

The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015

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Abstract: The Sino-Philippine Arbitration on the South China Sea (SCS) Disputes is coming to a critical stage. On 7-13 July 2015 a Hearing was conducted to review China's informal preliminary objections demonstrated by its Position Paper released on 7 December 2014 and other jurisdiction and admissibility issues. Whether the legality issues of China's actions complained by the Philippines' Memorial can be entertained by the Arbitral Tribunal (hereinafter "Tribunal") in the merits phase will depend on what China actually responds officially before 17 August 2015 and what China may respond as reflected by academic papers published before the award on jurisdiction and admissibility is granted.

This paper serves as scholarly advice as to what China may argue to challenge Philippines' oral statements at the July Hearing. It provides a comprehensive structure by answering six different levels of questions fundamental for Tribunal's ruling on jurisdiction and admissibility. These questions are: among Philippines' Submissions 1~14 (1) which Submission suffers from lack of dispute and why; (2) which Submission does not convey legal dispute and why; (3) which Submission

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fails to provide a dispute concerning the interpretation or application of UNCLOS and why; (4) which Submission fails to fulfill the requirements contained in Section 1 of Part XV of UNCLOS and should be deemed inadmissible for the dispute settlement mechanisms under Section 2 of Part XV to address and why; (5) which Submissions may not be entertained by the Tribunal due to application of Article 298 and why; and (6) whether Article 297 limits the jurisdiction of this Tribunal to address the Philippines' Submissions and why?

Before addressing these questions, this paper raises an even more fundamental issue. So far all the academic papers commenting on the SCS Arbitration have been focusing on the jurisdiction issues of the Tribunal over the disputes submitted by the Philippines, as well as the admissibility issues concerning the claims presented by the Memorial. A critical but ignored issue is the consequences of withholding those Sino-Philippine SCS (unsubmitted) core disputes by the Philippines. Would these consequences undermine the effectiveness of the award of this Arbitration? To what extent will such consequences affect the Sino-Philippine relations in the SCS after this Arbitration is over? Having completed an in-depth research on this issue, the author concludes that the Philippines' partial submission of its multi-layered SCS disputes with China will turn the award of this Tribunal totally useless in terms of resolving the confrontations between the Parties indicated by Philippines' Memorial. It concerns the Tribunal when approaching the stage of producing the first award on the jurisdiction and admissibility issues for this case. This paper advises the Tribunal to apply Article 27(2) of its Rules of Procedure and to terminate the arbitral proceedings as its continuation is unnecessary due to such inefficacy of the award in the merits phase.

Key Words: South China Sea Arbitration; The Hearing on 7-13 July 2015; UNCLOS; Annex VII Tribunal; Jurisdiction and admissibility; *Res judicata*; Sino-Philippine territorial disputes in the South China Sea; Sea boundary delimitation

I. Introduction

The South China Sea Arbitration initiated by the Philippines against China is coming to a critical stage. On 7-13 July 2015 a Hearing was conducted to review the informal preliminary objections of China and other jurisdiction and admissibility issues. Whether the legality issues of China's actions identified by the Philippines' Memorial can be entertained by the Arbitral Tribunal (hereinafter "Tribunal") will depend on what China has said before 17 August 2015.

This arbitration started on 22 January 2013, when the Philippines invoked Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)¹ and presented a diplomatic notification to initiate arbitration against China.² As said by the Notification and Statement of Claim (hereinafter “Notification”),³ the goal is “to seek a peaceful and durable resolution of the dispute in the West Philippine Sea [South China Sea]” between these two States. The Philippines challenged against China’s claims and entitlement to the eastern part of South China Sea (SCS) enclosed by the “U-Shaped Line”, requesting the Tribunal to declare the area as its exclusive economic zone (EEZ) and continental shelf.⁴ Five groups of claims were presented by the Notification:

(1) China’s rights concerning the SCS maritime areas are those established by UNCLOS only and consist of the territorial sea, the contiguous zone, the EEZ and the continental shelf. China’s maritime claims therein based on the “nine-dash line (U-Shaped Line)”⁵ contravene UNCLOS and are invalid.⁶

(2) Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef are submerged features not above sea level at high tide, and should not be deemed as islands or rocks according to Article 121 of UNCLOS. None of them are located on China’s continental shelf. Rather, the Mischief and McKennan Reefs are parts of the Philippines’ continental shelf. China’s occupation of these four maritime features and construction activities thereon are unlawful and should be terminated.⁷

(3) Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef

1 United Nations Convention on the Law of the Sea, 10 Dec. 1982, *U.N.T.S.*, Vol. 1833, 1982, p. 3. [hereinafter “UNCLOS”]

2 For the official explanations of the Philippines, see Institute for Maritime and Ocean Affairs, Statement by the Secretary of DFA on the UNCLOS Arbitral Proceedings against China, at <http://www.imoa.ph/press-releases/statement-by-secretary-of-foreign-affairs-albert-del-rosario-on-the-unclos-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps/>, 10 March 2015.

3 Notification and Statement of Claims, issued by Department of Foreign Affairs of Republic of the Philippines in Manila to the Embassy of the People’s Republic of China in Manila, Serial No. 13-0211, 22 January 2013, p. 1, para. 1, at https://www.dfa.gov.ph/index.php/component/docman/doc_download/56-notification-and-statement-of-claim-on-west-philippine-sea?Itemid=546, 10 March 2015. [hereinafter “Notification”]

4 Notification, paras. 31 (Section III: The Philippines’ Claims) & 41 (Section V: Relief Sought).

5 The term “nine-dash line” is interchangeable with “U-Shaped Line” and “eleven-dash line.” For various names of this line, see Keyuan Zou, China’s U-Shaped Line in the South China Sea Revisited, *Ocean Development and International Law*, Vol. 43, 2012, p.18.

6 Notification, paras. 31 (first and second claims) & 41 (first to third reliefs).

7 Notification, paras. 31 (third to fifth claims) & 41 (fourth to seventh reliefs).

should be considered as rocks under Article 121(3), and may only generate State entitlement to the territorial sea. Having unlawfully claimed maritime entitlements beyond twelve nautical miles (NM) from these features, China should refrain from preventing Philippine vessels from exploiting the living resources in waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with UNCLOS at or in the vicinity of these features.⁸

(4) The Philippines is entitled under UNCLOS to a 12 NM territorial sea, a 200 NM EEZ, and a continental shelf measured from its archipelagic baselines. China has unlawfully claimed and exploited the living and non-living resources in this EEZ and continental shelf, and prevented the Philippines from exploiting the living and non-living resources therein.⁹

(5) China has unlawfully interfered with the Philippines' exercise of its navigational rights and other rights under UNCLOS within and beyond the Philippines' EEZ. China should desist from these unlawful activities.¹⁰

On 19 February 2013, China officially rejected this arbitration,¹¹ based on, *inter alia*, its 2006 Declaration¹² which covers the disputes brought by the Philippines and deprives the Tribunal of necessary jurisdiction to entertain the case. The default rules¹³ were then applied to establish the Tribunal on 25 June 2013, when the fifth arbitrator was appointed.

The first meeting of the Members of the Tribunal was held on 11 July 2013, when they decided to use the Permanent Court of Arbitration (PCA) as Registry.¹⁴ On 27 August 2013, the Tribunal adopted the PH-CN Rules of Procedure (ROP) for this arbitration and issued the first Procedural Order to fix 30 March 2014 as

8 Notification, paras. 31 (sixth and seventh claims) & 41 (eighth and ninth reliefs).

9 Notification, paras. 31 (eighth and ninth claims) & 41 (tenth and eleventh reliefs).

10 Notification, paras. 31 (tenth claims) & 41 (twelfth and thirteenth reliefs).

11 Statement Made by the Spokesman of the Foreign Ministry of China on 9 February 2013, at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015317.shtml>, 10 March 2015.

12 On 25 August 2006 China made a written declaration according to Article 298 of UNCLOS. It reads: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention." United Nations Ocean & Law of the Sea, Declarations and Statements, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China upon ratification, 10 March 2015.

13 UNCLOS, Annex VII, Art. 3(e).

14 For the information released by the PCA, see PCA, *The Republic of the Philippines v. The People's Republic of China*, at http://www.pca-cpa.org/showpage.asp?pag_id=1529, 10 March 2015.

the deadline for the Philippines to submit its Memorial. The Tribunal directed the Philippines to fully address all issues in the Memorial, including matters relating to the jurisdiction of the Tribunal, the admissibility of the Philippines' claims, and the merits of the dispute.¹⁵ As directed, the Philippines presented the Memorial consisting of 15 Submissions which maintain the structure of the Notification. Fifteen Submissions were listed in the Memorial, where the Tribunal is requested to adjudge and declare that:

(1) China's maritime entitlements in the SCS, like those of the Philippines, may not extend beyond those permitted by UNCLOS;

(2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the SCS encompassed by the so-called "nine-dash line" are contrary to UNCLOS 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 EEZ or continental shelf;

(4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations (LTEs) that do not generate entitlements to a territorial sea, EEZ 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 EEZ and continental shelf of the Philippines;

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

(7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ 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 EEZ and continental shelf;

15 ROP, at [http://www.pca-cpa.org/PH-CN%20-%20Rules%20of%20Procedure%20\(ENG\)a7ec.pdf?fil_id=2504](http://www.pca-cpa.org/PH-CN%20-%20Rules%20of%20Procedure%20(ENG)a7ec.pdf?fil_id=2504), 10 March 2015.

(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the EEZ 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 UNCLOS to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

(12) China's occupation of and construction activities on Mischief Reef: (a) violate the provisions of UNCLOS 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 act of attempted appropriation in violation of the Convention;

(13) China has breached its obligation under UNCLOS 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.

(15) China shall desist from further unlawful claims and activities.¹⁶

To echo the above-mentioned Philippine claims, the US Department of State released on 5 December 2014 its serial study on "Limits in the Seas No. 143" entitled "China: Maritime Claims in the SCS" that questioned each of China's possible SCS maritime claims associated with the U-Shaped Line.¹⁷ Simultaneously, 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

16 The Philippines' Memorial is on file with this author.

17 US Department of State Bureau of Oceans & International Environmental and Scientific Affairs, China: Maritime Claims in the South China Sea (Limits in the Sea, No. 143), at <http://www.state.gov/documents/organization/234936.pdf>, 14 March 2015.

Philippines and the People's Republic of China was received by the Tribunal.¹⁸ As said by the press, this Vietnamese document supported the Philippine position that the Tribunal has jurisdiction over the disputes presented.¹⁹ On 7 December 2014 the Position Paper of the Government of the PRC on the Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines (hereinafter "China's Position Paper") was released. Arguing that the Tribunal has no jurisdiction over the disputes, China's Position Paper however was neither meant to be China's Counter-Memorial,²⁰ nor treated as such by the Tribunal.²¹ This made Article 25(2) of ROP²² applicable. Accordingly, the Tribunal gave the Philippines 26 questions to be answered before 15 March 2015 in the form of Further Written Argument. China is also requested to provide its comments on such Philippine supplemental arguments by 15 June 2015.²³ China did not respond as requested. However, China's Position Paper has affected the way how this arbitration should be conducted, as the Tribunal considered the document to constitute, in effect, a plea concerning jurisdiction.²⁴ In other words, this document is taken as an informal preliminary objection against the Tribunal's jurisdiction. Hence, the Tribunal decided to bifurcate the process of this arbitration. As a result, the Hearing took

18 Press Release by the Tribunal, 17 December 2014, at http://www.pca-cpa.org/showfile.asp?fil_id=2846, 14 March 2015.

19 Camille Diola, International Tribunal Seeks More Arguments from Philippines, *The Philippine Star*, 18 December 2014, at <http://www.philstar.com/disputed-seas/2014/12/18/1404065/intl-tribunal-seeks-more-arguments-philippines>, 14 March 2015.

20 China's Position Paper on South China Sea, *China Daily*, 7 December 2014, at http://www.chinadaily.com.cn/china/2014-12/07/content_19037946.htm, 14 March 2015.

21 Press Release by the Tribunal, 17 December 2014, at http://www.pca-cpa.org/showfile.asp?fil_id=2846, 14 March 2015.

22 Article 25(2) of the ROP reads: 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.

23 This is requested by the Procedural Order No. 3 of the Tribunal issued on December 17, 2014. Press Release by the Tribunal, 17 December 2014, at http://www.pca-cpa.org/showfile.asp?fil_id=2846, 14 March 2015.

