that dated 29 July 2013.

38. On 20 August 2013, the Tribunal, having considered the communications from the Parties, provided the Parties with revised drafts of the Rules of Procedure and Procedural Order No. 1 and informed them that it would issue the documents within a week, absent strong reservations expressed by either Party.

39. On 27 August 2013, the Tribunal issued Procedural Order No. 1, by which it adopted the Rules of Procedure and fixed 30 March 2014 as the date for the Philippines to submit a Memorial that "shall fully address all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute." Among other things, the Rules of Procedure, in Article 25(1), recalled that:

> Pursuant to Article 9 of Annex VII to the Convention, if one of the Parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Arbitral Tribunal to continue the proceedings and to make its Award. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings. Before making its award, the Arbitral Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Pursuant to Article 12 of the Rules of Procedure, the Registry transmitted these documents and all subsequent communications in these proceedings to the Agent of and Counsel for the Philippines and to the Chinese Ambassador to the Kingdom of the Netherlands.

40. On 14 November 2013, after the Chinese Ambassador to the United Kingdom requested a meeting with the President of the Tribunal, the Tribunal sent a letter to remind the Parties to refrain from *ex parte* communications with members of the Tribunal. The Tribunal stated that "[i]f a Party wishes to express its position on matters in dispute, it should be aware that such statements will be made available to all members of the Tribunal, the Registry and the other Party, in accordance with the Rules of Procedure and the need to ensure that the Parties are treated with equality." The Tribunal encouraged the Parties to direct any questions of a procedural nature to the Registry. The Tribunal recalled that the Registry had on two prior occasions discussed informal questions of a procedural nature with a representative of the Chinese Embassy and assured the Parties that any informal questions would be treated as such and would not affect either Party's formal position with respect to the proceedings.

41. On 3 February 2014, following enquiries from other States, the media, and the public and having sought the views of the Parties, the Tribunal directed the PCA to publish the Rules of Procedure on its website in accordance with Article 16 of the Rules of Procedure.

D. WRITTEN ARGUMENTS

42. On 28 February 2014, the Philippines applied for leave to amend its Statement of Claim by adding a request to determine the status pursuant to the Convention of the feature known internationally as "Second Thomas Shoal".

43. On 11 March 2014, having considered the Philippines' request and the proposed amendments and having sought and received no comments from China, the Tribunal granted the requested leave pursuant to Article 19 of the Rules of Procedure and accepted the Philippines' Amended Statement of Claim.

44. On 18 March 2014, the Philippines wrote to the Tribunal concerning "the recent actions of China to prevent the rotation and resupply of Philippine personnel stationed at Second Thomas (Ayungin) Shoal." The Philippines stated that "China's conduct seriously aggravates and extends the dispute" and reserved the right "to bring an application for the indication of provisional measures at the appropriate moment." On 19 March 2014, the Tribunal noted that it had not been called upon to take specific action at that time and welcomed any comments China might wish to provide on the Philippines' letter.

45. On 30 March 2014, pursuant to Procedural Order No. 1, the Philippines submitted its Memorial and accompanying annexes, Chapter 7 of which dealt in particular with jurisdictional issues. In accordance with the Rules of Procedure, copies of the Memorial were sent to members of the Tribunal, the PCA, and the Embassy of the People's Republic of China in the Kingdom of the Netherlands.

46. On 7 April 2014, the Philippines wrote further to the Tribunal regarding "China's most recent actions in and around Second Thomas (Ayungin Shoal)" and expressed concern "about its ability to resupply its personnel." The Philippines reserved "all of its rights, including the right to bring an application for the indication of provisional measures." On the same day, the Tribunal transmitted a copy of the letter to China, noting that it had not been asked to take specific action, and invited any comments China might wish to make.

47. On 12 April 2014, the Tribunal received a Note Verbale from the Embassy of the Socialist Republic of Viet Nam ("**Viet Nam**") in the Netherlands, which stated that "Viet Nam's legal interests and rights may be affected" by the arbitration and requested that the Embassy "be furnished with all copies of the pleadings and documents annexed thereto, and any documents relevant to the proceedings." The Tribunal conveyed a copy of the Note Verbale to the Parties on 14 April 2014 and invited them to provide any comments they might wish to make.

48. On 21 April 2014, the Philippines wrote to the Tribunal, stating that it "does not consider that 'Viet Nam's legal interests and rights may be affected' by the proceedings in the present case" and recalling the sections of its Memorial pertaining to third parties. Nevertheless, "in the interests of transparency, and because Viet Nam is also a coastal State in regard to the South China Sea," the Philippines consented to the request that Viet Nam be provided with copies of pleadings, and left it to the discretion of the Tribunal to furnish Viet Nam with other "documents relevant to the proceedings." China did not comment on Viet Nam's requests.

49. On 24 April 2014, having sought the views of the Parties, the Tribunal agreed to grant Viet Nam access to the Memorial of the Philippines and its annexed documents and noted that the Tribunal would consider in due course Viet Nam's request for access to any other relevant documents.

50. The Tribunal met in The Hague on 14-15 May 2014. On 15 May 2014, the Tribunal provided the Parties with a Draft Procedural Order No. 2 and a proposed timetable and invited comments from the Parties. The Tribunal recalled that China had "reiterated its position that it does not accept the arbitration initiated by the Philippines" but also noted that it "[n]onetheless remains open to China to participate in these proceedings."

51. On 29 May 2014, the Philippines provided comments on the Draft Procedural Order No. 2 and the proposed timetable.

52. On 2 June 2014, the Tribunal issued Procedural Order No. 2, in which it set 15 December 2014 as the date by which China could submit a Counter-Memorial.

53. On 30 July 2014, the Philippines wrote to the Tribunal, drawing attention to China's activities at several features in the South China Sea, in particular the land reclamation at McKennan (Hughes) Reef, Johnson Reef, Gaven Reef, and Cuarteron Reef. The Philippines expressed concern regarding: (a) the effect of these activities on the maritime entitlements of the features; (b) the effect on the fragile marine environment; (c) the significant departure from the *status quo*; (d) the consistency of these activities with the China–ASEAN Declaration on the Conduct of Parties in the South China Sea of 4 November 2002; and (e) the obligation of a State not to take action that might aggravate or extend a pending dispute to which it is party. The Philippines indicated that it was continuing to evaluate its options and reserved all of its rights in these proceedings.

54. On 5 December 2014, the Vietnamese Embassy sent a Note Verbale to the Tribunal, accompanied by a "Statement of the Ministry of Foreign Affairs of Viet Nam for the Attention of the Tribunal in the Proceedings between the Republic of the Philippines and the People's Republic of China" and annexed documents ("**Viet Nam's Statement**"). Viet Nam's Statement requested that the Tribunal give due regard to the position of Viet Nam with respect to: (a) advocating full observance and implementation of all rules and procedures of the Convention, including Viet Nam's position that it has "no doubt that the Tribunal has jurisdiction in these proceedings"; (b) preserving Viet Nam's rights and interests of a legal nature; (c) noting that the Philippines does not request this Tribunal to consider issues not subject to its jurisdiction under Article 288 of the Convention (namely questions of sovereignty and maritime delimitation); (d) "resolutely protest[ing] and reject[ing]" any claim by China based on the "nine-dash line"; and (e) supporting the Tribunal's competence to interpret and apply Articles 60, 80, 194(5), 206, 293(1), and 300 of the Convention and other relevant instruments. Viet Nam reserved "the right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law, including the relevant provisions of UNCLOS." Viet Nam also repeated its request to receive copies of all relevant documents in the arbitration.

55. On 7 December 2014, the Ministry of Foreign Affairs of the People's Republic of China published a "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines."

56. On 8 December 2014, the Chinese Embassy deposited with the PCA a Note Verbale requesting that the PCA forward China's Position Paper and its English translation to the members of the Tribunal. The Note Verbale added: "The Chinese Government reiterates that it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines. The Chinese Government hereby makes clear that the forwarding of the aforementioned Position Paper shall not be regarded as China's acceptance of or its participation in the arbitration."

57. On 11 December 2014, the Tribunal wrote to the Parties, noting that it had received the Note Verbale from the People's Republic of China and the accompanying Position Paper. The Tribunal also enclosed and sought the Parties' views on Viet Nam's Statement, in particular with respect to (a) Viet Nam's request for "any further documents relevant to Viet Nam's interests in this matter" and (b) Viet Nam's statement that "it reserves the right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law."

58. On 16 December 2014, the Tribunal—observing that China had not filed a Counter-Memorial in time and mindful of the provisions of Annex VII to the Convention, including Article 5 (which provides that the Tribunal shall "determine its own procedure, assuring to each party a full opportunity to be heard and to present its case") and Article 9 (which provides for the continuation of proceedings if "one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case")—issued Procedural Order No. 3. In Procedural Order No. 3, the Tribunal established a timetable for written submissions from both Parties in accordance with Article 25(2) of the Rules of Procedure. Article 25(2) of the Rules of Procedure provides:

> In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing Party shall be communicated to the non-appearing Party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

59. The Tribunal annexed to Procedural Order No. 3 a Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure (the "**Request for Further Written Argument**") and fixed 16 March 2015 as the date for the Philippines to file a Supplemental Written Submission. The Tribunal also fixed 16 June 2015 as the date by which China could provide comments in response. The Request for Further Written Argument included specific questions relating to admissibility, jurisdiction, and the merits of the dispute

and invited the Philippines' comments on any relevant public statements made by Chinese government officials or others.

60. In a letter accompanying Procedural Order No. 3, the Tribunal invited the Parties' comments on certain procedural matters, including (a) the possible bifurcation of the proceedings, (b) the possible appointment of an expert hydrographer, (c) the possibility of a site visit, (d) the appropriate procedure with regard to any *amicus curiae* submissions that the Tribunal may receive, and (e) the scheduling of a hearing in July 2015. The Tribunal noted China's reiteration of its position that it does not accept the arbitration, but recalled that it nonetheless remains open to China to participate in these proceedings.

61. On 22 December 2014, the Embassy of Viet Nam sent a Note Verbale to the Tribunal, requesting that it be furnished with a copy of Procedural Order No. 3 and further communications between the Tribunal and the Parties. The Tribunal forwarded the Note Verbale to the Parties on 24 December 2014 for their comments.

62. On 26 January 2015, the Philippines wrote twice to the Tribunal. The first letter set out the Philippines' comments on Viet Nam's requests. The Philippines noted, amongst other things, that it values the principles of openness and transparency and stated that it would be appropriate to allow Viet Nam access to the requested documents. The Philippines considered that the Tribunal's broad discretion on procedural matters encompasses the power to permit intervention, to accept Viet Nam's statement into the record, and to take any steps it might consider appropriate to request information from Viet Nam.

63. The second letter contained the Philippines' comments on the procedural matters raised in the Tribunal's letter of 16 December 2014. The Philippines (a) opposed bifurcation, (b) made suggestions as to the appropriate profile of a technical expert, (c) commented on the desirability and prospects of organizing a site visit, (d) commented on appropriate procedures for evaluating any *amicus curiae* submission, and (e) commented on the dates and scope of an oral hearing.

64. On 6 February 2015, the Chinese Ambassador to the Kingdom of the Netherlands wrote individually to the members of the Tribunal, setting out "the Chinese Government's position on issues relating to the South China Sea arbitration initiated by the Philippines" (the "**Chinese Ambassador's First Letter**"). The Chinese Ambassador's First Letter described China's Position Paper as having "comprehensively explain[ed] why the Tribunal . . . manifestly has no jurisdiction over the case." The letter also stated that the Chinese Government "holds an omnibus objection to all procedural applications or steps that would require some kind of response from China." The letter further clarified that China's non-participation and

non-response to any issue raised by the Tribunal "shall not be understood or interpreted by anyone in any sense as China's acquiescence in or non-objection to any and all procedural or substantive matters already or might be raised by the Arbitral Tribunal." The letter further expressed China's "firm opposition" to some of the procedural items raised in the PCA's correspondence, such as "intervention by other States," "*amicus curiae* submissions," and "site visit[s]". Finally, the letter recalled the commitment of China and ASEAN countries to resolving disputes through consultation and negotiation and expressed the hope that "all relevant actors will act in a way that contributes to peaceful settlement of the South China Sea disputes, cooperation among the coastal States of the South China Sea and the maintenance of peace and stability in the South China Sea."

65. On 17 February 2015, the Tribunal authorised the Registry to provide Viet Nam with a copy of Procedural Order No. 3 and the Tribunal's accompanying Request for Further Written Argument. The Tribunal stated that it would address the permissibility of intervention in these proceedings "only in the event that Viet Nam in fact makes a formal application for such intervention."

66. On 2 March 2015, the Philippines wrote to the Tribunal, advising that Acting Solicitor General Florin T. Hilbay would replace the former Solicitor General Francis H. Jardeleza as Agent for the Philippines.

67. On 16 March 2015, pursuant to Procedural Order No. 3, the Philippines submitted its Supplemental Written Submission and accompanying annexes (the "**Supplemental Written Submission**"). In accordance with the Rules of Procedure, copies were sent to members of the Tribunal, the PCA, and the Embassy of the People's Republic of China in the Kingdom of the Netherlands. A copy was also made available to Viet Nam.

E. BIFURCATION OF PROCEEDINGS

68. On 21 April 2015, following its third meeting in The Hague, the Tribunal issued Procedural Order No. 4, in which it noted the views of the Parties on bifurcation and the practice of international courts and tribunals of (a) taking note of public statements or informal communications made by non-appearing Parties, (b) treating such statements and communications as equivalent to or as constituting preliminary objections, and (c) bifurcating proceedings to address some or all of such objections as preliminary questions. Procedural Order No. 4 provided as follows:

1. Scope and Dates of July Hearing

1.1 The Arbitral Tribunal considers that the communications by China, including notably its Position Paper of 7 December 2015 and the Letter of 6 February 2015 from the Ambassador of the People's Republic of China to the Netherlands, effectively constitute a plea concerning this Arbitral Tribunal's jurisdiction for the purposes of Article 20 of the Rules of Procedure and will be treated as such for the purposes of this arbitration.

1.2 As provided for in Article 20(3) of the Rules of Procedure, the Arbitral Tribunal shall "rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character."

1.3 The Arbitral Tribunal considers that, in light of the circumstances and its duty to "assure to each Party a full opportunity to be heard and to present its case," it is appropriate to bifurcate the proceedings and to convene a hearing to consider the matter of the Arbitral Tribunal's jurisdiction and, as necessary, the admissibility of the Philippines' submissions ("Hearing on Jurisdiction").

1.4 Notwithstanding its decision that China's communications effectively constitute a plea concerning the jurisdiction of the Arbitral Tribunal, the Arbitral Tribunal considers that it continues to have a duty pursuant to Article 9 of Annex VII to the Convention to satisfy itself that it has jurisdiction over the dispute. Accordingly, the Arbitral Tribunal shall not be prevented from considering other possible issues of jurisdiction and admissibility not addressed in China's Position Paper, and the Hearing on Jurisdiction will not be limited to the questions raised in China's Position Paper.

1.5 The Hearing on Jurisdiction will commence on 7 July 2015 and will close on 13 July 2015, in accordance with a detailed schedule to be finalised in consultation with the Parties.

1.6 Noting that pursuant to Procedural Order No. 3 China has until 16 June 2015 to submit comments on the Philippines' Supplemental Written Submission and the Philippines' suggestions in its letter of 26 January 2015, the Arbitral Tribunal will aim to circulate, on or before 22 June 2015, any questions it may have relating to issues of jurisdiction and admissibility which it wants the Parties to address during the Hearing on Jurisdiction. The Parties will, however, not be limited during the Hearing on Jurisdiction to addressing those questions and this procedure will not rule out the possibility of individual members of the Arbitral Tribunal raising questions during the course of the hearing.

2. Decision on Jurisdiction and Admissibility

2.1 Conscious of its duty to conduct proceedings "to avoid unnecessary delay and expense and to provide a fair and efficient process," and the Philippines' expressed concerns about delay and disruption, the Arbitral Tribunal will endeavour to issue its decision on such preliminary objections that it determines appropriate as soon as possible after the Hearing.

2.2 If the Arbitral Tribunal determines after the Hearing on Jurisdiction that there are jurisdictional objections that do not possess an exclusively preliminary character, then, in accordance with Article 20(3) of the Rules of Procedure, such matters will be reserved for consideration and decision at a later stage of the proceedings.

. . .

69. Along with Procedural Order No. 4, the Tribunal wrote to the Parties regarding the proposed schedule and logistics for the hearing on jurisdiction and admissibility (the "**Hearing on**

Jurisdiction"). The letter explained that the "Arbitral Tribunal does not intend to open the hearing to members of the public" and that it "will only consider whether representatives of interested States may attend the hearing as observers upon request from that State." It further stated that it would "consider whether to make the verbatim records of the hearings public at some later date." Finally, the Tribunal stated that it was "[c]onscious of its duty under Article 10(1) of the Rules of Procedure to 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute'." The Tribunal accordingly invited the Parties' views on whether it should:

> without prejudice to any findings on jurisdiction and admissibility, nevertheless proceed to: (i) reserve a period of time in the next 6-12 months for a subsequent hearing should such a hearing become necessary; (ii) take steps now to ascertain the availability of potential technical experts who may assist the Arbitral Tribunal in the event a subsequent hearing on the merits should become necessary.

The Parties were also invited to comment on all other matters covered in the letter.

70. On 22 April 2015, the Tribunal informed Viet Nam that it had taken note of Viet Nam's Statement of 5 December 2014 and noted that the Statement had been included in the record by the Philippines as Annex 468 to the Supplemental Written Submission.

F. PRE-HEARING PROCEDURES AND REQUESTS FROM OTHER STATES

71. On 11 May 2015, the Philippines wrote to the Tribunal concerning the procedural matters relating to the Hearing on Jurisdiction. The Philippines stated its "strong interest in transparency and public access to information" and proposed that the verbatim records of the hearing be published after review and correction. The Philippines also urged the Tribunal to consider opening the Hearing on Jurisdiction to the public and indicated that it was in favour of the Tribunal provisionally scheduling dates for subsequent hearings on the merits and making provisional arrangements to engage an appropriate technical expert.

72. On 21 May 2015, the Tribunal received a letter from the Philippines dated 27 April 2015 (the transmission of which had been delayed), which described China's "current[] engage[ment] in a massive land reclamation project at various features in the South China Sea" as "deeply troubling to the Philippines" and submitted that such actions were in "violation of the Philippines' rights and in disregard of . . . China's duty not to cause serious harm to the marine environment." In light of such developments, the Philippines suggested that a merits hearing be provisionally scheduled at the earliest possible date.

73. On 2 June 2015, the Tribunal confirmed the schedule for the Hearing on Jurisdiction. With respect to publicity, the Tribunal decided that the Registry would issue a press release at the

time of the Hearing on Jurisdiction and would publish corrected transcripts shortly thereafter. However, the Tribunal informed the Parties that the hearing would not be open to the public generally and that the Tribunal would only consider allowing representatives of interested States to attend the hearing upon receipt of a written request. With respect to provisional dates for a merits hearing, the Tribunal asked the Parties to reserve dates in late November 2015. The Tribunal also advised that it was checking the availability of expert candidates.

74. On 11 June 2015, the Tribunal received a Note Verbale from the Embassy of Malaysia in the Kingdom of the Netherlands noting that "as one of the littoral states of the South China Sea, Malaysia has been following the proceedings and considers . . . that Malaysia's interests might be affected." The Malaysian Embassy therefore requested copies of pleadings and other relevant documents and requested that a small delegation of representatives be permitted to attend the Hearing on Jurisdiction as observers. The Tribunal then wrote to the Parties seeking their views on Malaysia's requests.

75. By 16 June 2015, the date set by Procedural Order No. 3 for China's comments on the Philippines' Supplemental Written Submission, no comments had been received from China.

76. On 21 June 2015, the Philippines wrote to the Tribunal, repeating its strong interest in the transparency of these proceedings and indicating that it had no objection to Malaysia receiving copies of the relevant documents or sending a small delegation to attend the Hearing on Jurisdiction.

77. On 23 June 2015, the Tribunal wrote to the Parties in preparation for the Hearing on Jurisdiction and, as anticipated in Procedural Order No. 4, set out a list of issues that the Philippines might wish to address in the course of the Hearing.

78. On 25 June 2015, the Tribunal informed the Parties and the Malaysian Embassy that, having sought the views of the Parties, it had decided to permit Malaysia to be furnished with copies of certain documents and to send a small delegation to attend the Hearing on Jurisdiction as observers.

79. On 26 June 2015, the Tribunal received a Note Verbale from the Embassy of Japan in the Kingdom of the Netherlands expressing the interest of Japan "as State Party to the Convention" in attending the Hearing on Jurisdiction as an observer. The Tribunal conveyed the Japanese request to the Parties for comment. The Philippines replied on 28 June 2015 that it did not object to a small delegation of Japanese representatives attending the Hearing on Jurisdiction as observers.

80. On 29 June 2015, the Tribunal received requests from the Embassies of the Socialist Republic of Viet Nam and the Republic of Indonesia in the Kingdom of the Netherlands for permission to send small delegations of observers to the Hearing on Jurisdiction. A similar request was received from the Royal Thai Embassy in The Kingdom of the Netherlands on 30 June 2015. The Tribunal conveyed the requests to the Parties for comment.

81. On 30 June 2015, the Philippines advised that its Agent, Mr. Florin T. Hilbay, had been promoted to Solicitor General of the Philippines as of 16 June 2015.

82. On 1 July 2015, the Philippines stated, "[i]n light of its oft-stated interest in transparency," that it had no objection to Thailand, Indonesia or Viet Nam sending small delegations of representatives to observe the hearing.

83. On 1 July 2015, China's Ambassador to the Kingdom of the Netherlands sent a second letter to the members of the Tribunal (the "**Chinese Ambassador's Second Letter**") setting out the Chinese Government's position. The letter first recalled China's "consistent policy and practice of [resolving] the disputes related to territory and maritime rights and interests with States directly concerned through negotiation and consultation" and noted China's "legitimate right" under the Convention "not to accept any imposed solution or any unilateral resorting to a third-party settlement," a right that it considered the Philippines breached by initiating the arbitration. Second, the Ambassador expressed the Chinese Government's concern that the Philippines' unilateral resort to arbitration would "erode the confidence shared by China and ASEAN Member States in jointly safeguarding peace and stability in the South China Sea." Third, the Ambassador recalled that the Chinese Government's position had been elaborated in China's Position Paper. Finally, the Ambassador stated that the Chinese Government's statements, including the Ambassador's letters, "shall by no means be interpreted as China's participation in the arbitral proceeding" and that China "opposes any moves to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures." A copy of the Chinese Ambassador's Second Letter was sent to the Philippines on 2 July 2015.

84. On 3 July 2015, the Tribunal informed the Parties that it had agreed to permit a small delegation from each of the governments of Viet Nam, Indonesia, Japan, and Thailand (in addition to Malaysia) to send small delegations of representatives to attend the hearing as observers. All observer delegations were informed of the hearing schedule and were reminded that their role would be to watch and listen, not to make statements.

85. On 7 July 2015, the Embassy of Brunei Darussalam in Brussels asked to be provided with "the transcripts of the arbitration and any other relevant information as soon as it becomes available."

G. HEARING ON JURISDICTION AND ADMISSIBILITY

86. Pursuant to Procedural Order No. 4, the Hearing on Jurisdiction took place in two rounds on 7, 8, and 13 July 2015 at the Peace Palace in The Hague, the Netherlands. The following were present at the Hearing:

Tribunal
Judge Thomas A. Mensah (Presiding)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred H.A. Soons
Judge Rüdiger Wolfrum

Philippines
Agent
Solicitor General Mr. Florin T. Hilbay

Representatives of the Philippines
House Speaker Feliciano Belmonte, Jr.
Executive Secretary Paquito N. Ochoa, Jr.
Secretary of Foreign Affairs Albert F. Del Rosario
Secretary of Justice Leila M. De Lima
Secretary of National Defense Voltaire T. Gazmin
Secretary Alfredo Benjamin S. Caguioa
Secretary Ronaldo M. Llamas
Justice Francis H. Jardeleza
Justice Antonio T. Carpio
Ambassador Jaime Victor B. Ledda
Ambassador Victoria S. Bataclan
Deputy Executive Secretary Menardo I. Guevarra
Undersecretary Emmanuel T. Bautista
Undersecretary Abigail D. F. Valte
Undersecretary Mildred Yovela Umali-Hermogenes
Assistant Secretary Benito B. Valeriano
Assistant Secretary Maria Cleofe R. Natividad
Assistant Secretary Eduardo Jose De Vega
Assistant Secretary Naealla Rose Bainto-Aguinaldo
Assistant Secretary Jose Emmanuel David M. Eva III
Justice Sarah Jane T. Fernandez
Consul General Henry S. Bensurto, Jr.
Minister and Consul General Marie Charlotte G. Tang
Minister and Consul Dinno M. Oblena
Director Ana Marie L. Hernando
Second Secretary and Consul Zoilo A. Velasco
Brigadier General Danilo D. Isleta
Colonel Romulo A. Manuel, Jr.

Attorney Josel Mostajo
Attorney Maximo Paulino T. Sison III
Attorney Aiza Katrina S. Valdez
Associate Solicitor Elvira Joselle R. Castro
Associate Solicitor Maria Graciela D. Base
Associate Solicitor Melbourne D. Pana
Mr. Ruben A. Romero
Mr. Rene Fajardo
Ms. Bach Yen Carpio
Attorney Jennie Logronio
Attorney Holy Ampaguey
Attorney Oliver Delfin
Attorney Melquiades Marcus N. Valdez

Counsel and Advocates
Mr. Paul S. Reichler
Mr. Lawrence H. Martin
Professor Bernard H. Oxman
Professor Philippe Sands QC
Professor Alan Boyle

Counsel
Mr. Yuri Parkhomenko
Mr. Nicholas M. Renzler

Technical Expert
Mr. Scott Edmonds

Assistants
Ms. Jessie Barnett-Cox
Ms. Elizabeth Glusman
Ms. Nancy Lopez

China
No Agent or representatives present

Delegations from Observer States

Republic of Indonesia
Mr. Ibnu Wahyutomo, Embassy of Indonesia
Mr. Ayodhia GL Kalake, Ministry for Maritime Affairs
Mr. Damos Dumoli Agusman, Ministry of Foreign Affairs
Ms. Ourina Ritonga, Embassy of Indonesia
Ms. Monica Nila Sari, Embassy of Indonesia
Ms. Tita Yowana Alwis, Ministry of Foreign Affairs
Ms. Fedra Devata Rossi, Ministry of Foreign Affairs

Japan
Mr. Masayoshi Furuya, Embassy of Japan
Mr. Nobuyuki Murai, Embassy of Japan
Ms. Kaori Matsumoto, Embassy of Japan

Malaysia
Mr. Azfar Mohamad Mustafar, Ministry of Foreign Affairs
Mr. Tan Ah Bah, Department of Survey and Mapping
Mr. Mohd Helmy Ahmad, Prime Minister's Department
Mr. Ahmad Zuwairi Yusoff, Embassy of Malaysia

Thailand
Ambassador Ittiporn Boonpracong
Mr. Asi Mamanee, Embassy of Thailand
Ms. Prim Masrinuan, Embassy of Thailand
Ms. Kanokwan Ketchaimas, Embassy of Thailand
Ms. Natsupang Poshyananda, Embassy of Thailand

Socialist Republic of Viet Nam
Mr. Trinh Duc Hai, National Boundary Commission
Ambassador Nguyen Duy Chien
Mr. Nguyen Dang Thang, National Boundary Commission
Mr. Thomas Grant, Counsel

Permanent Court of Arbitration
Ms. Judith Levine (Registrar)
Mr. Garth Schofield
Mr. Robert D. James
Mr. Brian McGarry
Ms. Nicola Peart
Ms. Julia Solana
Ms. Gaëlle Chevalier

Court Reporter
Mr. Trevor McGowan

87. The Secretary-General of the PCA, Mr. Hugo H. Siblesz, also attended part of the Hearing on Jurisdiction as an observer.

88. During the Hearing, oral presentations were made by: Solicitor General Florin T. Hilbay, the Agent of the Philippines; Secretary Albert F. Del Rosario, the Secretary of Foreign Affairs of the Philippines; Mr. Paul S. Reichler and Mr. Lawrence H. Martin of Foley Hoag LLP, Washington, DC; Professor Philippe Sands QC of Matrix Chambers, London; Professor Bernard H. Oxman of the University of Miami; and Professor Alan Boyle of Essex Court Chambers, London.

89. The Registry delivered daily transcripts of the Hearing to the Chinese Embassy, along with copies of all materials submitted by the Philippines during the course of their oral presentations.

90. On 10 July 2015, the Tribunal provided the Parties with "Questions for the Philippines to Address in the Second Round." Copies of the questions were subsequently made available to

the observer delegations. Also on 10 July 2015, the Tribunal invited the Parties to comment on various requests for documents from the observer delegations.

91. On 12 July 2015, the Philippines submitted to the Tribunal various items in connection with the hearing, including: (a) a letter stating the Philippines had no objection to furnishing the observer delegations with copies of the Tribunal's questions of 10 July 2015; (b) a letter commenting on various document requests from the observer delegations; (c) a letter enclosing a copy of a Note Verbale from the Embassy of China in Manila dated 6 July 2015; (d) a letter enclosing Annex 583 which comprised a list of data about satellite photos and navigational charts; and (e) a list of new Annexes which had been referred to in the course of the Philippines' oral pleadings. Copies of these materials were sent to the Chinese Embassy.

92. On 13 July 2015, in the second round of the Hearing on Jurisdiction, the Philippines responded to the Tribunal's written questions circulated on 10 July 2015 as well as to oral questions posed by individual arbitrators. Following a closing statement by the Agent for the Philippines, the Presiding Arbitrator outlined the next steps in the proceeding, including an invitation to the Philippines to submit by 23 July 2015 written responses to certain questions posed during the second round and an opportunity for China to comment by 17 August 2015 on any matter raised during or after the Hearing on Jurisdiction. The Presiding Arbitrator then declared the Hearing on Jurisdiction closed.

H. POST-HEARING PROCEEDINGS

93. On 18 July 2015, in accordance with the Tribunal's invitation to both Parties, the Philippines suggested certain corrections to the transcript.

94. On 23 July 2015 the Philippines filed its Written Responses to the Arbitral Tribunal's 13 July 2015 Questions and accompanying annexes, copies of which were conveyed to China.

95. On 24 July 2015, having sought the views of the Parties on the various requests from observer delegations and from Brunei Darussalam, the Tribunal informed the Parties that it would grant the observer delegations and Brunei Darussalam access to certain documents, including written submissions, procedural orders, answers to the Tribunal's questions, and the reviewed and corrected hearing transcripts.