24 Procedural Order No. 4 of 22 April 2015 issued by the Tribunal, at http://www.pca-cpa.org/showpage65f2.html?pag_id=1529, 18 July 2015.

place on 7-13 July 2015 in the Peace Palace, only to address the jurisdictional objections raised by China's Position Paper as well as other jurisdictional and admissibility issues. As said by the 6th Press Release by the PCA dated on 13 July 2015, the award on the part of jurisdiction will be produced by the end of 2015.²⁵

After the July Hearing,²⁶ the Transcripts of the Hearing were sent to the Philippines and China for review and correction. A deadline on 23 July 2015 was set for the Philippines to submit written answers to the questions posed by the Tribunal during the Hearing and to amplify the oral arguments in writing. China has the opportunity to send written comments by 17 August 2015 to refute (1) anything said in the Hearing and (2) any written answers from the Philippines filed by 23 July 2015.²⁷ It means that the Tribunal will not start its deliberation until after 17 August 2015 on all the issues covered by the Hearing so as to produce an Award on the Jurisdiction and Admissibility of this case. Only if the arbitral award finds that the Tribunal has jurisdiction over any disputes submitted by the Philippines will a second phase of trial on the merits be held to review the substantive legal issues for those disputes.²⁸

Now, the critical question is: what is the Hearing all about? As requested by the Tribunal, the legal team of the Philippines should address (1) the legal positions that have been stated by China's Position Paper and (2) other possible

25 Procedural Order No. 4 of 22 April 2015 issued by the Tribunal, at http://www.pca-cpa.org/showpage65f2.html?pag_id=1529, 18 July 2015; 5th press release issued for the hearing on 7 July 2015, at http://www.pca-cpa.org/showpage65f2.html?pag_id=1529, 18 July 2015; 6th press release issued on 13 July 2015, at http://www.pca-cpa.org/showpage65f2.html?pag_id=1529, 18 July 2015.

26 On the applicant side, lawyers were sent to present Philippines' case. China as the respondent was absent through the Hearing, without even sending any observers. It is interesting to note that observers did come from countries bordering South China Sea (Vietnam, Malaysia, and Indonesia) and outside this region (Japan and Thailand). See the 6th press release issued by the PCA for this arbitration on 13 July 2015.

27 The 6th press release issued by the PCA for this arbitration on 13 July 2015. Also see Closing Remarks by Thomas Mensah, President of the Tribunal, in Transcripts of the Hearing on 13 July 2015, pp. 81-82. The Transcripts for the Hearing, at <http://www.pcacases.com/web/view/7>, 18 July 2015.

28 This does not mean the end for objections against jurisdiction and admissibility. As said by the Tribunal, those jurisdictional and admissibility issues without exclusively preliminary nature will be reviewed during the second phase of this arbitration. See the 6th Press Release made on 13 July 2015 by the PCA for this arbitration.

issues of jurisdiction and admissibility.²⁹ To comment on China's Position Paper, Professor Philip Sands refuted China's first objection by contending that none of the Submissions raised sovereignty question.³⁰ Mr. Lawrence Martin focused on China's second objection by saying that nothing in Articles 281~283 of UNCLOS bars the Tribunal's jurisdiction.³¹ Professor Bernard Oxman then rebutted China's third objection by saying that Philippines' Submissions are not covered by Article 298(1)(a) relating to sea boundary delimitation.³²

For the other jurisdiction and admissibility issues outside China's Position Paper, the lead counsel of the Philippines, Mr. Paul Reichler addressed the issues of historic bay and titles under Article 298(1)(a).³³ Professor Oxman challenged China's possible objections under Article 298(1)(b) relating to law enforcement activities and military activities.³⁴ Professor Alan Boyle argued that first, the Tribunal has jurisdiction to try China's violations of Articles 192 and 194 of UNCLOS concerning marine environmental protection and preservation; second, Article 297(2)~(3) cannot limit Tribunal's jurisdiction; and third, Article 297(1) (c) and 297(3) give jurisdiction to the Tribunal.³⁵ Professor Sands argued that the indispensable third party issue does not exist in this case, while a legal dispute

29 Procedural Order No. 4 of 22 April 2015 issued by the Tribunal. Also see Opening Remarks by Thomas Mensah, President of the Tribunal, in Transcripts of the Hearing on 7 July 2015, p. 3. As revealed by Professor Oxman during the July Hearing, the Tribunal in its letter to the parties of 23 June said that: "... the Arbitral Tribunal does not accept that any issue of jurisdiction or admissibility is waived by virtue of its non-inclusion in China's communications to date." See First-round submissions by Professor Oxman, in the Transcripts of the Hearing on 8 July 2015, p. 74. Also see First-round submissions by Professor Sands, in Transcripts of the Hearing on 8 July 2015, p. 131. As said by Professor Sands, "... on 23rd June 2015, the Tribunal wrote to us to request that we 'address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims', irrespective of whether such objection had at any point been raised by China."

30 First-round submissions by Professor Sands, in Transcripts of Hearing on 7 July 2015, pp. 60~100.

31 First-round submissions by Mr. Martin, in Transcripts of Hearing on 8 July 2015, pp. 6~37.

32 First-round submissions by Professor Oxman, in Transcripts of Hearing on 8 July 2015, pp. 37~57.

33 First-round submissions by Mr. Reichler, in Transcripts of Hearing on 8 July 2015, pp. 58~73.

34 First-round submissions by Professor Oxman, in Transcripts of Hearing on 8 July 2015, pp. 73~93.

35 First-round submissions by Professor Boyle, in Transcripts of Hearing on 8 July 2015, pp. 93~120.

exists in each of Philippines' Submissions.³⁶

On the final day of the Hearing, which is on 13 July 2015, the Philippines' legal team answered 6 questions posed by the Tribunal during the Hearing. The questions are for the Philippines to (1) cite the sources relied upon to establish the existence of a legal dispute on each Submission;³⁷ (2) elaborate the relevance of *Mauritius v. UK* to the present arbitration;³⁸ (3) explain the applicability of the principle of estoppels to the present case;³⁹ (4) comment on the Convention on Biological Diversity (CBD), especially Article 27(4) of CBD and its relation to Article 281 of UNCLOS,⁴⁰ and comment on the Treaty of Amity & Cooperation and compulsory nature of High Council;⁴¹ (5) comment on military activities exception under Article 298(1)(b) concerning activities at Mischief Reef under Submission 12;⁴² and (6) answer if there are issues of jurisdiction & admissibility not having exclusively preliminary nature, which should be deferred till the merits phase.⁴³

In order to assist the Tribunal in its deliberation on the award on jurisdiction and admissibility, this paper will discuss "other possible issues of jurisdiction and admissibility outside China's Position Paper". Section III of this paper attempts to comment on the following six different levels of questions deemed important by the Tribunal, with special reference to the oral statements by Philippines' legal team during the Hearing.

These six levels of questions are: among Philippines' Submissions 1~14, (1) which submission suffers from lack of dispute and why; (2) which Submission does not convey legal dispute and why; (3) which Submission fails to provide a dispute concerning the interpretation or application of UNCLOS and why;

36 First-round submissions by Professor Sands, in Transcripts of Hearing on 8 July 2015, pp. 120~150.

37 Mr. Reichler answered this question. See Second-round submissions by Mr. Reichler, in Transcripts of Hearing on 13 July 2015, pp. 3~24.

38 Professor Sands answered this question. See Second-round submissions by Professor Sands, in Transcripts of Hearing on 13 July 2015, pp. 24~25.

39 Mr. Martin answered this question. See Second-round submissions by Mr. Martin, in Transcripts of Hearing on 13 July 2015, pp. 28~37.

40 Professor Boyle answered this question. See Second-round submissions by Professor Boyle, in Transcripts of Hearing on 13 July 2015, pp. 41~47.

41 Mr. Martin answered this question. See Second-round submissions by Mr. Martin, in Transcripts of Hearing on 13 July 2015, pp. 38~41.

42 Professor Oxman answered this question. See Second-round submissions by Professor Oxman, in Transcripts of Hearing on 13 July 2015, pp. 47~58.

43 Professor Sands answered this question. See Second-round submissions by Professor Sands, in Transcripts of Hearing on 13 July 2015, pp. 26~28.

(4) which Submission fails to fulfill the requirements contained in Section 1 of Part XV of UNCLOS and should be deemed as inadmissible for the dispute settlement mechanisms under Section 2 of Part XV to address and why; (5) which Submissions may not be entertained by the Tribunal due to application of Article 298 and why; and (6) whether Article 297 limits the jurisdiction of this Tribunal to address Philippines' Submissions and why?

Before addressing the foregoing legal issues, something of primary importance must be presented. So far all the academic papers commenting on the SCS Arbitration have been focusing on the jurisdiction issues of the Tribunal over the disputes submitted by the Philippines, as well as the admissibility issues concerning the claims presented by the Memorial (as Section III of this paper will also do). A no-less-important aspect of this Arbitration has been ignored but worthy of serious deliberation, namely, the consequences of withholding those Sino-Philippine SCS core disputes that are not submitted by the Philippines. Would these consequences undermine the effectiveness of the award of this Arbitration? To what extent will such consequences affect the Sino-Philippine relations in the SCS after this Arbitration is over? Having completed an in-depth research on this issue,⁴⁴ the author has reasons to believe that Philippines' partial submission of its multi-layered SCS disputes with China will turn the award of this Tribunal totally useless in terms of resolving the confrontations between the Parties as indicated by Philippines' Memorial. It concerns the Tribunal when approaching the stage of producing the first award on the jurisdiction and admissibility issues for this case. Section II of this paper shall be devoted to this issue. Finally, after laying down all the comments, a conclusion will be given by Section IV of this paper.

II. The Ineffectiveness of the Award as the Factor Making the Continuation of the Arbitral Proceedings Unnecessary under Article 27(2) of ROP

A. The Goal of Initiating SCS Arbitration by the Philippines

The goal of this arbitration, as declared by the Philippines, is to resolve certain

44 Michael Sheng-ti Gau, Special Report: The Prospects for the Sino-Philippine Arbitration on the South China Sea (U-Shaped Line) Dispute, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 31, 2013. (to be published)

parts of the Sino-Philippine SCS disputes, narrow the disputes, reduce the tensions, and facilitate the diplomatic resolutions of those issues beyond the Tribunal's jurisdiction, without being barred by China's 2006 Declaration.⁴⁵ However, doubts remain that this Tribunal with limited subject-matter jurisdiction⁴⁶ eventually may not even resolve any Sino-Philippine SCS disputes at all. The author must venture to ask two questions here. If the Philippines loses the case in the merits, will it also lose legal grounds to counter China's activities as identified by the Memorial? If the Philippines wins in the merits phase, will China become legally unjustified to carry on those activities as complained by the Philippines' Memorial?

Both answers are no. To provide a detailed examination of this fundamental issue so as to evaluate the efficacy⁴⁷ of this arbitration, the author has written an extensive paper to reveal the available legal arguments for the losing party to justify the continuation of its disputed yet over-ruled actions. This paper will be published by the end of 2015 in Vol. 31 of *Chinese (Taiwan) Yearbook of International Law and Affairs*, as a special report. As the Philippine Submissions are divided into four groups for the sake of discussion, the examination of the possible legal arguments

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- 45 On 22 January 2013, the Secretary of Foreign Affairs of the Philippines, Mr. Albert del Rosario, made a statement in a press conference which explained the initiation by the Philippines of an arbitral proceedings against China to achieve a peaceful and durable solution to the dispute in the WPS (South China Sea). Statement: The Secretary of Foreign Affairs on the UNCLOS Arbitral Proceedings against China, 22 January 2013, at <http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/>, 10 March 2015. Also see First-round submissions by Solicitor General Hilbay, in Transcripts of the Hearing on 7 July 2015, p. 8; First-round submissions by Mr. Reichler, in Transcripts of the Hearing on 7 July 2015, p. 27.
- 46 Andreas Zimmermann and Jelena Bäumlner, Navigating through Narrow Jurisdictional Straits: The Philippines – PRC South China Sea Dispute and UNCLOS, *The Law & Practice of International Courts and Tribunals*, Vol. 12, 2013, p. 431; Ted L. McDorman, The South China Sea: The U-Shaped Line, Islands and the Philippine-China Arbitration, *German Yearbook of International Law*, Vol. 56, 2013, p. 33; Stefan Talmon and Bing Bing Jia eds., *The South China Sea Arbitration: A Chinese Perspective*, Oxford: Hart Publishing, 2014; Mincai Yu, China's Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options, *Ocean Development & International Law*, Vol. 45, 2014, p. 1; Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, *Chinese Journal of International Law*, Vol. 13, 2014, p. 663; Mincai Yu, China's Informal Participation in the Annex VII Philippines v. China Arbitral Tribunal's Proceedings, *International Journal of Marine & Coastal Law*, Vol. 30, 2015, p. 54.
- 47 In the very first case which came before the Permanent Court of International Justice, it was decided that the PCIJ neither could nor should contemplate the possibility of its judgment not being complied with. See PCIJ, S.S. "Wimbledon", 1923 P.C.I.J., Series A, No. 1, 17 August 1923, p. 32. Also see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, pp. 339, 356.

are also made in each of the groups accordingly. Most importantly, the general principle of *res judicata* embodied by Article 296 of UNCLOS is applied to support these possible contentions throughout the examination.