96. China did not respond to the invitation to submit to the Tribunal, by 17 August 2015, comments on matters raised during or after the Hearing on Jurisdiction. However, on 24 August 2015, China published "Foreign Ministry Spokesperson Hua Chunying's Remarks on the Release of the Transcript of the Oral Hearing on Jurisdiction by the South China Sea Arbitral Tribunal

Established at the Request of the Philippines." In those remarks, the spokesperson recalled that China had "consist[e]ntly expounded its position of neither accepting nor participating in the South China Sea arbitration unilaterally initiated by the Philippines" and that China's Position Paper had "pointed out that the Arbitral Tribunal . . . has no jurisdiction over the case and elaborated on the legal grounds for China's non-acceptance and non-participation in the arbitration."[4]

97. In a letter to the Parties dated 27 September 2015, the Tribunal requested further information from the Philippines about certain annexes in the record. The Philippines responded to this request on 7 October 2015.

I. DEPOSITS FOR COSTS OF THE ARBITRATION

98. Article 33 of the Rules of Procedure states that the PCA may from time to time request the Parties to deposit equal amounts as advances for the costs of the arbitration. Should either Party fail to make the requested deposit within 45 days, the Tribunal may so inform the Parties in order that one of them may make the payment. The Parties have so far been requested to make payments toward the deposit on two occasions. While the Philippines paid its share of the deposit within the time limit granted on each occasion, China has made no payments toward the deposit. Having been informed of China's failure to pay, the Philippines paid China's share of the deposit.

* * *

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

III. RELIEF REQUESTED AND SUBMISSIONS

99. In its Amended Statement of Claim, the Philippines requested, under the heading "Relief Sought", that the Tribunal issue an Award that:

- Declares that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;

- Declares that China's maritime claims in the South China Sea based on its so-called "nine-dash line" are contrary to UNCLOS and invalid;

- Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS;

- Declares that Mischief Reef, McKennan Reef and Second Thomas Shoal are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on Mischief Reef and McKennan Reefs; and its exclusion of Philippine vessels from Second Thomas Shoal, violate the sovereign rights of the Philippines;

- Requires that China end its occupation of and activities on Mischief Reef and McKennan Reef and at Second Thomas Shoal;

- Declares that Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;

- Requires China to terminate its occupation of and activities on Gaven Reef and Subi Reef;

- Declares that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 M; and that China has unlawfully claimed maritime entitlements beyond 12 M from these features;

- Requires that China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with the Convention at or in the vicinity of these features;

- Declares that the Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;

- Declares that China has unlawfully claimed, and has unlawfully exploited the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting living and non-living resources within its Exclusive Economic Zone and Continental Shelf;

- Declares that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under the Convention in areas within and beyond 200 M of the Philippines' archipelagic baselines; and

- Requires that China desist from these unlawful activities.[5]

100. With respect specifically to jurisdiction, the Philippines submitted in its Memorial "that the Tribunal has jurisdiction in regard to all of the claims raised by the Philippines in its Amended Statement of Claim and in [the] Memorial" because:

> 1. All aspects of the disputes raised in the Philippines' Amended Statement of Claim concern the interpretation and application of UNCLOS;
>
> 2. China's decision not to appear has no effect on the Tribunal's jurisdiction;
>
> 3. The 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea does not bar the exercise of jurisdiction by this Tribunal;
>
> 4. The Philippines fulfilled the requirement to engage in an exchange of views with China;
>
> 5. The limitations to jurisdiction provided in Article 297 are inapplicable to the claims of the Philippines in this case; and
>
> 6. The optional exceptions to jurisdiction provided in Article 298 also do not apply to the claims of the Philippines.[6]

101. The Philippines' final submissions as set out at pages 271 and 272 of its Memorial (the "**Submissions**") are as follows:

> On the basis of the facts and law set forth in this Memorial, the Philippines respectfully requests the Tribunal to adjudge and declare that:
>
> 1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
>
> 2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
>
> 3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
>
> 4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
>
> 5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
>
> 6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

5 Notification and Amended Statement of Claim, pp. 17-19.

6 Memorial, para. 7.157.

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

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

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

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

11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

12) China's occupation and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

(b) violate China's duties to protect and preserve the marine environment under the Convention; and

(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

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

14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and

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

15) China shall desist from further unlawful claims and activities.[7]

102. At the close of the Hearing on Jurisdiction, the Philippines presented its final submissions as follows:

> The Philippines respectfully asks the Tribunal to adjudge and declare that the claims brought by the Philippines, as reflected in its submission recorded at pages 271 and 272 of our Memorial, are entirely within its jurisdiction and are fully admissible.[8]

103. While China does not accept and is not participating in this arbitration, it has stated its position that the Tribunal "does not have jurisdiction over this case."[9]

7 Memorial, pp. 271-72.

8 Jurisdictional Hearing Tr. (Day 3), p. 80.

104. As set out in Procedural Order No. 4 of 21 April 2015, the Tribunal considered China's "statements and communications as equivalent to or as constituting preliminary objections"[10] and decided that they "effectively constitute a plea concerning this Tribunal's jurisdiction."[11]

105. China points out that its Position Paper "does not express any position on the substantive issues related to the subject-matter of the arbitration initiated by the Philippines."[12]

* * *

9 China's Position Paper, para. 2; *see also* Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, 6 February 2015; Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, 1 July 2015.

10 Procedural Order No. 4, p. 5.

11 Procedural Order No. 4, para 1.1.

12 China's Position Paper, para. 2.

IV. PRELIMINARY MATTERS

A. THE STATUS OF THE PHILIPPINES AND CHINA AS PARTIES TO THE CONVENTION

106. The Tribunal recalls that both the Philippines and China are parties to the Convention.[13] The Philippines ratified it on 8 May 1984[14] and China on 7 June 1996.[15] Accordingly, they are both bound by the dispute settlement procedures provided for in Part XV of the Convention in respect of any dispute between them concerning the interpretation or application of the Convention.

107. The dispute settlement provisions set out in Part XV of the Convention were heavily negotiated and reflect a compromise. While according States Parties the flexibility to resolve disputes in the manner of their choosing, the Convention nevertheless provides compulsory dispute procedures that are subject only to very specific exceptions spelled out in the Convention itself. China's declaration of 25 August 2006[16] is an example of a declaration intended to activate certain exceptions to the compulsory settlement of disputes set out in Article 298 of the Convention. Beyond these specific exceptions, however, Article 309 provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." The States Parties to the Convention are accordingly not free to pick and choose the portions of the Convention they wish to accept or reject.

13 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

14 Upon signing the Convention on 10 December 1982, the Philippines issued an "Understanding" which was confirmed upon ratification. Among other things, the Understanding stated: "The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty." The Philippines made no declaration upon ratification on 8 May 1984.

15 When China ratified the Convention on 7 June 1996, it issued a statement, which included the following:

> 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 the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability.
>
> 3. The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992.

16 On 25 August 2006, China made the following Declaration under Article 298 of the Convention (hereinafter "**China's 2006 Declaration**"):

> 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)-(c) of Article 298 of the Convention.

108. Part XV of the Convention, concerning the settlement of disputes, is structured in three Sections. Section 1 lays out general provisions, including those aimed at reaching agreement through negotiations and other peaceful means. Section 2 provides for compulsory procedures entailing binding decisions, which apply where no settlement has been reached by recourse to Section 1 but are subject to Section 3, which sets out a number of specific limitations and exceptions to jurisdiction. This scheme is encapsulated in Article 286 of the Convention, which provides:

> *Article 286*
> *Application of procedures under this section*
>
> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

109. Article 287 of the Convention accords parties a choice of procedures for the settlement of their disputes.[17] Neither the Philippines nor China has made a written declaration choosing one of the particular means of dispute settlement set out in Article 287, Paragraph 1. Accordingly, under Paragraph 3 of that Article, both Parties are deemed to have accepted arbitration in accordance with Annex VII to the Convention. The present dispute has therefore correctly been submitted to arbitration before a tribunal constituted under Annex VII of the Convention. The Tribunal also notes, as evidenced by the procedural history set out in Chapter II, that the Tribunal's constitution was in accordance with the Convention and its Annex VII.

110. Article 288 addresses jurisdiction. It states in Paragraph 4 that a court or tribunal referred to in Article 287 "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." This Tribunal's jurisdiction thus depends on a finding that the Parties actually have a dispute and that the dispute "concern[s] the interpretation or application of this Convention." Further, as stated in Article 286, the Tribunal must be satisfied that no settlement has been reached by recourse to other peaceful means of dispute settlement as contemplated in Section 1 of Part XV. Additionally, the Tribunal must be satisfied that none of the specific limitations and exceptions set out in Section 3 of Part XV of the Convention apply.

[17] Article 287(1) provides: "When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein." Article 287(3) provides: "A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII."

111. Article 288(4) of the Convention provides that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."[18]

B. THE LEGAL AND PRACTICAL CONSEQUENCES OF CHINA'S NON-PARTICIPATION

112. As evident from the Procedural History recounted in Chapter II, China has not participated in this arbitration at any stage. It did not participate in the constitution of the Tribunal, it did not submit a Counter-Memorial in response to the Philippines' Memorial, it did not attend the Hearing on Jurisdiction in July 2015, and it has not advanced any of the funds requested by the Tribunal toward the costs of arbitration. Throughout the proceedings, China has rejected and returned correspondence from the Tribunal sent by the Registry, explaining on each occasion "its position that it does not accept the arbitration initiated by the Philippines."

113. Under the Convention, non-participation by one of the parties to a dispute does not constitute a bar to the proceedings. For arbitrations pursuant to Annex VII, Article 9 of that Annex applies. The Article provides as follows:

> *Article 9*
> *Default of Appearance*
>
> If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

114. In its Memorial, the Philippines expressly requested, for the avoidance of any doubt, that these proceedings continue,[19] and in accordance with Article 9 of Annex VII, the Tribunal has continued the proceedings. Despite its non-appearance, China remains a Party to these proceedings, with the ensuing rights and obligations, including that it will be bound by any decision of the Tribunal.[20] Article 296(1) of the Convention provides that "[a]ny decision rendered by a court or tribunal having jurisdiction under [Section 2 of Part XV] shall be final and shall be complied with by all the parties to the dispute." In addition, Article 11 of Annex VII provides that "[t]he award shall be final and without appeal . . . . It shall be complied with by the parties to the dispute." Hence, despite its non-participation in the

18 Convention, Article 288(4). As to Article 288, *see* China's Position Paper, para. 83.

19 Memorial, paras. 1.21, 7.39.

20 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ Reports 1986, p. 14 at p. 24, para. 28 (**Annex LA-15**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 at p. 242, para. 51 (**Annex LA-45**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Jurisdiction, Award of 26 November 2014, para. 60 (**Annex LA-180**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, para. 10.

proceedings, China is a Party to the arbitration and is bound under international law by any awards rendered by this Tribunal.

115. The Tribunal notes that for situations of non-participation, Article 9 seeks to balance the risks of prejudice that could be suffered by either party. First, it protects participating parties by ensuring that the proceedings will not be frustrated by the decision of the other party not to participate. Second, it protects the rights of non-participating parties by ensuring that a tribunal will not simply accept the claim of the participating party by default. Instead, the Tribunal must satisfy itself that it has jurisdiction and that the claim is well founded in fact and law.

116. The Tribunal has conducted these proceedings in such a way as to avoid the prejudice to either Party that could arise as a result of China's non-participation. Article 5 of Annex VII leaves it to the Tribunal "to determine its own procedure, assuring to each party a full opportunity to be heard and to present its case." The duty to treat the parties equally is also reflected in Article 10 of the Rules of Procedure.

117. The Tribunal has taken a number of measures to safeguard the procedural rights of China. Among others, it has (a) ensured that all communications and materials in this arbitration have been promptly delivered, both electronically and physically, to the Ambassador of China to the Netherlands in The Hague; (b) granted China adequate and equal time to submit written responses to the pleadings submitted by the Philippines; (c) invited China to comment on procedural steps taken throughout the proceedings; (d) provided China with adequate notice of hearings; (e) promptly provided China with copies of transcripts of the Hearing on Jurisdiction and all documents submitted in the course of the hearing; (f) invited China to comment on anything said during the Hearing on Jurisdiction or in post-hearing written comments; (g) made the Registry staff available to the Chinese Embassy to answer any questions of an administrative or procedural nature; and (h) reiterated that it remains open to China to participate in the proceedings at any stage.

118. The Tribunal has also taken a number of measures to safeguard the Philippines' procedural rights. As noted by ITLOS in *Arctic Sunrise*, the participating party "should not be put at a disadvantage because of the non-appearance of the [non-participating party] in the proceedings."[21] In addition to imposing the duty to treat the Parties equally, Article 10 of the Rules of Procedure in this case requires the Tribunal to "avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute." Conscious of this duty, the Tribunal has been responsive to the views of the Parties on scheduling and logistics.

21 *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 at p. 243, para. 56 (**Annex LA-45**).

119. A further disadvantage that the Philippines could suffer as a result of China's non-appearance is what the Philippines described as being "in the position of having to guess what China's arguments might be and formulate arguments for both States."[22] The Philippines suggested that the Tribunal could discern China's arguments by consulting communications from its officials, statements of those associated with the Government of China, and academic literature by individuals closely associated with Chinese authorities.[23] Acknowledging that the Tribunal of course may wish to raise certain matters *proprio motu*, the Philippines was also anxious to ensure that China's non-appearance would not deprive it of "an opportunity to address any specific issues that the Arbitral Tribunal considers not to have been canvassed, or to have been canvassed inadequately" by the Philippines.[24] Conscious of these concerns, the Tribunal introduced the following process into Article 25(2) of its Rules of Procedure:

> In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing Party shall be communicated to the non-appearing Party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

120. The Tribunal implemented the above procedure by issuing a Request for Further Written Argument on 16 December 2014, containing 26 questions. On 23 June 2015, the Tribunal also sent both Parties a list of questions to address in advance of the Hearing and circulated further questions on 10 July 2015 before the second round of the Hearing.

121. Any concerns about the Philippines "having to guess what China's arguments might be" have also been alleviated to some extent by China's decision to make public its Position Paper. The Position Paper has since been followed by two letters from the Chinese Ambassador addressed to the members of the Tribunal and by regular public statements of Chinese officials that touch on the arbitration.

122. In its Procedural Order No. 4, the Tribunal took cognizance of the practice of international courts and tribunals in interstate disputes of (a) taking notice of public statements or informal communications made by non-appearing Parties, (b) treating such statements and communications as equivalent to or as constituting preliminary objections, and (c) bifurcating

22 Memorial, para. 7.42.

23 Memorial, para. 1.23.

24 Letter from the Philippines to the Tribunal (31 July 2013), commenting on draft Rules of Procedure.

proceedings to address some or all of such objections as preliminary questions.[25] The Tribunal decided to treat the communications by China, including its Position Paper and the Chinese Ambassador's First and Second Letters, as effectively constituting a plea concerning the Tribunal's jurisdiction for purposes of Article 20 of the Rules of Procedure.

123. However, the Tribunal also stated that it would not confine itself to addressing only those issues raised in China's Position Paper and that, in line with its duty to satisfy itself of its jurisdiction, the Tribunal would consider other issues that might potentially pose an obstacle to the continuation of these proceedings. One such issue, to which the Tribunal turns in Chapter VI, is whether the Tribunal should be barred from proceeding by the absence of other States as parties to the arbitration.

C. WHETHER THE ARBITRATION CONSTITUTES AN ABUSE OF LEGAL PROCESS

124. In its Position Paper, China repeatedly claims that the Tribunal "manifestly" lacks jurisdiction and describes the Philippines' initiation of this arbitration is "an abuse of the compulsory dispute settlement procedures."[26] This language calls to mind two separate provisions in the Convention which the Tribunal briefly addresses here, Article 300 and Article 294.

125. Article 300 appears in Part XVI of the Convention, entitled "General Provisions", and provides:

> *Article 300*
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

126. The Tribunal notes that China has not specifically tied its allegations of abuse to Article 300 of the Convention and does not request a declaration that the Philippines has breached Article 300. Nevertheless, the Tribunal notes that the mere act of unilaterally initiating an arbitration under

25 Procedural Order No. 4, 21 April 2015, p. 5, citing as examples *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 at p. 243, para. 54 (**Annex LA-45**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Jurisdiction, Award of 26 November 2014, para. 44 (**Annex LA-180**); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 3 (**Annex LA-8**); *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253 (**Annex LA-7**); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3 (**Annex LA-9**).

26 China's Position Paper, paras. 3, 29, 85, 86; *see also* "Foreign Ministry Spokesperson Hua Chunying's Remarks on the Release of the Transcript of the Oral Hearing on Jurisdiction by the South China Sea Arbitral Tribunal Established at the Request of the Philippines" 24 August 2015, published at www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1290752.shtml ("The Philippines' unilateral submission of the relevant disputes to compulsory arbitration … initiation of arbitration . . . constitutes . . . an abuse of international legal procedure. . . .").

Part XV in itself cannot constitute an abuse of rights. In this regard it recalls the following statement in *Barbados v. Trinidad and Tobago*:

> [T]he unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged. . . .[27]

127. The language of China's allegations of abuse is also reminiscent of the following terms in Article 294 of the Convention:

> *Article 294*
> *Preliminary Proceedings*
>
> 1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.
> 2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.
> 3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.

128. China has not made an application to the Tribunal pursuant to Article 294(1) of the Convention, and the Tribunal is therefore under no obligation to follow the procedure outlined in Article 294(2). While the Tribunal is entitled to determine *proprio motu* whether the Philippines' claim constitutes an abuse of legal process or whether *prima facie* it is unfounded, it declines to do so in the present case. In light of the serious consequences of a finding of abuse of process or *prima facie* unfoundedness, the Tribunal considers that the procedure is appropriate in only the most blatant cases of abuse or harassment.[28] In the view of the Tribunal, China's concerns about the potential obstacles to the Tribunal's jurisdiction over the Philippines' Submissions are more appropriately dealt with as preliminary objections in accordance with the applicable rules of procedure which, as Article 294(3) provides, remain unaffected by Articles 294(1) and (2). The Tribunal, therefore, does not need to decide whether the case falls within the meaning of "a

[27] *Barbados v. Trinidad and Tobago*, Award of 11 April 2006, PCA Award Series at pp. 96-97, para. 208, RIAA Vol. XXVIII, p. 147 at pp. 207-08, para. 208 (**Annex LA-54**).

[28] At the 61st Plenary Meeting of the UN Conference on the Law of the Sea, 6 April 1976, a concern was raised that, in the absence of a provision such as Article 294, "the acceptance of compulsory third-party settlement would mean that the coastal State might be subjected to constant harassment by having to appear before international tribunals at considerable loss of money and time." Article 294 can be understood as a safeguard against such harassment arising from frivolous or clearly unfounded claims. *See* Intervention of the representative of Kenya, Mr. Njenga, at the Third UN Conference on the Law of the Sea on 6 April 1976, *Third United Nations Conference on the Law of the Sea*, Official Record, Vol. V, para. 49.

dispute referred to in article 297," a characterisation which in any event could only apply to some of the Philippines' Submissions.

129. In the present case, the applicable rules on preliminary objections can be found in Article 20 of the Rules of Procedure. As noted above at Paragraphs 68, 104, and 122, the Tribunal ruled in Procedural Order No. 4 that China's communications would be treated, for purposes of Article 20 of the Rules of Procedure, as effectively constituting a plea that the Tribunal does not have jurisdiction. In accordance with Article 20(3) of the Rules of Procedure, in the remainder of this Award, the Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question. However, if the Tribunal determines that any objection to jurisdiction does not possess an exclusively preliminary character with respect to any Submission, it shall rule on such jurisdictional issues at a later phase, in conjunction with the merits.

* * *

V. IDENTIFICATION AND CHARACTERISATION OF THE DISPUTE

130. Article 288 of the Convention limits the jurisdiction of this Tribunal to "disputes concerning the interpretation and application of this Convention." Article 288 provides as follows:

> *Article 288*
> *Jurisdiction*
>
> 1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
>
> 2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
>
> . . .
>
> 4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

131. Accordingly, the Tribunal is required to determine, first, whether there is a dispute between the Parties concerning the matters raised by the Philippines and, second, whether such a dispute concerns the interpretation or application of the Convention.

A. THE PARTIES' POSITIONS

132. The Tribunal has decided to treat the objections in China's Position Paper and communications as effectively constituting a plea on jurisdiction. Preliminary objection proceedings typically take the form of a self-contained case in which the objecting State appears as applicant. Accordingly, in this Award, summaries of the possible or actual objections of China are set out first, followed by summaries of the Philippines' positions in response.

1. China's Position

133. China has addressed two aspects of the characterisation of the Parties' dispute in its Position Paper of 7 December 2014, which the Tribunal understands to reflect China's position on the issues raised therein, notwithstanding China's non-participation in these proceedings. First, China argues that "the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention."[29] Second, China argues that even if the Parties' dispute were concerned with the Convention, the

[29] China's Position Paper, para. 4.

dispute "would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the Declaration filed by China in 2006."[30]

134. According to China, the dispute raised by the Philippines is actually one of sovereignty because "[t]o decide upon any of the Philippines' claims, the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea."[31] China divides the Philippines' Submissions between those concerned with China's historic rights, those relating to the status of certain maritime features, and those involving China's exercise of rights in the South China Sea.[32]

135. In China's view, the Philippines' Submissions concerning the extent of China's historic rights reflect a dispute over sovereignty because "only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention."[33] China recalls the general principle that "sovereignty over land territory is the basis for the determination of maritime rights."[34] China also recalls the preamble to the Convention and submits that "'due regard for the sovereignty of all States' is the prerequisite for the application of the Convention to determine maritime rights of the States Parties."[35] Accordingly, China concludes:

> without first having determined China's territorial sovereignty over the maritime features in the South China Sea, the Arbitral Tribunal will not be in a position to determine the extent to which China may claim maritime rights in the South China Sea pursuant to the Convention, not to mention whether China's claims exceed the extent allowed under the Convention.[36]

136. China likewise submits that the Philippines' claims concerning the status of features constitute a dispute over sovereignty because "without determining the sovereignty over a maritime feature, it is impossible to decide whether maritime claims based on that feature are consistent with the Convention."[37] According to China, "[w]hen not subject to State sovereignty, a maritime feature *per se* possesses no maritime rights or entitlements whatsoever," and "[i]f the sovereignty over a maritime feature is undecided, there cannot be a concrete and real dispute for arbitration as to whether or not the maritime claims of a State based on such a feature are

30 China's Position Paper, para. 3.
31 China's Position Paper, para. 29.
32 China's Position Paper, para. 8.
33 China's Position Paper, para. 10.
34 China's Position Paper, para. 11.
35 China's Position Paper, para. 12.
36 China's Position Paper, para. 13.
37 China's Position Paper, para. 16.

compatible with the Convention."[38] Moreover, in China's view, "[w]hether low-tide elevations can be appropriated as territory is in itself a question of territorial sovereignty, not a matter concerning the interpretation or application of the Convention."[39] China also argues that by focusing on only a few maritime features, the Philippines is attempting "to gainsay China's sovereignty over the whole of the Nansha Islands" and distort the nature of the Parties' dispute.[40]

137. Finally, China submits that the Philippines' remaining Submissions reflect a dispute over sovereignty because "the legality of China's actions in the waters of the Nansha Islands and Huangyan Dao rests on both its sovereignty over relevant maritime features and the maritime rights derived therefrom."[41] According to China, the Philippines' claims concerning sovereign rights and jurisdiction are based on the premise "that the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas."[42] In fact, China argues, "[u]ntil and unless the sovereignty over the relevant maritime features is ascertained and maritime delimitation completed, this category of claims of the Philippines cannot be decided upon."[43]

138. In the alternative, China submits that the subject matter of these proceedings is "an integral part of the dispute of maritime delimitation between the two States" and accordingly excluded from the Tribunal's jurisdiction by Article 298.[44] According to China, the legal issues:

> presented by the Philippines in the present arbitration, including maritime claims, the legal nature of maritime features, the extent of relevant maritime rights, and law enforcement activities at sea, are all fundamental issues dealt with in past cases of maritime delimitation decided by international judicial or arbitral bodies and in State practice concerning maritime delimitation.[45]

For China, these issues "are part and parcel of maritime delimitation," which is "an integral, systemic process."[46] The Philippines' selection of certain of those issues for presentation in these proceedings would, in China's view, "destroy the integrity and indivisibility of maritime

38 China's Position Paper, para. 17.
39 China's Position Paper, para. 25.
40 China's Position Paper, para. 22.
41 China's Position Paper, para. 26.
42 China's Position Paper, para. 27.
43 China's Position Paper, para. 27.
44 China's Position Paper, para. 75.
45 China's Position Paper, para. 66.
46 China's Position Paper, paras. 66, 67.

delimitation and contravene the principle that maritime delimitation must be based on international law . . . and that 'all relevant factors must be taken into account'."[47]

139. China also considers that certain of the Philippines' Submissions amount to "a request for maritime delimitation by the Arbitral Tribunal in disguise."[48] China refers to the Submissions requesting declarations that "certain maritime features are part of the Philippines' EEZ and continental shelf" or that "China has unlawfully interfered with the enjoyment and exercise by the Philippines of sovereign rights in its EEZ and continental shelf."[49] For China, these requests are "obviously . . . an attempt to seek a recognition by the Arbitral Tribunal that the relevant maritime areas are part of the Philippines' EEZ and continental shelf."[50]

2. The Philippines' Position

140. The Philippines submits that the essence of the Parties' dispute concerns China's claims to "'historic rights' in the South China Sea which [China] says are enshrined in its national law and general international law, and which exist outside the scope of the Convention" and "supersede and, in effect, nullify the rights of other states."[51] The Philippines considers that it has positively opposed this contention[52] and rejects the attempts made in China's Position Paper to characterise the Parties' dispute as relating either to sovereignty or to maritime boundary delimitation. The Philippines also reviews its Submissions and argues that an identifiable dispute between the Parties, relating to the interpretation and application of the Convention, exists with respect to each of them.

141. With respect to sovereignty, the Philippines accepts that a dispute concerning sovereignty over maritime features in the South China Sea exists between the Parties and acknowledges that the Philippines' "disputes with China in the South China Sea have more than one layer."[53] However, the Philippines considers that this is entirely irrelevant to the Tribunal's jurisdiction, because "[n]one of [the Philippines'] submissions require the Tribunal to express any view at all as to the extent of China's sovereignty over land territory, or that of any other state."[54] The

47 China's Position Paper, para. 68.
48 China's Position Paper, para. 69.
49 China's Position Paper, para. 69.
50 China's Position Paper, para. 69.
51 Jurisdictional Hearing Tr. (Day 1), p. 27.
52 Jurisdictional Hearing Tr. (Day 1), p. 27.
53 Supplemental Written Submission, para. 26.8.
54 Jurisdictional Hearing Tr. (Day 1), pp. 61-62.

Philippines cites arbitral awards as support for the conclusion that sovereignty claims over maritime features raise no impediment to the determination of their maritime entitlements.[55]

142. According to the Philippines, the fact that there is a dispute between the Parties in respect of sovereignty does not prevent the Tribunal from considering the other disputes presented by the Philippines' Submissions. The Philippines relies on the decisions in *United States Diplomatic and Consular Staff in Tehran*,[56] *Military and Paramilitary Activities in and against Nicaragua*;[57] and *Application of the Interim Accord of 13 September 1995*[58] for the principle that "a dispute may have different elements," which does not "preclude some elements from falling within jurisdiction."[59] The Philippines also distinguishes the decision in *Chagos Marine Protected Area* to deny jurisdiction over disputes relating to sovereignty.[60] According to the Philippines, the parties in that case "were in agreement that in order to address Mauritius's first submission, the tribunal in that case was required to make a prior determination as to which state had sovereignty," whereas the Philippines' present submissions require no such decision.[61]

143. The Philippines argues that its Submissions concerning the relationship between China's claimed historic rights and the Convention do not require any prior determination of sovereignty. The Philippines agrees with China that the land dominates the sea, but points to the corollary that without land, there can be no maritime entitlements on the basis of historic rights or otherwise. 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 claim to 'historic rights' within the areas encompassed by the nine-dash line exceeds the limits of its potential entitlement under the Convention."[62] In the Philippines' view, China's maximum potential maritime entitlements in the Spratlys (contrasted with the area

55 Written Responses to the Tribunal's 13 July 2015 Questions, paras. III.7-III.12, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, p. 659 at p. 702, para. 135 (**Annex LA-177**); *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 40 at pp. 98-99, paras. 191, 196 (**Annex LA-26**); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, ICJ Reports 2012, p. 624 at pp. 642-45, paras. 28-38 (**Annex LA-35**); *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, 91 ILR p. 543 at pp. 673-77 (**Annex LA-231**).

56 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports 1980, p. 3 at pp. 19-20, para. 36 (**Annex LA-175**).

57 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at pp. 439-40, paras. 105-106 (**Annex LA-13**).

58 *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, p. 644 at p. 659, para. 37 (**Annex LA-221**).

59 Jurisdictional Hearing Tr. (Day 1), p. 69.

60 *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015 (**Annex LA-225**).

61 Jurisdictional Hearing Tr. (Day 1), pp. 76-77.

62 Supplemental Written Submission, para. 26.13 [emphasis in original].

enclosed by the nine-dash line) can be seen graphically in the following Figure 5 on page 51 below, which appears as Figure 4.2 in the Philippines' Memorial. This depicts in pink the area within the "nine-dash line", in blue lines the 200 nautical mile limits from the coasts of surrounding States, and in red circles the Philippines' portrayal of "China's maximum potential entitlements under UNCLOS."

144. In the Philippines' view, there is likewise no need to determine sovereignty before considering the existence of maritime entitlements on the basis of features in the South China Sea. According to the Philippines:

(a) The proper approach to determining the existence of maritime entitlements "must necessarily—and logically—be to determine the character and nature of a particular feature."[63] This "does not require any prior determination of which state has sovereignty over the feature"[64] because "[t]he maritime entitlement that feature may generate is . . . a matter for objective determination." In other words, the Philippines argues, "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 "sovereignty is wholly irrelevant."[65]

(b) No significance follows from the Philippines' focus on specific features. For the Philippines, this is merely pragmatic in light of the large number of maritime features in the Spratlys, and "if the largest of the Spratly features is incapable of generating an EEZ and continental shelf entitlement, then it is most unlikely that any of the other 750 features will be able to do so."[66]

(c) And, in response to China's arguments concerning low-tide elevations: "[w]hether or not a feature is a low-tide elevation is to be determined by reference to Article 13(1) of the Convention," and is accordingly within the Tribunal's jurisdiction. Additionally, *Bay of Bengal Maritime Boundary* demonstrates that "tribunals have routinely made determinations with regard to low-tide elevations, the incidental result of which is that sovereignty over that feature vests in one or another state."[67]

63 Jurisdictional Hearing Tr. (Day 1), p. 64.

64 Jurisdictional Hearing Tr. (Day 1), p. 65.

65 Supplemental Written Submission, para. 26.15.

66 Jurisdictional Hearing Tr. (Day 1), p. 89.

67 *Bay of Bengal Maritime Boundary (Bangladesh v. India),* Award of 7 July 2014, para. 191 (**Annex LA-179**); Jurisdictional Hearing Tr. (Day 1), p. 95.

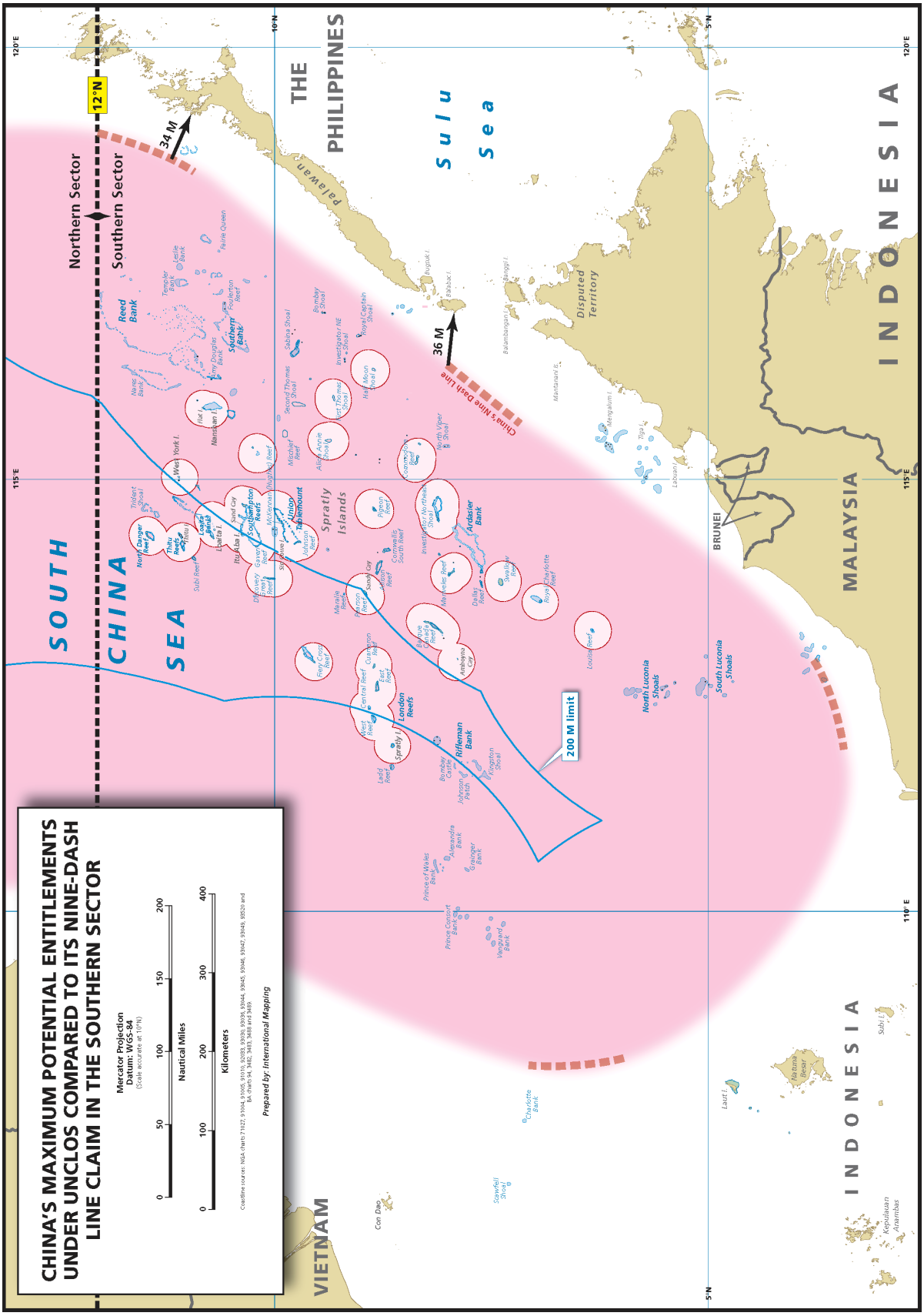

Figure 5: "China's Maximum Potential Entitlements under UNCLOS Compared to its Nine-Dash Line Claim in the Southern Sector" (Memorial, Figure 4.2)

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145. Finally, the Philippines rejects China's argument that sovereignty must be determined before the Philippines' Submissions concerning the exercise of sovereign rights and jurisdiction may be considered. According to the Philippines, "[t]he Philippines' claims pertaining to China's unlawful conduct are premised on China's maximum permissible entitlement under the Convention, even assuming that it, *quod non*, has sovereignty over all disputed insular features."[68] The Philippines emphasises that "[t]his part of the Philippines' claim . . . is made entirely regardless of sovereignty, and entirely without prejudice to China's territorial assertions, or indeed the territorial assertions of any other state."[69]

146. The Philippines similarly rejects China's overarching characterisation of the Parties' dispute as relating to maritime boundary delimitation. According to the Philippines, "China's contention conflates two different things: (1) entitlement to maritime zones, and (2) delimitation of areas where those zones overlap."[70] The Philippines considers one of the major accomplishments of the Convention to have been the "near universal adherence to a detailed elaboration of what are, and are not, the entitlements of coastal states"[71] and emphasises that issues of entitlement engage the overall interests of the international community.[72] In contrast, a question of maritime delimitation involves only the States concerned[73] and "does not arise unless and until it is determined that there are overlapping maritime entitlements."[74] In this respect, the Philippines recalls the approach in *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* and *Territorial and Maritime Dispute (Nicaragua v. Colombia)* in first determining the existence of overlapping entitlements before turning to delimitation.[75] The Philippines concludes that "[t]he fact that resolution of delimitation issues may require the prior resolution of entitlement issues does not mean that entitlement issues are an integral part of the delimitation process itself."[76]

147. Turning to its own Submissions in detail, the Philippines argues that "each and every one of the submissions is indeed the subject of a legal dispute . . . and that it arises under and calls for the

68 Jurisdictional Hearing Tr. (Day 1), p. 98.

69 Jurisdictional Hearing Tr. (Day 1), p. 98.

70 Jurisdictional Hearing Tr. (Day 2), p. 40.

71 Jurisdictional Hearing Tr. (Day 2), p. 40.

72 Jurisdictional Hearing Tr. (Day 2), p. 42.

73 Jurisdictional Hearing Tr. (Day 2), p. 42.

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

75 *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, p. 4 at p. 99, paras. 376-77 (**Annex LA-43**); *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Merits, Judgment, ICJ Reports 2012, p. 624 at p. 688, para. 169 (**Annex LA-35**).

76 Jurisdictional Hearing Tr. (Day 2), p. 46.

interpretation or application of specific identified provisions of the Convention."[77] According to the Philippines:

> **Submissions No. 1 and 2** relate to:
>
> > China's claim that its maritime entitlements in the South China Sea extend beyond those permitted by UNCLOS (in opposition to [the Philippines'] submission 1), and its claim to "historic rights", including sovereign rights and jurisdiction, within the maritime area encompassed by the nine-dash line beyond the limits of its UNCLOS entitlements (in opposition to [the Philippines'] submission 2).[78]
>
> The Philippines refers to its own Note Verbale to China[79] and multiple Chinese statements concerning China's historic rights[80] as evidence of the dispute.
>
> **Submission No. 3** relates to the Philippines' position that Scarborough Shoal is a rock under Article 121(3), opposed by China's position that it "is not a sand bank but rather an island." The Philippines refers to the proceedings of the 10th and 18th Philippines–China Foreign Ministry Consultations and other diplomatic communications.[81]
>
> **Submission No. 4** relates to the Philippines' position that Mischief Reef, Second Thomas Shoal, and Subi Reef are low tide elevations that do not generate entitlement to maritime zones, opposed by China's view that "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf." The Philippines refers to its own Notes Verbales[82] and China's diplomatic communications.[83]

77 Jurisdictional Hearing Tr. (Day 2), p. 133.

78 Jurisdictional Hearing Tr. (Day 3), pp. 5-6.

79 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228), pp. 3-4 (5 April 2011) (**Annex 200**).

80 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S, p. 2, para. 8 (21 June 2011) (**Annex 72**); Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011, p. 2 (16 September 2011) (**Annex 113**); *China Asserts Sea Claim with Politics and Ships*, NY Times, p. 3 (11 August 2012) (**Annex 320**); Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea (8 February 2014) (**Annex 131**).

81 Department of Foreign Affairs of the Republic of the Philippines, Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations (30 July 1998) (**Annex 184**); Department of Foreign Affairs of the Republic of the Philippines, Notes on the 18th Philippines-China Foreign Ministry Consultations, p. 12, para. 52 (19 October 2012) (**Annex 85**); Foreign Ministry of the People's Republic of China, Chinese Foreign Ministry Statement Regarding Huangyandao (22 May 1997) (**Annex 106**); Memorandum from Rodolfo C. Severino, Undersecretary, Department of Foreign Affairs of the Republic of the Philippines, to the President of the Republic of the Philippines, p. 2 (27 May 1997) (**Annex 25**).

82 Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577, p. 2 (5 November 1998) (**Annex 185**); Note

Submission No. 5 relates to a dispute over whether "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines or, as China puts it, of 'China's Nansha Islands'." According to the Philippines, "the dispute turns on whether the Spratly Islands can generate an EEZ and continental shelf."[84] The Philippines refers to its bilateral consultations with China and diplomatic communications.[85]

Submission No. 6 relates to a dispute over whether Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations "that do not generate any maritime entitlements of their own."[86] The Philippines refers to China's statements regarding the entitlements of the Nansha Islands.[87]

Submission No. 7 relates to a dispute "on whether these three reefs [Johnson Reef, Cuarteron Reef, and Fiery Cross Reef] do or do not generate an entitlement to an exclusive economic zone or continental shelf."[88] The Philippines refers to China's statements regarding the entitlements of the Nansha Islands.[89]

Submission No. 8 relates to a dispute that arises because "China has interfered with lawful activity of the Philippines—petroleum exploration, seismic surveys and fishing—within 200 miles of the Philippines' mainland coast, as a consequence of China's erroneous belief

Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885, p. 1 (4 April 2011) (**Annex 199**).

83 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-071-2014-S (10 March 2014) (**Annex 100**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S, para. 4 (7 March 2014) (**Annex 98**).

84 Jurisdictional Hearing Tr. (Day 2), p. 139.

85 Philippine-China Bilateral Consultations: Summary of Proceedings, p. 7 (20-21 March 1995) (**Annex 175**); Memorandum from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (11 March 2014) (**Annex 101**).

86 Jurisdictional Hearing Tr. (Day 2), p. 139.

87 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

88 Jurisdictional Hearing Tr. (Day 2), p. 140.

89 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

that it is entitled to claim sovereign rights beyond its entitlements under UNCLOS."[90] The Philippines refers to China's diplomatic correspondence and public statements.[91]

Submission No. 9 relates to a dispute over "the legality under UNCLOS of China's purported grant of rights to nationals and vessels in areas over which the Philippines exercises sovereign rights."[92] The Philippines refers to China's statements on the extent of Chinese fishing rights in the Nansha Islands.[93]

Submission No. 10 relates to a dispute "premised on [the] fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal."[94] The Philippines refers to Chinese statements directing Philippines fishing vessels to stay away from Scarborough Shoal.[95]

Submission No. 11 relates to a dispute concerning "China's failure to protect and preserve the marine environment at these two shoals [Scarborough Shoal and Second Thomas Shoal]."[96] The Philippines refers to China's conduct in ignoring repeated Philippines' protests. In the Philippines' view, "China either believes its fishermen are acting lawfully, or it does not care that they are acting unlawfully."[97]

Submission No. 12 relates to a dispute "premised on the characterisation of Mischief Reef as a low-tide elevation that is part of the seabed and subsoil and located in the Philippines' EEZ and continental shelf" and on "China's construction and other activities."[98] The Philippines refers to China's diplomatic communications concerning construction activity on Mischief Reef.[99]

90 Jurisdictional Hearing Tr. (Day 2), p. 140.

91 Memorandum from Rafael E. Seguis, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines, p. 1 (30 July 2010) (**Annex 63**); Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011, p. 2 (16 September 2011) (**Annex 113**); Note Verbale from the Embassy of the People's Republic of China to the Department of Foreign Affairs of the Philippines, No. (15)PG-229 (6 July 2015) (**Annex 580**).

92 Jurisdictional Hearing Tr. (Day 2), p. 141.

93 Memorandum from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines, p. 2 (10 April 1995) (**Annex 21**).

94 Jurisdictional Hearing Tr. (Day 2), p. 141.

95 Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S, p. 5 (26 July 2012) (**Annex 84**).

96 Jurisdictional Hearing Tr. (Day 2), p. 142.

97 Jurisdictional Hearing Tr. (Day 2), p. 99.

98 Jurisdictional Hearing Tr. (Day 2), p. 143.

99 Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 November 1998) (**Annex 33**).

Submission No. 13 relates to the Philippines' protest against China's "purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS"[100] and China's rejection of those protests.[101]

Submission No. 14 relates to a dispute concerning China's "activities at Second Thomas Shoal . . . after these proceedings were commenced," including the prevention of the rotation and resupply of Philippine personnel at the Shoal and interference with navigation.[102] The Philippines refers to China's diplomatic communications and communications with the Philippine forces stationed on Second Thomas Shoal.[103]

B. THE TRIBUNAL'S DECISION

148. The concept of a dispute is well-established in international law and the inclusion of the term within Article 288 constitutes a threshold requirement for the exercise of the Tribunal's jurisdiction. Simply put, the Tribunal is not empowered to act except in respect of one or more actual disputes between the Parties. Moreover, such disputes must concern the interpretation and application of the Convention.

149. In determining whether these criteria are met, the Tribunal recalls that, under international law, a "dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[104] Whether such a disagreement exists "is a matter for objective determination."[105] A mere assertion by one party that a dispute exists is "not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence."[106] It is not adequate to show that "the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the

100 Jurisdictional Hearing Tr. (Day 2), p. 144; Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222, p. 1 (30 April 2012) (**Annex 209**).

101 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239, p. 1 (25 May 2012) (**Annex 211**).

102 Jurisdictional Hearing Tr. (Day 2), p. 144.

103 Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 April 2013) (**Annex 93**); Letter from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 March 2014) (**Annex 99**).

104 *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No. 2, p. 6 at p. 11 (**Annex LA-57**).

105 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74 (**Annex LA-1**).

106 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74 (**Annex LA-1**).

other."[107] Moreover, the dispute must have existed at the time the proceedings were commenced.[108] In the present case, that would be 22 January 2013, the date of the Philippines' Notification and Statement of Claim.

150. Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterised. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim."[109] In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so. As set out in *Fisheries Jurisdiction (Spain v. Canada)*, it is for the Court itself "to determine on an objective basis the dispute dividing the parties, by examining the position of both parties."[110] Such a determination will be based not only on the "Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence."[111] In the process, a distinction should be made "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[112]

151. In the present case, the Philippines argues that it has submitted to the Tribunal a series of concrete disputes concerning the interpretation or application of specific articles of the Convention to Chinese activities in the South China Sea and to certain maritime features occupied by China. The Philippines also considers that it has submitted a dispute concerning the interaction of "historic rights" claimed by China with the provisions of the Convention. China's Position Paper sets out two overarching characterisations of the Parties' dispute that, in China's view, exclude it from the Tribunal's jurisdiction. In its Position Paper, China argues,

107 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328 (**Annex LA-6**).

108 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84-85, para. 30 (**Annex LA-34**).

109 *Nuclear Tests (New Zealand v. France),* Judgment, ICJ Reports 1974, p. 457 at p. 466, para. 30; *see also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports 1995, p. 288 at p. 304, para. 55.

110 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 448, para. 30 (**Annex LA-23**).

111 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 31 (**Annex LA-23**).

112 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 32 (**Annex LA-23**); *see also Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208 (**Annex LA-225**).

first, that the Parties' dispute concerns "territorial sovereignty over several maritime features in the South China Sea" and, second (in what the Tribunal understands to be an alternative argument), that the Parties' dispute concerns matters that are "an integral part of maritime delimitation." The former characterisation would, in China's view, mean that the dispute is not one concerning the interpretation or application of the Convention; the latter would bring it within the ambit of the jurisdictional exceptions created by China's declaration under Article 298 of the Convention. As China's objections concern the Philippines' Submissions as a whole, the Tribunal considers it appropriate to address them generally, before turning to the Philippines' arguments concerning the proper characterisation of its Submissions.

152. There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea. The Philippines concedes as much,[113] and the objection set out in China's Position Paper is premised on the existence of such a dispute. A dispute over sovereignty is also readily apparent on the face of the diplomatic communications between the Parties provided by the Philippines. The Tribunal does not accept, however, that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings. In the Tribunal's view, it is entirely ordinary and expected that two States with a relationship as extensive and multifaceted as that existing between the Philippines and China would have disputes in respect of several distinct matters. Indeed, even within a geographic area such as the South China Sea, the Parties can readily be in dispute regarding multiple aspects of the prevailing factual circumstances or the legal consequences that follow from them. The Tribunal agrees with the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran* that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[114]

153. The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing.[115] The Tribunal likewise does not see that any

113 Memorial, para. 1.16; Supplemental Written Submission, para. 26.8.

114 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports 1980, p. 3 at pp. 19-20, para. 36 (**Annex LA-175**).

115 Memorial, para. 1.16; Jurisdictional Hearing Tr. (Day 1), pp. 76-77, 99.

of the Philippines' Submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines' Submissions from the premise—as the Philippines suggests[116]—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys. The Tribunal is fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines' Submissions, intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea. Nor does the Tribunal understand the Philippines to seek anything further. The Tribunal does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.[117] In this respect, the present case is distinct from the recent decision in *Chagos Marine Protected Area*. The Tribunal understands the majority's decision in that case to have been based on the view both that a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims. For the reasons set out in this paragraph, 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.

154. One aspect of this objection, however, warrants further comment. In its Position Paper, China objects that "the Philippines selects only a few features" and argues that "[t]his is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole."[118] The Tribunal does not agree that the Philippines' focus only on the maritime features occupied by China carries implications for the question of sovereignty. The Tribunal does, however, consider that this narrow selection may have implications for the merits of the Philippines' claims. To the extent that a claim by the Philippines is premised on the absence of any overlapping entitlements of China to an exclusive economic zone or to a continental shelf, the Tribunal considers it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China, whether or not such feature is presently occupied by China.

155. Turning now to the question of maritime boundaries, the Tribunal is likewise not convinced by the objection in China's Position Paper that the Parties' dispute is properly characterised as relating to maritime boundary delimitation. The Tribunal agrees with China that maritime boundary delimitation is an integral and systemic process. In particular, the Tribunal notes that the concepts of an "equitable solution", of "special circumstances" in respect of the territorial sea, and of

116 Jurisdictional Hearing Tr. (Day 1), p. 98.

117 Memorial, para. 1.34.

118 China's Position Paper, para. 19.

"relevant circumstances" in respect of the exclusive economic zone and continental shelf may entail consideration of a wide variety of potential issues arising between the parties to a delimitation. It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.

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

157. In these proceedings, the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary. Certain consequences, however, do follow from the limits on the Tribunal's competence in this respect and the limited nature of the dispute presented by the Philippines. China correctly notes in its Position Paper that certain of the Philippines' Submissions (Submissions No. 5, 8 and 9) request the Tribunal to declare that specific maritime features "are part of the exclusive economic zone and continental shelf of the Philippines" or that certain Chinese activities interfered with the Philippines' sovereign rights in its exclusive economic zone. Because the Tribunal has not been requested to—and will not—delimit a maritime boundary between the Parties, the Tribunal will be able address those of the Philippines' Submissions based on the premise that certain areas of the South China Sea form part of the Philippines' exclusive economic zone or continental shelf only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area. This fact also bears on the decisions that the Tribunal is presently prepared to make regarding the scope of its jurisdiction (see Paragraphs 390 to 396 below).

158. Having addressed the two objections raised generally by China concerning the nature of the Parties' dispute, the Tribunal turns to the disputes that it considers do appear from the

Philippines' Submissions, as reflected in the Parties' diplomatic correspondence in the record and the public statements of the Parties.

159. The Tribunal is called upon to address an issue arising from the manner in which China has chosen to publicly present its claimed rights in the South China Sea and also from China's non-participation in these proceedings. The existence of a dispute in international law generally requires that there be "positive opposition" between the parties, in that the claims of one party are affirmatively opposed and rejected by the other.[119] In the ordinary course of events, such positive opposition will normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected.

160. In the present case, however, China has not elaborated on certain significant aspects of its claimed rights and entitlements in the South China Sea. China has, for instance, repeatedly claimed "historic rights" or rights "formed in history" in the South China Sea.[120] But China has not, as far as the Tribunal is aware, clarified the nature or scope of its claimed historic rights. Nor has China clarified its understanding of the meaning of the "nine-dash line" set out on the map accompanying its Notes Verbales of 7 May 2009.[121] Within the Spratlys, China has also generally refrained from expressing a view on the status of particular maritime features and has

119 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328.

120 *See, e.g.*, Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S, p. 6, para. 8 (21 June 2011) (**Annex 72**); Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011*, p. 2 (16 September 2011) (**Annex 113**).

121 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**). The Tribunal's use of the term "nine-dash line" is not to be understood as recognizing any particular nomenclature or map as correct or authoritative. The Tribunal observes that different terms have been used at different times and by different entities to refer to this line. For example, China refers to "China's dotted line in the South China Sea" (China's Position Paper, para. 8); Viet Nam refers to the "nine-dash line" (Viet Nam's Statement, para. 4(i)); Indonesia has referred to the "so called 'nine-dotted-lines map' (Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10, pp. 1-2 (8 July 2010) (**Annex 197**); and some commentators have referred to it as the "Cow's Tongue" and "U-Shaped Line." Further, the Tribunal observes that the number of dashes varies, depending on the date and version of the map consulted. For example, there were eleven dashes in the 1947 Atlas Map "Showing the Location of the Various Islands in the South China Sea (Nanhai Zhu Dao Wei Zhi Tu) (Memorial, Figure 4.5, **Annex M20**) and those in the 1950s (**Annexes M1-M3**). Nine dashes appeared in subsequent maps, including that appended to the 2009 Notes Verbales to the UN Secretary-General (Memorial Figure 1.1, Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**)). Ten dashes appear in the more recent 2013 "Map of the People's Republic of China" produced by China Cartographic Publishing House (**Annex M19**).

rather chosen to argue generally that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[122] The Tribunal sees nothing improper about this and considers that China is free to set out its public position as it considers most appropriate. Nevertheless, certain consequences follow for the Tribunal's determination of whether a dispute can reasonably be said to exist where the Philippines' claims raise matters on which China has so far refrained from expressing a detailed position.

161. The Tribunal notes that:

> a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.[123]

The existence of a dispute may also "be inferred from the failure of a State to respond to a claim in circumstances where a response is called for."[124]

162. The Tribunal recalls that this issue arose in the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, in which the United States declined to expressly affirm or contradict the United Nations' view that its legislation constituted a violation of the United Nations Headquarters Agreement. The Court, on that occasion, noted that:

> where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.[125]

Similarly, in *Land and Maritime Boundary (Cameroon v. Nigeria)*, Nigeria adopted a reserved approach to setting out its position and argued only generally that there was "no dispute concerning the delimitation of that boundary as such throughout its whole length."[126] The Court observed that:

122 *See*, *e.g.*, Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

123 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at p. 315, para. 89 (**Annex LA-25**).

124 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84-85, para. 30 (**Annex LA-34**).

125 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p. 12 at p. 28, para. 38.

126 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

> Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute.[127]

163. In the Tribunal's view, two principles follow from this jurisprudence. First, where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the Tribunal is entitled to examine the conduct of the Parties—or, indeed, the fact of silence in a situation in which a response would be expected—and draw appropriate inferences. Second, the existence of a dispute must be evaluated objectively. The Tribunal is obliged not to permit an overly technical evaluation of the Parties' communications or deliberate ambiguity in a Party's expression of its position to frustrate the resolution of a genuine dispute through arbitration.

164. In the Tribunal's view, the Philippines' Submissions No. 1 and 2 reflect a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention. This dispute is evident from the diplomatic exchange between the Parties that followed China's Notes Verbales of 7 May 2009, which stated, in relevant part that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government and is widely known by the international community.[128]

The Notes enclosed a map depicting what is known as the nine-dash line in the South China Sea.

165. The Philippines' contrasting view that entitlements in the South China Sea stem only from land features is well set out in its Note Verbale of 5 April 2011, issued in explicit response to China's Notes Verbales of 7 May 2009. In addition to claiming sovereignty over the "Kalayaan Island Group (KIG)", the Note provides in relevant part:

> On the "Waters Adjacent" to the Islands and other Geological Features
>
> **SECOND,** the Philippines, under the Roman notion of *dominium maris* and the international law principle of "*la terre domine la mer*" which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS).

127 *Land and Maritime Boundary (Cameroon v. Nigeria),* Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

128 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**).

> At any rate, the extent of the waters that are "adjacent" to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.
>
> On the Other "Relevant Waters Seabed and Subsoil" in the SCS
>
> **THIRD**, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the *"relevant waters as well as the seabed and subsoil thereof"* (as reflected in the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their "adjacent waters" would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.[129]

166. This Note prompted an immediate and comprehensive objection from China, which both rejected the Philippines' claim of sovereignty and set out certain comments on China's claimed maritime rights. China's Note of 14 April 2011 stated in relevant part that:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The contents of the Note Verbale No 000228 of the Republic of Philippines are totally unacceptable to the Chinese Government.
>
> . . . Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.
>
> Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992)* and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998)*, China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[130]

167. In the Tribunal's view, a dispute is readily apparent in the text and context of this exchange: from the map depicting a seemingly expansive claim to maritime entitlements, to the Philippines' argument that maritime entitlements are to be derived from "geological features" and based solely on the Convention, to China's invocation of "abundant historical and legal evidence" and rejection of the contents of the Philippines' Note as "totally unacceptable". The existence of a dispute over these issues is not diminished by the fact that China has not clarified the meaning of the nine-dash line or elaborated on its claim to historic rights.

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

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

168. Nor is the existence of a dispute concerning the interpretation and application of the Convention vitiated by the fact that China's claimed entitlements appear to be based on an understanding of historic rights existing independently of, and allegedly preserved by, the Convention. The Philippines' position, apparent both in its diplomatic correspondence and in its submissions in these proceedings, is that "UNCLOS supersedes and nullifies any 'historic rights' that may have existed prior to the Convention."[131] This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.

169. In the Tribunal's view, the Philippines' Submissions No. 3, 4, 6, and 7 reflect a dispute concerning the status of the maritime features and the source of maritime entitlements in the South China Sea. The Philippines has requested that the Tribunal determine the status—as an island, rock, low-tide elevation, or submerged feature—of nine maritime features, namely: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross Reef. In this instance, the Parties appear to have only rarely exchanged views concerning the status of specific individual features.[132] China has set out its view on the status of features in the Spratly Islands as a group, stating that "China's Nansha Islands [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[133] The Philippines has likewise made general claims, setting out its view that "the extent of the waters that are 'adjacent' to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention."[134] The Philippines has, however, also underlined its view that the features in the Spratly Islands are entitled to at most a 12 nautical mile territorial sea and that any claim to an exclusive economic zone or to a continental shelf in the South China Sea must emanate from one of the surrounding coastal or archipelagic States. For example, following an incident concerning survey operations in the area of Reed Bank, the Philippines stated:

131 Memorial, para. 4.96(2).

132 *See*, *e.g.*, Memorandum from Rodolfo C. Severino, Undersecretary, Department of Foreign Affairs of the Republic of the Philippines, to the President of the Republic of the Philippines (27 May 1997) (**Annex 25**).

133 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, p. 2 (14 April 2011) (**Annex 201**).

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

> SECOND, even while the Republic of the Philippines has sovereignty and jurisdiction over the [Kalayaan Island Group], the Reed Bank where [service contract] CSEC 101 is situated does not form part of the "adjacent waters," specifically the 12 M territorial waters of any relevant geological features in the [Kalayaan Island Group] either under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS);
>
> THIRD, Reed Bank is not an island, a rock, or a low tide elevation. Rather, Reed Bank is a completely submerged bank that is part of the continental margin of Palawan. Accordingly, Reed Bank, which is about 85 M from the nearest coast of Palawan and about 595 M from the coast of Hainan, forms part of the 200 M continental shelf of the Philippine archipelago under UNCLOS;
>
> FOURTH, Article 56 and 77 of UNCLOS provides that the coastal or archipelagic State exercises sovereign rights over its 200 M Exclusive Economic Zone and 200 M Continental Shelf. As such, the Philippines exercises exclusive sovereign rights over the Reed Bank.[135]

170. The Tribunal considers that, viewed objectively, a dispute exists between the Parties concerning the maritime entitlements generated in the South China Sea. Such a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature. Rather, the Tribunal must "distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[136] International law does not require a State to expound its legal arguments before a dispute can arise.

171. The Tribunal is conscious that it may emerge, in the course of the Tribunal's examination or in light of further communications from China, that the Parties are not, in fact, in dispute on the status of, or entitlements generated by, a particular maritime feature. In this respect, the Tribunal considers the situation akin to that faced by the International Court of Justice in *Land and Maritime Boundary (Cameroon v. Nigeria)*: even if "the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties."[137] The Tribunal is entitled to deal with this dispute.

172. In the Tribunal's view, the Philippines' Submission No. 5 merely presents another aspect of the same general dispute between the Parties concerning the sources of maritime entitlements in the South China Sea. In Submission No. 5, however, the Philippines has asked not for a determination of the status of a particular feature, but for a declaration that Mischief Reef and Second Thomas Shoal as low-tide elevations "are part of the exclusive economic zone and continental shelf of the Philippines." In so doing, the Philippines has in fact presented a dispute concerning the status of every maritime feature claimed by China within 200 nautical miles of Mischief Reef and Second Thomas Shoal, at least to the extent of whether such features are

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

136 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 449, para. 32 (**Annex LA-23**).

137 *Land and Maritime Boundary (Cameroon v. Nigeria),* Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 316-17, para. 93 (**Annex LA-25**).

islands capable of generating an entitlement to an exclusive economic zone and to a continental shelf. Only if no such overlapping entitlement exists—and only if China is not entitled to claim rights in the South China Sea beyond those permitted by the Convention (the subject of the Philippines' Submissions No. 1 and 2)—would the Tribunal be able to grant the relief requested in Submission No. 5.

173. If the Philippines' Submissions No. 1 through 7 concern various aspects of the Parties' dispute over the sources and extent of maritime entitlements in the South China Sea, the Philippines' Submissions No. 8 through 14 concern a series of disputes regarding Chinese activities in the South China Sea. The incidents giving rise to these Submissions are well documented in the record of the Parties' diplomatic correspondence and the Tribunal concludes that disputes implicating provisions of the Convention exist concerning the Parties' respective petroleum and survey activities,[138] fishing (including both Chinese fishing activities and China's alleged interference with Philippine fisheries),[139] Chinese installations on Mischief Reef,[140] the actions of Chinese law enforcement vessels,[141] and the Philippines' military presence on Second Thomas Shoal.[142]

138 *See, e.g.*, Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 February 2010) (**Annex 195**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 March 2011) (**Annex 198**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 April 2011) (**Annex 199**); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011) (**Annex 202**).