B. The Principle of Res Judicata as Codified by Article 296 of UNCLOS and Its Application to the Unsubmitted Core Disputes

Entitled “finality and binding force of decisions”, Article 296 of UNCLOS reads: “1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute”.⁴⁸ Article 11 of Annex VII to UNCLOS⁴⁹ and Article 26(2) of ROP⁵⁰ restate this rule of *res judicata* that is also a general principle of law recognized by civilized nations.⁵¹

Clearly, the finality and binding force of decisions cannot be established without two conditions. First, the dispute must fall within the subject-matter jurisdiction of the tribunal.⁵² Second, the dispute must have been presented to the tribunal for settlement. Sometimes the tribunal is presented with a dispute that allegedly goes beyond the scope of the tribunal’s subject-matter jurisdiction. Then most likely the tribunal will have to address such a preliminary dispute concerning whether it has jurisdiction over the dispute.⁵³ Should the answer be negative, the tribunal will refrain from determining the merits. Consequently, the dispute in merits will be left unsettled. On the other hand, any dispute beyond the scope of the tribunal’s jurisdiction will definitely remain unresolved if it is clearly withheld by the Parties and not presented to the tribunal for resolution.

48 UNCLOS, Art. 296.

49 Article 11 (Finality of Award) of Annex VII to UNCLOS reads: “The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.”

50 Article 26(2) of PH-CN Rules of Procedure adopted on 27 August 2013, reads: “Pursuant to Article 11 of Annex VII to the Convention, the award shall be final and without appeal, unless the Parties agree in advance to an appellate procedure. It shall be complied with by the Parties.”

51 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, p. 336.

52 Stefan Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, in Stefan Talmon and Bing Bing Jia eds., *The South China Sea Arbitration: A Chinese Perspective*, Oxford: Hart Publishing, 2014, pp. 15, 26~53.

53 UNCLOS, Art. 288(4). Also see ROP, Art. 20(1).

In this Sino-Philippine Arbitration, the situation is complex where the two Parties have disputes of different levels or layers in the SCS. The inner disputes (or the core disputes) are:

(1) Territorial disputes: Sino-Philippine SCS territorial disputes relate to Scarborough Shoal and Kalayaan Islands Group (which is only part of Spratly Islands Group claimed by China); and

(2) Sea boundary delimitation disputes: Based on the land territories claimed by China in the SCS, China claims maritime entitlements of EEZ and continental shelf. Such maritime claims overlap with those of the Philippines in the SCS. However, due to the on-going Sino-Philippine territorial disputes it is hard for the Philippines to accept that China has any maritime entitlements in the eastern part of SCS at all. Thus, inside such maritime boundary delimitation disputes there is a basic disbelief of the Philippines that China does not even have any maritime entitlement to create any maritime boundary delimitation disputes with the Philippines in the first place.

Besides, there are incidental or ancillary issues that will affect and concern the settlement of these core disputes (the ancillary disputes),⁵⁴ namely,

(1) Disputes on legal status of maritime features as identified by Submissions 3~7: The bigger maritime entitlements China has in the SCS, the bigger overlap there will be between China and the Philippines, and the bigger slice of maritime area China may receive after sea boundary delimitation with the Philippines is completed. So it is important to find out exactly what kind of maritime entitlement each China-claimed maritime feature can have under UNCLOS from Philippines' perspective. In this context, the legal status of maritime features affects the sea boundary delimitation between China and the Philippines.

(2) Dispute on the alleged China's historic rights to support its SCS maritime claims within the U-Shaped Line that is identified by Submission 2 (see Section III-E-1 of this paper); and

(3) Dispute on the legality of the U-Shaped Line as the alleged China's outer limits of SCS maritime claims that is also identified by Submission 2 (see Section

54 See First-round submissions by Solicitor General Hilbay, in Transcripts of the Hearing on 7 July 2015, pp. 7~8. "Professor Oxman will also explain how your determination of the potential maritime entitlements of the parties will serve to narrow the disputes between them, reduce tensions, and facilitate the diplomatic resolution of those issues that lie outside your jurisdiction; namely, sovereignty over small maritime features and the delimitation of maritime boundaries."

III-B-1 of this paper).

Apart from the above-mentioned two levels of disputes, there are some “consequences”⁵⁵ of the lack of settlement of the core disputes. Not being disputes *per se*, such consequences are nevertheless called by the Philippines in the SCS Arbitration as “disputes” and submitted to the Tribunal for settlement. If they can count as disputes at all, they should be called the “surface disputes”. In terms of SCS Arbitration such surface disputes are the disputes concerning China’s trespass into Philippines’ EEZ and continental shelf, as identified by Submissions 8~14 (see Section III-E-4 of this paper).⁵⁶

While the ancillary disputes and surface disputes have been presented to the Tribunal for settlement, the core disputes clearly and definitely are neither falling within the subject-matter jurisdiction of the Tribunal nor have been brought to the Tribunal “directly or indirectly”⁵⁷ by the Philippines,⁵⁸ as confirmed repeatedly by

55 Chargos Marine Protection Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 211.

56 Michael Sheng-ti Gau, The Sino-Philippine Arbitration of the South China Sea Nine-Dash-Line Dispute: Applying the Rule of Default of Appearance, *Ocean Yearbook*, Vol. 28, 2014, p. 121.

57 See First-round submissions by Professor Sands, in Transcripts of the Hearing on 7 July 2015, pp. 68~69. As said by Professor Sands, “... there is agreement between the parties that their differences in the South China Sea are complex and multifaceted. One aspect certainly concerns sovereignty over insular features in the South China Sea, but that issue is not before this Tribunal, not directly and not indirectly. This dispute concerns other matters – and this touches on your question, sir – that plainly do fall within your jurisdiction.”

58 Paragraph 7 of the Notification reads: “The Philippines does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. 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.” Para. 40 then reads: “It follows that the Philippines’ claims do not fall within China’s Declaration of 25 August 2006, because they do not: concern the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitation; involve historic bays or titles within the meaning of the relevant provisions of the Convention; concern military activities or law enforcement activities; or concern matters over which the Security Council is exercising functions assigned to it by the UN Charter.” Notification, pp. 3 & 16.

Philippines' counsel at the July Hearing.⁵⁹ Given the situation of non-submission of core disputes, the award will not be able to settle the Sino-Philippine maritime confrontations reflected by the Philippine Submissions. The confrontations will go on, if not getting worse. The reason for such protraction of clashing policies, claims, and actions in the SCS is because the unsettled core disputes rather constitute the real causes of conflict while applying the *res judicata* principle in such a scenario. This will be proved by all the available reasonable legal arguments for the losing Party to this arbitration to advance, while the paper to be published in *Chinese (Taiwan) Yearbook of International Law and Affairs* by this author provides all such legal arguments on both the Philippines' and China's sides, when losing the case.

In this connection, the authoritative study by Professor Bin Cheng is inspiring. According to him, *res judicata* has two effects: (1) "that which is *res judicata* is definitive"; and (2) "what has been finally decided by a tribunal is binding upon the parties".⁶⁰ More important is the limits of such principle, "[it] applies only where there is identity of ... the question at issue".⁶¹ In the words of Article 296 of UNCLOS, any decision rendered by a tribunal having jurisdiction under Section 2

59 See First-round submissions by Philippines' Foreign Secretary Del Rosario in the July Hearing, in Transcripts of the Hearing on 7 July 2015, p. 12. "Mr President, allow me to respectfully make it clear: in submitting this case, the Philippines is not asking the Tribunal to rule on the territorial sovereignty aspect of its disputes with China." Also see First-round submissions by Mr. Reichler, in the Transcript of the Hearing on 7 July 2015, p. 31, 46; First-round submissions by Professor Sands, in the Transcript of the Hearing on 7 July 2015, pp. 61~62, 76~77, 99. As said by Professor Sands: "Let us be very clear. The Philippines' case is, in essence — if it is "in essence" about anything — about the character of certain features; it is not about territorial sovereignty. None of our 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." (pp. 61~62) "There is nothing that you have read in the pleadings to address the question of which state does or does not have sovereignty over a particular insular feature, and the Tribunal is not asked to — and does not need to — make any determination as to sovereignty over any island or any rock in order to determine the maritime entitlements of that feature." (pp. 76~77) "The Philippines has not invited the Tribunal, directly or indirectly, to adjudicate on China's claims of sovereignty over any island or rock, or the claims of any other state." (p. 99)

60 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, pp. 337~338.

61 This was held by the British-United States Claims Arbitral Tribunal (1910), as quoted by Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, pp. 339~340.

of Part XV shall have no binding force except in respect of that particular dispute.⁶² In other words, *res judicata* principle is “to prevent legal principles accepted by the Court in a particular case from being binding ... in other disputes”,⁶³ and “what is not *res judicata* between the parties has no authoritative and binding effect”.⁶⁴

This “limits” of the *res judicata* principle, as analyzed by Professor Bin Cheng, explain the possible outcome of this arbitration that is the lingering row. To be submitted, no matter which Party wins the case in the merits phase, the losing Party will not be stripped of its legal grounds to carry on its disputed yet over-ruled actions. It is based on the unaffected and undefeated claims of the losing Party for the unsubmitted core disputes on territorial sovereignty over SCS maritime features and maritime delimitation in the SCS region. Such uninterrupted behaviors would not do violence to the award and could even conform to the *res judicata* principle.⁶⁵

C. *The Application of Article 27(2) of ROP and the Termination of the Arbitral Proceedings*

Article 27(2) of ROP provides that “[i]f, before an award is made, the continuation of the arbitral proceedings becomes unnecessary ... for any reason not mentioned in paragraph 1, the Arbitral Tribunal shall inform the Parties of its intention

62 The identity of “that particular case”, as one of the conditions of *res judicata*, means “the matter in that dispute” or “the same question at issue”. It covers both “the object” and “the grounds of the claim” of that dispute. “[W]here new rights are asserted, there is a new case which ought not to be barred by a previous decision even if the parties and the object be identical.” “In the case of the *Compagnie generale de l’Orenoque* (1905), it was decided that counter-claims, as well as claims that might be presented by way of setoff, constituted independent actions. Even though they could have been pleaded in a previous action, if in fact they were not presented and considered, subsequent action upon them was not precluded by the previous decision.” See various decisions cited by Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, notes 16~17, pp. 341, 343, 345~347.

63 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, p. 341, note 22 (summarizing the PCIJ’s position).

64 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London: Steven & Sons, London, 1953, p. 341.

65 There are four reasons for this: First, the core Sino-Philippine territorial and maritime delimitation disputes rather constitute the causes of the confrontations reflected by the Philippine Submissions. Second, such core disputes are undoubtedly beyond the subject-matter jurisdiction of the Tribunal and have not been formally brought to the Tribunal for settlement in the first place. Third, the legality of claims of either Party in such core disputes shall not be adjudged by the Tribunal that may not settle such disputes indirectly and informally. Fourth, no matter which award the Tribunal may give in the merits, there can be no *res judicata* between the Parties over such core disputes.

to issue an order for the termination of the proceedings.”⁶⁶ What is the “reason not mentioned in paragraph 1” of this article? Article 27(1) provides that, due to agreement between the Parties to settle the disputes, the Tribunal shall either order a termination of the proceedings or, when requested by the Parties and accepted by the Tribunal, record the settlement in the form of an award on agreed terms. Therefore, the term “any reason not mentioned in paragraph 1” in Article 27(2) clearly means all the situations other than the existence of agreement between the Parties for settling the disputes. In other words, Article 27(2) grants the right to the Tribunal to terminate the proceedings without settlement of the disputes between the Parties as long as the continuation of such proceedings is unnecessary.

But, what makes the continuation of the arbitral proceedings unnecessary? If eventually the Philippines wins the case in the merits phase, China’s possible non-compliance (by appearance) with the unfavorable award will conveniently be seen as violating Article 296 of UNCLOS to which China is a Contracting Party. However, if this is a problem, it is not merely China’s problem. As discussed by the paper to be published in *Chinese (Taiwan) Yearbook of International Law and Affairs* by this author, this is not at all an issue of infringing Article 296 by nature, but rather a common phenomenon for the losing Parties (be it the Philippines or China) that conforms to *res judicata* principle and Article 296.

Given the circumstance that the maritime confrontations identified by the Philippines’ Memorial will continue even after an award on the merits is issued, such ineffectiveness of the award on the merits will most probably constitute one of the predictable situations rendering the continuation of the arbitral proceedings unnecessary. It is suggested that the Tribunal should seriously consider applying Article 27(2) of ROP and decisively terminate the rest of the arbitral proceedings for this case.

66 Article 27 of ROP provides: “1. If, before an award is made, the Parties agree on a settlement of the dispute, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the Parties and accepted by the Arbitral Tribunal, record the settlement in the form of an award on agreed terms. The Arbitral Tribunal is not obliged to give reasons for such an award. 2. If, before an award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the Arbitral Tribunal shall inform the Parties of its intention to issue an order for the termination of the proceedings. The Arbitral Tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the Arbitral Tribunal considers it appropriate to do so ...”

III. Inadmissibility and Lack of Jurisdiction for the Claims and Disputes Submitted

A. Lack of Dispute

According to Part XV of UNCLOS, one of the conditions to initiate the Arbitration under Annex VII is the existence of a dispute concerning the interpretation or application of UNCLOS. Any claim impossible to constitute even a dispute⁶⁷ should be considered hypothetical, moot and inadmissible by the Tribunal. The following statements will prove that Submissions 1~7 convey no real dispute for the Tribunal to try and should be declared inadmissible.

1. For Submission 1: Philippines' Misinterpretation of "Relevant Waters" Mentioned in China's 2009 Note Verbales

One of the biggest misunderstandings and misinterpretations about China's South China Sea maritime claim originated from the text of and the map (Fig. 1 of this paper) attached to China's two Note Verbales (NVs) dated on 7 May 2009. As put by the leading lawyer of the Philippines, Mr. Paul Reichler, in his first-round submissions in the afternoon of 7 July 2015,

This is a map of the South China Sea showing the nine-dash line that China

67 Article 283 of UNCLOS requires the existence of a dispute before the dispute settlement mechanism of Part XV of UNCLOS can operate. In *Barbados v. Trinidad and Tobago*, both Parties emphasized the need of the existence of a dispute according to Art. 283. The Tribunal accepted such interpretation. See *Barbados/Trinidad and Tobago, Award, UNCLOS Annex VII Tribunal* (11 April 2006), paras. 74, 80, 196~200, at http://www.pcacpa.org/showpage.asp?pag_id=1152, 10 March 2015. In the judgment of *The Mavrommatis Palestine Concessions*, the Permanent Court of International Justice has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *The Mavrommatis Palestine Concessions*, [30 August 1924] *PCIJ Series A*, No. 2, p. 11, at http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf, 10 March 2015. Seen as an elaboration of such a definition, J.G. Merrills said that, "a dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another." J.G. Merrills, *International Dispute Settlement*, 4th ed., Cambridge: Cambridge University Press, 2005, p. 1. A.V. Lowe and J. Collier also describe the dispute as "a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on." J. Collier and A.V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford: Oxford University Press, 1999, p. 1. Clearly, a dispute is built upon an exchange of claims and counter-claims through such a process the point of conflict becomes specific and crystallised.

brought to the world's attention in 2009. China did so in notes objecting to a joint submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, and to a separate submission made by Vietnam. This is the same map that was attached to the notes asserting China's objections. Those notes stated:

*"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)."*⁶⁸

The notes and map are at tab 1.2 of your folders.

...

*To be sure, the wording of China's 2009 note, taken by itself, leaves some question over the purpose of the nine-dash line, although the line would appear to represent the outer limits of the maritime areas over which China's note was claiming sovereign rights and jurisdiction.*⁶⁹

The above position was also stated in Philippines' Memorial dated 30 March 2014.⁷⁰ However, this is a misinterpretation of the China's position as revealed in its 2009 NVs. It has been explained by the paper published in *China Oceans Law Review* by this author.⁷¹

When seeing the word "relevant", one cannot help asking "relevant to what". The answer can only be found by looking at the background against which China sent these two NVs in 2009 to the UN, which was also acknowledged by Mr.

68 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). MP, Vol. VI, 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). MP, Vol. VI, Annex 192.

69 Transcripts of the Hearing on 7 July 2015, pp. 32~33. Also see Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 6.

70 Philippines' Memorial, pp. 70~71.

71 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 175~181.

Reichler.⁷² They were in fact used to protest⁷³ against (1) the Vietnam/Malaysia Joint Submission for the Outer limits of Outer Continental Shelf in SCS,⁷⁴ and (2) the Vietnamese Individual Submission for the Outer Limits of Outer Continental Shelf in SCS.⁷⁵ Fig. 2⁷⁶ and Fig. 3⁷⁷ of this paper are the illustrations provided by these two submissions respectively. Putting these two figures together with Fig. 1 of this paper, it becomes evident why China raised objections and what China objected against. It was because the areas of the two submissions overlap with China's EEZ and continental shelf generated by the Spratly Islands Group and the Parcel Islands over which China maintains territorial claims. Hence, it is justified to say that the word "relevant waters" means the waters (and the seabed and subsoil thereof) enclosed by these two outer continental shelf submissions, instead of the whole range of waters enclosed by the U-Shaped Line. Fig. 4 of this paper⁷⁸ demonstrates all these factors as it puts the regions under those two outer continental shelf submissions into a SCS map with the U-Shaped Line, together with the locations of the Parcel Islands and the Spratly Islands Group that are next

72 Transcripts of the Hearing on 7 July 2015, p. 32.

73 Para. 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS) provides that: "[i]n cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute." China provided two NVs to the UN to (1) prove the existence of land and maritime disputes that are involved in the Vietnam/Malaysia Joint Submission and the Vietnamese Submission, and (2) express the unwillingness of China, as one of the parties to such land and maritime disputes, for the CLCS to consider these two outer continental shelf submissions. Therefore, the words "relevant waters" in China's NVs can indicate nothing but the maritime region of outer continental shelves as reflected by those two submissions. The Rules of Procedure of the CLCS, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/309/23/PDF/N0830923.pdf?OpenElement>, 10 March 2015.

74 Mission of the PRC to the UN, Note Verbale, CML/17/2009, 7 May 2009, para. 1, at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf, 10 March 2015.

75 Mission of the PRC to the UN, Note Verbale, CML/18/2009, 7 May 2009, para. 1, at http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf, 10 March 2015.

76 Executive Summary of the Vietnam/Malaysia Joint Submission Dated on 6 May 2009, p. 5, at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf, 10 March 2015.

77 Executive Summary of the Vietnamese Individual Submission Dated on 7 May 2009, p. 5, at http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf, 10 March 2015.

78 Lori Fisler Damrosch and Bernard H. Oxman, Agora: The South China Sea, Editors' Introduction, *American Journal of International Law*, Vol. 107, 2013, pp. 95-96.

to (and almost within) the areas marked by these two submissions.

Therefore, it is incorrect to say that China uses the U-Shaped Line as the outer limits of maritime claims in SCS based on China's 2009 NVs to the UN. Such a self-evident meaning for the term "relevant waters" proves the inaccuracy of the above interpretation of Mr. Reichler. In the same context, we cannot fail to note the statement of China in its 2011 NV,

*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.*⁷⁹

Clearly, China adheres to UNCLOS and UNCLOS-compliant domestic laws when making maritime claims in the SCS. It is China's Nansha Islands (Spratly Islands Group) treated as a singular unit, instead of the U-Shaped Line, that is used to generate EEZ and continental shelf in SCS. This is consistent with the "land dominates the sea" principle. No dispute can thus be created between China and the Philippines concerning the legality of the U-Shaped Line used as either basis or the outer limits of China's SCS maritime claims.⁸⁰

79 Mission of the People's Republic of China to the United Nations, NV, CML/8/2011, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf, 10 March 2015.

80 For the reasons why Philippines' Submission 1 should be deemed inadmissible, please see Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 172~186.

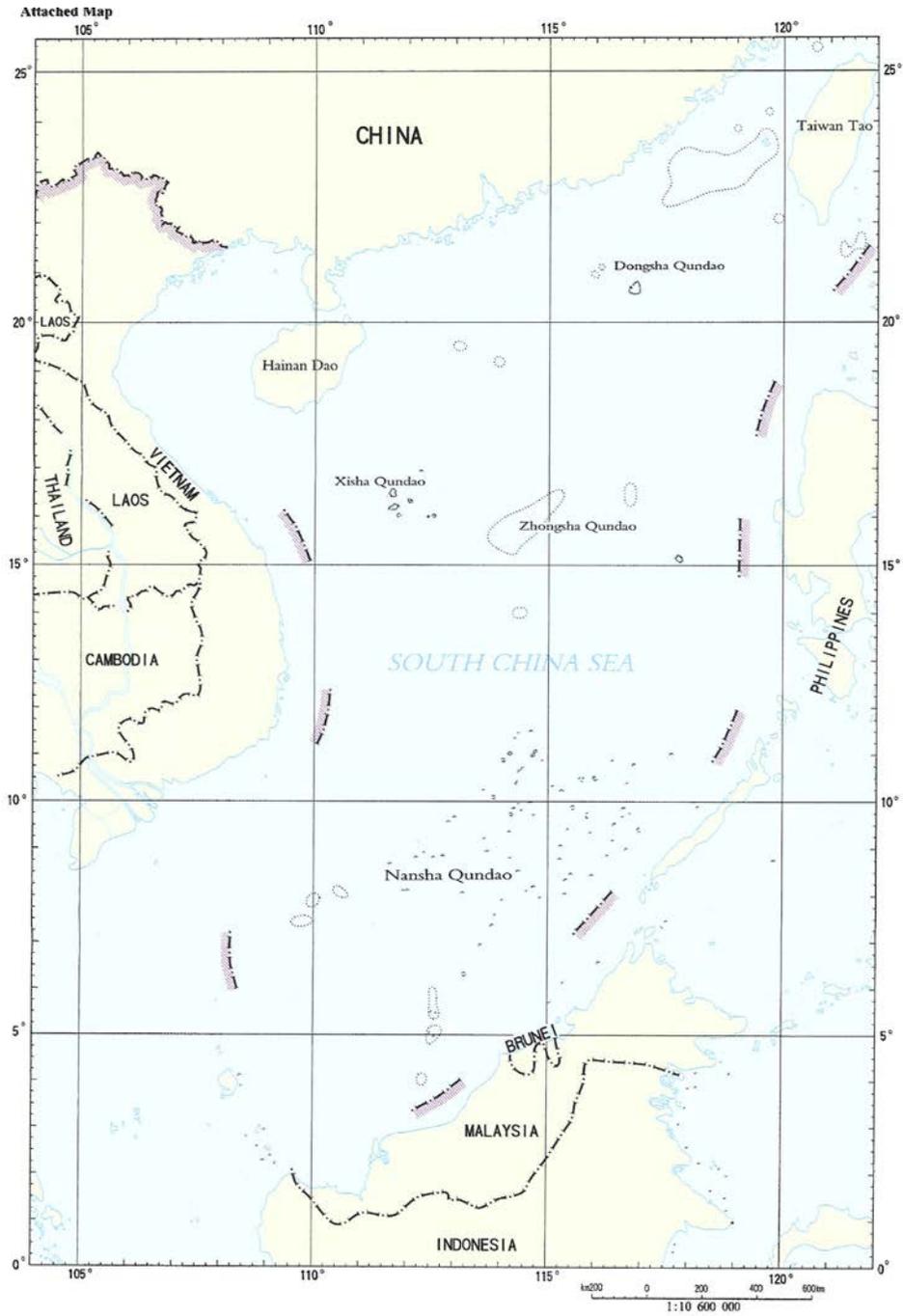


Fig. 1 The Map Produced by China in Its 2009 NVs to Protest Vietnam/Malaysia Outer Continental Shelf Submissions in SCS