139 See, for instance, the extensive correspondence collected at the Memorial, para. 3.40 n. 211.

140 See, *e.g.,* Government of the Republic of the Philippines and Government of the People's Republic of China, Philippine-China Bilateral Consultations: Summary of Proceedings (20-21 March 1995) (**Annex 175**); Government of the Republic of the Philippines and Government of the People's Republic of China, Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures, (23 March 1995) (**Annex 178**); Department of Foreign Affairs of the Republic of the Philippines, Transcript of Proceedings: RP-PRC Bilateral Talks (9 August 1995) (**Annex 179**); Government of the Republic of the Philippines and Government of the People's Republic of China, Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue (10 August 1995) (**Annex 180**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 November 1998) (**Annex 185**).

141 *See, e.g.*, Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222, p. 1 (30 April 2012) (**Annex 209**); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239, p. 1, (25 May 2012) (**Annex 211**).

142 *See, e.g.*, Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013) (**Annex 217**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882, 10 June 2013 (**Annex 219**); Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 140711 (11 March 2014) (**Annex 221**); Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 April 2013) (**Annex 93**).

174. Submissions No. 11 and 12(b), which concern allegations that China's activities in the South China Sea have caused environmental harm,[143] require particular consideration in light of their reference to the provisions of the Convention on Biological Diversity (the "**CBD**"). In its Memorial, the Philippines stated that "China's toleration of its fishermen's environmentally harmful activities at Scarborough Shoal and Second Thomas Shoal . . . constitute violations of its obligations under the CBD."[144] The Tribunal has given consideration to whether, for the purposes of its jurisdiction under Article 288, Submissions No. 11 and 12(b) constitute "disputes concerning the interpretation and application of this Convention," or disputes that concern the interpretation or application of the Convention on Biological Diversity.

175. The Tribunal is satisfied that the incidents alleged by the Philippines, in particular as to the use of dangerous substances such as dynamite or cyanide to extract fish, clams, or corals at and around Scarborough Shoal and Second Thomas Shoal,[145] could involve violations of obligations under Article 194 of the Convention, read in conjunction with Article 192 of the Convention, to take measures to prevent, reduce and control pollution of the marine environment.

176. The Tribunal also accepts the Philippines' assertion that, while it considers China's actions and failures to be inconsistent with the provisions of the CBD, the Philippines has not presented a claim arising under the CBD as such.[146] The Tribunal is satisfied that Article 293(1) of the Convention, together with Article 31(3) of the Vienna Convention on the Law of Treaties, enables it in principle to consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.[147]

177. While the Tribunal acknowledges that the factual allegations made by the Philippines could potentially give rise to a dispute under both the Convention and the CBD, the Tribunal is not convinced that this necessarily excludes its jurisdiction to consider Submissions No. 11 and 12(b). It is not uncommon in international law that more than one treaty may bear upon a

143 *See, e.g.*, Memorandum from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 March 1998) (**Annex 29**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 2000100 (14 January 2000) (**Annex 186**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-09-2001-S (17 March 2001) (**Annex 47**); Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 April 2012) (**Annex 205**).

144 Memorial, paras. 6.85-6.89.

145 Memorial, paras. 6.80, 6.89.

146 Supplemental Written Submission, para. 11.

147 Supplemental Written Submission, paras. 11.3-11.5; Jurisdictional Hearing Tr. (Day 2), p. 97; *see also* Memorial, para. 6.82, on the relevance of the CBD under Article 293(1) of the Convention.

particular dispute, and treaties often mirror each other in substantive content.[148] Moreover, as stated by ITLOS in *MOX Plant*, although different treaties "contain rights or obligations similar to or identical with the rights and obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention."[149]

178. The Tribunal is accordingly satisfied that disputes between the Parties concerning the interpretation and application of the Convention exist with respect to the matters raised by the Philippines in all of its Submissions in these proceedings.

* * *

[148] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Wolfrum, ITLOS Reports 2001, p. 131.

[149] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 106, paras. 48-52 (**Annex LA-39**); *see also Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 294, para. 55 (**Annex LA-37**).

VI. WHETHER ANY THIRD PARTIES ARE INDISPENSABLE TO THE PROCEEDINGS

179. In this arbitration, the Tribunal has been asked to rule on the status of, and maritime entitlements generated by, a number of features in the South China Sea over which sovereignty is claimed not only by the Philippines and China, but also by Viet Nam and/or others. China has not argued in its Position Paper or elsewhere that Viet Nam's absence as a party in the present arbitration is a factor that would bar jurisdiction.[150] Nonetheless, the Tribunal considers it appropriate to dispose of the issue, which has been addressed by the Philippines and was the subject of correspondence between the Tribunal and the Parties.[151]

180. As concluded above at Paragraphs 152 to 154, the determination of the nature of and entitlements generated by the maritime features in the South China Sea does not require a decision on issues of territorial sovereignty. The legal rights and obligations of Viet Nam therefore do not need to be determined as a prerequisite to the determination of the merits of the case.

181. The present situation is different from the few cases in which an international court or tribunal has declined to proceed due to the absence of an indispensable third party, namely in *Monetary Gold Removed from Rome in 1943* and *East Timor* before the International Court of Justice and in the *Larsen v. Hawaiian Kingdom* arbitration.[152] In all of those cases, the rights of the third States (respectively Albania, Indonesia, and the United States of America) would not only have been affected by a decision in the case, but would have "form[ed] the very subject-matter of the decision."[153] Additionally, in those cases the lawfulness of activities by the third States was in question, whereas here none of the Philippines' claims entail allegations of unlawful conduct by Viet Nam or other third States.

150 In its Position Paper, China simply pointed out that "[t]he South China Sea issue involves a number of countries, and it is no easy task to solve it." China's Position Paper, para. 47. China also refers to its negotiated boundaries with Viet Nam as an example of successful peaceful negotiations between China and its neighbours.

151 Memorial, paras. 5.115-5.137; Letter from the Philippines to the Tribunal (26 January 2015); Supplemental Written Submission, paras. 25.1-25.4; Jurisdictional Hearing Tr. (Day 3), pp. 120-25.

152 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, and United States)*, Preliminary Question, Judgment, ICJ Reports 1954, p. 19 at p. 32 (**Annex LA-3**); *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90 (**Annex LA-22**); *Larsen v. Hawaiian Kingdom*, Award of 5 February 2001, 119 ILR p. 566 (**Annex LA-52**).

153 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, and United States)*, Preliminary Question, Judgment, ICJ Reports 1954, p. 19 at p. 32 (**Annex LA-3**); *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90 at p. 104-105, para. 34 (**Annex LA-22**); *Larsen v. Hawaiian Kingdom*, Award of 5 February 2001, 119 ILR p. 566 at pp. 588, 596-97, paras. 11.8, 12.17 (**Annex LA-52**).

182. The Tribunal's conclusion is supported by the position Viet Nam itself has taken in the present arbitration.[154] The Tribunal can certainly appreciate why Viet Nam and other neighbouring States are interested in the present proceedings. The "nine-dash line" that is the subject of the Philippines' first two Submissions was notably appended to China's Notes Verbales to the United Nations Secretary-General in 2009, in direct response to Viet Nam's separate submission and joint submission with Malaysia to the Commission on the Limits of the Continental Shelf.[155] And the Tribunal has already mentioned Viet Nam's sovereignty claims to the features identified in the Philippines' Submissions No. 4 to 7.

183. As early as April 2014, Viet Nam informed the Tribunal that it had been "following the proceedings closely" and requested copies of the pleadings to help it determine whether "Viet Nam's legal interests and rights may be affected."[156] After seeking the views of the Parties, the Tribunal granted Viet Nam access to the Memorial. On 7 December 2014, Viet Nam delivered for the Tribunal's attention a "Statement of the Ministry of Foreign Affairs of Viet Nam." The Statement requests the Tribunal to have due regard to the position of Viet Nam "in order to protect its rights and interests of a legal nature in the South China Sea . . . which may be affected in this arbitration."[157] With respect to jurisdiction, Viet Nam expressed support for "UNCLOS States Parties which seek to settle their disputes concerning the interpretation or application of the Convention . . . through the procedures provided for in Part XV of the Convention."[158] It stated that "Viet Nam has no doubt that the Tribunal has jurisdiction in these proceedings" and expected that the Tribunal's decision could contribute to "clarifying the legal positions of the parties in this case and interested third parties."[159]

184. Viet Nam noted that matters of territorial sovereignty and maritime delimitation had deliberately been excluded from the Philippines' claim. With respect to the merits of the claims, Viet Nam "resolutely protests and rejects any claim . . . based on the 'nine-dash line' . . . [which] has no

154 *See, e.g.*, Letter from Viet Nam to the Tribunal (8 April 2014) and Viet Nam's Statement (**Annex 468**), both discussed below.

155 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 191**); Socialist Republic of Viet Nam, *Submission to the Commission on the Limits of the Continental Shelf, Partial Submission in Respect of Vietnam's Extended Continental Shelf: North Area* (April 2009) (**Annex 222**); Malaysia and the Socialist Republic of Viet Nam, *Joint Submission to the Commission on the Limits of the Continental Shelf, in Respect of the Southern Part of the South China Sea* (6 May 2009) (**Annex 223**).

156 Letter from Viet Nam to the Tribunal (8 April 2014).

157 Viet Nam's Statement, p. 1 (**Annex 468**).

158 Viet Nam's Statement, p. 1 (**Annex 468**).

159 Viet Nam's Statement, pp. 1-2 (**Annex 468**).

legal, historical or factual basis and is therefore null and void."[160] With respect to the features mentioned specifically in the Philippines' Memorial, Viet Nam considers that none of them "can enjoy their own exclusive economic zone and continental shelf or generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or 'rocks' under Article 121(3) of the Convention."[161] Viet Nam added its support to the Tribunal applying Articles 60, 80, 94, 194, 206, and 300 of the Convention.[162] Viet Nam reserved its right to protect its legal rights and interests in the South China Sea by any peaceful means as appropriate and necessary in accordance with the Convention and in addition reserved its "right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law, including the relevant provisions of UNCLOS."[163]

185. The Tribunal invited the Parties to comment on Viet Nam's Statement, in particular its request for documents and its reservation of the right to intervene.[164] The Philippines was in favour of sharing documents with Viet Nam and allowing Viet Nam to be present at any hearing as an observer. On the question of intervention, the Philippines noted that the Tribunal's broad discretion to determine its own procedure would encompass the power to permit intervention. The Philippines stated that it would not object to Viet Nam's Statement being accepted into the record and to the Tribunal remaining cognizant of the positions stated therein, akin to the approach adopted by the International Court of Justice with respect to the Philippines in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*.[165] China did not directly comment on Viet Nam's Statement, but the Chinese Ambassador's First Letter did express serious concern and opposition to a procedure of "intervention by other States" as being "inconsistent with the general practices of international arbitration."[166]

186. The Tribunal informed Viet Nam that it would "address the permissibility of intervention in these proceedings only in the event that Viet Nam in fact makes a formal application for such intervention."[167] Viet Nam has not applied to intervene in the proceedings.

160 Viet Nam's Statement, p. 3 (**Annex 468**).

161 Viet Nam's Statement, p. 5 (**Annex 468**).

162 Viet Nam's Statement, pp. 5-6 (**Annex 468**).

163 Viet Nam's Statement, p. 7 (**Annex 468**).

164 Letter from the Tribunal to the Parties (11 December 2014).

165 Philippines' Letter to Tribunal (26 January 2015), citing *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment, ICJ Reports 2001, p. 575 at p. 607, paras. 93-94.

166 Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, 6 February 2015, para. 5.

167 Letter from the Tribunal to the Vietnamese Ambassador to the Kingdom of the Netherlands (17 February 2015).

187. In the circumstances described above and in light of Viet Nam's own stance with respect to the proceedings, the Tribunal finds that Viet Nam is not an indispensable third party and that its absence as a party does not preclude the Tribunal from proceeding with the arbitration.

188. Similarly, the absence of other States as parties to the arbitration poses no obstacle. Like Viet Nam, Malaysia and Indonesia have received copies of the pleadings and attended the hearings as observers and Brunei Darussalam has been provided with copies of documents. No argument has been made by China, the Philippines, or the neighbouring States that their participation is indispensable to the Tribunal proceeding with this case.

* * *

VII. PRECONDITIONS TO THE TRIBUNAL'S JURISDICTION

189. In the following sections, the Tribunal analyses, by reference to the provisions in Section 1 of Part XV of the Convention, whether there are any circumstances that would preclude access to the compulsory dispute resolution procedures in Section 2 of Part XV of the Convention and thus bar jurisdiction over the Philippines' claims.

190. In particular, the Tribunal examines China's position that the Philippines is precluded from recourse to arbitration because of the long-standing agreement between the Parties to resolve their disputes in the South China Sea through friendly consultations and negotiations.[168] China bases this argument on a number of statements jointly made by the Parties starting in the mid-1990s and on the signing of the Declaration on the Conduct of Parties in the South China Sea in 2002, the latter subsequently reinforced by further statements committing the Parties to settling disputes by negotiation. The Tribunal also considers, *proprio motu*, whether the Treaty of Amity and Co-operation in Southeast Asia could preclude the submission of the Parties' dispute to arbitration or whether the Convention on Biological Diversity could preclude jurisdiction over the Philippines' claims concerning the marine environment.

191. Section 1 of Part XV of the Convention contains "General Provisions" relating to the "Settlement of Disputes." It begins with Article 279, recalling the obligation on States to settle their disputes peacefully and to this end requiring them to seek solutions through the means indicated in Article 33, paragraph 1 of the UN Charter (namely "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice"). Article 280 then confirms that nothing in Part XV impairs the freedom of States to "agree at any time to settle their disputes concerning the interpretation and application of the Convention by any peaceful means of their own choice."

192. If States have so agreed on a peaceful mechanism of their own choice, then under certain circumstances set out in Articles 281 and 282, their agreement may preclude recourse to the compulsory procedures in Part XV, Section 2. Article 281 is discussed in Section A below, and Article 282 is discussed in Section B. In any case, pursuant to Article 283 of the Convention, access to Part XV, Section 2 is preconditioned on the Parties having had an "exchange of views regarding [the] settlement [of the dispute] by negotiation or other peaceful means." As

168 China's Position Paper, paras. 3, 30-44; *see also* Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, p. 1 (19 February 2013) (**Annex 3**).

discussed in Section C below, China does not agree with the Philippines that the Parties have exchanged views.[169]

A. ARTICLE 281 (PROCEDURE WHERE NO SETTLEMENT HAS BEEN REACHED BY THE PARTIES)

193. Article 281 of the Convention provides:

> *Article 281*
> *Procedure where no settlement has been reached by the Parties*
>
> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

194. Article 281 is premised upon the existence of a "dispute concerning the interpretation or application of this Convention." If there is no such dispute, Article 281 is irrelevant. The Tribunal has, for the reasons set out in Chapter V, found that there are disputes concerning the interpretation or application of the Convention. The Philippines sought to imply that China, by invoking Article 281, necessarily conceded the existence of a dispute concerning the interpretation or application of the Convention.[170] The Tribunal does not accept that China makes that admission. China has argued that the "essence of the subject-matter of the arbitration . . . does not concern the interpretation or application of the Convention" and prefaced its Article 281 position by stating that "[e]ven supposing that the Philippines' claims were concerned with the interpretation or application of the Convention, the compulsory procedures . . . of the Convention still could not be applied . . . ."[171]

195. The next question under Article 281 is whether the Parties "have agreed to seek settlement of the dispute by a peaceful means of their own choice." If there is no such agreement, then Article 281 poses no obstacle to jurisdiction. If there is such an agreement, the compulsory procedures of Part XV, Section 2 will only be available if (i) no settlement has been reached by recourse to the agreed means, (ii) the Parties' agreement does not exclude any further procedure, and (iii) any agreed time limits have expired.

196. China argues that for all disputes over the South China Sea, including the claims in this arbitration, the only means of settlement agreed by the parties is negotiation, to the exclusion of

169 China's Position Paper, para. 45.

170 *See* Memorial, para. 7.77; Jurisdictional Hearing Tr. (Day 2), p. 9.

171 China's Position Paper, paras. 3, 42.

any other means. China calls attention to the fact that "[t]hrough bilateral and multilateral instruments, China and the Philippines have agreed to settle their relevant disputes by negotiations, without setting any time limit for the negotiations." China further argues that the two States:

> have excluded any other means of settlement. In these circumstances, it is evident that, under the above-quoted provisions [Article 280 and 281] of the Convention, the relevant disputes between the two States shall be resolved through negotiations and there shall be no recourse to arbitration or other compulsory procedures.[172]

197. The Tribunal now examines the respective instruments which may possibly be viewed as forming such an agreement for the purposes of Article 281, either as argued by China in its Position Paper or raised by the Tribunal in its questions to the Parties.

1. Application of Article 281 to the DOC

198. The DOC was signed on 4 November 2002 by government representatives of the ASEAN Member States and China. The signatory States set out their desire "to enhance favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned."[173] In the DOC, the signatory States "declare" as follows:

> 1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall each serve as the basic norms governing state-to-state relations;
>
> . . .
>
> 4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
>
> 5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

199. There follows a list of confidence building measures for the signatory States to undertake "pending a peaceful settlement of territorial and jurisdictional disputes," including military dialogue and the treatment of persons in distress. Paragraph 6 then lists areas for cooperative activities that may be explored "pending a comprehensive and durable settlement of the dispute," such as marine protection and research, navigational safety and combatting crime.

172 China's Position Paper, paras. 41, 44.

173 DOC, preamble (**Annex 144**).

200. Finally, the DOC provides for continuing consultations towards the eventual adoption of a code of conduct:

> 7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;
>
> 8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;
>
> . . .
>
> 10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

201. The Parties have different views on whether the DOC constitutes an "agreement" for purposes of Article 281 and, if so, whether it is an agreement to seek settlement by friendly consultations and negotiations only, to the exclusion of any other means of dispute settlement.

(a) China's Position

202. China argues in its Position Paper that by signing the DOC, the Philippines and China have undertaken a mutual obligation to settle their disputes in relation to the South China Sea through "friendly consultations and negotiations" and thus "agreed to seek settlement of the dispute by a peaceful means of their own choice" within the meaning of Article 281.[174]

203. China notes that to constitute a binding "agreement" for purposes of Article 281, an instrument must evince "a clear intention" to establish rights and obligations between the parties, irrespective of the form or designation of the instrument. To this end, China focuses on the word "undertake" in paragraph 4 of the DOC, a word which was recognised in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* to mean "give a formal promise, to bind or engage oneself, to give a promise, to agree, to accept an obligation."[175] China claims that the DOC's status as an "agreement" is "mutually reinforced" by the multitude of other bilateral instruments in which the two states have reiterated their commitment to peaceful settlement of disputes through negotiations.

174 China's Position Paper, para. 38.

175 China's Position Paper, para. 38 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43 at p. 111, para. 162 (**Annex LA-176**).

204. China acknowledges that the DOC contains no phrase expressly excluding further procedure. However, China does not consider that an express exclusion is necessary. Rather, it relies on the position adopted by the tribunal in *Southern Bluefin Tuna* that "the absence of an express exclusion of any procedure is not decisive."[176] China argues that third-party settlement is "obviously" excluded by virtue of (a) the emphasis in paragraph 4 of the DOC on negotiations being conducted "by the sovereign States directly concerned" and (b) the Parties' reaffirmation in the DOC and other instruments of negotiations as the means for settling disputes.

205. China rejects the Philippines' suggestion that China should be prevented from invoking the DOC in light of China's own alleged violations of the DOC.[177] In response to the Philippines' allegation that China had threatened force to drive away Philippine fishermen from the waters of Huangyan Dao (Scarborough Shoal), China asserts that it was the Philippines that first resorted to the threat of force in 2012. In response to the Philippines' allegation that China had blocked the resupply of a naval vessel at Ren'ai Jiao (Second Thomas Shoal), China asserts that the Philippines illegally ran the naval ship aground there in May 1999 and has attempted to build illegally instead of towing it away. China thus accuses the Philippines of taking a "selective and self-contradictory" approach to the DOC, which in China's view "violates the principle of good faith in international law."[178]

206. Finally, China stresses the importance of the DOC's positive role in building trust and maintaining peace and stability in the South China Sea. China recalls that the Parties have been engaged in consultations regarding the "Code of Conduct in the South China Sea" and warns that denying the DOC's significance could lead to a "serious retrogression" in the current relationship between China and the ASEAN member States.[179]

(b) The Philippines' Position

207. The Philippines argues that the DOC poses no obstacle for the Tribunal's jurisdiction under Article 281 for four reasons.[180]

176 China's Position Paper, para. 40, citing *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan),* Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at pp. 43-44, para. 57 (**Annex LA-50**).

177 China's Position Paper, paras. 51-53, responding to Memorial, paras. 7.74-7.77.

178 China's Position Paper, para. 3.

179 China's Position Paper, paras. 54-56.

180 Memorial, paras. 7.50-7.58; Supplemental Written Submission, paras. 26.27-26.39; Jurisdictional Hearing Tr. (Day 2), pp. 7-11.

208. First, according to the Philippines, the DOC is not a legally binding "agreement" within the meaning of Article 281, but merely a non-binding political document that was never intended to create legal rights and obligations. The Philippines argues that this is evident from (a) the content of the DOC, which the Philippines describes as replete with aspirational and hortatory language merely confirming existing obligations;[181] (b) the circumstances of the DOC's adoption, which according to the Philippines show that the DOC was intended as a political document, reflecting a compromise reached as a "stop-gap measure" to reduce tensions, following years of trying for a legally binding code of conduct;[182] and (c) the Parties' subsequent conduct, both in the way they have characterised the DOC (as political and not legal) and in their continued efforts over the course of a decade to strive for a binding code of conduct.[183]

209. Second, the Philippines submits that, even if the DOC was intended to be a binding agreement, no settlement has been reached through the means contemplated in it (*i.e.*, consultations and negotiations). This, according to the Philippines, is a question of fact proven here by the "numerous unsuccessful diplomatic exchanges, negotiations and consultations between the Parties" and the exacerbation of the dispute in recent years.[184] The Philippines claims it was "entirely justified in concluding that continued negotiation would be futile."[185] In support of the proposition that Article 281 does not require parties to negotiate indefinitely, the Philippines cites decisions of both the Annex VII tribunal and ITLOS in *Southern Bluefin Tuna*, as well as the ITLOS provisional measures orders in *Land Reclamation by Singapore in and around the Straits of Johor*, *MOX Plant*, *ARA Libertad,* and *Arctic Sunrise.*[186]

181 Jurisdictional Hearing Tr. (Day 2), p. 9.

182 Memorial, paras. 7.54-7.55; Supplemental Written Submission, paras. 26.30-26.32; Jurisdictional Hearing Tr. (Day 2), p. 10

183 Memorial, para. 7.57; Supplemental Written Submission, para. 26.34-26.38; Jurisdictional Hearing Tr. (Day 2), p. 10.

184 Memorial, para. 7.63; Supplemental Written Submission, para. 26.47.

185 Memorial, para. 7.63; Supplemental Written Submission, para. 26.53.

186 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at pp 42-43, para. 55 (**Annex LA-50**); *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 295, para. 60 (**Annex LA-37**); *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 at p. 19, para. 47 (**Annex LA-41)**; *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 107, para. 60 (**Annex LA-39)**; *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 at p. 247, para. 76 (**Annex LA-45**); *ARA Libertad (Republic of Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 326 at p. 346, para. 71 (**Annex LA-44**).

210. Third, the Philippines argues that even if the DOC was intended to be a binding agreement, it does not exclude recourse to the dispute settlement procedures established in Section 2 of Part XV of the Convention. In the Philippines' view, for Article 281 to bar recourse to arbitration, the terms of the Parties' agreement to resolve their dispute by other peaceful means must expressly exclude recourse to the dispute settlement procedures under Part XV.[187] According to the Philippines, such a view is consistent with the text and context of Article 281, decisions of ITLOS in *Southern Bluefin Tuna* and *MOX Plant*, and the dissent of Judge Keith in *Southern Bluefin Tuna*, which the Philippines urges the Tribunal to follow.[188] According to the Philippines, the DOC plainly contains no express exclusion of recourse to further procedures. Nor, argues the Philippines, can the DOC remotely (let alone "obviously") be read to imply an exclusion of recourse to further procedures.[189] The Philippines observes that paragraphs 1 and 4 of the DOC refer to the Convention and submits that these references must necessarily incorporate Part XV, which is an integral part of the Convention.[190] Thus, "far from excluding recourse to the Convention's dispute settlement procedures, the DOC actually incorporates them."[191]

211. Fourth, the Philippines argues that, even if the DOC were a binding agreement within the meaning of Article 281 and even if it purported to exclude further procedures, China still cannot rely on it to avoid jurisdiction due to China's own conduct in "flagrant disregard" of the DOC.[192] The Philippines invokes the general principle of law that "a party which . . . does not fulfil its own obligations cannot be recognised as retaining the rights which it claims to derive from the relationship."[193] In particular, the Philippines recalls paragraph 5 of the DOC, in which the Parties "undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features." China's disregard of paragraph 5 would, according to the Philippines, deprive it of any entitlement to claim the benefit of its alleged rights under paragraph 4. The Philippines refers by way of example to China's expulsion of Philippine fishermen from Scarborough

187 Memorial, paras. 7.64-7.72; Supplemental Written Submission, paras. 26.42-26.45; Jurisdictional Hearing Tr. (Day 2), pp. 13-17.

188 Memorial, paras. 7.68-7.70; Supplemental Written Submission, paras. 26.41; Jurisdictional Hearing Tr., (Day 2), pp. 116-118 (citing academic commentary that has favoured a similar approach).

189 Supplemental Written Submission, para. 26.40; Jurisdictional Hearing Tr. (Day 2).

190 Jurisdictional Hearing Tr. (Day 2), p. 1.

191 Memorial, para. 7.72.

192 Jurisdictional Hearing Tr. (Day 2), p. 17; Memorial, para. 7.49; Supplemental Written Submission, para. 26.25.

193 Memorial, paras. 7.74-7.76, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16 at p. 46, para. 91 (**Annex LA-6**); Jurisdictional Hearing Tr. (Day 2), p. 17.

Shoal, China's assumption of *de facto* control over Second Thomas Shoal and, more recently, China's large-scale land reclamations on the features it occupies in the Spratly Islands.[194] The Philippines objects to the way China, in its Position Paper, characterises the Philippines' own conduct in connection with these complained of events and notes that it has in fact taken rigorous measures to avoid the violation of any of the political commitments it undertook in the DOC.[195]

(c) The Tribunal's Decision

212. The Tribunal first considers whether the DOC constitutes a binding "agreement" within the meaning of Article 281.

213. To constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties. Such clear intention is determined by reference to the instrument's actual terms and the particular circumstances of its adoption. The subsequent conduct of the parties to an instrument may also assist in determining its nature. This test is accepted by both Parties and has been articulated in a number of international cases, including *Aegean Continental Shelf*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, and *Land and Maritime Boundary (Cameroon v. Nigeria)*.[196]

214. Although the DOC is entitled a "declaration" rather than a "treaty" or "agreement", the Tribunal acknowledges that international agreements may take a number of forms and be given a variety of names. The form or designation of an instrument is thus not decisive of its status as an agreement establishing legal obligations between the parties.[197] The Tribunal observes that the DOC shares some hallmarks of an international treaty. It is a formal document with a preamble, it is signed

194 Memorial, Chapters 3 and 6, paras. 7.75-7.76; Supplemental Written Submission, paras. 26.55-26.57; Jurisdictional Hearing Tr. (Day 2), p. 17.

195 Supplemental Written Submission, paras. 26.55-26.56 (responding to China's Position Paper, paras. 51-53); Jurisdictional Hearing Tr. (Day 3), p. 70 (responding to Tribunal question on 'unclean hands'); and Philippines' Written Response to Tribunal Hearing Questions, 23 July 2015, paras. II.1-II.8.

196 China's Position Paper, para. 38; Memorial, para. 7.51, Supplemental Written Submission, paras. 26.28-26.29; Jurisdictional Hearing Tr. (Day 2), p. 12; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3 at p. 39, para. 96 (**Annex LA-9**), *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, p. 112 at pp. 120-22, paras. 23-29 (**Annex LA-21**); *Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303 at pp. 427, 429, paras. 258, 262-263 (**Annex LA -27**).

197 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3 at p. 39, para. 96 (**Annex LA-9**), *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, p. 112 at pp. 120-22, paras. 23-29 (the Court found an exchange of letters and minutes of consultations between the parties' foreign ministers to constitute agreements to refer the dispute to the Court) (**Annex LA-21**); *Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303 at pp. 427, 429, paras. 258, 262-263 (the Court found a Declaration to constitute an international agreement, having considered subsequent conduct) (**Annex LA-27**); *see also* Vienna Convention on the Law of Treaties, Article 2(1)(a).

by the foreign ministers of China and the ASEAN States, and the signatory States are described in the DOC as "Parties".

215. However, with respect to its terms, the DOC contains many instances of the signatory States simply "reaffirming" existing obligations. For example, in paragraph 1, they "reaffirm their commitment" to the UN Charter, the Convention, and other "universally recognized principles of international law." In paragraph 5, they "reaffirm their respect and commitment to the freedom of navigation and overflight" as provided in the Convention. In paragraph 10, they reaffirm "the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region." The only instance where the DOC uses the word "agree" is in paragraph 10 where the signatory States "agree to work, on the basis of consensus, towards the eventual attainment" of a Code of Conduct. This language is not consistent with the creation of new obligations but rather restates existing obligations pending agreement on a Code that eventually would set out new obligations. The DOC contains other terms that are provisional or permissive, such as paragraph 6, outlining what the Parties "may explore or undertake," and paragraph 7, stating that the Parties "stand ready to continue their consultations and dialogues."

216. On the other hand, some of the terms used in the DOC are suggestive of the existence of an agreement. For example, the word "undertake", used in paragraph 4 ("undertake to resolve their . . . disputes by peaceful means . . . through friendly consultations and negotiations by sovereign states directly concerned") and in paragraph 5 ("undertake to exercise self-restraint"). As China mentions, the Court observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[198] that the word "undertake" is "regularly used in treaties setting out the obligations of Contracting Parties" and found the ordinary meaning of "undertake" to be "give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation." However, the Tribunal notes a number of differences between paragraph 4 of the DOC and Article 1 of the Genocide Convention. First, the Court was operating in the context of a treaty, whose legally binding character was not in any doubt. The examples cited by the Court—the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights—were also indisputably legally binding treaties. The Court was not seeking to determine whether an agreement on the submission of disputes was binding (as it was in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* and *Land and Maritime Boundary (Cameroon v. Nigeria)*), but rather whether Article 1 of the

198 China's Position Paper, para. 38, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 43 at pp. 111-12, paras. 162-63 (**Annex LA-176**).