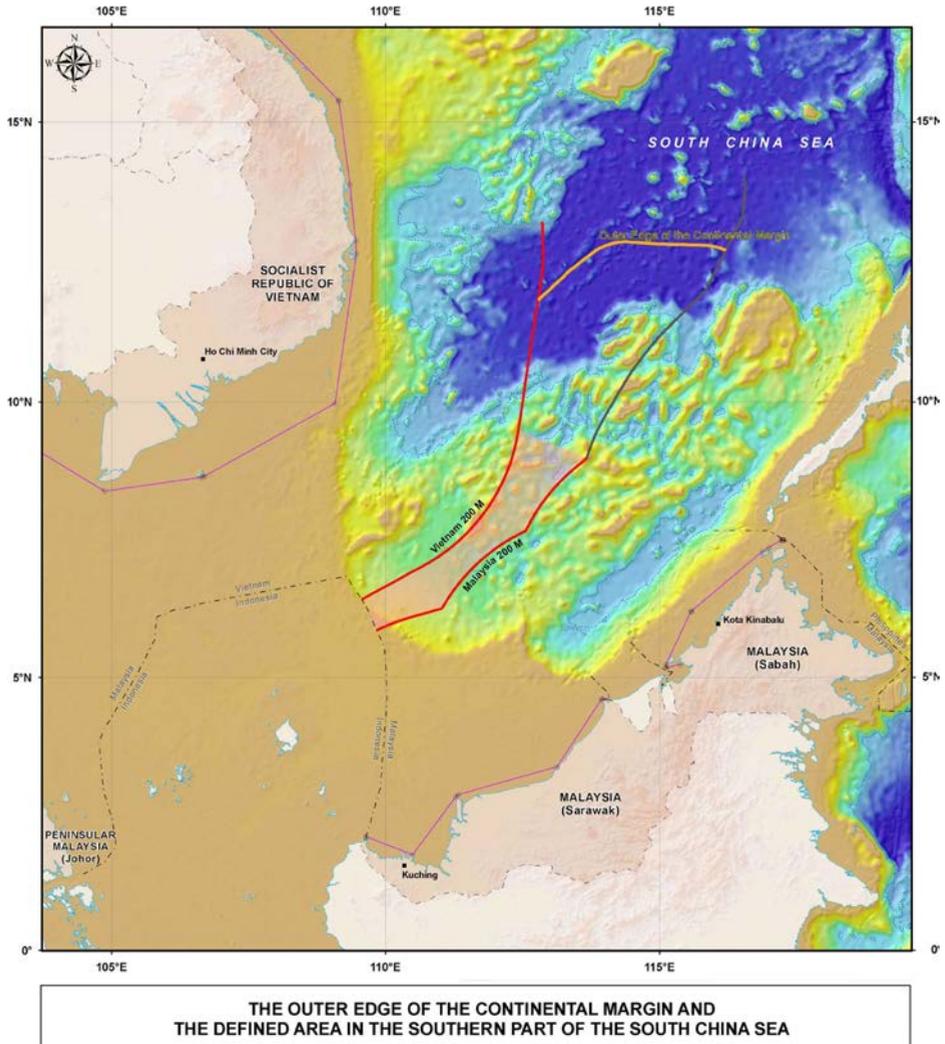


Fig. 2 Vietnam/Malaysia 2009 Outer Continental Shelf Joint Submission

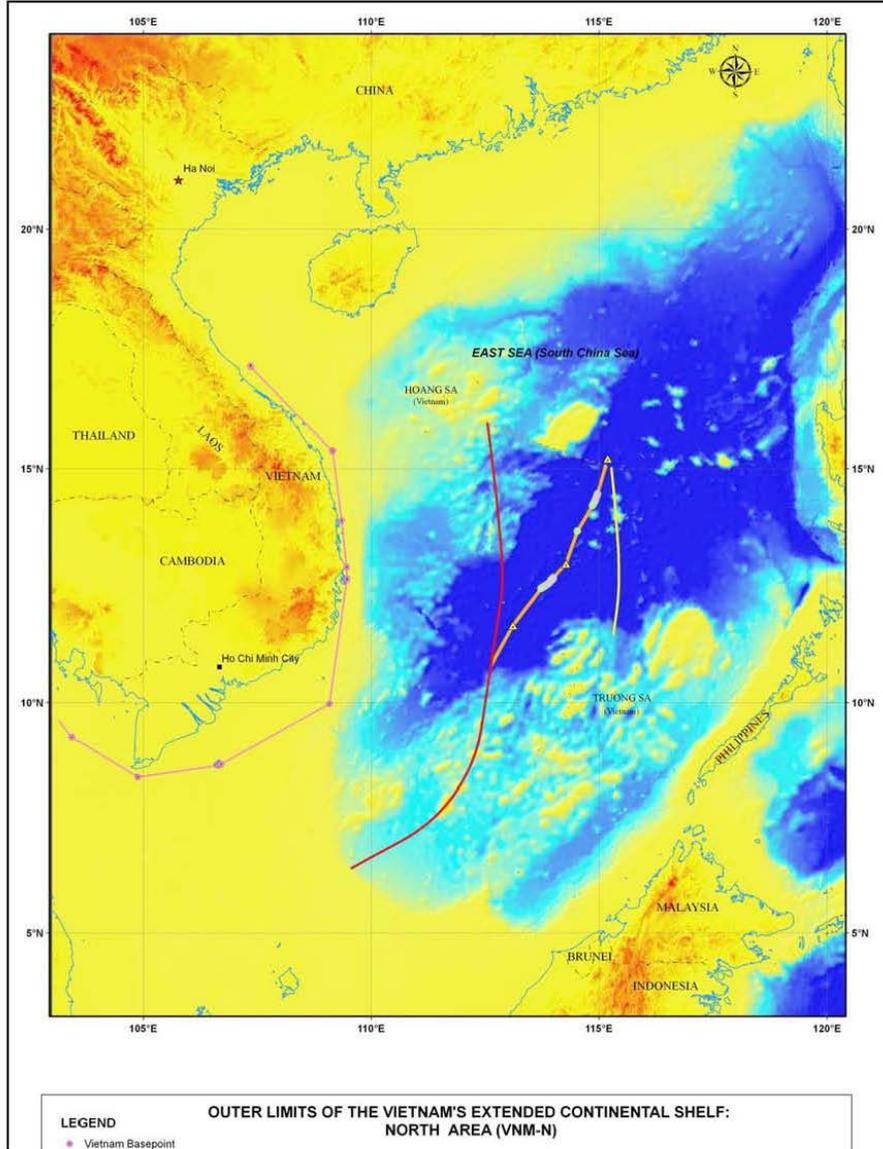


Fig. 3 Vietnam's 2009 Outer Continental Shelf Submission in SCS

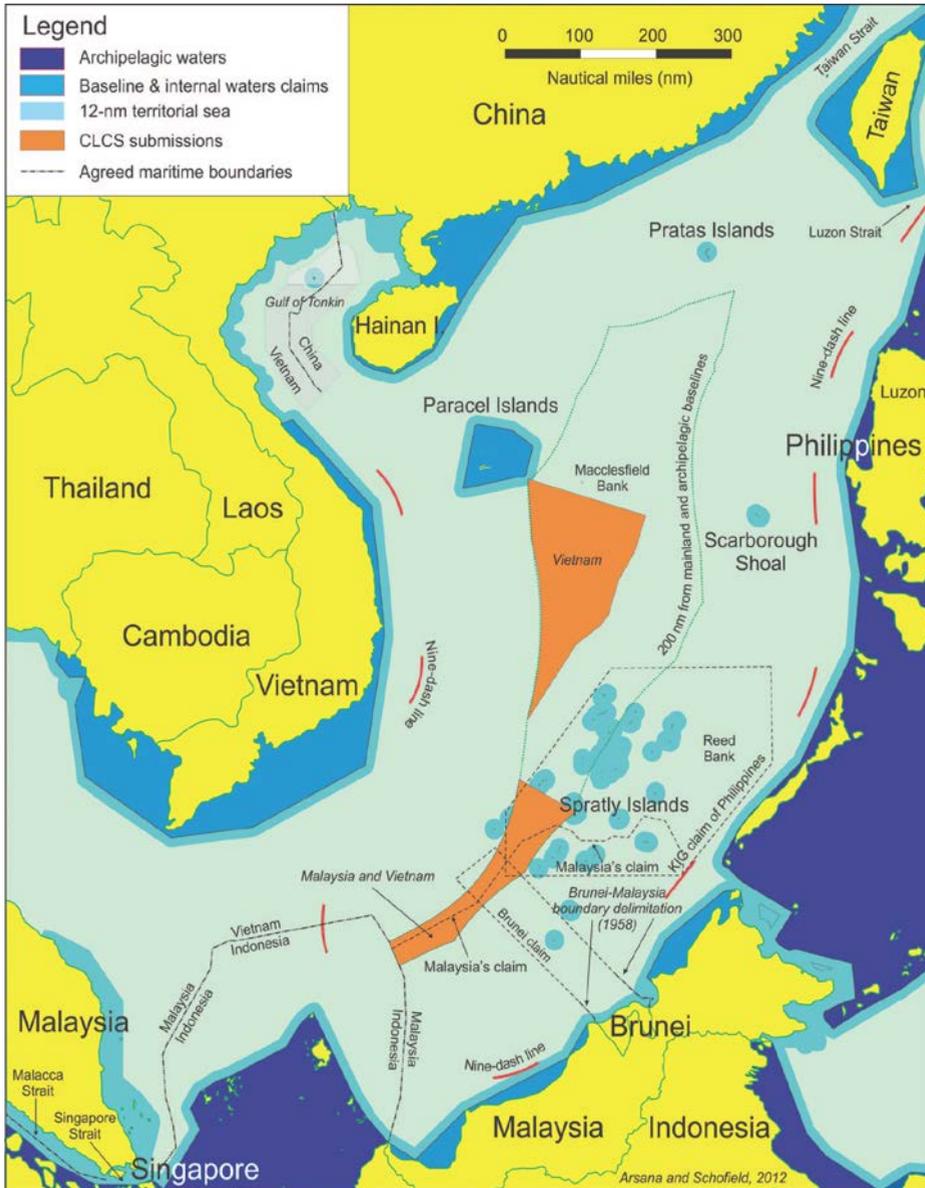


Fig. 4 2009 Malaysia/Vietnam Joint Submission & Vietnam Submission Overlap with China’s SCS Territorial/Maritime Claims Inside

2. For Submission 2: Philippines’ Misinterpretation of Chinese Scholars’ Papers as to “China’s Claim of Historic Rights in the SCS”

Another big misinterpretation by the Philippines for China’s historic right claim in the SCS is based on academic papers by Chinese scholars. In his first-round submissions, Mr. Reichler invoked the paper published in the *American*

Journal of International Law by Judge Gao Zhiguo and Professor Jia Bingbing. As said by Mr. Reichler,

We accept that Judge Gao's explanation of China's position is not an official one, but it is nevertheless, we submit, worthy of your attention. Judge Gao stated that the nine-dash line has more than one meaning:

"First, it represents the title to the island groups that it encloses. In other words, within the nine-dash line in the South China Sea, China has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights and jurisdiction – in accordance with UNCLOS – over the waters and seabed and subsoil adjacent to those islands and insular features. Second, it preserves Chinese historic rights in fishing, navigation and such other maritime activities as oil and gas development in the waters and on the continental shelf surrounded by the line."⁸¹

In the same article, Judge Gao made even clearer that the "historic rights" claimed by China in areas surrounded by the nine-dash line are beyond those provided in the Convention:

"In addition to these rights conferred by UNCLOS, China can assert historic rights within the nine-dash line – under Article 14 of its 1998 law on the EEZ and the continental shelf – in respect of fishing, navigation, and exploration and exploitation of resources."⁸²

...

China's first formal assertion of maritime rights beyond its UNCLOS entitlements was in Article 14 of its 1998 EEZ law.⁸³ You will recall that Judge Gao wrote, in the AJIL article I cited yesterday, that the 1998 law is the source of China's "historic rights" claim and the justification for the nine-dash line, which he says "preserves Chinese historic rights in fishing, navigation and such other marine activities as oil and gas development in the

81 Gao Zhiguo and Jia Bingbing, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, *American Journal of International Law*, Vol. 107, 2013, pp. 123~124. MP, Vol. X, Annex 307.

82 Gao Zhiguo and Jia Bingbing, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, *American Journal of International Law*, Vol. 107, 2013, pp. 109~110.

83 People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

waters and on the continental shelf surrounded by the line".⁸⁴ Judge Gao thus equated China's "historic rights" claim to a claim of sovereign rights, not sovereignty.⁸⁵

In the Philippines' Memorial, more academic papers were invoked to support its position that China is using Article 14 of its 1988 Law on the EEZ and the Continental Shelf to claim historic rights in the SCS enclosed by the U-Shaped Line. However, as shown by Paragraphs 4.29~4.30 of the Memorial, renowned legal scholars from Chinese Mainland and Taiwan could only speculate on the legal effect of Article 14 of the 1998 Law. They do not know whether Chinese Government has invoked that provision to justify its historic rights claim in SCS as enclosed by the U-Shaped Line.⁸⁶ Had China done that, they would have known it and said so. Such ambiguity of China's maritime claims based on historic right is noticed by other renowned scholars who are non-Chinese.⁸⁷

As said by this author in his paper published in *China Oceans Law Review*,⁸⁸ none of those Chinese and non-Chinese scholars represent Chinese Government, while their opinions on the China's assertion of historic rights within U-Shaped Line are uncertain. Most importantly, instead of saying that China has been or is asserting historic rights..., Judge Gao and Professor Jia in their well-quoted paper say that "China can assert historic rights..." This clearly confirms their uncertain view.

84 Gao Zhiguo and Jia Bingbing, The Nine-Dash Line in the South China Sea: History, Status, and Implications, *American Journal of International Law*, Vol. 107, 2013, p. 124. MP, Vol. X, Annex 307.

85 See First-round submissions by Mr. Reichler, in Transcripts of the Hearing on 7 July 2015, pp. 41~42; and in Transcripts of the Hearing on 8 July 2015, p. 61. Also see Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 13.

86 Philippines' Memorial, pp. 80~81. The scholars are Keyuan Zou, Yann-huei Song, Li Jinming, and Li Dexia. See Yann-huei Song and Keyuan Zou, Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States, *Ocean Development & International Law*, Vol. 31, No. 4, 2000, p. 318; Li Jinming and Li Dexia, The Dotted Line on the Chinese Map of the South China Sea: A Note, *Ocean Development & International Law*, Vol. 34, Nos. 3~4, 2003, p. 293; Keyuan Zou, Historic Rights in International Law and in China's Practice, *Ocean Development & International Law*, Vol. 32, No. 2, 2001, p. 160.

87 Robert C. Beckman and Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, *The International Journal of Marine and Coastal Law*, Vol. 29, 2014, p. 205.

88 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 181~182.

Therefore, it is fair to say that the above statement of Mr. Reichler is incorrect. Eminent Chinese scholars' academic papers are not sufficient to prove the position that China is claiming historic rights based on Article 14 of its 1998 Law in the SCS enclosed by the U-Shaped Line. Instead, what those papers clearly demonstrate is the ambiguity of China's position in the SCS within the U-Shaped Line. Yet, ambiguous position is hard to build up a dispute for the Tribunal to try in the first place.

3. For Submission 2: No Dispute concerning the Alleged "China's Historic Rights" in Waters beyond 12 NM from Scarborough Shoal

First of all, China claims territorial sovereignty in the waters 12 NM from Scarborough Shoal as its territorial water. More importantly, no evidence provided by the Philippines' Memorial and its lawyers' oral statements in the Hearing on 7, 8 and 13 of July 2015 can prove that China in fact is claiming historic right to justify its law enforcement activities beyond territorial waters from Scarborough Shoal in the northern part of SCS enclosed by the U-Shaped Line. The lack of historic right claims beyond China's territorial water surrounding Scarborough Shoal is further demonstrated by the absence of Sino-Philippine maritime confrontations in this outer belt of waters. Moreover, Submissions 10, 11, and 13 endorse such a position. These Submissions reflect Sino-Philippine maritime confrontations which occurred only in the waters within 12 NM from Scarborough Shoal. Therefore, the facts can hardly substantiate the existence of a Sino-Philippine dispute concerning China's invocation of historic rights to justify its maritime claims beyond territorial waters in this region.

If China has made any real maritime claim beyond 12 NM from Scarborough Shoal, it might be EEZ which has to be supported by UNCLOS, but not by historic rights. The statements made by Philippines' lawyers in the Hearings of July 2015 give the impression that China has claimed EEZ in such waters.⁸⁹ If it is correct to say that China claims EEZ in such waters, then it will be irreconcilable for China to claim historic rights to support its maritime claim in the same area. It follows that, as far as the northern part of SCS is concerned, the facts shows that Submission 2 only conveys a moot issue (instead of a real dispute) in terms of China's historic rights claim.

89 See First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, pp. 29~30, footnote 34. Also see Second-round submissions and Response to Tribunal questions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, pp. 13~14, 68.

4. For Submission 2: No Dispute concerning the Alleged “China’s Historic Rights” in Waters beyond 200 NM from Non-Rock Islands in Spratly Islands Group

It is an undeniable fact that China claims territorial sovereignty over all the islands, rocks and maritime features in the Spratly Islands Group, of which Kalayaan Islands Group (KIG) is only a part. Such Chinese territorial claim is of much older origin and with more comprehensive geographical scope than that of the Philippines in the KIG, as evidenced by this author’s paper published in *China Oceans Law Review*.⁹⁰

China is claiming EEZ and continental shelf generated by the Spratly Islands Group as a singular unit.⁹¹ Besides, among those numerous maritime features located in the Spratly Islands Group, quite a few of them are islands individually meeting the conditions of Article 121 of UNCLOS. One scholar who teaches at Navy Command and Staff College of National Defense University in Taiwan, Captain Ruei-Lin Yu, has compiled top 15 non-rock islands in terms of area in the Spratly Islands Group,⁹² while Robert Beckman and Clive Schofield consider 12 of them as “islands” under Article 121.⁹³ After double-checking the official information provided by the PRC Government concerning the spelling of the English and Chinese names (including pin-yin) of these islands, as well as the coordinates for these islands, a Table of Names and Coordinates of the 15 Biggest Islands in Spratly Islands Group is produced as Table 1 of this paper. It is very easy

90 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 209–222.

91 In its 2011 NV, China declared that “[s]ince 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.” See Mission of the People’s Republic of China to the United Nations, NV, CML/8/2011, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf, 10 March 2015.

92 Ruei-Lin Yu, A Study of Strategic Options for [Taiwan] in the South China Sea during the Possible Potency of Islands Delimitation, *National Defense Journal*, No. 1, 2014, pp. 14–15. (in Chinese)

93 Robert C. Beckman and Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, *The International Journal of Marine and Coastal Law*, Vol. 29, 2014, pp. 210–211.

to know the situations of these islands through the publicly available information provided on the internet.

Table 1 Table of Names and Coordinates of the Top 15 Biggest Islands in Spratly Islands Group⁹⁴

Size Rank	Names of the islands			Coordinates	Occupant
	English	Chinese	Pin-Yin		
1	Itu Aba ⁹⁵	太平岛	Taiping Dao	10°23' N 114°22' E	Taiwan
2	Thitu Island (Pagasa) ⁹⁶	中业岛	Zhongye Dao	11°06' N 114°17' E	Philippines
3	West York Island (Likas) ⁹⁷	西月岛	Xiyue Dao	11°05' N 115°02' E	Philippines
4	Spratly (Storm) Island ⁹⁸	南威岛	Nanwei Dao	8°39' N 111°55' E	Vietnam
5	Northeast Cay (Parola) ⁹⁹	北子岛	Beizi Dao	11°27' N 114°22' E	Philippines
6	Southwest Cay ¹⁰⁰	南子岛	Nanzi Dao	11°26' N 114°20' E	Vietnam
7	Sin Cowe Island ¹⁰¹	景宏岛	Jinghong Dao	9°53' N 114°20' E	Vietnam
8	Nanshan Island (Lawak) ¹⁰²	马欢岛	Mahuan Dao	10°44' N 115°48' E	Philippines

94 The names of the SCS islands are those adopted by the National Toponymy Committee of China and published in the *People's Daily*, 25 April 1983. For the size ranking of these islands, see Rueli-Lin Yu, A Study of Strategic Options for [Taiwan] in the South China Sea during the Possible Potency of Islands Delimitation, *National Defense Journal*, No. 1, 2014, pp. 14-15. (in Chinese)

95 For a photo of this island, at <http://www.glocal.org.hk/wp-content/uploads/2014/05/45208564.jpg>, 10 March 2015.

96 For a photo of this island, at <http://www.presstv.ir/detail/2012/06/23/247525/china-vietnam-dispute-over-spratlys/>, 10 March 2015.

97 For a photo of this island, at <http://www.panoramio.com/photo/56907434>, 10 March 2015.

98 For a photo of this island, at <http://www.unanhai.com/a/nansha/daojiagaikuang/2012/0527/nanweidao.html>, 10 March 2015.

99 For a photo of this island, at <http://www.panoramio.com/photo/56910828>, 10 March 2015.

100 For a photo of this island, at <https://www.flickr.com/photos/60082435@N05/7409387472/>, 10 March 2015.

101 For a photo of this island, at <http://www.unanhai.com/a/nansha/daojiagaikuang/2012/0417/JinghongDao.html>, 10 March 2015.

102 For a photo of this island, at <http://chenwei18196555.blog.163.com/blog/static/14232554620123297738389> and <http://baike.sogou.com/v61274.htm>, 10 March 2015.

9	Sandy Cay ¹⁰³	敦谦沙洲	Dunqian Shazhou	10°23' N 114°28' E	Vietnam
10	Loaita Island (Dugao Kota) ¹⁰⁴	南钥岛	Nanyue Dao	10°40' N 114°25' E	Philippines
11	Swallow Reef (Layang Layang) ¹⁰⁵	弹丸礁	Danwan Jiao	7°23' N 113°50' E	Malaysia
12	Namyit Island ¹⁰⁶	鸿麻岛	Hongxiu Dao	10°11' N 114°22' E	Vietnam
13	Amboyna Cay or Amboyne ¹⁰⁷	安波沙洲	Anbo Shazhou	7°53' N 112°56' E	Vietnam
14	Flat Island (Patag Flat) ¹⁰⁸	费信岛	Feixin Dao	10°49' N 115°50' E	Philippines
15	Lankiam Cay	杨信沙洲	Yangxin Shazhou	10°43' N 114°32' E	

Such kind of data withheld by the Memorial and Philippines' counsel in

103 For a photo of this island, at <http://gming1983.blog.163.com/blog/static/111390122011713103033153/>, 10 March 2015.

104 For a photo of this island, at <http://baike.sogou.com/v61290.htm>, 10 March 2015.

105 For a photo of this island, at <http://asiadivingvacation.com/diving/layang-layang-island> and <http://www.timawa.net/forum/index.php?topic=10149.45>, 10 March 2015.

106 For a photo of this island, at <http://www.unanhai.com/a/nansha/daojiagaikuang/2012/1102/942.html>, 10 March 2015.

107 For a photo of this island, at <http://www.unanhai.com/a/nansha/daojiagaikuang/2012/1102/944.html>, 10 March 2015.

108 For a photo of this island, at <http://blog.163.com/ytmtydihc@126/blog/static/6706819520135361959673/>, 10 March 2015.

the July Hearing¹⁰⁹ is critical for the Tribunal to examine, in order to accurately calculate the real maritime entitlements China may claim in the eastern part of SCS enclosed by the U-Shaped Line (hereinafter “Relevant Area”).