Genocide Convention imposed an obligation to prevent genocide that was separate and distinct from other obligations in the Genocide Convention. Notably, the Court looked beyond the ordinary meaning of the word "undertake" to verify its understanding. It thus gave weight to the object and purpose of the Genocide Convention and the negotiating history of the relevant provisions.[199]

217. When a similar exercise is undertaken with respect to the DOC, it becomes apparent to this Tribunal that the DOC was not intended to be a legally binding agreement with respect to dispute resolution. The purpose and circumstances surrounding the DOC's adoption reinforce the Tribunal's understanding that the DOC was not intended to create legal rights and obligations. Descriptions from contemporaneous documents leading up to and surrounding the adoption of the DOC amply demonstrate that the DOC was not intended by its drafters to be a legally binding document, but rather an aspirational political document. For example:

(a) In December 1999, the Chinese drafters described their own October 1999 draft as reflecting the "consensus that the Code should be a political document of principle."[200]

(b) In August 2000, a spokesperson for the Chinese Foreign Ministry reporting on the results the Second Meeting of the Working Group of the China–ASEAN Senior Officials' Consultation on the Code of Conduct stated that the "Code of Conduct will be a political document to promote good neighbourliness and regional stability instead of a legal document to solve specific disputes."[201]

199 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 43 at pp. 111-13, paras. 162, 164-65 (**Annex LA-176**).

200 Memo of China's Position Regarding the Latest Draft Code of Conduct by the ASEAN, para. 2 (18 December 1999) (**Annex 471**). With respect to the use of "Code" and "Declaration" in the drafting history of the instrument, the Tribunal notes that the DOC originated out of the negotiations on a "Code of Conduct", stemming from a proposal by the Chinese negotiators in October 1999 for a text that would provide an alternative to what they considered to be an unacceptable draft Code. The Chinese alternative, although originally being referred to as a "Code", was a precursor to what would in 2002 be termed a "Declaration". This Declaration provided a means to move past a political impasse between the positions reflected in the Chinese alternative proposal, and a contemporaneous ASEAN proposal, thus enabling negotiations on an eventual Code of Conduct to continue in light of the consensus reflected in the Declaration. For this reason, the early documentation referring to the Chinese proposal refers to it as the "Code" rather than the "Declaration". *See*, *e.g.*, Memo of China's Position Regarding the Latest Draft Code of Conduct by the ASEAN, paras. 1, 2 (18 December 1999) (**Annex 471**); Ministry of Foreign Affairs of the People's Republic of China, *Spokesperson's Comment on China-Asean Consultation*, p. 1 (30 August 2000) (**Annex 491**).

201 Ministry of Foreign Affairs of the People's Republic of China, *Spokesperson's Comment on China-Asean Consultation*, p. 1 (30 August 2000) (**Annex 491**).

(c) According to the official report of the Third Meeting of the same Working Group, which took place on 11 October 2000, the participants "reaffirmed that the Code of Conduct is a political and not legal document and is not aimed at resolving disputes in the area."[202]

(d) Rodolfo C. Severino, who was the ASEAN Secretary-General at the time the DOC was adopted and had been involved with negotiations over the South China Sea on behalf of the Philippines since the 1990s, recalls that the final version of the DOC that was signed in 2002 "was reduced to a political declaration from the originally envisioned legally binding 'code of conduct'."[203]

218. The Parties' subsequent conduct further confirms that the DOC is not a binding agreement. In this respect, the Tribunal notes the Parties' continuing efforts over a decade after the DOC was signed to agree upon a Code of Conduct. The Tribunal also observes that in recent years, at least before the arbitration commenced, several Chinese officials described the DOC as a "political" document.[204]

219. The Tribunal's finding that the DOC was not intended as a legally binding agreement would be sufficient to dispose of the issue of the DOC for the purposes of Article 281. However, for completeness and in light of their potential relevance for the other instruments, the Tribunal briefly addresses the remaining elements of Article 281, namely whether a settlement has been reached by recourse to the agreed means and whether the agreement excludes any further procedure.

220. The Tribunal notes as a matter of fact that, despite years of discussions aimed at resolving the Parties' disputes, no settlement has been reached. If anything, the disputes have intensified.[205] Article 281 does not require parties to pursue any agreed means of settlement indefinitely.[206] It

202 Association of Southeast Asian Nations, *Report of the Third Meeting of the Working Group of ASEAN-China Senior Official Consultations on the Code of Conduct in the South China Sea*, para. 3 (11 October 2000) (**Annex 498**).

203 For Mr. Severino's early role in negotiations, see Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**); Rodolfo Severino, *ASEAN and the South China Sea*, 6(2) Security Challenges 45 (2010) (**Annex 293**).

204 Ministry of Foreign Affairs of the People's Republic of China, *Remarks by H.E. Li Keqiang, Premier of the State Council of the People's Republic of China, at the 16th ASEAN-China Summit*, p. 2 (16 October 2013) (**Annex 128**). The Tribunal notes that none of the signatory States to the DOC have ever submitted the DOC to the UN Secretariat for registration and publication.

205 *See* Section VII.C below.

206 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at pp. 42-43, para. 55 (**Annex LA-50**); *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 295, para. 60 (**Annex LA-37**) (holding "[a] State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the

only requires parties to abide by any time limit set out in their agreement. There is no time limit in the DOC.

221. The Tribunal now turns to the final element in Article 281 and finds that the DOC "does not exclude any further procedure."

222. It is common ground between the Parties that the DOC contains no express exclusion of recourse to the Part XV dispute resolution procedures. The DOC does not say that it "excludes Part XV of the Convention." It could have, but it does not. While the DOC states that the Parties undertake to resolve their disputes "without resorting to the threat or use of force," it does not say that the Parties undertake to resolve their disputes "without resorting to third-party settlement." It could have, but it does not. The DOC does not say that the parties undertake to resolve their disputes "only through friendly consultations and negotiations by sovereign states directly concerned." It could have, but it does not. The DOC does not say that the Parties "undertake not to submit a dispute to any method of settlement other than negotiations." It could have—similar exclusionary language has been used in the Treaty of the Functioning of the European Union—but the signatory States to the DOC did not include such language.[207] The DOC does not specify that the chosen means of negotiation "shall be an exclusive one and that no other procedures (including those under Part XV of the Convention) may be resorted to even if negotiations do not lead to a settlement."[208] It could have, but it does not.

223. As stated above, the Parties disagree on whether an express exclusion is required. The Philippines argues that the intent to exclude further procedures under the Convention must be evident from the terms of the agreement itself. China considers an express exclusion unnecessary and subscribes to the view of the majority of the Annex VII tribunal in *Southern Bluefin Tuna*. The Tribunal considers that the better view is that Article 281 requires some clear

possibilities of settlement have been exhausted"); *see also Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 at p. 19, para. 47 (**Annex LA-41**); *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 107 para. 60 (**Annex LA-39**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 at p. 247, para. 76 (**Annex LA-45**); *ARA Libertad (Republic of Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 326 at p. 346, para. 71 (**Annex LA-44**).

207 Article 344 of the Treaty on the Functioning of the European Union states: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." *See* Consolidated Version of the Treaty on the Functioning of the European Union, 55 Official Journal of the European Union 47 (2012) (**Annex LA-83**), as cited in Memorial, para. 7.70.

208 This is a formula suggested in *United Nations Convention on the Law of the Sea 1982: A Commentary* (hereinafter "**Virginia Commentary**"), Volume V 23-24 (Nordquist et al. eds., 1989) (**Annex LA-148**); *see also* Jurisdictional Hearing Tr. (Day 2), pp. 14-15.

statement of exclusion of further procedures. This is supported by the text and context of Article 281 and by the structure and overall purpose of the Convention. The Tribunal thus shares the views of ITLOS in its provisional measures orders in the *Southern Bluefin Tuna* and *MOX Plant* cases,[209] as well as the separate opinion of Judge Keith[210] in *Southern Bluefin Tuna* that the majority's statement in that matter that "the absence of an express exclusion of any procedure . . . is not decisive"[211] is not in line with the intended meaning of Article 281.

224. The text of Article 281 provides that when parties agree to resolve their dispute by other peaceful means, Part XV dispute procedures "will apply" where the parties' agreement "does not exclude any further procedure." This requires an "opting out" of Part XV procedures. It does not contain an "opting in" requirement whereby the Parties must positively agree to Part XV procedures. Such an "opting in" is only required where the parties have chosen an alternative compulsory and binding procedure, as set out in Article 282. Pursuant to Article 282, the chosen binding procedure will apply "in lieu of" the Part XV procedures "unless the parties to the dispute otherwise agree." In other words, the Part XV procedures are excluded by the alternative compulsory binding procedure, and the only way to make them available is for the parties to opt back in to them by "agreeing otherwise". That distinction between Article 281 and 282 is consistent with the overall design of the Convention as a system whereby compulsory dispute resolution is the default rule and any limitations and exceptions are carefully and precisely defined in Section 3 of Part XV.[212]

225. Requiring express exclusion for Article 281 is also consistent with the overall object and purpose of the Convention as a comprehensive agreement. The drafters of the Convention recalled that "the system for the settlement of disputes must form an integral part and an essential element of the Convention."[213] In introducing the dispute resolution provisions, the President of the Conference, Ambassador Amerasinghe, explained that "[d]ispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be

209 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 (**Annex LA-37**); *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 (**Annex LA-39**).

210 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Separate Opinion of Justice Sir Kenneth Keith, RIAA, Vol. XXIII, p. 49 at pp. 53-57, paras. 17-30 (**Annex LA-51**).

211 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at p. 43, para. 57 (**Annex LA-50**).

212 Virginia Commentary, Vol. V, para. XV.4 ("[U]niformity in the interpretation of the Convention should be sought . . . [and] a few carefully defined exceptions should be allowed").

213 *Ibid.*

balanced."[214] His successor, Ambassador Koh, stressed the "integral" nature of the Convention, meaning that, with very limited exceptions, it is "not possible for States to pick what they like and to disregard what they do not like."[215] In these circumstances it is difficult to accept that the Parties may remove a pivotal part of the Convention without clearly expressing an intention to do so.

226. In any event, even if the Tribunal were to accept that recourse to Part XV dispute settlement procedures may be *implicitly* excluded, the Tribunal finds that no such exclusion can be implied from the DOC.

227. In paragraph 1 of the DOC, the parties commit to the UN Charter and the 1982 UN Convention on the Law of the Sea among "universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations."

228. While China argues that the reference to negotiations "by sovereign states directly concerned" implicitly excludes any third-party settlement by those not "directly concerned", this argument overlooks the fact that paragraph 4 actually embraces the Convention, stating in full:

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

The DOC did not carve out any part of the Convention, let alone a fundamental part that has been described by the Convention's founders as the "pivot upon which delicate equilibrium of the compromise must be balanced."[216] Instead, the DOC (in paragraphs 1 and 3) repeatedly invokes the Convention and the UN Charter generally, without differentiating amongst the component parts of those instruments.

229. The Tribunal accordingly concludes that the DOC does not, by virtue of Article 281, bar the Tribunal's jurisdiction.

214 UN Conference on the Law of the Sea III, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, UN Doc. A/CONF.62/WP.9/ADD.1, p. 122, para. 6 (31 March 1976) (**Annex LA-106**).

215 UN Conference on the Law of the Sea, *185th Meeting*, U.N. Doc. A/CONF.62/PV.185, p. 14, para. 53 (26 January 1983) (**Annex LA-116**).

216 UN Conference on the Law of the Sea III, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, UN Doc. A/CONF.62/WP.9/ADD.1, p. 122, para. 6 (31 March 1976) (**Annex LA-106**).

2. Application of Article 281 to Other Bilateral Statements

230. In addition to and in combination with the DOC, China has pointed to a series of bilateral documents to show that China and the Philippines have a long-standing agreement to settle their relevant disputes through negotiations to the exclusion of any other means of settlement.

231. The following documents, which pre-date the DOC, have been discussed by the Parties:

(a) A Joint Statement dated 10 August 1995 reflecting the results of the first consultations between senior officials of the Philippines and China on the South China Sea issue.[217] The two sides agreed on "the necessity and desirability of having a code of conduct in the disputed area" and, "[p]ending the resolution of the dispute," to abide by a number of principles, including:

> 1. Territorial disputes between the two sides should not affect the normal development of their relations. Disputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect.
>
> . . .
>
> 3. In the spirit of expanding common ground and narrowing differences, a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes.
>
> 4. The two sides agreed to settle their bilateral disputes in accordance with the recognized principles of international law, including the UN Convention on the Law of the Sea.
>
> . . .
>
> 8. Disputes shall be settled by the countries directly concerned without prejudice to the freedom of navigation in the South China Sea.

The document also states that "[i]n order to push the process forward, the two sides agreed to hold discussions among experts on legal issues . . . ."

(b) A Joint Statement dated 12 March 1999 of the China-Philippines Experts Group Meeting on Confidence-Building Measures, in which the two sides "reiterated their commitment to":

> 1. The understanding to continue to work for a settlement of their differences through friendly consultations;
>
> 2. Settle their dispute in accordance with the generally-accepted principles of international law, including the United Nations Convention on the Law of the Sea;

[217] Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**), cited in China's Position Paper, para. 31.

The two sides stated that "[t]hey have agreed that the dispute should be peacefully settled through consultation and that the normal development of bilateral relations should not be affected by their differences."[218]

(c) A Joint Statement dated 16 May 2000 on a "Framework of Bilateral Cooperation in the Twenty-First Century" in which the two sides "undertake to elevate Philippines-China relations to greater heights in the 21st century and to this end" and stated:

> 1. The two sides reaffirm that the purposes and principles of the United Nations Charter, the Five Principles of Peaceful Coexistence, the principles established in the Treaty of Amity and Cooperation in Southeast Asia and other universally recognized principles of international law are the basic norms governing the relations between the two countries.
>
> . . .
>
> 9. The two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 Joint Statement between the two countries on the South China Sea and agree not to take actions that might complicate or escalate the situation. The two sides expressed their determination to follow through the work of the Philippines-China Working Group on Confidence Building Measures to enhance peace and stability in the region. They reiterate that they will contribute positively toward the formulation and adoption of the regional Code of Conduct in the South China Sea.[219]

(d) A Joint Press Statement, dated 4 April 2001, of the Third China-Philippines Experts' Group Meeting on Confidence-Building Measures, which reported:

> IV. The two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound development of Philippines-China relations and peace and stability of the South China Sea area
>
> . . .
>
> VIII. The two sides will strengthen their cooperation to contribute positively toward the formulation and adoption of an ASEAN-China regional code of conduct in the South China Sea.[220]

218 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures*, p. 2 (23 March 1999) (**Annex 178**), cited in China's Position Paper, para 32.

219 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Framework of Bilateral Cooperation in the Twenty-First Century* (16 May 2000) (**Annex 505**), cited in China's Position Paper, para. 33; Supplemental Written Submission, para. 2.11.

220 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: 3rd Philippines-China Experts' Group Meeting on Confidence-Building Measures, Manila, 3-4 April 2001* (4 April 2001) (**Annex 506**), cited in China's Position Paper, para. 34; Supplemental Written Submission, para. 2.11.

232. The following bilateral documents, which post-date the DOC, have also been discussed by the Parties:

(a) A Joint Press Statement dated 3 September 2004 on the occasion of the State visit to China of the President of the Philippines, Gloria Macapagal-Arroyo, which reported:

> The two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area. They agreed to promote the peaceful settlement of disputes in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They agreed that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation.[221]

(b) A Joint Statement dated 1 September 2011 on the occasion of the State visit to China of President Benigno S. Aquino III, which reported:

> 15. Both leaders exchanged views on the maritime disputes and agreed not to let the maritime disputes affect the broader picture of friendship and cooperation between the two countries. The two leaders reiterated their commitment to addressing the disputes through peaceful dialogue, to maintain continued regional peace, security, stability and an environment conducive to economic progress. Both leaders reaffirmed their commitments to respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002.[222]

233. The Parties take different views on the effect of the above-mentioned statements on the Tribunal's jurisdiction.

(a) China's Position

234. China characterises the foregoing bilateral instruments as evidence of a long-standing and binding "agreement" between the Philippines and China to resolve their disputes in the South China Sea by friendly negotiations. China reiterates that so long as such instruments "intend to create rights and obligations for the parties, these rights and obligations are binding" and the designation or form of an instrument is not decisive.[223]

221 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People's Republic of China*, 1-3 September 2004 (3 September 2004) (**Annex 188**). Cited in China's Position Paper, para. 36; Supplemental Written Submission, para. 2.11.

222 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement* (1 September 2011) (**Annex 507**). Cited in China's Position Paper, para. 37; Supplemental Written Submission, para. 2.11.

223 China's Position Paper, para. 38.

235. According to China, the repeated use of the word "agree" in many of the instruments "evinces a clear intention to establish an obligation between the two countries in this regard."[224] China also argues that the instruments taken together and with the DOC are "mutually reinforcing" and form an "agreement" between China and the Philippines for purposes of Article 281.

236. China then addresses whether this agreement "exclude[s] any further procedure" within the meaning of Article 281. China acknowledges that none of the bilateral instruments include "such an express phrase as 'exclude other procedures of dispute settlement'," but, as with the DOC, argues on the basis of *Southern Bluefin Tuna* that "the absence of an express exclusion of any procedure . . . is not decisive."[225]

237. China argues that the bilateral statements "obviously have produced the effect of excluding any means of third-party settlement" by virtue of two factors. First, China "always insists on peaceful settlement of disputes by means of negotiations between the countries directly concerned." According to China, this position was well known and clear to the Philippines during the drafting and adoption of the bilateral instruments.[226] Second, China points to the expectation that negotiations will "eventually" settle the dispute, as encapsulated in the August 1995 Statement that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes."[227] According to China, the use of the term "eventually" in this context "clearly serves to emphasize that 'negotiations' is the only means the parties have chosen for dispute settlement, to the exclusion of any other means including third-party settlement procedures."

(b) The Philippines' Position

238. The Philippines argues that, as with the DOC, none of the bilateral instruments invoked by China, whether taken individually or collectively, can be said to constitute a legally binding agreement.[228] The Philippines observes that joint statements like those relied upon by China are "commonplace" in international practice, do not purport to establish binding legal obligations,

224 China's Position Paper, paras. 38, 43-44.

225 China's Position Paper, para. 40, citing *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan),* Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at pp. 43-44, para. 57.

226 China's Position Paper, para. 40.

227 China's Position Paper, para. 40.

228 Supplemental Written Submission, paras. 26.61-26.63; Jurisdictional Hearing Tr. (Day 2), p. 20.

and "at best, constitute aspirational political statements." The Philippines suggests that "States everywhere would undoubtedly be dismayed to learn otherwise."[229]

239. In any event, the Philippines argues that nothing in any of the statements, explicitly or impliedly, excludes recourse to dispute settlement under Part XV of the Convention. To the contrary, the Philippines points out that at least one of the instruments, the May 2000 statement, refers to negotiations being conducted "in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea." Recalling that Section 2 of Part XV "constitutes an integral part of the Convention," the Philippines argues that the reference to the Convention "plainly reflects an understanding that, while negotiations are to be encouraged, recourse to alternative procedures, including compulsory procedures, is entirely appropriate when negotiation has failed or is futile."[230]

240. The Philippines summarily dismisses China's reliance on the two bilateral statements post-dating the DOC. Both statements reaffirm the Parties' commitment to the implementation of the DOC, and according to the Philippines, their force "can extend no further than that of the DOC itself," which for reasons explained the Philippines considers to be of no consequence to the Tribunal's jurisdiction.[231] In other words, by merely reaffirming the DOC, the two statements "cannot give that instrument more weight than the drafters intended."[232]

(c) The Tribunal's Decision

241. To determine whether the bilateral statements are legally binding, the Tribunal applies the standard set out above with respect to the DOC and analyses whether the text of those instruments and the circumstances of their adoption evince an intention to create legal rights and obligations.[233]

242. While it is true that the designation of an instrument is not decisive, the Tribunal observes that none of the instruments in question are designated as agreements but rather are in the form of

229 Supplemental Written Submission, para. 26.63; Jurisdictional Hearing Tr. (Day 2), p. 22.

230 Supplemental Written Submission, para. 26.64. The Philippines points to cases in which the ICJ has found that the fact that negotiations are being actively pursued during the judicial proceedings does not, legally, present any obstacle to the exercise by the Court of its judicial function. *See*, *e.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 (**Annex LA-13**); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, ICJ Reports 1978, p. 3 (**Annex LA-9**). The Philippines argues that "[i]f active negotiations are no impediment to the exercise of the judicial function, *a fortiori* failed or futile negotiations are not either." Supplemental Written Submission, para. 26.67.

231 Supplemental Written Submission, para. 26.61.

232 Jurisdictional Hearing Tr. (Day 3), p. 35.

233 *See* Section VII.A.1.c above.

joint press statements and reports of meetings of officials of varying ranks. Even where the statements and reports use the word "agree", that usage occurs in the context of other terms suggestive of the documents being political and aspirational in nature.

243. Notably, many of the statements reference the aspiration of the Parties to conclude a code of conduct for settlement of disputes in the region at a later date. Thus, the 1995 Statement refers to the "necessity and desirability of having a code of conduct in the dispute area" and provides that, "[p]ending" the resolution of the dispute, the states shall seek to settle disputes "in a peaceful and friendly manner through consultations." The senior officials who reported on the consultation even mentioned the need to "hold discussions among experts on legal issues" in order to "push the process forward."[234] This language is suggestive of an aspirational arrangement rather than a legally binding agreement. Similarly, the Joint Statement of May 2000 reiterated that the sides will "contribute positively toward the formulation and adoption of the regional Code of Conduct in the South China Sea,"[235] and the April 2001 Press Statement states that "the two sides will strengthen their cooperation to contribute positively toward the formulation and adoption of an ASEAN-China regional code of conduct in the South China Sea."[236]

244. The Tribunal does not accept the argument of China that the bilateral statements mutually reinforce each other so as to render them legally binding. Repetition of aspirational political statements across multiple documents does not *per se* transform them into a legally binding agreement.

245. The Tribunal is thus not convinced that these statements constitute binding agreements to settle disputes by "other peaceful means" within the meaning of the first part of Article 281.

246. In any event, the Tribunal does not find that the statements "exclude any further procedure." None of the instruments expressly rule out compulsory dispute settlement proceedings. To the contrary, most of them expressly refer to the Convention and/or Article 33 of the UN Charter. For example, in paragraph 4 of the 1995 Statement, "[t]he two sides agreed to settle their bilateral disputes in accordance with the recognized principles of international law, including

234 Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**).

235 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Framework of Bilateral Cooperation in the Twenty-First Century*, para. 9 (16 May 2000) (**Annex 505**).

236 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: 3rd Philippines-China Experts' Group Meeting on Confidence-Building Measures*, Manila, 3-4 April 2001, para. VIII (4 April 2001) (**Annex 506**).

the UN Convention on the Law of the Sea."[237] The March 1999 Statement reiterates the two sides' commitment to "settle their dispute in accordance with the generally accepted principles of international law, including the United Nations Convention on the Law of the Sea."[238] The September 2004 press statement on the occasion of President Arroya's visit to China also states the agreement "to promote the peaceful settlement of disputes in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea." As already noted above, Part XV of the Convention is an "integral part and an essential element of the Convention" and the "pivot upon which the delicate equilibrium of the compromise must be balanced."[239] The Tribunal will not imply an exclusion of that integral part of the Convention from documents which, in the context of dispute settlement, implore adherence to that very instrument.

247. Finally, the Tribunal addresses China's argument that by "repeatedly reaffirming negotiations as the means for settling relevant disputes, and by emphasizing that negotiations be conducted by sovereign States directly concerned" the statements "obviously have produced the effect of excluding any means of third-party settlement."[240] The Tribunal understands that China's preferred means for dispute resolution in the South China Sea is bilateral negotiation. Indeed, the DOC and other joint statements show that negotiation was also the preferred means for the Philippines. The Tribunal accepts that China "always insists on" negotiations and has made this preference "clear and well-known to the Philippines."[241] However, repeated insistence by one party on negotiating indefinitely until an eventual resolution cannot dislodge the "backstop of compulsory, binding procedures" provided by Section 2 of Part XV.[242] One party's preference for one means of dispute settlement, however persistent, cannot imply that if negotiations fail or become futile, the other party has relinquished its right to have recourse to the other means of dispute settlement set out in Section 2 of Part XV.[243]

237 Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue*, para. 4 (10 August 1995) (**Annex 180**).

238 Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures*, para. 2 (23 March 1995) (**Annex 178**).

239 UN Conference on the Law of the Sea III, *Memorandum by the President of the Conference on document A/CONF.62/WP.9*, UN Doc. A/CONF.62/WP.9/ADD.1, p. 122, para. 6 (31 March 1976) (**Annex LA-106**).

240 China's Position Paper, para. 40.

241 China's Position Paper, para. 40.

242 *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan),* Separate Opinion of Justice Sir Kenneth Keith, RIAA, Vol. XXIII, p. 49 at p. 56, para. 26 (**Annex LA-51**).

243 China's Position Paper, paras. 40-41.

248. The Tribunal therefore concludes that, whether treated individually or collectively, the bilateral statements made by the Philippines and China, both before and after the DOC, do not bar the Tribunal's jurisdiction under the terms of Article 281 of the Convention.

249. Related to the question of whether the bilateral statements and the DOC trigger a bar to jurisdiction under Article 281 is the question, raised during the hearing, of whether the Philippines' statements and conduct in respect of the DOC could estop the Philippines from seeking recourse to arbitration.[244]

250. As recently articulated by the arbitral tribunal in *Chagos Marine Protected Area*, 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."[245] 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.[246]

251. In order for the DOC and the Philippines' related statements to estop the Philippines from seeking recourse to arbitration, the Tribunal would first have to find that the Philippines had made clear and consistent representations that it would not resort to the Part XV compulsory dispute settlement procedures. The Tribunal finds no evidence of such representations. In fact, as set out under Section C below, the Philippines specifically raised the prospect of recourse to compulsory dispute settlement if it were left with no other choice and negotiations were failing. The DOC contains an undertaking to resolve territorial and jurisdictional disputes by "peaceful means . . . through friendly consultations and negotiations by sovereign states directly concerned" and invokes "universally recognized principles of international law," but neither of these statements can be construed as a representation that the Philippines would not bring compulsory proceedings against China. Nor can the statements in the various bilateral instruments committing to peaceful and friendly consultations have that effect. The International Court of Justice has held that the fact that negotiations have been or are being actively pursued at the same time as compulsory proceedings is not, legally, an obstacle to

244 Jurisdictional Hearing Tr. (Day 2), pp. 36-37.

245 *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 435 (**Annex LA-225**).

246 *Ibid.*, para. 438 (**Annex LA-225**).

jurisdiction. In *Land and Maritime Boundary (Cameroon v. Nigeria)*, the Court found that an estoppel would apply only if Cameroon had "consistently made it fully clear" that it had agreed to settle the dispute by bilateral dialogue "alone."[247] The Court found Cameroon did not "attribute an exclusive character to the negotiations conducted with Nigeria." The Tribunal has similarly found here that neither the DOC nor the subsequent statements attributed an exclusive character to negotiations. To the contrary, they specifically incorporate the Convention and Article 33 of the UN Charter, both of which enumerate judicial settlement and arbitration as acceptable means of dispute settlement. Accordingly, no estoppel arises.

3. Application of Article 281 to the Treaty of Amity

252. The Treaty of Amity and Co-operation in Southeast Asia (the "**Treaty of Amity**") is a multilateral treaty concluded on 24 February 1976 amongst the governments of Indonesia, Malaysia, the Philippines, Singapore, and Thailand. It came into force on 15 July 1976, and thus pre-dates the UN Convention on the Law of the Sea.[248] Since its entry into force, dozens of other States from within and outside of ASEAN have become parties to it. China acceded to the Treaty on 8 October 2003.

253. The Treaty of Amity's preamble states that the High Contracting Parties were "[c]onvinced that the settlement of differences or disputes between their countries should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder cooperation." The Treaty's purpose includes the promotion of perpetual peace and everlasting amity and cooperation amongst the parties.

254. Chapter IV of the Treaty of Amity is entitled "Pacific Settlement of Disputes" and contains the following provisions:

> *Article 13*. The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.
>
> *Article 14*. To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.
>
> *Article 15*. In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in

247 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at p. 303, para. 57 (**Annex LA-25**).

248 Treaty of Amity and Cooperation in Southeast Asia, 1025 UNTS 319 (opened for signature 24 February 1976, entered into force 15 July 1976) (hereinafter "**Treaty of Amity**") (**Annex LA-185**).

> dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.
>
> *Article 16*. The foregoing provisions of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offer of assistance.
>
> *Article 17*. Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

255. The Tribunal examines here whether the Treaty of Amity could constitute a bar to jurisdiction by virtue of Article 281. The Philippines says it cannot; China is silent on this point.

(a) Possible Objections

256. China's Position Paper refers to the Treaty of Amity only insofar as the parties to the DOC, in paragraph 1, reaffirmed their commitment to the Treaty of Amity, among other instruments, including the Convention and the Charter of the United Nations.[249] China does not otherwise invoke the Treaty of Amity in itself as a basis for precluding the jurisdiction of the Tribunal.

257. On its face, the Treaty of Amity is an agreement between the Parties which includes a range of choices for peaceful means of dispute settlement. Thus the Tribunal invited the Philippines to address "the effect, if any, of the Treaty of Amity and Cooperation in Southeast Asia on the Tribunal's jurisdiction and the admissibility of the Philippines' claims," with reference to Article 281 of the Convention.[250]

258. During the Hearing on Jurisdiction, the Tribunal also invited the Philippines to address the question whether, before seeking arbitration, it was necessary for the Philippines to attempt resolution through the High Council provisions in the Treaty of Amity, in light of the precondition in Article 281 that "no settlement has been reached by recourse to the [agreed] means."[251]

249 China's Position Paper, para. 54; DOC, para. 1.

250 Request for Further Argument, Question 2; *see also* Letter from the Tribunal to the Parties (23 June 2015), Issue C.

251 Tribunal Questions of 10 July 2015, Question 4 (a).

(b) The Philippines' Position

259. The Philippines acknowledges that, unlike the DOC and the other bilateral statements discussed above, the Treaty of Amity "is a legally binding agreement to which both the Philippines and China are parties."[252]

260. However, the Philippines argues that the Treaty of Amity "does not constitute an agreement to settle disputes in any particular manner." Although Article 13 refers to "friendly negotiations" and Articles 14 and 15 refer to a set of procedures for a High Council to "recommend" certain non-adversarial means of dispute resolution, the Philippines points out that, under Article 16, those provisions shall not apply to a dispute unless "all the parties to the dispute agree to their application to that dispute."[253]

261. Thus, in answer to the Tribunal's question about the compulsory nature of the High Council provisions and whether it was necessary for the Philippines to resort to the High Council before arbitration, the Philippines stressed that: "Article 16 makes it clear that Article 15 is not compulsory. More than this, Article 16 makes clear that Article 15 cannot apply to this case, because the parties to the dispute, the Philippines and China, have never agreed to submit the dispute, or any part of it, to the High Council."[254]

262. The Philippines draws attention to Article 17 of the Treaty of Amity, which provides that nothing in the Treaty "shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations" and that parties to a dispute "should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations." The Philippines describes the words "should be encouraged" as "hortatory language" that shows pre-arbitration negotiation is not mandatory but that parties are "merely encourage[d]" to attempt to settle their dispute by negotiation. The Philippines also cites State practice to demonstrate a shared understanding amongst parties to the Treaty of Amity that the High Council provisions are not compulsory.[255]

252 Jurisdictional Hearing Tr. (Day 2), p. 20.

253 Treaty of Amity, Article 16; *see* Supplemental Written Submission, paras. 2.2-2.3; Jurisdictional Hearing Tr. (Day 2), pp. 20-21; Jurisdictional Hearing Tr. (Day 3), p. 38.