In the Memorial, the Philippines identified five low-tide elevations (LTEs) that China occupies in KIG which is part of Spratly Islands Group. They are Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, and McKennan Reef. It is argued by the Philippines that none of these LTEs forms part of China’s continental shelf. Hence, China must desist from occupying these features and from exercising sovereign rights and jurisdictions in the waters surrounding these features and beyond. The Philippines identified four other maritime features that China occupies in the eastern part of SCS, namely, Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef. They are not considered by the Philippines as “islands” but “rocks” meeting the conditions of Article 121(3), as misinterpreted by the Memorial.¹¹⁰ The Philippines contends that China relies on historic rights to justify its law enforcement activities in the waters beyond 12 NM from these four “rocks”. Additionally, Reed Bank was identified by the Memorial as the site of Sino-Philippine maritime dispute,¹¹¹ as Reef Bank is not deemed by the Philippines as part of China’s EEZ or continental shelf.

It is submitted that the above-mentioned five “LTEs”, three “rocks” (not

109 Professor Sands, as Philippines’ counsel, was unwilling to provide such critical information to the Tribunal. See First-round submissions by Professor Sands, in the Transcripts of the Hearing on 7 July 2015, pp. 86–88. It was said by Professor Sands that “[w]hat China says is that we have ‘deliberately excluded’ the largest ‘island’ occupied by China, Itu Aba, and that we have been mischievous in doing this. To be very realistic, the basis upon which the Philippines selected nine maritime features is explained fully in the Memorial. There are more than 750 features in the Spratly Islands, and possibly this Tribunal may want to engage in the exercise – which would last a very lengthy period of time, having regard to a similar experience in the case of Slovenia and Croatia on a huge number of different matters – but we felt it would simply be unmanageable and unreasonable for the Philippines to request the Tribunal to determine the nature of so many features, and we said so. So we have asked the Tribunal to rule only on those features that are occupied or controlled by China, on the basis that this would assist in the resolution of differences as to the entitlements generated by all the other features. Once we’ve got your award, we can apply your award to all the other features. So we have not ‘deliberately excluded’ anything for any malign purpose; we have simply tried to be pragmatic in relation to what is doable in a reasonable period of time. And that was motivated, for right or for wrong, to assist the Tribunal.”

110 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 199–209.

111 Philippines’ Memorial, pp. 164–166, paras. 6.16–6.22.

counting Scarborough Shoal), and Reed Bank, all fall within EEZ and continental shelf China may claim from, *inter alia*, Itu Aba, Thitu, and West York islands, as well as the Spratly Islands Group as a single unit. In the Hearing, Professor Sands denied Itu Aba the legal status as an island under Article 121 of UNCLOS.¹¹² However, the factual situation of Itu Aba has been released by Taiwan on 7 July 2015 which is the first day of the July Hearing.¹¹³ In addition, Table 2 below illustrates the distance between these three non-rock islands on the one hand and each of these maritime features identified by the Philippines, on the other hand.

Being all within 200 NM from these three non-rock islands, these five “LTEs” constitute part of China’s continental shelf and EEZ as well. China is thus entitled to continue its occupation and to exercise sovereign rights and jurisdiction under UNCLOS regime of EEZ and continental shelf for these LTEs and the waters surrounding them. By the same token, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, even if considered as “rocks” under Article 121(3), are maritime features located in China’s EEZ and continental shelf. Hence, for the maritime area surrounding and beyond these three “rocks”, China is still entitled to exercise sovereign rights and jurisdiction under EEZ and continental shelf regime of UNCLOS. As the Sino-Philippine maritime confrontations identified by the Philippines’ Submissions 8~14 are all located in the EEZ and continental shelf generated by, *inter alia*, these three non-rock islands, the legality dispute concer-

112 See First-round submissions by Professor Sands, from the Transcripts of the Hearing on 7 July 2015, pp. 88~89. “Itu Aba, which is the largest feature in the southern sector, has been occupied by the authorities in Taiwan since 1946. It is no more than 0.43 square kilometres in size. It has no permanent population. It provides no water suitable for drinking, and it does not provide a meaningful amount of agricultural produce. It is similar in nature to Colombia’s Serrana Cay, which is also roughly 0.4 square kilometres in size. In fact, Serrana Cay is 10 metres in height, and there there is a well to supply water for visiting fishermen and law enforcement officers. In the case of *Nicaragua v Colombia*, although the International Court found it unnecessary to decide whether to apply Article 121 of the Convention to Serrana Cay, it granted this feature no more than a 12-nautical mile territorial sea. But in any event, Itu Aba has not been “deliberately excluded” by the Philippines, as China puts it. Our written pleadings do address the largest features in the Spratlys, including Itu Aba, Thitu and West York. And we have demonstrated that the features in the Spratly area are “rocks” within the meaning of Article 121 of the Convention, so that none is capable of generating an entitlement to any EEZ or continental shelf.”

113 The information of Itu Aba Island released by Taiwan, at <http://www.mofa.gov.tw/Upload/RelFile/661/150648/a1fe8e7f-aeeb-4953-8921-ef2607294072.pdf>, 10 August 2015; The Statement of the South China Sea by Taiwan, at http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=EDEBCA08C7F51C98, 10 August 2015.

Table 2 Distance between Three Biggest Islands and Each of the Nine Maritime Features in the Spratly Islands Identified by the Submissions 3~7 of the Philippines' Memorial

Categorization Given by the Philippines	Names of the Maritime Features	Location Coordinates¹¹⁴	Distance from Itu Aba¹¹⁵ (M)	Distance from Thitu Island (M)	Distance from West York Island (M) 11°05' N, 115°02' E	Position in Philippines' Submission
Low-tide elevation under UNCLOS Article 13	Mischief Reef 美济礁	9°52' -9°56' N, 115°30' -115°35' E	77-78	114	91-93	4~5, 12, 14
	McKenna Reef 西门礁	9°54' N, 114°28' E	42	91	101	6
	Gaven Reef 南熏礁	10°10' -10°13' N, 114°13' -114°15' E	7-9	56-58	75-77	6
	Subi Reef 渚碧礁	10°54' -10°56' N, 114°04' -114°07' E	21-22	31-32	63-65	4
	Second Thomas Shoal 仁爱礁 (Ayungin Reef)	9°39' -9°48' N, 115°51' -115°54' E	90-91	125-128	99-104	11, 14

114 The coordinates for these maritime features are based on the List of Partial Standard Names for China's Islands in South China Sea, at <http://www.unanhai.com/nhzddm.htm>, 10 March 2015.

115 The distances are calculated by the Latitude/Longitude Distance Calculator provided by the National Weather Service, National Hurricane Center of National Oceanic and Atmospheric Administration, at <http://www.nhc.noaa.gov/gccalc.shtml>, 10 March 2015.

Rocks under UNCLOS Article 121(3)	Johnson Reef 赤瓜礁	9°42' N, 114°17' E	49	98	110	7
	Quarteron Reef 华阳礁	8°51' -8°52' N, 112°50' -112°53' E	143-145	181-182	211-213	7
	Fiery Cross Reef 永暑礁	9°30' -9°40' N, 112°53' -113°04' E	86-114	120-143	153-181	7
	Reed Bank 礼乐滩	11°06' -11°55' N, 116°22' -117°20' E	128-193	121-181	71-132	Paras. 6.16~6.22 of the Memorial

ning the alleged China's historic right claim¹¹⁶ for justifying its law enforcement activities in the area surrounding and beyond those five LTEs, three rocks, and Reed Bank becomes hypothetical,¹¹⁷ moot, non-justiciable,¹¹⁸ and pointless for the Tribunal to address.¹¹⁹

**5. For Submission 3: No Maritime Confrontations Complained by the
Philippines in This Case Occurred in Waters beyond 12 NM
from Scarborough Shoal**

It is interesting to see that Submission 3 of the Philippines requests the Tribunal to declare that “Scarborough Shoal generates no entitlement to an EEZ or continental shelf”. To establish a dispute based on this Submission, China must have claimed an EEZ or continental shelf that is generated by this “rock”. However, the Philippines’ legal team admitted in the Hearing of July 2015 that all Sino-Philippine maritime confrontations involving Scarborough Shoal happened in the territorial water of this “rock”.¹²⁰ Once again, the lack of Sino-Philippine clashes in terms of law enforcement activities in the waters beyond territorial sea

116 See First-round submissions by Philippines’ Foreign Secretary Del Rosario, the Transcripts of the Hearing on 7 July 2015, pp. 14~16. Also see First-round submissions by Mr. Reichler, in the Transcripts of the Hearing on 7 July 2015, pp. 26~27, 30.

117 Article 283 of UNCLOS requires the existence of a dispute before the dispute settlement mechanism of Part XV of UNCLOS can operate. In *Barbados v. Trinidad and Tobago*, both Parties emphasized the need of the existence of a dispute according to Art. 283. The Tribunal accepted such interpretation. See *Barbados/Trinidad and Tobago, Award, UNCLOS Annex VII Tribunal* (11 April 2006), paras. 74, 80, 196~200, at http://www.pcacpa.org/showpage.asp?pag_id=1152, 10 March 2015.

118 J. Collier and A. V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford: Oxford University Press, 1999, pp. 10, 13, 156~157. After the heading “Justiciability” the two eminent scholars say that “[i]t was mentioned above that not all disputes are suitable for judicial settlement. To be suitable, the dispute must be justiciable. A dispute is said to be justiciable if, first, a specific disagreement exists, and secondly, that disagreement is of a kind which can be resolved by the application of rules of law by judicial (including arbitral) processes ... Thus far we have been concerned with the task of establishing that a dispute has come into existence. In the case of most (but not all) tribunals a further aspect of this precondition of justiciability is that the dispute remains in existence up to the point that the judgment or award is given. To put it another way, most tribunals will refuse to give rulings on disputes that are hypothetical or have become moot.”

119 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 224~227.

120 See Transcripts of the Hearing on 7 July 2015, pp. 8, 23 (Statement of Solicitor General Hilbay), 99 (Statement of Professor Sands); Transcripts of the Hearing on 8 July 2015, pp. 30 (Statement of Mr. Martin), 86~87 (Statement of Professor Oxman); Transcripts of the Hearing on 13 July 2015, p. 15 (Statement of Mr. Reichler).

from Scarborough Shoal undermines the position that China is making EEZ and continental shelf claims surrounding Scarborough Shoal.

Moreover, the two evidences invoked by Mr. Martin¹²¹ and Mr. Reichler¹²² in the Hearing of July 2015 indicated that China had positively claimed EEZ generated by Scarborough Shoal only in 1997-1998, but not later.¹²³ Mr. Martin did provide another two evidences to show the protest of the Philippines against China on 15 and 16 of April 2012.¹²⁴ However, this will not be sufficient to show that China is still maintaining its EEZ claim in the said water unless information can be provided to show China's positive maritime claim of this nature made at the same times.

To be added, Scarborough Shoal is called by Chinese as Huang-Yan-Dao (黄岩岛), literally meaning Yellow Rock Island. The third word Dao (岛) means island in Chinese. This name was given by Chinese Government 11 years before UNCLOS entered into force. It would be unfair to say that this feature with such a name must have been treated by China as an "island" according to UNCLOS. To be noted, the National Toponymy Committee of China was commissioned by the PRC Government to conduct a census on the names of maritime features in SCS, which was part of a general project to standardize geographical names in China. On April 25, 1983, this Committee used *People's Daily* to announce the List of Partial Standard Names for China's Islands in South China Sea for 287 maritime features

121 See First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, pp. 29-30, footnote 34.

122 See Second-round submission and Response to Tribunal questions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, pp. 13-14, 69.

123 (1) Foreign Ministry of the People's Republic of China, Chinese Foreign Ministry Statement regarding Huangyandao (22 May 1997), p. 2. MP, Vol. V, Annex 106. (2) Department of Foreign Affairs of the Republic of the Philippines, Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations (30 July 1998), p. 23. MP, Vol. VI, Annex 184 (stating Chinese view that Scarborough Shoal "is not a sand bank but rather an island," indicating an entitlement to an EEZ). See First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, pp. 29-30, footnote 34. Also see Second-round submissions and Response to Tribunal questions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, pp. 14 (footnotes 15-16), 68.