254 Jurisdictional Hearing Tr. (Day 3), p. 40.

255 Jurisdictional Hearing Tr., (Day 3), pp. 38-40, in response to Tribunal Questions of 10 July 2015, Question 4. The Philippines notes, in reference to *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 at p. 19, para. 47 (**Annex LA-41**), and *Bay of Bengal Maritime Boundary (Bangladesh v. India)*, Award of 7 July 2014 (**Annex LA-179**), that "[i]n neither case did the respondent state raise any objection based on the treaty, nor was there any prior resort to the High Council, which has never even been constituted in any event."

263. As for the other elements of Article 281, the Philippines notes that no settlement has been reached through the means contemplated in the Treaty, recalling the extensive efforts the Parties have made to settle their dispute through many years of negotiations. It reiterates that pre-arbitration negotiation is neither mandatory under the Treaty of Amity, nor under general international law.[256]

264. Finally, the Philippines argues that the Treaty does not exclude recourse to the procedures specified in Section 2 of Part XV of the Convention. To the contrary, the language in Article 17 makes it "crystal-clear" that the Contracting States may have recourse to the modes of peaceful settlement identified in Article 33(1) of the Charter, which include "arbitration" and "judicial settlement".[257]

(c) The Tribunal's Decision

265. The Treaty of Amity is a legally binding agreement. It contains an array of options for peaceful dispute settlement, including by means of negotiation, mediation, conciliation and use of the good offices of a High Council composed of ministerial representatives. However, it does not prescribe a particular form of dispute settlement and certainly does not exclude recourse to compulsory dispute settlement procedures.

266. Read in isolation, Article 13 appears to impose an obligation that States directly affected by a dispute "shall at all times settle such disputes among themselves through friendly negotiations." Likewise, read in isolation, Articles 14 and 15 provide for an obligation to resort to the High Council in the event direct negotiations fail. However, Articles 13, 14, and 15 all come within Chapter IV on "Pacific Settlement of Disputes." Article 16 in the same Chapter states that "the foregoing provisions of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute." In the context of the structure of the Treaty and composition of Chapter IV, Article 16 must be read as applying to all of the means set out in Articles 13, 14, and 15. Thus, the Treaty does not constitute a binding agreement to resolve disputes by negotiation or other chosen means. That obligation only becomes binding if there is an additional specific agreement amongst all parties to the particular dispute to resort to any of the means in Articles 13, 14, and 15. The first part of Article 281, is therefore not satisfied for the Treaty of Amity.

256 Memorial, paras. 3.22-3.72; Supplemental Written Submission, para. 2.7.

257 Supplemental Written Submission, para. 2.6; UN Charter, Art. 33(1) (**Annex LA-181**); Jurisdictional Hearing Tr. (Day 2), p. 21.

267. There has been no settlement of the dispute, as discussed earlier, and the Philippines was not required to pursue the optional High Council mechanisms as a precursor to arbitration.

268. The Treaty of Amity in any event "does not exclude any further procedure." This conclusion is directly confirmed by the text of Article 17 which envisages recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations, among which is arbitration.

269. The Tribunal therefore concludes that the Treaty of Amity is not a bar to its jurisdiction under Article 281.

4. Application of Article 281 to the CBD

270. The Convention on Biological Diversity, or CBD, is a multilateral treaty for conservation and sustainable use of biological diversity.[258] China has been a party since 29 December 1993, and the Philippines since 1 June 1994.

271. The CBD obliges Contracting Parties to regulate and manage biological resources important for the conservation of biological diversity. It also requires Contracting Parties to "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."[259]

272. Article 27 of the CBD contains provisions on "Settlement of Disputes" as follows:

> 1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.
>
> 2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.
>
> 3. When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:
>
> (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II
>
> (b) Submission of the dispute to the International Court of Justice.

[258] Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992) (entry into force 29 December 1993) (**Annex LA-82**) (hereinafter "**CBD**").

[259] CBD, Arts. 8(c) and (d).

> 4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.
>
> . . .

273. The Tribunal examines here whether the CBD could constitute a bar to its jurisdiction by virtue of Article 281. The Philippines says it cannot; China is silent on this point.

(a) Possible Objections

274. The Philippines alleges that China's actions have violated the CBD as well as Articles 192 and 194 of the Convention. To the extent, therefore, that both treaties factually protect marine biodiversity and cover the same allegedly unlawful actions, it might be arguable that China and the Philippines have, in ratifying the CBD, agreed to seek settlement of the disputes concerning Submissions No. 11 and 12 (b) in accordance with the dispute settlement procedures set out in Article 27 of the CBD.[260] If it could be shown that the CBD constitutes an "agreement" within the meaning of Article 281 and that the CBD excludes recourse to further procedures, then the Tribunal's jurisdiction to decide Submissions No. 11 and 12(b) could be barred.

275. China's Position Paper does not make this argument, nor does it address any of the Philippines' allegations about violations of Articles 192 and 194 of the Convention or the CBD.

276. Nevertheless, the Tribunal invited the Philippines to elaborate on the relationship between alleged violations of the CBD and the Convention and to comment by reference to Articles 281 and 282 of the Convention on the Tribunal's jurisdiction to address alleged violations of the CBD.[261] During the Hearing, the Tribunal asked the Philippines whether the Article 281 requirement that "no settlement has been reached" under an agreed means necessitated that the Philippines attempt the compulsory conciliation process in Article 27(4) of the CBD.[262]

(b) The Philippines' Position

277. The Philippines maintains that Article 281 "could only apply if the dispute settlement mechanisms of the CBD were deemed to constitute an agreement to settle disputes 'concerning the interpretation or application of this Convention' – *i.e.*, UNCLOS – by recourse to means other than those provided for in Section 2 of Part XV."[263] According to the Philippines, the

260 Jurisdictional Hearing Tr. (Day 2), pp. 109-10.

261 Request for Further Argument, Question 11; *see also* Letter from Tribunal to the Parties (23 June 2015), Issue C.

262 Tribunal Questions of 10 July 2015, Question 4 (a).

263 Supplemental Written Submission, para. 11.10 [emphasis in original].

CBD's dispute settlement procedures apply exclusively to disputes concerning the interpretation or application of the CBD.

278. The Philippines states further that if, *arguendo*, Article 27 of the CBD were intended to constitute an agreement by the Philippines and China to settle disputes concerning the interpretation and application of the Convention by means of their own choice, clear and unambiguous wording would be required to this effect. The Philippines recalls Judge Wolfrum's observation in *MOX Plant* that "such agreement among the parties to a conflict cannot be presumed. An intention to entrust the settlement of disputes concerning the interpretation and application of the Convention to other institutions must be expressed explicitly in respective agreements."[264] According to the Philippines, none of the wording in Article 27 of the CBD (including the compulsory conciliation provision) or its Annexes expressly excludes further proceedings under the Convention.

279. The Philippines acknowledges that its position is contrary to *Southern Bluefin Tuna* but considers that tribunal's decision on this point to have been wrongly decided. The Philippines recalls that the decision has been "almost universally disputed in the literature, and by other judicial decisions" and suggests that this Tribunal should decline to follow it.[265] The Philippines also observes that unlike *Southern Bluefin Tuna* where the whole dispute "primarily centred" on the Bluefin Tuna Convention, the present dispute under Submissions No. 11 and 12(b) is centred on protection and preservation of the marine environment and not at all on conservation and sustainable use of biological diversity under the CBD.

280. The Philippines urges the Tribunal to prefer the reasoning adopted by ITLOS in *MOX Plant* "because it respects the characterization of the dispute adopted by the party bringing the case, and because it better reflects the need for a coherent integration of different treaty regimes with each other."[266]

(c) The Tribunal's Decision

281. The Philippines' Submissions No. 11 and 12(b) allege that China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and

264 *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001 (**Annex LA-39)**, Separate Opinion of Judge Wolfrum, ITLOS Reports 2001, p. 131 at p. 132.

265 Jurisdictional Hearing Tr. (Day 2), pp. 114-16, citing, *inter alia*, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 294, para. 55 (**Annex LA-37**); and *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 106, para. 49 (**Annex LA-39**).

266 Jurisdictional Hearing Tr. (Day 3), p. 47.

Second Thomas Shoal and that China's occupation of and construction activities on Mischief Reef also violate China's duties to protect and preserve the marine environment under Part XII of the Convention, specifically its Articles 192 and 194.

282. The Philippines has further clarified that it does not separately plead a claim for breach of the CBD. It refers to the CBD only insofar as that instrument informs the normative content of Articles 192 and 194. That the CBD can be used in this way to interpret the Convention is clear from Article 31(3) of the Vienna Convention on the Law of Treaties and the applicable law provision in Article 293 of the Convention and has been confirmed in other recent cases.[267]

283. For the purposes of establishing its jurisdiction under Part XV of the Convention, the Tribunal must rule out the possibility that its jurisdiction to consider the Philippines' Submissions No. 11 and 12(b) is excluded on the basis of Article 281 of the Convention. In particular, the question that the Tribunal must address is whether the Philippines and China, in ratifying the CBD, have agreed to settle disputes concerning Articles 192 and 194 of the Convention—insofar as those disputes concern the protection of marine biological diversity—using procedures set out in Article 27 of the CBD.

284. The Tribunal acknowledges some overlap in the subject matter of Part XII of the Convention and the subject matter of the CBD. For example, there is a "General Obligation" under Article 192 of the Convention to protect and preserve the marine environment, which may be broadly enough worded to include the obligation to protect and preserve marine biodiversity. Similarly, obligations under Article 194 of the Convention may include the protection and preservation of the biological diversity represented by coral reefs. It is also true that the same facts may implicate multiple treaties. In its Memorial, the Philippines submitted evidence allegedly showing China's toleration of, and active support for, environmentally harmful fishing practices employed by Chinese nationals at Scarborough Shoal and Second Thomas Shoal, including the harvesting of endangered species and the use of dynamite and cyanide to harvest fish, clams, and corals. The Tribunal appreciates, therefore, that the alleged conduct could constitute a breach of several treaties, including the Convention and the CBD.

285. The Tribunal is of the view, however, that an overlap of subject matter is not sufficient to bring the CBD within the meaning of Article 281 of the Convention. Article 2 of the CBD defines "biological diversity" as "variability among living organisms from all sources included, *inter*

267 Jurisdictional Hearing Tr. (Day 2), pp. 97-98, citing *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 4 December 1997, ITLOS Reports 1999, p. 10 at p. 42, paras. 84-85 (**Annex LA-36**) and *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, p. 4 at p. 68, para. 216 (**Annex LA-223**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, paras. 193-98.

alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part . . . ." The objective of the CBD, as set out in its Article 1, is "the conservation of biological diversity." The CBD is therefore aimed at protecting biological diversity in general—beyond that found in the marine environment. The objective of the CBD potentially overlaps with, but also goes well beyond, the scope of Articles 192 and 194 of the Convention. Similarly, the Convention's scope goes well beyond the obligation to protect and conserve the marine environment. The two treaties establish parallel environmental regimes that overlap in a discrete area. One creates a distinct jurisdiction to address the protection of the marine environment whilst the other aims to protect biodiversity in general. The same facts may give rise to violations of both treaties, but a violation of Articles 192 and 194 of the Convention does not necessarily give rise to a violation of the CBD such that Article 27 of the CBD may be invoked to settle disputes regarding "the interpretation and application of the Convention." In this respect the Tribunal agrees with the Philippines that "[a] dispute under UNCLOS does not become a dispute under the CBD merely because there is some overlap between the two. Parallel regimes remain parallel regimes."

286. This conclusion is supported by the fact that Article 27 of the CBD does not expressly exclude recourse to dispute settlement procedures under Section 2 of Part XV of the Convention. For the reasons outlined above in connection with the DOC, the Tribunal is of the view that a clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for the Tribunal's jurisdiction.

287. Moreover, Article 22 of the CBD, which addresses the relationship between the CBD and other international conventions, states that:

> 1. The provisions of this Convention shall not affect the rights and obligations of any contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.
>
> 2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

288. Article 22(1) of the CBD preserves the rights and obligations of the Philippines and China under the Convention, including under Part XV, Section 2 relating to dispute settlement. Article 22(2) of the CBD recognises the substantive overlap between the two parallel conventions and therefore requires that they be implemented consistently.

289. The dispute settlement provisions in the CBD therefore cannot, by virtue of Article 281, preclude the Tribunal's jurisdiction over Submissions No. 11 and 12(b).

B. ARTICLE 282 (OBLIGATIONS UNDER GENERAL, REGIONAL OR BILATERAL AGREEMENTS)

290. Article 282 of the Convention provides:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

291. Assuming there is a dispute concerning the interpretation or application of this Convention (which the Tribunal has already found), Article 282 would only displace the dispute resolution provisions in Section 2 of Part XV if four requirements are met. These are: (a) that the parties must have agreed through a "general, regional or bilateral agreement or otherwise" that, (b) at the request of any party to the dispute, (c) the dispute shall be submitted to a procedure "that entails a binding decision," and (d) that the parties have not otherwise agreed to retain access (*i.e.*, to opt back in) to the Part XV, Section 2 procedures.

1. Application of Article 282 to the DOC and Other Bilateral Statements

(a) Possible Objections

292. China's Position Paper does not mention Article 282 of the Convention. Nevertheless, in the Tribunal's Request for Further Argument of 16 December 2014, the Tribunal invited the Philippines to elaborate on whether the DOC "constitutes an agreement within the meaning of Article 282 of the Convention."[268]

293. In its 23 June 2015 letter to the Parties listing issues to address at the Hearing on Jurisdiction, the Tribunal invited the Parties to address the "applicable standard for determining whether any agreement between the Parties provides 'a procedure that entails a binding decision' within the meaning of Article 282 of the Convention" and asked whether any of the DOC, Treaty of Amity, or Convention on Biological Diversity might constitute such an agreement.[269]

(b) The Philippines' Position

294. The Philippines does not consider the DOC to fall within the meaning of Article 282 of the Convention because it is not an "agreement" and it does not provide for a procedure that "entails a binding decision."

268 Request for Further Argument, Question 1.

269 Letter from Tribunal to the Parties (23 June 2015), Issue D.

295. The Philippines relies on the same arguments as it made for Article 281 to show that the DOC is not an agreement but a "political undertaking only" that does not purport to create legally binding obligations.[270]

296. As to the standard for determining whether an agreement provides for a "procedure that entails a binding decision," the Philippines considers the "only possible answer" to this question is that the agreement must make express provision for a compulsory procedure that entails a binding decision. Such procedures can never be implied.[271] Here, there is no such express provision, and there is certainly none providing for a binding procedure that would apply "in lieu of" the Part XV procedures. Although there is agreement to have recourse to "procedures" in the form of "friendly consultations and negotiations" (paragraph 4) or continued "consultations and dialogues" (paragraph 7), none of these procedures entail a "binding decision".

297. According to the Philippines, the only hint in the DOC of a binding procedure is the undertaking to resolve "jurisdictional disputes" through consultations and negotiations "in accordance with the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea." The DOC thus indicates that when negotiations fail, the disputes should be settled in accordance with the Convention's binding procedures, and there is nothing to imply a procedure was intended to apply "in lieu" thereof.

298. With respect to other bilateral statements made by the Philippines and China, the Philippines recalls that they are all political and aspirational in nature, not legally binding. Further, none of them "even arguably reflects an intent to exclude recourse to compulsory proceedings entailing a binding decision."[272]

(c) The Tribunal's Decision

299. For reasons already expounded in connection with Article 281, the Tribunal does not consider the DOC to constitute a legally binding agreement within the meaning of Article 282.

300. In any event, the DOC does not provide expressly for a compulsory binding procedure "in lieu of" the Part XV procedures. "Friendly consultations and negotiations" do not entail binding decisions. To the extent that any procedures entailing binding decisions are envisioned, they are the provisions in Part XV itself, given the reference in paragraph 4 to the 1982 UN Convention on the Law of the Sea. Therefore far from devising a compulsory binding procedure "in lieu of"

270 Supplemental Written Submission, para. 1.4.

271 Jurisdictional Hearing Tr. (Day 2), p. 23.

272 Supplemental Written Submission, para. 26.64; Jurisdictional Hearing Tr. (Day 2), p. 22.

the Convention's dispute settlement provisions, the DOC specifically contemplates recourse to the Convention.

301. Similarly, the Tribunal recalls that none of the other joint statements constitute binding agreements. Further, none of them can be read as providing for compulsory procedures that entail binding decisions, let alone displace the dispute resolution provisions in the very Convention that so many of the Statements expressly endorse.[273]

302. Accordingly, neither the DOC nor the joint statements referred to in Paragraphs 231 to 232 above are legally binding agreements within the meaning of Article 282. They have no impact on the Tribunal's jurisdiction.

2. Application of Article 282 to the Treaty of Amity

(a) Possible Objections

303. China's Position Paper does not mention Article 282 of the Convention, and includes only a passing reference to the Treaty of Amity.

304. On its face, the Treaty of Amity is an agreement between the Parties which refers to compulsory and binding dispute settlement mechanisms. Thus, the Tribunal invited further argument from the Philippines on "the effect, if any, of the Treaty of Amity and Cooperation in Southeast Asia on the Tribunal's jurisdiction and the admissibility of the Philippines' claims" in reference to Article 282 of the Convention.

(b) The Philippines' Position

305. According to the Philippines, the Treaty of Amity does not implicate Article 282 of the Convention because none of the Treaty's dispute settlement provisions establishes "a procedure entailing a binding decision."

306. The Philippines points out that, failing negotiation, the High Council is at most empowered only to "recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation" and/or to constitute itself as a committee of mediation, inquiry or conciliation.[274] Even those procedures, however, must according to Article 16 be specifically agreed upon by all the parties in the dispute. They cannot be initiated "at the request of any party to the dispute" and thus fall short of the requirements in Article 282.

273 *See* Section VII.A.2.c above.

274 Supplemental Written Submission, para 2.9, referring to Treaty of Amity (**Annex LA-185**).

(c) The Tribunal's Decision

307. While the Treaty of Amity is a binding agreement, the Tribunal finds that it does not meet the criteria specified in Article 282 for three reasons.

308. First, it does not contain an agreement for disputes to be submitted to a procedure "at the request of any party to the dispute." The dispute resolution mechanisms described in Articles 13, 14, and 15 of the Treaty of Amity shall, by the terms of Article 16, "not apply unless all the parties to the dispute agree to their application to that dispute."

309. Second, there is no agreement to binding dispute resolution. The mechanisms enumerated in Articles 13, 14, and 15 of the Treaty—namely negotiation, good offices, mediation, inquiry or conciliation—do not entail "a binding decision". When deemed necessary, they might lead to a recommendation by the High Council as to appropriate preventative measures, but this would entail a recommendation only, not a binding decision.

310. Finally, the parties to the Treaty have agreed in Article 17 that none of its provisions preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the UN Charter, which of course includes arbitration. In these circumstances it is not possible to imply an agreement to submit to compulsory dispute settlement "in lieu of" the procedures provided for in Part XV.

3. Application of Article 282 to the CBD

(a) Possible Objections

311. As noted above, China's Position Paper does not address the CBD or the Philippines' claims relating to environmental protection under Articles 192 and 194 of the Convention.

312. Nevertheless, the Philippines' Memorial alleges that China has violated provisions of the CBD, as well as Articles 192 and 194 of the Convention. To the extent that both treaties protect marine biodiversity and cover the same allegedly unlawful actions, it might be arguable that China and the Philippines have, in ratifying the CBD, agreed to seek settlement of the Submissions No. 11 and 12 (b) disputes in accordance with Article 27 of the CBD.[275] Given the compulsory nature of some of the dispute settlement options in Article 27, this could raise the question of whether the CBD constitutes an "agreement" referring to compulsory binding procedures within the meaning of Article 282, with the consequence that Article 27 of the CBD should apply "in lieu of" the procedures in Part XV, Section 2.

275 Jurisdictional Hearing Tr. (Day 2), pp. 109-110.

313. The Tribunal invited the Philippines to comment, by reference to Article 282 of the Convention, on the Tribunal's jurisdiction to address alleged violations of the CBD.[276]

(b) The Philippines' Position

314. The Philippines reiterates that it does not allege any separate breach of the CBD, and it therefore considers that the dispute resolution procedures in Article 27 of the CBD are entirely irrelevant to this dispute.[277] The Philippines only pleads in this arbitration that China has breached Articles 192 and 194 of the Convention. Submissions No. 11 and 12(a) therefore present a dispute over the interpretation and application of the Convention. The Philippines only refers to the CBD insofar as it informs the normative content of Articles 192 and 194. This being the case, the Philippine argues that the dispute does not concern the interpretation or application of the CBD.[278]

315. As with Article 281, the Philippines argues that the CBD could only be used to invoke Article 282 if Article 27 of the CBD were deemed to constitute an agreement for the settlement of disputes "concerning the interpretation or application of this [Law of the Sea] Convention." Article 27 of the CBD is not such an agreement. By its terms, Article 27 of the CBD constitutes an agreement only for settling disputes concerning the interpretation or application of the CBD itself.[279]

316. Second, the Philippines argues that even if Article 27 of the CBD could be deemed to constitute an agreement to submit disputes concerning the interpretation or application of the Convention, it does not fulfil the other requirement of Article 282, which is that it should also be a compulsory process that entails a binding decision.[280]

(c) The Tribunal's Decision

317. As noted above in the context of Article 281, there is no doubt about the status of the CBD as a legally binding agreement to which both the Philippines and China are parties. The question here is whether the CBD constitutes an "agreement" within the terms of Article 282 of the Convention and whether it satisfies all the requirements of that Article, such that the dispute resolution provisions in Article 27 of the CBD apply "in lieu of" the procedures in Part XV,

276 Request for Further Argument, Question 11; Letter from Tribunal to Parties (23 June 2015), Issue D.

277 *See generally* Supplemental Written Submission, para. 11.1; Jurisdictional Hearing Tr. (Day 2), p. 93.

278 Supplemental Written Submission, paras. 11.3-11.4; Jurisdictional Hearing Tr. (Day 2), p. 93.

279 Supplemental Written Submission, para. 11.10.

280 Jurisdictional Hearing Tr. (Day 2), pp. 109-11.

Section 2. Article 27 of the CBD would only bar consideration of Submissions No. 11 and 12(b) if this were the case.

318. In order for the CBD to constitute a bar by virtue of Article 282, it must be shown that (a) Article 27 of the CBD constitutes an agreement for the settlement of "a dispute concerning the interpretation or application of the [UNCLOS] Convention"; (b) that there is an agreement to submit such disputes to a compulsory procedure, in the sense that the dispute is capable of being unilaterally initiated, "at the request of any party to the dispute"; and (c) the agreed compulsory procedure "entails a binding decision".

319. The Tribunal finds that the CBD does not constitute an agreement for the settlement of disputes concerning the interpretation or application of the Convention and has already set out its reasoning in that respect in Paragraphs 281 to 289 above.

320. Even if that first requirement were satisfied, the Tribunal has no doubt that the CBD does not meet the second and third requirements of Article 282, which demand agreement to submit a dispute to a compulsory process "entail[ing] a binding decision". None of the provisions in Article 27 of the CBD meets those criteria. Article 27(1) of the CBD requires parties to seek a solution by negotiation. That is not a compulsory process that entails a binding decision. Article 27(2) provides that, failing negotiation, the parties "may jointly seek the good offices of, or request mediation by, a third party." That is neither compulsory nor does it entail a binding decision. Article 27(3) provides that a party to the CBD may lodge a written declaration with the Depositary that, for a dispute not resolved in accordance with Article 27(1) or (2), it accepts one or both of arbitration or International Court of Justice adjudication as compulsory. Such a procedure would entail a binding decision, however neither the Philippines nor China has deposited such a declaration, so it is not available "at the request of any party" as required under Article 282. Article 27(4) then provides that if the parties have not accepted the same or any of the binding procedures in Article 27(3), then the dispute "shall be submitted to conciliation." That is compulsory, but it does not entail a binding decision. At most, a conciliation commission constituted under Annex II, Part 2 of the CBD can "render a proposal for resolution of the dispute, which the parties shall consider in good faith."[281] But that is not a "binding decision".

321. The dispute settlement provisions in the CBD therefore cannot, by virtue of Article 282, preclude the Tribunal's jurisdiction over Submissions No. 11 and 12(b).

[281] CBD, Annex II, Part 2, Article 5 (**Annex LA-82**).

C. ARTICLE 283 (EXCHANGE OF VIEWS) AND OBLIGATION TO NEGOTIATE

322. Article 283 of the Convention sets out an obligation on the Parties to exchange views concerning the settlement of the dispute by negotiation or other peaceful means prior to the commencement of arbitral proceedings. Article 283 provides as follows:

> *Article 283*
> *Obligation to exchange views*
>
> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

1. China's Position

323. China has addressed the obligation to exchange views in its Position Paper of 7 December 2014, which the Tribunal understands to reflect China's position on the issues raised therein, notwithstanding China's non-participation in these proceedings.

324. According to China:

> The Philippines claims that, the two countries have been involved in exchanges of views since 1995 with regard to the subject-matter of the Philippines' claims for arbitration, without however reaching settlement, and that in its view, the Philippines is justified in believing that it is meaningless to continue the negotiations, and therefore the Philippines has the right to initiate arbitration. But the truth is that the two countries have never engaged in negotiations with regard to the subject-matter of the arbitration.[282]

325. China goes on to argue that, as a matter of law, "general exchanges of views, without having the purpose of settling a given dispute, do not constitute negotiations."[283] According to China, however, "the exchanges of views between China and the Philippines in relation to their disputes have so far pertained to responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation."[284] In China's view, such exchanges "are far from constituting negotiations" and "did not concern the subject-matter of the Philippines' claims for arbitration."[285] China also questions how the Philippines could have exchanged views

282 China's Position Paper, para. 45.

283 China's Position Paper, para. 46.

284 China's Position Paper, para. 47.

285 China's Position Paper, paras. 47, 49.

concerning the interpretation or application of the Convention when the Philippines only brought its own maritime claims into conformity with the Convention in 2009.[286]

2. The Philippines' Position

326. The Philippines addressed the application of Article 283 in both its Memorial and during the hearing, but in different terms.

327. In its Memorial, the Philippines submitted that "the Philippines has over many years had extensive exchanges of views with China regarding its claims in these proceedings." The Philippines went on to detail its communications with China, drawing particular attention to its protest to China's Notes Verbales of May 2009,[287] consultations on the status of Scarborough Shoal in 1997 and 1998,[288] communications concerning the entitlements of maritime features in the Spratlys in 2011,[289] and an extended series of correspondence concerning what the Philippines considered to be China's interference with its sovereign rights and jurisdiction.[290]

328. Prior to the July 2015 hearing, the Tribunal invited the Parties to address whether Article 283 of the Convention imposes an obligation to exchange views concerning the substance of the Parties' dispute or the means by which the dispute may be settled.

329. In the course of the hearing, the Philippines emphasised that "Article 283 is not a requirement to negotiate as such. Rather, it is only an obligation to exchange views."[291] The Philippines also argued that "the obligation has always been understood to impose a modest burden on disputing states."[292] The Philippines went on to take note of the holding of the tribunal in *Chagos Marine Protected Area* that Article 283 "requires that the Parties engage in some exchange of views regarding the means to settle the dispute."[293] Ultimately, the Philippines submitted that "whether Article 283 requires an exchange of views on the means by which the dispute will be settled, the substance of the dispute, or both, the Philippines has met those requirements in this case."[294]

286 China's Position Paper, para. 50.
287 Memorial, paras. 7.84-7.87.
288 Memorial, paras. 7.88-7.89.
289 Memorial, paras. 7.90-7.91.
290 Memorial, para. 7.92.
291 Jurisdictional Hearing Tr. (Day 2), p. 25.
292 Jurisdictional Hearing Tr. (Day 2), p. 25.
293 Jurisdictional Hearing Tr. (Day 2), pp. 25-26.
294 Jurisdictional Hearing Tr. (Day 2), p. 26.

330. In respect of an exchange of views on the means to settle the Parties' dispute, the Philippines argued that it had met the requirements of Article 283 by virtue of "two exchanges in 1995 and 1998 that by themselves show this requirement to have been satisfied."[295] The Philippines also noted that, in its view, China's Position Paper itself demonstrates "that the obligation to exchange views on the means to settle the dispute has been satisfied."[296]

331. In respect of an exchange of views on the substance of the Parties' dispute, the Philippines recalled the correspondence set out in its Memorial that "shows that the parties exchanged views on numerous occasions over many years."[297] The Philippines went on to address the degree of specificity required of an exchange of views on the substance of the Parties' dispute. Drawing on the decisions in *Chagos Marine Protected Area* and *Guyana v. Suriname*, the Philippines argued that "several general propositions can be extracted." These are:

(a) "it is not necessary to exchange views on the substance of each and every submission *per se*";[298]

(b) "as long as there has been an exchange of views on the general subject matter of the dispute, broadly construed, Article 283 is satisfied, both with respect to the main dispute as well as any incidental issues that are subsumed within it";[299] and

(c) "relatedly, there is no need for an exchange of views to touch upon specific articles of the Convention. Indeed it is not even necessary that the Convention itself be mentioned in the course of the relevant exchanges."[300]

295 Jurisdictional Hearing Tr. (Day 2), p. 27; Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995) (**Annex 175**); Republic of the Philippines, Department of Foreign Affairs, *Record of Courtesy Call on Chinese Vice Premier and Foreign Minister Qian Qichen* (21 March 1995) (**Annex 176**); *Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 March 1995) (**Annex 177**); Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 March 1995) (**Annex 178**); Department of Foreign Affairs of the Republic of the Philippines, *Transcript of Proceedings: RP-PRC Bilateral Talks* (9 August 1995) (**Annex 179**); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**); Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 August 1995), p. 3 (**Annex 181**). Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Communiqué: Philippines-China Foreign Ministry Consultations* (29-31 July 1998), para. 4 (**Annex 183**).

296 Jurisdictional Hearing Tr. (Day 2), pp. 27-28.

297 Jurisdictional Hearing Tr. (Day 2), p. 28.

298 Jurisdictional Hearing Tr. (Day 2), p. 34.

299 Jurisdictional Hearing Tr. (Day 2), pp. 34-35.

300 Jurisdictional Hearing Tr. (Day 2), p. 35.

3. The Tribunal's Decision

332. In the Tribunal's view, the Parties' positions on the application of Article 283 reflect the uncertainty that has sometimes surrounded the intended meaning of that provision. This also reflects the fact that diplomatic communications and exchanges do not divide neatly between procedural and substantive matters. With rare exceptions, States in the midst of a pressing dispute will not separate their communications between the two. Correspondence elaborating the Parties' views on the substantive matters between them may well shed a great deal of light on their respective views on how the dispute may—or may not—be settled. Proposals on the mode of settlement will necessarily involve some discussion of substance. The Convention must be applied with this reality in mind.

333. As recognised by the tribunal in *Chagos Marine Protected Area*: "Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed . . . . Once a dispute has arisen, Article 283 then requires that the Parties engage in some exchange of views regarding the means to settle the dispute."[301] This view was recently echoed by the tribunal in *Arctic Sunrise*, which held that Article 283 requires "that the Parties exchange views regarding the means by which a dispute that has arisen between them may be settled . . . . Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute."[302]

334. In the present case, the Tribunal notes the Philippines' attention to the two rounds of bilateral consultations between the Philippines and China that took place in 1995 and 1998 (see Paragraph 330 above). In the Tribunal's view, these consultations do include the exchange of views on the means of resolving the dispute between the Parties at that time. The Summary of Proceedings prepared by the Philippines[303] of the consultations that took place on 20 March 1995, for instance, record the Chinese Vice-Foreign Minister, Tang Jiaxuan, as follows:

> China's consistent position was to discuss this through bilateral channels, and not let in countries irrelevant to the dispute. The Vice-Minister stated that the situation in the

301 *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, paras. 382-83 (**Annex LA-225**).

302 *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, para. 151.

303 The Tribunal notes that the majority of the records of the Parties' consultations available to it are the Philippines' internal records and are therefore less authoritative as to what was said than a record that was prepared jointly. The Tribunal nevertheless considers that the Philippines' diplomatic records do have evidentiary value insofar as they were contemporaneous to the events in question and were prepared in the course of the Philippines' normal diplomatic practice.

> situation in the Nanshas has become very complicated, and there are some countries who want to further aggravate the situation.[304]

The record goes on to state that "[t]he [Philippines] Undersecretary [of Foreign Affairs, Rodolfo Severino,] welcomed the Chinese proposal to discuss activities bilaterally, and multilaterally as well because these would naturally involve other countries."[305] As would be expected, these comments, and numerous others like them, were interspersed throughout the Parties' substantive discussions, but clearly indicate that the Parties discussed the manner in which their dispute, as it then was, could be settled.

335. The Tribunal also notes that paragraph 4 of the November 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea provides as follows:

> 4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;[306]

Notwithstanding the Tribunal's finding that this did not constitute a legally binding agreement, the Tribunal is of the view that the DOC itself, along with discussions on the creation of a further Code of Conduct, represents an exchange of views on the means of settling the Parties' dispute.[307]

336. The DOC was signed in 2002. The consultations highlighted by the Philippines took place in 1995 and 1998. At that time, the dispute between the Parties that appears from the record of the Parties' exchanges concerned sovereignty over the Spratly Islands and certain activities at Mischief Reef. Critical elements of the disputes that the Philippines has put before the Tribunal had not yet occurred. In particular, China had not yet issued its Notes Verbales of 7 May

304 Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995) (**Annex 175**); *see also Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 March 1995), para. 36 (**Annex 177**).

305 Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995) (**Annex 175**); *see also Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 March 1995), para. 40 (**Annex 177**).

306 Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 November 2002) (**Annex 144**).

307 *See, e.g.*, Memorandum from the Assistant Secretary of Foreign Affairs for Asia and Pacific Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (21 December 1999) (**Annex 471**).

2009,[308] nor had it taken the majority of the actions complained of in the Philippines' Submissions No. 8 to 14.

337. The Tribunal recognises that the various disputes between the Parties concerning the South China Sea are related and accepts that it may occur that parties will comprehensively exchange views on the settlement of a dispute only to have that dispute develop further, or other related disputes arise, prior to the commencement of arbitral proceedings. But the Tribunal need not definitively determine the application of Article 283 to such a situation, because the record indicates that the Parties continued to exchange views on the means to settle the disputes between them until shortly before the Philippines initiated this arbitration. In particular, the Parties held a bilateral consultation on 14 January 2012 to address a range of issues, including the South China Sea. The minutes of those discussions record the Philippines Undersecretary of Foreign Affairs, Ms. Erlinda Basilio, as follows:

> 134. We look upon our valuable and long-standing friendship with China as one based on mutual respect and equality. To peacefully and finally settle the disputes in the West Philippine Sea, it behooves conflicting claims to be resolved based on the rules-based regime of the United Nations Convention on the Law of the Sea (UNCLOS). The Philippines is prepared to validate its own claims.
>
> 135. The Philippines believes that a rules-based approach is the only legitimate way in addressing the disputes in the West Philippine Sea.
>
> 136. The dispute settlement mechanism established in the United Nations Convention on the Law of the Sea is the fundamental principle of the rules-based approach being espoused by the Philippines.
>
> 137. The Philippines has proposed to ASEAN the Zone of Peace, Freedom, Friendship, and Cooperation as an actionable framework to address China's 9 dash line and resolve disputes through peaceful means by clarifying and segregating the disputed land features from the non-disputed waters of the West Philippine Sea. In other words, we are saying that not all of the South China Sea is disputed.
>
> 138. The dispute in the [West Philippine Sea] is a regional concern as well as a national concern because there are several members of the ASEAN who have competing claims in that area.
>
> 139. The Philippines is working closely with ASEAN towards the establishment of a more legally binding Code of Conduct in the West Philippine Sea.
>
> 140. During the November 2011 ASEAN Foreign Ministers' Meeting (AMM), the Philippines, speaking through Secretary Albert Del Rosario, he specifically called for a meeting of the claimant states, including China, to sit down together under the auspices of ASEAN to resolve the competing claims and to define the disputed areas from the non-disputed areas.
>
> 141. We continue to present this proposal and enlist the assistance of ASEAN colleagues and in this undertaking (and hope that) China will sit down with us. . . .[309]

[308] Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (**Annex 191**); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (**Annex 192**).

338. Undersecretary Basilio's Chinese counterpart, Assistant Foreign Minister Liu Zhenmin, replied as follows:

> 148. Well on the current stage, it is quite difficult to resolve this dispute through any legal procedure. Therefore, we believe that the proposals that the Philippines made previously are not realistic or feasible whether it is about to refer the matter to any international mechanism or to hold any multilateral negotiations among claimant states. Since the dispute is there already, if it cannot be resolved once it is referred to the international mechanism, then it will only add to the mistrust between our two countries. China has been working all along to start the talks. Because it is our long-standing position that the dispute in the South China Sea should be properly resolved among parties directly involved through peaceful negotiations. So, therefore, I believe that the classification of/identification of the disputed areas or non-disputed areas are not what the dispute is about or anything to be negotiated about.
>
> 149. What we need to do now is to start negotiations between our two countries in a bilateral way and take stock of the current dispute and problem. We may discuss the establishment of a China-Philippines maritime consultation mechanism or resume the confidence building mechanism between our two countries. Recently, the Philippine side has noted the Chinese Embassy in the Philippines that you would like to have informal consultation with China on South China Sea. China appreciates this and hopes that consultation will be held in February this year at the working level on that basis, we shall establish a regular consultation mechanism. It is good to start talking in any form.[310]

339. Undersecretary Basilio then stated:

> 155. Your Excellency, we have listened very carefully during your views with reference to the West Philippine Sea. As enunciated by our Foreign Minister when he met with Foreign Minister Yang Jiechi, they agreed then to keep the matter to rest, to put the matter to rest because obviously, the Chinese position, is diametrically opposed to the Philippine position. You are for bilateral discussion. We have embarked on a path that uses the law, the UN Convention on the Law of the Sea as the basis for working out the problems that we face in the West Philippine Sea. We believe in a multilateral approach because there are other competing claims there and they are members of the Association of Southeast Asian Nations, namely: Vietnam, Brunei, Malaysia and the Philippines. To approach the matter bilaterally, even theoretically speaking, you know we try to solve it our way, just the two of us, there are competing claims there and therefore, in our belief, it is better that we all sit down together and be able to thresh out the matter in a manner that will contribute to the peace and stability, be treated in a peaceful manner. For us, we believe that our recourse is through ASEAN calling for a meeting with all of us seated together because after all, we are parties to the Declaration on Conduct of Parties in the South China Sea. And the Code of Conduct that we envision for ourselves, China is of course a party to that, we also believe that we should sit down together and discuss what goes in there in the main elements of such conduct. But obviously, our positions are not convergent. Let's leave it at that but as our Foreign Minister has always stressed that we set that aside, we set the West Philippine Sea issue aside. . . .
>
> 156. . . . We are for a multilateral approach and we, at this stage, we would like to embark on a multilateral approach to it because we want the other claimants who are also ASEAN member states. And there is again your province, Taiwan. You see,

309 *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations*, paras. 134-41 (14 January 2012) (**Annex 204**).

310 *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations*, paras. 148-49 (14 January 2012) (**Annex 204**).

> who also has a competing claim there. So they are central parties. That is why we want a multilateral approach to it. So that when we sit down, whatever venue, if you want to meet with us, and we meet with you, we can arrive at a solution that will make everybody happy that perhaps at some time.[311]

340. In the months that followed, certain events occurred in the vicinity of Scarborough Shoal as described in the submissions which the Philippines has made in these proceedings. On 26 April 2012, the Philippines presented China with a Note Verbale concerning "the on-going situation at the Philippines' Bajo de Masinloc (Scarborough Shoal)." In this Note Verbale, the Department of Foreign Affairs of the Philippines:

> . . . calls on China to respect the Philippines' sovereignty and sovereign rights under international law including UNCLOS, over the Scarborough Shoal and its EEZ, respectively.
>
> However, if China believes otherwise, it would be good—as a parallel track to the on-going efforts to settle the matter peacefully—for the two countries to bring the matter before an appropriate third-party adjudication body under international law, specifically the International Tribunal on the Law of the Sea (ITLOS) with respect to the rights and obligations of the two countries in the Philippines' EEZ under international law, specifically UNCLOS. In inviting China to join the Philippines in bringing the issue before any of the dispute settlement mechanism under international law, the Department believes that this approach would resolve on a long-term basis any differences of position on the matter, and thus ensure a peaceful, stable, and lasting bilateral relationship between the two countries.[312]

341. China replied on 29 April 2012, as follows:

> Huangyan Islands is China's inherent territory. The proposal from the DFA of the Philippines to bring the so-called "Huangyan island issue" to a third-party arbitration body has none ground. The Chinese side urges the Philippine side to pay due respect to and refrain from any infringement on China's territorial sovereignty.[313]

342. Taking the exchanges in 2012 together, the Tribunal is convinced that the Parties have unequivocally exchanged views regarding the possible means of settling the disputes between them that the Philippines has presented in these proceedings. These exchanges did not, of course, result in agreement. The Philippines favoured either multilateral negotiations involving other ASEAN Member States or the submission of the Parties' disputes to one of the third-party mechanisms contemplated in the Convention. China, in turn, was adamant that only bilateral talks could be considered. The same difference in approach is also evident in the Parties' earlier exchanges.

311 *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations*, paras. 155-56 (14 January 2012) (**Annex 204**).

312 Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 April 2012) (**Annex 207**).

313 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Philippines, No. (12) PG-206 (29 April 2012) (**Annex 208**).

343. The Parties having exchanged views and failed to reach agreement on the approach for resolving the disputes between them, the Tribunal considers Article 283 to have been satisfied. The extensive record of communications between the Parties, including frequent bilateral consultations, establishes that China was aware of the issues in respect of which the Parties disagreed and cannot have been taken by surprise when the Philippines decided to proceed with arbitration. The Parties explored whether any mutually agreeable mode of settlement could be identified and found none. Thereafter, it is well established that the Philippines was "not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted."[314]

344. Having held that Article 283 requires an exchange of view on the means by which the Parties' dispute would be settled and that this obligation was met, the Tribunal nevertheless considers that China's Position Paper—and, in particular, China's statement that "the two countries have never engaged in negotiations with regard to the subject-matter of the arbitration"[315]—squarely raises a separate question: whether, independently of Article 283, the Convention nevertheless imposes an obligation on States parties to engage in negotiations prior to resorting to compulsory settlement.

345. The Tribunal recalls that "[n]either in the [United Nations] Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to [international adjudication]."[316] An obligation to engage in negotiations may, however, arise as a result of the particular legal regime applicable in customary law[317] or as a result of interaction of the respective rights claimed by the States in question.[318] An obligation to negotiate or a requirement of negotiations prior to compulsory settlement may also arise on the basis of a treaty applicable between the Parties.[319]

314 *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 at p. 19, para. 47 (**Annex LA-41**).

315 China's Position Paper, para. 45.

316 *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 302-303, para. 56 (**Annex LA-25**).

317 *North Sea Continental Shelf, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 3 at pp. 46-48, paras. 83-87 (**Annex LA-4**).

318 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 3 at pp. 31-32, paras. 73-75 (**Annex LA-8**).

319 *See, e.g.*, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 at pp. 67-68, para. 149; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 129-30, paras. 147-48 (**Annex LA-34**).

346. In the present case, the Tribunal notes that Article 279 of the Convention provides that the Parties "shall seek a solution by the means indicated in Article 33, [P]aragraph 1, of the [United Nations] Charter" and that Article 33 of the United Nations Charter identifies "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, [and] resort to regional agencies or arrangements" as means for the pacific settlement of disputes. Article 286 of the Convention then provides that "[s]ubject to [S]ection 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." The Tribunal recalls the view of the tribunal in *Barbados v. Trinidad and Tobago* that:

> the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations, ... Upon the failure of the Parties to settle their dispute by recourse to Section 1, *i.e.* to settle it by negotiations, Article 287 entitles one of the Parties unilaterally to refer the dispute to arbitration.[320]

347. The Tribunal considers it unnecessary to determine precisely the full scope of the obligation to seek a solution through recourse to Section 1 of Part XV or any obligation to negotiate arising from the nature of the Parties' rights. This is because the Tribunal is satisfied that the Philippines did seek to negotiate with China concerning the disputes presented in these proceedings and that its obligations, both under the Convention and customary law, have accordingly been satisfied.

348. The Philippines has held regular bilateral discussions with China, addressing a wide range of issues of concern to the two governments, including the South China Sea. Detailed minutes of several of these sessions have been put before the Tribunal by the Philippines.[321] In addition to these formal, annual meetings, the Philippines and China have convened working groups on matters such as confidence-building measures,[322] have held meetings between high-level

320 *Barbados v. Trinidad and Tobago*, Award of 11 April 2006, PCA Award Series at p. 96, para. 206, RIAA Vol. XXVIII, p. 147 at p. 207, para. 206.

321 Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995) (**Annex 175**); *Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 March 1995) (**Annex 177**); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**); Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998) (**Annex 184**); *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations* (14 January 2012) (**Annex 204**); Department of Foreign Affairs of the Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 October 2012) (**Annex 85**).

322 *See, e.g.*, Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 March 1995) (**Annex 178**); Government of the Republic of the Philippines and Government of the

officials to address particular issues,[323] and have maintained regular contacts between their respective foreign ministries and ambassadors in Manilla and Beijing in respect of developments in the South China Sea.[324]

349. The Tribunal recognises that even the most formal of these meetings were termed consultations, rather than negotiations, and that any agreement would almost certainly have required more sustained and intensive discussions than in fact occurred. The Tribunal does not consider nomenclature to be dispositive, however, and notes that the discussions between the Parties did accomplish one of the principal goals of prior negotiations, namely to clarify the Parties' respective positions on the issues in dispute. Most importantly, the Tribunal is also convinced that these discussions were meaningful and that both the Philippines and China approached them in good faith and were genuinely interested in seeking agreed solutions to the disputes between them. That more sustained negotiations did not occur and no agreement was reached does not reflect a lack of interest or commitment by either Party, but rather mutually incompatible views as to how such talks should be conducted. With disputes as complex as those in the South China Sea, this is hardly unexpected. As appears repeatedly throughout the Parties' exchanges, the Philippines believed that it was necessary to take a multilateral approach involving other littoral States to the South China Sea; China, in contrast, was committed to addressing matters on a bilateral basis. The Tribunal also considers that the Parties' frequent discussions and exchanges left them well positioned to assess the likelihood of any mutually agreeable compromise and notes the frequently expressed preference to shelve the more difficult issues of sovereignty over the features in the South China Sea in favour of confidence-building measures and efforts to reduce tensions in other aspects of the relationship between the two States.

People's Republic of China, *Joint Statement: 3rd Philippines-China Experts' Group Meeting on Confidence-Building Measures, Manila, 3-4 April 2001* (4 April 2001) (**Annex 506**).

323 *See, e.g.*, Memorandum from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (28 March 2011) (**Annex 71**).

324 *See, e.g.*, Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S (26 July 2012) (**Annex 84**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S (24 May 2012) (**Annex 81**); Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011) (**Annex 72**); Memorandum from Acting Assistant Secretary of the Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs (10 March 2011) (**Annex 70**); Memorandum from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (7 February 2011) (**Annex 68**); Memorandum from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (7 December 2010) (**Annex 66**).

350. Article 279 calls on the Parties to "seek a solution" through means that may include negotiations. 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."[325] Moreover, even an obligation to negotiate "does not imply an obligation to reach an agreement,"[326] and "the States concerned . . . are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation."[327]

351. The Tribunal also recognises 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"[328] and the Convention does not require the Parties to set out the specifics of their legal claims in advance of dispute settlement.

352. Accordingly, and for the foregoing reasons, the Tribunal concludes 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.

*

353. For the foregoing reasons, the Tribunal concludes that none of the provisions in Part XV, Section 1 poses any bar to the Tribunal's consideration of the Submissions presented by the Philippines.

* * *

325 *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 at p. 19, para. 47 (**Annex LA-41**).

326 *Railway Traffic between Lithuania and Poland,* Advisory Opinion of 15 October 1931, PCIJ Series A/B, No. 42, p. 108 at p. 116.

327 *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No. 2, p. 6 at p 15 (**Annex LA-57**).

328 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at p. 133, para. 161 (**Annex LA-34**).

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VIII. LIMITATIONS AND EXCEPTIONS TO THE TRIBUNAL'S JURISDICTION

354. Within the dispute settlement provisions of Part XV of the Convention, Section 3 sets out certain limitations and exceptions to the jurisdiction that a court or tribunal may exercise with respect to disputes concerning the interpretation or application of the Convention. Among these provisions, Article 297 sets out limitations on jurisdiction that apply automatically to any dispute between State Parties to the Convention. Article 298 then sets out further, optional exceptions that a State Party may activate by declaration. Finally, Article 299 confirms that, in the event that such a limitation or exception is applicable, "[a] dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute."

355. The Tribunal will now examine the possible implications of each provision before considering their application to the disputes presented by the Philippines in these proceedings.

A. ARTICLE 297 AND AUTOMATIC LIMITATIONS TO THE TRIBUNAL'S JURISDICTION

356. Article 297 provides as follows:

> *Article 297*
> *Limitations on applicability of section 2*
>
> 1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
>
> (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
>
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
>
> (c) when it is alleged 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.
>
> 2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
>
> (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.

(b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.

3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

(b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

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

(c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.

(d) The report of the conciliation commission shall be communicated to the appropriate international organizations.

(e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

1. Possible Objections

357. China's Position Paper does not raise an objection on the basis of any specific automatic limitation to the Tribunal's jurisdiction set out in Article 297. Rather, China expresses the position that:

> As a State Party to the Convention, China has accepted the provisions of section 2 of Part XV on compulsory dispute settlement procedures. But that acceptance does not mean that

> those procedures apply to . . . disputes already excluded by Article 297. . . . With regard to the Philippines' claims for arbitration, China has never accepted any of the compulsory procedures of section 2 of Part XV.[329]

358. The Tribunal has already held that the Convention does not permit a State Party to exempt itself generally from the dispute settlement provisions of Part XV and that no consequences for the Tribunal's jurisdiction follow from China's decision not to participate in these proceedings (see Paragraphs 106 to 123 above). The Tribunal considers it imperative to examine, *proprio motu* and in light of China's general remarks on Article 297, whether a limitation to its jurisdiction follows from Article 297, in order to satisfy itself that it has jurisdiction over the dispute as required by Article 9 of Annex VII.

359. The Tribunal considers that two issues in relation to Article 297 could potentially impact its jurisdiction. First, Article 297 could be understood as implicitly limiting the jurisdiction of courts and tribunals over disputes concerning sovereign rights and jurisdiction in the exclusive economic zone only to the cases specifically identified in that Article. The Tribunal notes that Article 297 has sometime been interpreted in this way,[330] although the tribunal in *Chagos Marine Protected Area* recently declined to endorse this interpretation.[331] Second, Article 297(3) could potentially bar the Tribunal's jurisdiction over the Philippines claims in relation to fisheries, to the extent that the events in question took place in China's exclusive economic zone or in an area of overlapping entitlements. The Tribunal, therefore, considers it necessary to examine this question in some detail.

360. Accordingly, in its Request for Further Written Argument and the questions put to the Parties in advance of the hearing, the Tribunal invited the Philippines to elaborate on the following possible issues:

(a) the relationship between Article 288, Article 297, and the Tribunal's jurisdiction;

(b) the application of Article 297(1)(c) to the Philippines' claims concerning the preservation of the marine environment; and

(c) the application of Article 297(3) to the Philippines' claims concerning fisheries.

329 China's Position Paper, para. 79.

330 *See Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan),* Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at p. 44, para. 61 (**Annex LA-50**).

331 *Chagos Marine Protected Area (Mauritius v. United Kingdom),* Award of 18 March 2015, para. 317 (**Annex LA-225**).

2. The Philippines' Position

361. The Philippines' interpretation of the first portion of Article 297 has evolved in the course of these proceedings. In its Memorial, the Philippines argued that "Paragraph 1 [of Article 297] excludes from jurisdiction disputes concerning a coastal State's 'exercise' of its sovereign rights and jurisdiction, except those listed in subparagraphs (a)-(c)."[332] Subsequently, the Philippines endorsed the *Chagos Marine Protected Area* tribunal's view that "Article 297(1) confirms and expands jurisdiction over environmental disputes, but does not limit it."[333]

362. According to the Philippines, the Tribunal has jurisdiction over the Parties' dispute concerning the preservation of the marine environment at Scarborough Shoal "because the relevant waters constitute territorial sea, to which Article 297 does not apply."[334] The Philippines also considers that the Tribunal has jurisdiction over the dispute concerning preservation of the marine environment in and around Second Thomas Shoal because Article 297 applies only to the exercise of sovereign rights and jurisdiction by the coastal State. Because, in the Philippines' view, only the Philippines is a relevant coastal State with an entitlement to an exclusive economic zone in the area of Second Thomas Shoal, issues concerning Chinese activities cannot involve the exercise of China's sovereign rights and jurisdiction, and Article 297 therefore cannot apply.[335] In any event, however, the Philippines considers that, following the interpretation in *Chagos Marine Protected Area*, "Article 297(1) . . . supports [the Philippines'] case on jurisdiction over environmental disputes within the territorial sea and on the continental shelf, even if China were the relevant coastal state"[336]

363. The Philippines likewise considers that "[n]othing in paragraph 3 of Article 297 impairs the Tribunal's jurisdiction to address Submissions 8, 9 and 10," concerning the living resources of the Philippines' exclusive economic zone and traditional fishing activities at Scarborough Shoal.[337] According to the Philippines, Article 297(3) would only limit the Tribunal's jurisdiction over the issues raised in Submissions No. 8 and 9 if the relevant areas were part of China's exclusive economic zone.[338] However, because the Philippines considers that it has "demonstrated that none of the insular features claimed by China in the Southern Sector of the South China Sea generates entitlement to an EEZ or continental shelf," Article 297(3) can have

332 Memorial, para. 7.96.
333 Jurisdictional Hearing Tr. (Day 2), pp. 103-105.
334 Supplemental Written Submission, para. 4.1.
335 Supplemental Written Submission, para. 4.6.
336 Jurisdictional Hearing Tr. (Day 2), p. 104.
337 Supplemental Written Submission, para. 5.1.
338 Supplemental Written Submission, para. 5.4.

no application.[339] In the Philippines' view, Article 297(3) is also inapplicable to traditional fishing activities at Scarborough Shoal because such fishing only ever occurs within the 12 nautical mile territorial sea surrounding the feature.[340]

B. ARTICLE 298 AND OPTIONAL EXCEPTIONS TO THE TRIBUNAL'S JURISDICTION

364. Article 298 provides as follows:

> *Article 298*
> *Optional exceptions to applicability of section 2*
>
> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
>
> (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
>
> (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;
>
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
>
> (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.
>
> . . .

339 Supplemental Written Submission, para. 5.5.

340 Supplemental Written Submission, para. 5.8.

365. On 25 August 2006, China issued a declaration pursuant to Article 298, activating all of the optional exceptions to jurisdiction in the following terms: "[t]he 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."[341]

1. China's Position and Possible Further Objections

366. China's Position Paper recalls its 2006 Declaration under Article 298 and submits that "[t]he purpose and the effect of China's 2006 Declaration is such that the disputes listed therein are fully excluded from the compulsory settlement procedures under the Convention."[342] As set out above (see Paragraphs 138 to 139), China considers that "[t]he issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines."[343] In the event that the Philippines and China disagree with respect to whether the dispute is covered by China's declaration, China considers that "the Philippines should first take up this issue with China, before a decision can be taken on whether or not it can be submitted for arbitration."[344] The Tribunal has already considered—and rejected—this characterisation of the Parties' dispute. As stated in Paragraphs 155 to 157 above, the Tribunal does not consider the dispute to be over maritime boundary delimitation.

367. China's Position Paper does not raise any further objections based on Article 298, although the Tribunal notes that Article 298 contains a number of other exceptions to the jurisdiction of a tribunal constituted under Annex VII. For the reasons already given with respect to Article 297, the Tribunal considers it imperative to examine *proprio motu* whether any further exception to its jurisdiction follows from Article 298, in order to satisfy itself that it has jurisdiction over the dispute as required by Article 9 of Annex VII.

368. Although the Tribunal does not agree with China's characterisation of the Parties' dispute, Article 298's exclusion of jurisdiction over disputes relating to sea boundary delimitations may nevertheless constrain the Tribunal's jurisdiction.

369. First, the Tribunal's jurisdiction over some of the Philippines' Submissions could be barred if a feature claimed by China in the South China Sea were found to be an island within the meaning of Article 121 of the Convention, entitled to an exclusive economic zone or continental shelf

341 *See* China's Position Paper, para. 58.

342 China's Position Paper, para. 72.

343 China's Position Paper, para. 68.

344 China's Position Paper, para. 73.

overlapping those generated by the Philippines archipelago. In that case, the resolution of the merits of certain of the Philippines' claims would not be possible without first delimiting the overlapping entitlements, a step which, because of China's 2006 Declaration, would be outside the scope of the Tribunal's jurisdiction. However, the question of delimiting overlapping entitlements would not arise if the Tribunal were to find at the merits phase that none of the features claimed by China are islands that generate their own exclusive economic zone or continental shelf.

370. Second, Article 298 excludes disputes "involving historic bays or titles" which could bear on the Philippines' Submissions concerning China's claims to historic rights, if such rights were found to be permitted by the Convention and within the scope of this exclusion.

371. Finally, Article 298 excludes disputes concerning "military activities", as well as "law enforcement activities" related to marine scientific research or fisheries. This could be a bar to the Tribunal's jurisdiction over the Parties' disputes relating, among others, to (a) Chinese fisheries enforcement measures, (b) land reclamation and construction at Mischief Reef, (c) the operation of Chinese law enforcement vessels, and (d) the stand-off between the Philippines and China at Second Thomas Shoal.

372. Accordingly, in its Request for Further Written Argument and the questions put to the Parties in advance of the hearing, the Tribunal invited the Philippines to elaborate on the following possible issues:

(a) the scope of the exception for disputes relating to maritime boundary delimitation and the relationship between the Philippines' Submissions and such a delimitation;

(b) the relationship between the Article 298 reference to "historic bays or titles" and any claim by China to "historic rights";

(c) whether the Chinese activities addressed in the Philippines' Submissions No. 8-14 constitute "military activities" within the scope of Article 298(1)(b); and

(d) whether the Chinese activities addressed in the Philippines' Submissions No. 8-11 and 13-14 constitute "law enforcement activities" within the scope of Article 298(1)(b).

373. Additionally, in connection with the possible jurisdictional issues described above and the Philippines' argument that "none of the features in the Spratlys—not even the largest among them—is capable of generating entitlement to an EEZ or a continental shelf,"[345] the Tribunal has

345 Memorial, para. 5.96.

at various points in the proceedings requested the Philippines to provide additional maps, charts, tidal data, satellite images, photographs, historical, anthropological, geographic, and hydrographic information regarding certain features in the Spratly Islands.[346]

2. The Philippines' Position

374. As stated above (see Paragraph 146), the Philippines rejects China's contention that the Parties' disputes constitute, as a whole, an integral part of maritime boundary delimitation. The Philippines also notes that Article 298(a)(1) refers not simply to maritime boundary disputes, but specifically to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations." Whatever the nature of the dispute, therefore, the Philippines submits that Article 298 has no effect unless the Tribunal is called on to interpret or apply one of the three specified articles, which relate to the actual delimitation of—respectively—the territorial sea, exclusive economic zone, and continental shelf.[347]

375. The Philippines likewise submits that Article 298 does not exclude the jurisdiction of the Tribunal. Questions of maritime delimitation, the Philippines recalls, "arise only in the context of overlapping entitlements of coastal states."[348] According to the Philippines, however, it has demonstrated that:

> none of the insular features claimed by China in the Southern Sector of the South China Sea generates entitlement to an EEZ or continental shelf. As a result, the waters, seabed and subsoil within 200 M of the Philippines, but beyond 12 M from any high-tide feature, constitute the EEZ and continental shelf of the Philippines, not China.[349]

Thus, in the Philippines' view, no situation of overlapping entitlements potentially requiring delimitation occurs in the areas in which the events addressed in the Philippines' Submissions took place.

376. With respect to "historic bays or titles", the Philippines argues that Article 298 "does not apply . . . because China is not claiming such title in the South China Sea."[350] The Philippines examines the term for historic title in the Chinese text of the Convention and the references to historic rights in China's Exclusive Economic Zone and Continental Shelf Act[351] and argues that

346 Request for Further Argument, 16 December 2014, Requests No. 17-24; Letter from Tribunal to the Parties (23 June 2015).

347 Jurisdictional Hearing Tr. (Day 2), pp. 49-50.

348 Jurisdictional Hearing Tr. (Day 2), p. 39.

349 Supplemental Written Submission, para. 5.5.

350 Memorial, para. 7.129.

351 People's Republic of China, Exclusive Economic Zone and Continental Shelf Act (26 June 1998), Art. 14 (Chinese version) (**Annex 107**).

"[w]hat is clear is that China claimed 'historical rights' as distinguished from 'historic title'."[352] In any event, the Philippines argues, "the concept of 'historic title' as used in Article 298 has a specific and limited meaning: it pertains only to near-shore areas of sea that are susceptible to a claim of sovereignty as such."[353] Furthermore, the Philippines argues, Article 298 was crafted with the delimitation of the Gulf of Fonseca (a historic bay) in mind and applies only to disputes over the *delimitation* of historic bays and titles. According to the Philippines, "when Article 298(1)(a)(i) refers to 'those involving historic bays or titles' the 'those' being referred to are not disputes generally but rather disputes concerning delimitation."[354] In the Philippines' view, no such dispute over delimitation is implicated by its submissions in these proceedings.

377. As for "military activities", the Philippines submits that "[n]one of the activities undertaken by Chinese government vessels about which the Philippines complains in these proceedings are properly considered 'military activities'."[355] According to the Philippines, "the nature and purpose of the activity itself that determines whether it is to be categorized as 'military' or 'law enforcement', not the identity of the actor."[356] Nevertheless, "absent evidence to the contrary, it can ordinarily be assumed that [non-military] vessels and aircraft are not engaged in military activities."[357] In the present case, the Philippines argues as follows:

> The specific actions of Chinese government vessels of which the Philippines complains in these proceedings are all characteristic of law enforcement activities. China's unlawful fishing activities in the Philippines' EEZ were carried [out] under the protection of law enforcement vessels of the [China Marine Surveillance] and [Fisheries and Law Enforcement Command]. China's interferences with the Philippines' exercise of its sovereign right to exploit the living and non-living resources of its EEZ and continental shelf were also carried out by vessels of the [China Marine Surveillance]and [Fisheries and Law Enforcement Command]. . . . The interdiction of Philippine vessels at Scarborough Shoal and Second Thomas Shoal was carried out exclusively by [China Coast Guard], [China Marine Surveillance] and [Fisheries and Law Enforcement Command] vessels, as were the dangerous navigational manoeuvres that risked (and narrowly avoided) collision with Philippines vessels.[358]

Furthermore, in the Philippines' view, "[e]vidence that Mischief Reef is now occupied by personnel associated with the Chinese military is not relevant to the question of jurisdiction over China's conduct at the time of its initial occupation and construction activities. At that time, China itself repeatedly asserted that these activities were for civilian purposes."[359] Even since

352 Memorial, para. 4.28; *see also* Jurisdictional Hearing Tr. (Day 2), pp. 59-62.

353 Memorial, para. 7.130.

354 Memorial, para. 7.139.

355 Memorial, para. 7.147.

356 Memorial, para. 7.148.

357 Jurisdictional Hearing Tr. (Day 2), p. 81.

358 Memorial, para. 7.151.

359 Jurisdictional Hearing Tr. (Day 2), p. 88 (citing Memorandum from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines

the expansion of Chinese reclamation activities at Mischief Reef, the Philippines argues, "China itself declares that the 'main purpose of [its construction] activities is to meet various civilian demands'."[360]

378. Finally, with respect to the exclusion of "law enforcement activities" from jurisdiction, the Philippines emphasises that "[o]nly certain types of law enforcement activities may be excluded by a declaration under paragraph 1(b) of Article 298."[361] Such activities must be related to the jurisdictional limitations for marine scientific research and fisheries set out in Article 297. According to the Philippines, however, because "paragraphs 2 and 3 of Article 297 do not apply to any of the claims of the Philippines in this case," the law enforcement exception in Article 298 is likewise inapplicable.[362] The Philippines emphasises that it "makes no claims regarding China's exercise of its rights . . . to regulate marine scientific research . . . or the exercise of sovereign rights with respect to living resources in China's EEZ."[363] The Philippines further emphasises that "the Philippines' claims only concern areas where China has no entitlement to an EEZ or continental shelf" and where neither Article 297 nor, correspondingly, Article 298(1)(b) can apply.[364]

C. THE APPLICATION OF ARTICLES 297 AND 298 AND THE TRIBUNAL'S FINDINGS ON THE SCOPE OF ITS JURISDICTION

379. Having set out the possible limitations and exceptions to its jurisdiction and the Parties' views thereon, the Tribunal now turns to the application of those provisions to the disputes presented

(10 March 1995) (**Annex 18**); Memorandum from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 April 1995) (**Annex 21**); Memorandum from the Ambassador of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-231-95 (20 April 1995) (**Annex 22**); Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 November 1998) (**Annex 33**); Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-77-98-S (9 November 1998) (**Annex 34**); Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (14 November 1998) (**Annex 36**); Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-18-99-S (15 March 1999) (**Annex 38**); Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 March 1995) (**Annex 175**); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 August 1995) (**Annex 180**); Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 August 1995) (**Annex 181**)).

360 Jurisdictional Hearing Tr. (Day 3), p. 53.

361 Memorial, 7.153.

362 Memorial, 7.154.

363 Memorial, 7.154.

364 Memorial, 7.154.

by the Philippines. As an initial step, however, the Tribunal considers it necessary to address whether such possible issues of jurisdiction are even capable of being decided at this phase of the arbitration or whether they are so interwoven with the merits that they should properly be deferred for decision at a later stage.

1. Whether Issues of Jurisdiction Possess an "Exclusively Preliminary Character"

(a) The Applicable Legal Standard

380. Article 20(3) of the Rules of Procedure provides that the Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question unless it determines that the "objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits." Thus, in Procedural Order No. 4, when the Tribunal decided to treat China's communications as effectively constituting a plea on jurisdiction and to hold a separate Hearing on Jurisdiction about those pleas and any other jurisdictional issues, it noted that:

> If the Arbitral Tribunal determines after the Hearing on Jurisdiction that there are jurisdictional objections that do not possess an exclusively preliminary character, then, in accordance with Article 20(3) of the Rules of Procedure, such matters will be reserved for consideration and decision at a later stage of the proceedings.[365]

381. The "exclusively preliminary character" test in Article 20(3) of the Rules of Procedure is modelled on Article 79(9) of the Rules of Court of the International Court of Justice, which provides that the Court may, after hearing the parties on any preliminary objections, issue a judgment in which it declares that "the objection does not possess, in the circumstances of the case, an exclusively preliminary character." If the Court so rules, it shall proceed to "fix time-limits for the further proceedings."[366]

382. The Court has applied this rule on many occasions.[367] Recently, in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*,[368] the Court summarised its approach as follows:

365 Procedural Order No. 4, 21 April 2015, para. 2.2.

366 ICJ Rules of Court, Article 79(9). For similar provision in the ITLOS Rules, see Article 97(6).

367 *See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at pp. 425-26, para. 76 (**Annex LA-13**); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 9 at pp. 28-29, para. 50 (**Annex LA-24**); *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 324-25, paras. 116-17 (**Annex LA-25**).

368 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832 at p. 850, para. 46.

> In principle, a party raising preliminary objections is entitled to 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 questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits.[369]

In brief, the accumulated jurisprudence of the International Court of Justice indicates that whether or not a preliminary objection will be found, in the circumstances of a particular case, to "possess an exclusively preliminary character" will depend on two types of enquiry: first, whether the Tribunal has had the opportunity to examine all the necessary facts to dispose of the preliminary objection; and second, whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits.

383. Similar tests have been applied in the context of arbitration. For example, in *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, the United Kingdom raised two objections to the admissibility of France's application to interpret a previous decision. The first, relating to the timeliness of the application, was capable of being decided in the preliminary phase. However, the second, relating to whether the application properly fell within the meaning of the interpretation provision in the arbitration agreement, was held not to possess an exclusively preliminary character and was deferred to the merits, because the issue raised by the objection was "intimately linked to the merits of the claim."[370] Similar issues arose in *Guyana v. Suriname*, where the tribunal declined to convene a separate procedural phase to consider Suriname's jurisdictional objections because they did not possess an exclusively preliminary character.[371] In contrast, in *Arctic Sunrise,* the tribunal dealt with one preliminary objection, relating to "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction," but deferred its consideration of other possible preliminary objections to the merits phase.[372]

369 *Ibid.*, para. 51 (internal citations omitted). *See also Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Preliminary Objections, Judgment, 24 September 2015, para. 53 (in which the Court found that it was not precluded from ruling on Chile's objection at a preliminary stage because "the Court considers that it has all the facts necessary to rule on Chile's objection . . . .")

370 *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Award of 14 March 1978, RIAA Vol. XVIII, p. 271 at pp. 290-291, paras. 16-17.

371 *Guyana v. Suriname*, Preliminary Objections, Order No. 2 of 18 July 2005, para. 2. The tribunal in *Chagos Marine Protected Area* likewise declined to conduct a separate jurisdictional phase of the United Kingdom's objections. *See Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, paras. 28-31 (**Annex LA-225**), referencing Procedural Order No. 2 of 15 January 2013 (declining UK's application to hear preliminary objections relating to territorial sovereignty separately).

372 *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Jurisdiction, Award of 26 November 2014 (**Annex LA-180**); *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, paras. 142-86.

(b) The Parties' Positions on the Link between Jurisdiction and the Merits

384. Prior to issuing Procedural Order No. 4, the Tribunal sought the views of the Parties on whether it should bifurcate the proceedings into a preliminary phase on some or all issues of the Tribunal's jurisdiction and a separate subsequent phase on the merits. The Philippines also addressed the question of whether any issue of jurisdiction was not of an exclusively preliminary character in the course of the Hearing.

385. The Chinese Ambassador's First Letter of 6 February 2015 opposed several procedural options raised by the Tribunal, but notably did not address the issue of bifurcation.[373] China's Position Paper likewise did not express a view on the timing of the Tribunal's consideration of its jurisdiction. The Position Paper did, however, expressly and deliberately limit its arguments to issues of jurisdiction only and excluded any consideration of the merits of the dispute. China noted specifically that:

> This Position Paper is intended to demonstrate that the arbitral tribunal established at the request of the Philippines for the present arbitration ("Arbitral Tribunal") does not have jurisdiction over this case. It does not express any position on the substantive issues related to the subject-matter of the arbitration initiated by the Philippines.[374]

386. The Philippines' position on the link between the Tribunal's jurisdiction and the merits has evolved in the course of these proceedings. Initially, the Philippines opposed any preliminary consideration of matters of jurisdiction. In response to the Tribunal's invitation, the Philippines wrote to the Tribunal on 26 January 2015, expressing the view that it would be "neither appropriate nor desirable" to conduct a separate jurisdictional phase.

387. According to the Philippines' letter "the jurisdictional issues in the case . . . are plainly interwoven with the merits" and the jurisdictional issues raised in the Chinese Position Paper "depend 'in significant measure [on] the same facts and arguments on which the merits of the case depend.' They therefore do not possess an exclusively preliminary character, making bifurcation inappropriate." For example, the Philippines noted that the extent to which Article 298(1) poses a jurisdictional bar turns on "the scope of the phrase "historic titles" in Article 298, and . . . the nature of China's claims," both of which "can only be decided by reference to the substance of China's claim." Similarly, the Philippines commented that questions about Article 297(1) "can only be answered in light of the specific nature of China's environmentally harmful conduct in the South China Sea" and questions about Article 298(1)(b) can only be answered "in light of the character of China's relevant conduct as either military or

373 Letter from the Chinese Ambassador to the Kingdom of the Netherlands, addressed to the individual members of the Tribunal, 6 February 2015.

374 China's Position Paper, para. 2.

non-military in nature." According to the Philippines, such questions can only be assessed in light of the merits of the Philippines' claims and thus lack an exclusively preliminary nature. As to the "core jurisdictional contentions" in China's Position Paper, the Philippines observed that whether its claims "truly implicate questions of territorial sovereignty and/or maritime delimitation . . . can only be decided by reference to the nature and substance of the claims of the Philippines on the merits."[375]

388. At the Hearing, however, the Philippines argued that there was no need to defer any question of jurisdiction for further consideration with the merits. The Tribunal's list of possible issues to address at the Hearing included the question whether "any potential issue of jurisdiction or admissibility does not 'possess an exclusively preliminary' character, such that it should be deferred for consideration in conjunction with the merits of the Philippines' claims." During the Hearing, counsel for the Philippines responded: "We say there are none."[376] The Philippines went on to emphasise that the position of the Philippines was that all issues of jurisdiction argued during the Hearing "could and should be resolved at this stage of the proceedings."[377]

389. Notwithstanding some inconsistency, the Tribunal understands the latter view, expressed in the course of the Hearing, to represent the position of the Philippines on this question.

(c) Tribunal's Decision

390. The basic principle governing the handling of jurisdictional issues before an international tribunal is straightforward: a State "should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."[378] In furtherance of this principle, the International Court of Justice has stated that a party raising preliminary objections 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 questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[379] The Rules of Procedure adopted by this Tribunal similarly call for it to rule on any plea concerning its jurisdiction as a preliminary question, "unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character."

375 Philippines' Letter of 26 January 2015.

376 Jurisdictional Hearing Tr. (Day 2), p. 148.

377 Jurisdictional Hearing Tr. (Day 3), pp. 27-28.

378 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan),* Judgment, ICJ Reports 1972, p. 46 at p. 56.

379 *Territorial and Maritime Dispute (Nicaragua v. Colombia)* Preliminary Objections, Judgment, ICJ Reports 2007, p. 832 at p. 852, para. 51.

391. Having determined that China's Position Paper and its communications effectively constitute a plea concerning the Tribunal's jurisdiction,[380] the Tribunal bifurcated these proceedings to consider the question of its jurisdiction and the admissibility of the Philippines' claims as a preliminary matter. In the Tribunal's view, the objections to jurisdiction set out in China's Position Paper concerning the characterisation of the dispute and the Philippines' compliance with Section 1 of Part XV of the Convention are exclusively preliminary in nature, and the Tribunal has accordingly proceeded to reach decisions on these objections in Chapters V and VII of this Award.

392. The Tribunal considers that it is likewise incumbent on it to address any issue of jurisdiction not raised by China—and to satisfy itself as to whether it has jurisdiction over the dispute—in this preliminary phase to the greatest extent possible. Nevertheless, the Tribunal considers that the remaining issues, in particular the limitations and exceptions to jurisdiction in Articles 297 and 298, are in significant respects interwoven with the merits, for the following reasons, *inter alia*.

393. First, the Tribunal's jurisdiction to decide on the merits of some of the Philippines' Submissions may depend upon the nature and validity of any claim by China to historic rights in the South China Sea. The nature of such historic rights may determine whether the Parties' dispute is covered by the exclusion from jurisdiction of "historic bays or titles" in Article 298 and also whether a situation of overlapping entitlement to maritime zones exists in the areas in which certain Chinese activities are alleged to have occurred. The possible existence of any overlapping entitlements would, in turn, potentially impact the application of other limitations and exceptions in Articles 297 and 298. The Philippines has requested the Tribunal to address both the nature and validity of any Chinese historic rights in its Submission No. 2. This, however, is a merits determination that the Tribunal cannot make at this point in the proceedings.

394. Second, the Tribunal's jurisdiction to decide on the merits of some of the Philippines' Submissions may depend upon the status of certain maritime features in the South China Sea. Specifically, if (contrary to the Philippines' position) any maritime feature in the Spratly Islands constitutes an "island" within the meaning of Article 121 of the Convention, generating an entitlement to an exclusive economic zone or continental shelf, it may be the case that the Philippines and China possess overlapping entitlements to maritime zones in the relevant areas of the South China Sea. In that case, the Tribunal may not be able to reach the merits of certain of the Philippines' Submissions (Nos. 5, 8, and 9) without first delimiting the Parties' overlapping entitlements, a step that it cannot take in light of Article 298 and China's

[380] Procedural Order No. 4, 21 April 2015, para. 1.1.

declaration. The Philippines has specifically requested the Tribunal to determine the status of a number of maritime features and has argued generally that no maritime feature in the South China Sea generates more than a 12 nautical mile territorial sea. This, however, is a merits determination that the Tribunal cannot make at this point in the proceedings.

395. Third, the Tribunal's jurisdiction to decide on the merits of some of the Philippines' Submissions (Nos. 8, 9, 10 and 13) may depend on the maritime zone in which alleged Chinese law enforcement activities in fact took place. Specifically, the exclusion from jurisdiction in Article 298 for disputes relating to law enforcement activities may apply to the extent that 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. As already noted, whether any maritime feature claimed by China generates a possible entitlement to an exclusive economic zone in the South China Sea, and whether any situation of overlapping entitlements exists as a result, is a merits determination that the Tribunal cannot make at this point in the proceedings.

396. Fourth, the Tribunal's jurisdiction to decide on the merits of some of the Philippines' Submissions may depend upon whether certain Chinese activities are military in nature. If so, the exclusion from jurisdiction in Article 298 for disputes relating to military activities may bar the Tribunal's jurisdiction. The Philippines has requested the Tribunal to address certain Chinese activities at Mischief Reef and Second Thomas Shoal in its Submissions No. 12 and 14. The nature of such activities, however, is a merits determination that the Tribunal cannot make at this point in the proceedings.

2. The Tribunal's Conclusions on its Jurisdiction

397. Having considered the application of Articles 297 and 298 of the Convention and the possible effects of merits issues on the extent of its jurisdiction, the Tribunal decides with respect to its jurisdiction as follows.

398. The Philippines' Submission No. 1 reflects a dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The Philippines' Submission No. 1 does, however, require the Tribunal to consider the effect of any historic rights claimed by China to maritime entitlements in the South China Sea and the interaction of such rights with the provisions of the Convention. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be

dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 1 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 1 for consideration in conjunction with the merits of the Philippines' claims.**

399. The Philippines' Submission No. 2 reflects the same dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention as Submission No. 1. Again, this is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The Philippines' Submission No. 2 directly requests the Tribunal to determine the legal validity of any claim by China to historic rights in the South China Sea. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 2 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 2 for consideration in conjunction with the merits of the Philippines' claims.**

400. The Philippines' Submission No. 3 reflects a dispute concerning the status of Scarborough Shoal as an "island" or "rock" within the meaning of Article 121 of the Convention and is not barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. This is not a dispute concerning sovereignty over the feature, which would remain entirely unaffected by the Tribunal's determination. Nor is this a dispute concerning sea boundary delimitation: given that Scarborough Shoal lies over 200 nautical miles from any maritime feature claimed by any State to generate an exclusive economic zone or continental shelf, no delimitation is required before the Tribunal may determine the status of Scarborough Shoal, nor is any delimitation potentially relevant to the determination. Article 298 does not, therefore, limit the Tribunal's jurisdiction. Nor is any other exception or limitation in Article 297 or 298 potentially applicable to the status of Scarborough Shoal. **Accordingly, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 3.**

401. The Philippines' Submission No. 4 reflects a dispute concerning the status of Mischief Reef, Second Thomas Shoal, and Subi Reef as "low-tide elevations" within the meaning of Article 13 of the Convention and is not barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. Low-tide elevations do not generate entitlement to a territorial sea, exclusive economic zone, or continental shelf. This is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty. Nor is this a dispute concerning sea boundary delimitation: the status of a feature as a "low-tide elevation", "island", or a "rock" relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap. If, however, China has an entitlement to an exclusive economic zone or to a continental shelf overlapping that of the Philippines in the area of Mischief Reef, Second Thomas Shoal, or Subi Reef, the Tribunal considers that the existence of overlapping entitlements may have practical considerations for the selection of the vertical datum and tidal model against which the status of the features is to be assessed. This may be particularly true if the Parties' respective data and models indicate differing results. **Accordingly, subject to a caveat with respect to the possible effects of any overlapping entitlements, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 4.**

402. The Philippines' Submission No. 5 reflects a dispute concerning the sources of maritime entitlements in the South China Sea and whether a situation of overlapping entitlements to an exclusive economic zone or to a continental shelf exists in the area of Mischief Reef and Second Thomas Shoal. This dispute is not barred from the Tribunal's consideration by any requirement of Section 1 of Part XV and is not a dispute concerning sovereignty over the feature, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty. Nor is this a dispute concerning sea boundary delimitation: the premise of the Philippines' Submission is not that the Tribunal will delimit any overlapping entitlements in order to declare that these features form part of the exclusive economic zone and continental shelf of the Philippines, but rather that no overlapping entitlements can exist. If, however, another maritime feature claimed by China within 200 nautical miles of Mischief Reef or Second Thomas Shoal were to be an "island" for the purposes of Article 121, capable of generating an entitlement to an exclusive economic zone and continental shelf, the resulting overlap and the exclusion of boundary delimitation from the Tribunal's jurisdiction by Article 298 would prevent the Tribunal from addressing this Submission. Whether this is the case depends upon a merits determination on the status of maritime features in the South China Sea. The possible jurisdictional objections with respect to the dispute underlying Submission

No. 5 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 5 for consideration in conjunction with the merits of the Philippines' claims.**

403. The Philippines' Submission No. 6 reflects a dispute concerning the status of Gaven Reef and McKennan Reef (including Hughes Reef) as "low-tide elevations" within the meaning of Article 13 of the Convention and is not barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. Low-tide elevations do not generate entitlement to a territorial sea, exclusive economic zone, or continental shelf. This is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty. Nor is this a dispute concerning sea boundary delimitation: the status of a feature as a "low-tide elevation", "island", or a "rock" relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap. If, however, China has entitlement to an exclusive economic zone or to a continental shelf overlapping that of the Philippines in the area of Gaven Reef or McKennan Reef (including Hughes Reef), the Tribunal considers that the existence of overlapping entitlements may have practical considerations for the selection of the vertical datum and tidal model against which the status of the features is to be assessed. This may be particularly true if the Parties' respective data and models indicate differing results. **Accordingly, subject to a caveat with respect to the possible effects of any overlapping entitlements, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 6.**

404. The Philippines' Submission No. 7 reflects a dispute concerning the status of Johnson Reef, Cuarteron Reef, and Fiery Cross Reef as "islands" or "rocks" within the meaning of Article 121 of the Convention. This dispute is not barred from the Tribunal's consideration by any requirement of Section 1 of Part XV and is not a dispute concerning sovereignty over the features, which would remain entirely unaffected by the Tribunal's determination. Nor is this a dispute concerning sea boundary delimitation: the status of a feature as an "island" or a "rock" relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap. Article 298 does not, therefore, limit the Tribunal's jurisdiction. Nor is any other exception or limitation in Article 297 or 298 potentially applicable to the status of Johnson Reef, Cuarteron Reef, or Fiery Cross Reef. **Accordingly, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 7.**

405. The Philippines' Submission No. 8 reflects a dispute concerning China's actions that allegedly interfere with the Philippines' petroleum exploration, seismic surveys, and fishing in what the Philippines claims as its exclusive economic zone. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The premise of the Philippines' submission is that no overlapping entitlements exist because only the Philippines possesses an entitlement to an exclusive economic zone in the relevant areas. If, however, another maritime feature claimed by China within 200 nautical miles of these areas were to be an "island" for the purposes of Article 121, capable of generating an entitlement to an exclusive economic zone and continental shelf, the resulting overlap and the exclusion of boundary delimitation from the Tribunal's jurisdiction by Article 298 would prevent the Tribunal from addressing this Submission. Whether this is the case depends upon a merits determination on the status of maritime features in the South China Sea. The possible jurisdictional objections with respect to the dispute underlying Submission No. 8 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 8 for consideration in conjunction with the merits of the Philippines' claims.**

406. The Philippines' Submission No. 9 reflects a dispute concerning Chinese fishing activities in what the Philippines claims as its exclusive economic zone. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. Article 297 and 298, however, would restrict the Tribunal's jurisdiction over fishing and fisheries-related law enforcement in the event that the relevant areas formed part of China's exclusive economic zone. The premise of the Philippines' submission is that no overlapping entitlements exist because only the Philippines possesses an entitlement to an exclusive economic zone in the relevant areas. If, however, another maritime feature claimed by China within 200 nautical miles of these areas were to be an "island" for the purposes of Article 121, capable of generating an entitlement to an exclusive economic zone and continental shelf, the resulting overlap and the exclusion of boundary delimitation from the Tribunal's jurisdiction by Article 298 would prevent the Tribunal from addressing this Submission. Whether this is the case depends upon a merits determination on the status of maritime features in the South China Sea. The possible jurisdictional objections with respect to the dispute underlying Submission No. 9 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 9 for consideration in conjunction with the merits of the Philippines' claims.**

407. The Philippines' Submission No. 10 reflects a dispute concerning China's actions that allegedly interfere with the traditional fishing activities of Philippine nationals at Scarborough Shoal. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The Philippines has clarified that these activities occur within the 12 nautical mile territorial sea that would be generated by Scarborough Shoal irrespective of whether the feature were considered to be a rock or island pursuant to Article 121 of the Convention. The Tribunal notes that traditional fishing rights may exist even within the territorial waters of another State[381] and considers that its jurisdiction to address this dispute is not dependent on a prior determination of sovereignty over Scarborough Shoal. Articles 297 and 298 of the Convention have no application in the Territorial Sea and thus impose no limitation on the Tribunal's jurisdiction. **Accordingly, to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 10.**

408. The Philippines' Submission No. 11 reflects a dispute concerning the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal and the application of Articles 192 and 194 of the Convention. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. Depending on the Tribunal's ultimate decision on the status of these features, the basis for its jurisdiction may differ:

(a) To the extent that the alleged harmful activities took place in the territorial sea surrounding Scarborough Shoal, or in any territorial sea generated by Second Thomas Shoal, the Tribunal notes that the environmental provisions of the Convention impose obligations on States Parties including in the territorial sea. The Tribunal's jurisdiction is thus not dependent on a prior determination of the status of Second Thomas Shoal or of sovereignty over either feature, and Articles 297 and 298 of the Convention have no application in the territorial sea.

(b) To the extent that the alleged harmful activities took place in the exclusive economic zone of the Philippines, of China, or in an area of overlapping entitlements, the Tribunal notes that Article 297(1)(c) expressly affirms the Tribunal's jurisdiction over disputes concerning the alleged violation of "specified international rules and standards for the protection and preservation of the marine environment" in the exclusive economic zone.

381 *Eritrea/Yemen,* Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, PCA Award Series at p. 145, paras. 525-26, RIAA Vol. XXII, p. 209 at pp. 329-30, paras. 525-26 (**Annex LA-48**).

Under neither circumstance, however, is jurisdiction precluded. The Tribunal's jurisdiction is thus not dependent on a prior determination of the status of any maritime feature, on the existence of an entitlement by China to an exclusive economic zone in the area, or on the prior delimitation of any overlapping entitlements. **Accordingly, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 11.**

409. The Philippines' Submission No. 12 reflects a dispute concerning China's activities on Mischief Reef and their effects on the marine environment. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. However, the Tribunal's jurisdiction to address these questions is dependent on the status of Mischief Reef as an "island", "rock", or "low-tide elevation." If the Tribunal were to find—contrary to the premise of the Philippines' Submission—that Mischief Reef is an "island" or "rock" and thus constitutes land territory, the Tribunal would lack jurisdiction to consider the lawfulness of China's construction activities or the appropriation of the feature. The status of Mischief Reef is a matter for the merits. Additionally, Article 298 excludes disputes concerning military activities from the Tribunal's jurisdiction. The Tribunal considers that the specifics of China's activities on Mischief Reef and whether such activities are military in nature to be a matter best assessed in conjunction with the merits. The possible jurisdictional objections with respect to the dispute underlying Submission No. 12 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 12 for consideration in conjunction with the merits of the Philippines' claims.**

410. The Philippines' Submission No. 13 reflects a dispute concerning the operation of China's law enforcement activities in the vicinity of Scarborough Shoal and the application of Articles 21, 24, and 94 of the Convention. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The Tribunal understands this dispute to relate principally to events occurring in the territorial sea surrounding Scarborough Shoal and notes that Article 298(1)(b) has no application in the territorial sea. The Tribunal further notes that the provisions of the Convention invoked by the Philippines impose duties on both the coastal State and on vessels engaged in innocent passage. The Tribunal's jurisdiction is thus not dependent on a prior determination of sovereignty over Scarborough Shoal. **Accordingly, to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 13.**

411. The Philippines' Submission No. 14 reflects a dispute concerning China's activities in and around Second Thomas Shoal and China's interaction with the Philippine military forces stationed on the Shoal. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. However, the Tribunal's jurisdiction to address these questions may depend on the status of Second Thomas Shoal as an "island", "rock", or "low-tide elevation," which is a matter for the merits. Additionally, Article 298 excludes disputes concerning military activities from the Tribunal's jurisdiction. The Tribunal considers the specifics of China's activities in and around Second Thomas Shoal and whether such activities are military in nature to be a matter best assessed in conjunction with the merits. The possible jurisdictional objections with respect to the dispute underlying Submission No. 14 therefore do not possess an exclusively preliminary character. **Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 14 for consideration in conjunction with the merits of the Philippines' claims.**

412. The Tribunal has not, so far, addressed the question of its jurisdiction in relation to the Philippines' Submission No. 15, requesting a declaration that "China shall desist from further unlawful claims and activities." In the Tribunal's view, the claims and activities to which this Submission could potentially relate are unclear from the Philippines pleadings to date. The Tribunal is therefore presently unable to determine whether there exists a dispute between the Parties concerning the interpretation or application of the Convention or to assess the scope of the Tribunal's jurisdiction in this respect. **The Tribunal therefore directs the Philippines to clarify the content and narrow the scope of its Submission No. 15. The Tribunal reserves the question of its jurisdiction in relation to Submission No. 15 for consideration in conjunction with the merits of the Philippines' claims.**

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IX. DECISION

413. For the above reasons, the Tribunal unanimously:

A. FINDS that the Tribunal was properly constituted in accordance with Annex VII to the Convention.

B. FINDS that China's non-appearance in these proceedings does not deprive the Tribunal of jurisdiction.

C. FINDS that the Philippines' act of initiating this arbitration did not constitute an abuse of process.

D. FINDS that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.

E. FINDS that the 2002 China–ASEAN Declaration on Conduct of the Parties in the South China Sea, the joint statements of the Parties referred to in paragraphs 231 to 232 of this Award, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity, do not preclude, under Articles 281 or 282 of the Convention, recourse to the compulsory dispute settlement procedures available under Section 2 of Part XV of the Convention.

F. FINDS that the Parties have exchanged views as required by Article 283 of the Convention.

G. FINDS that the Tribunal has jurisdiction to consider the Philippines' Submissions No. 3, 4, 6, 7, 10, 11, and 13, subject to the conditions noted in paragraphs 400, 401, 403, 404, 407, 408, and 410 of this Award.

H. FINDS that a determination of whether the Tribunal has jurisdiction to consider the Philippines' Submissions No. 1, 2, 5, 8, 9, 12, and 14 would involve consideration of issues that do not possess an exclusively preliminary character, and accordingly RESERVES consideration of its jurisdiction to rule on Submissions No. 1, 2, 5, 8, 9, 12, and 14 to the merits phase.

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

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

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Done at The Hague, this 29th day of October 2015,

Judge Rüdiger Wolfrum

Judge Stanislaw Pawlak

Judge Jean-Pierre Cot

Professor Alfred H.A. Soons

Judge Thomas A. Mensah
Presiding Arbitrator

Ms. Judith Levine
Registrar