124 Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1030 (15 Apr. 2012). MP, Vol. VI, Annex 206 (indicating that Scarborough Shoal does not generate an EEZ); 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. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207 (indicating that Scarborough Shoal does not generate an EEZ). See First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, pp. 29-30, footnote 34.

in the four groups of SCS islands and maritime features.¹²⁵ The name of Huang Yan Dao for Scarborough Shoal was indicated in the name list.

Clearly, no credible evidence can doubtlessly prove that China is now claiming an EEZ and continental shelf surrounding Scarborough Shoal. It is fair to conclude that what is presented by Submission 3 should be considered as a moot issue, incapable of forging any dispute for the Tribunal to try in the first place.

**6. For Submissions 4~7: Overlooking Spratly Islands “as a Singular Unit”
Used by China to Claim EEZ and Continental Shelf in SCS under China’s
2011 NV**

On the third day of the hearing, the leading lawyer of the Philippines, Mr. Reichler, answered Question 1 posed by the Tribunal to provide “the sources relied upon for ascertaining China’s position with respect to each of the Philippines’ specific submissions in the context of establishing the existence of a legal dispute.” When Mr. Reichler touched upon Submissions 4~7, he seriously misinterpreted China’s 2011 NV to the UN (dated 14 April 2011), by saying

*The source list also shows that China has likewise opposed the claims made by the Philippines in submissions 4 through 7 in regard to the character and entitlements of eight other specific features, all of which are in the Spratlys, and which the Philippines regards as low-tide elevations with no maritime entitlements, or rocks with only a 12-mile entitlement. In contrast, China claims a 200-mile EEZ and continental shelf for all of these Spratly features.*¹²⁶

It is absolutely important to note the background of China’s 2011 NV in order to understand the nature of the Sino-Philippine disputes demonstrated by this NV. The disputes started with China’s two NVs delivered to the United

125 The name-list was said to be only part of the complete names of maritime features China claims in SCS. It appeared on page A4 of *People’s Daily* on 25 April 1983. It was reproduced on the website of <http://www.unanhai.com/nhzddm.htm>.

126 See Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 14 and his footnote 17 (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 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.)

Nations on 7 May 2009 (China's 2009 NVs) and the map attached thereto.¹²⁷ They are meant to challenge the Malaysia/Viet Nam Joint Submission¹²⁸ and the Viet Nam Submission¹²⁹ to the CLCS concerning extended continental shelf in certain SCS areas on 6 and 7 May 2009 respectively. Later on, the Philippines, *inter alia*, delivered its NV (No. 000228) on 5 April 2011 (Philippines' 2011 NV)¹³⁰ to challenge China's 2009 NVs. To respond to the Philippines' 2011 NV, the PRC produced its NV dated on 14 April 2011 (China's 2011 NV).¹³¹

It is necessary to go through the text of these 4 NVs to precisely ascertain the Sino-Philippine disputes and to judge the accuracy of Mr. Reichler's statement. The language of both China's 2009 NVs is identical:

*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.*¹³²

The relevant part of the Philippines' 2011 NV is as follows:

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- 127 Dated on May 7, 2009, the two Chinese Notes Verbales (CML/17/2009 and CML/18/2009) were issued to oppose the Malaysia-Viet Nam Joint Submission and Viet Nam Individual Submission for Outer Continental Shelf beyond 200 Nautical Miles in the SCS Region. At http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm_c.pdf, 10 March 2015.
- 128 Executive Summary of the Vietnam/Malaysia Joint Submission, at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf, 10 March 2015.
- 129 Executive Summary of the Vietnam Individual Submission, at http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf, 10 March 2015.
- 130 Philippine Note Verbale dated 5 April 2011 (No. 000228), at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf, 10 March 2015.
- 131 Mission of the People's Republic of China to the United Nations, NV, CML/8/2011, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf, 1 March 2015.
- 132 Dated on May 7, 2009, the two Chinese Notes Verbales (CML/17/2009 and CML/18/2009) were issued to oppose the Malaysia-Viet Nam Joint Submission and Viet Nam Individual Submission for Outer Continental Shelf beyond 200 Nautical Miles in the SCS Region. At http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm_c.pdf, 10 March 2015.

On the Islands and other Geological Features

FIRST, the Kalayaan Island Group (KIG) constitutes an integral part of the Philippines. The Republic of the Philippines has sovereignty and jurisdiction over the geological features in the KIG.

On the “Water Adjacent” to the Islands and other Geological Features

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

At any rate, the extent of the waters that are “adjacent” to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.

On the Other “Relevant Waters, Seabed and Subsoil” in the SCS

THIRD, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People’s Republic of China on the “relevant waters as well as the seabed and subsoil thereof” (as reflected in the so-called 9-dash line map attached to Noted Verbales CML/17/1009 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.¹³³

The relevant part of China’s 2011 NV reads:

China has indisputable sovereignty over the islands in the South China Sea

133 At http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf, 10 March 2015.

and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence. The content of the Note Verbale No. 000228 of the Republic of the Philippines are totally unacceptable to the Chinese Government.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of the Philippines is in fact part of China's Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of the Philippines and the domestic legislation of the Republic of the Philippines prior to 1970s, the Republic of the Philippines had never made any claims to Nansha Islands or any of its components. Since 1970s, the Republic of the Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of the Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "ex injuria jus non oritur", the Republic of the Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "la terre domine la mer", coastal states' Exclusive Economic Zone (EEZ) and CS 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.¹³⁴

134 Mission of the People's Republic of China to the United Nations, NV, CML/8/2011, 14 April 2011, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf, 10 March 2015.

Clearly, the China's 2011 NV does not claim a 200 NM EEZ and continental shelf for all of the 8 maritime features identified by Philippines' Submissions 4~7. China's 2011 NV takes Spratly Islands Group (Nansa Islands) as a singular unit that generates EEZ and continental shelf, as the wording used in this NV is not "are", but "is".¹³⁵ Secondly, the names of the 8 maritime features identified by Philippines' Submissions 4~7 were not even mentioned in China's 2011 NV.¹³⁶ Thirdly, these 4 NVs demonstrate (China-opposed) Philippines' territorial sovereignty claims over each of the maritime features located in the KIG. Some of the features are obviously considered by the Philippines as rocks that generate territorial waters only. Some other features are clearly deemed islands that generate EEZ and continental shelf. It will be wrong for the Philippines to misinterpret the foregoing China's unequivocal position in the Spratly Islands Group as using each maritime

135 Here, it is wrong for the Philippines' legal team to say (at the Hearing of 8 July 2015), "The Philippines' fourth submission is for a declaration that: 'Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, [EEZ] or continental shelf, and are not features ... capable of appropriation by occupation or otherwise ...' China has asserted that these reefs are part of 'China's Nansha Islands', the Spratlys, and that they 'are fully entitled to Territorial Sea, Exclusive Economic Zone ... and Continental Shelf'". To be noted, at the end of this quotation, there is footnote 143 which says that "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 Apr. 2011). MP, Vol. VI, 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-070-2014-S (7 Mar. 2014), p. 2." See First-round submissions by Professor Sands, in Transcripts of the Hearing on 8 July 2015, p. 137. It is also totally misleading for Mr. Reichler to say on 13 July 2015 that "China's note is at tab 4.5. In this sector of the South China Sea, China claims both historic rights within the nine-dash line and 200-mile entitlements, purportedly under UNCLOS, for all of the Spratly features. It has said repeatedly that: 'China's Nansha Islands are fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf.'" To be noted, at the end of this quotation, there is footnote 12, which reads: "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 Apr. 2011), p. 2. MP, Vol. VI, Annex 201." See Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 11.

136 Relying on the same China's 2011 NV, Mr. Reichler again misinterpreted China's positions by saying, "The source list also shows that China has likewise opposed the claims made by the Philippines in submissions 4 through 7 in regard to the character and entitlements of eight other specific features, all of which are in the Spratlys, and which the Philippines regards as low-tide elevations with no maritime entitlements, or rocks with only a 12-mile entitlement. In contrast, China claims a 200-mile EEZ and continental shelf for all of these Spratly features." To be noted, at the end of this quotation, there is footnote 17 which reads: "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 Apr. 2011), p. 2. MP, Vol. VI, Annex 201." See Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 14.

feature to generate maritime entitlements under UNCLOS, just because this method is followed by the Philippines. Fourthly and most astonishingly, it is admitted by Philippines' 2011 NV that certain maritime features in KIG are islands (in plural but not singular form) under UNCLOS legal regime and capable of generating EEZ and continental shelf for the owner (the Philippines) of those maritime features. To be noted, Professor Sands in his oral statement delivered at the July Hearing even provided a Philippines' Supreme Court Ruling to confirm the above position in Philippines' 2011 NV.¹³⁷ It totally defeats Philippines' own position in this arbitration that none of the maritime features in the KIG should be considered as island under Article 121 of UNCLOS.¹³⁸

To conclude, Philippines' Submissions 4~7 cannot reflect the real China's position that is opposed by the Philippines. It is groundless to say that any dispute exists concerning the situations reflected by these submissions.

7. For Submissions 4 and 6: It Is Not China's Claim that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, and McKennan Reef Are Not LTEs

Please see Section III-A-6 of this paper. No dispute exists for Submissions 4 and 6.

8. For Submission 7: It Is Not China's Claim that Johnson Reef, Cuarteron Reef, and Fiery Cross Reef Generate Entitlement to an EEZ or Continental Shelf

Please see Section III-A-6 of this paper. No dispute exists for Submission 7.

9. For Submission 5: What China Objects Is Not that Mischief Reef and Second Thomas Shoal Are Part of Philippines' EEZ and Continental Shelf

137 It was said by Professor Sands on 8 July 2015 that, "The Philippines Supreme Court has affirmed the constitutionality of RA 9522 in its 2011 judgment in the case of *Magallona v Ermita*. The Supreme Court ruled in that case that the Philippine Congress's decision to classify the Kalayaan Island Group as a regime of islands under the Republic of the Philippines consistent with Article 121 of UNCLOS: '... manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS ...'" See Response to Tribunal questions by Professor Sands, in Transcripts of the Hearing on 8 July 2015, pp. 4~5.

138 Mr. Reichler in his First-round submissions delivered on 7 July 2015 said, "As we have also shown in our written response to the Tribunal's questions of December 2014, only a handful of the remaining Spratly features not mentioned in our submissions are above water at high tide, and even the largest of those comprises no more than 0.4 square kilometres. None is capable of sustaining human habitation or economic life of its own. Thus, none is entitled to more than a 12-mile territorial sea." See Transcripts of the Hearing on 7 July 2015, p. 47; Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 12; Philippines' Memorial, pp. 142~146, paras. 5.96~5.105.

For Submission 5, the Philippines totally distorts the point of issues by requesting the Tribunal “to adjudge and declare that Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines”. However, neither Philippines’ Memorial nor its lawyers’ statements in the July Hearing have proved China’s denial of Mischief Reef and Second Thomas Shoal to be part of Philippines’ EEZ and continental shelf.¹³⁹ Instead, according to both the Philippines’ Memorial and oral statements said in the July Hearing, China understands¹⁴⁰ and admits that the Philippines, as another coastal State and Party to UNCLOS, also has maritime entitlements of EEZ and continental shelf extending from its archipelagic baselines, thus necessitating Sino-Philippines sea boundary delimitation in SCS.¹⁴¹

To be submitted, the real issue dividing the two Parties is the Philippines’ opposition against China’s position that China also enjoys EEZ and continental shelf in the SCS which extends to the location of these two maritime features, due to Philippines’ denial of (1) China’s territorial claims over all the maritime features in KIG and (2) the legal status as islands for all China-occupied maritime features

139 See the statement by Professor Sands on 8 July 2015, “The Philippines’ fifth submission is for a declaration that: ‘Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines ...’ Mischief Reef is located 126 nautical miles from the nearest point on Palawan in the Philippines, and 596 miles from the nearest point on Hainan Island in China, and over 50 miles from Nanshan, the nearest high-tide feature in the Spratlys that is claimed by China. Second Thomas Shoal is 104 miles from the nearest point on Palawan in the Philippines, and 614 miles from the nearest point on Hainan Island in China, and 55 miles from Nanshan. The legal dispute here – again, self-evidently – is 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’, and the dispute turns on whether the Spratly Islands can generate an EEZ and continental shelf. This dispute will be resolved definitively by the application of Articles 13(2), 57, 76 and 121 of the Convention.” See First-round submissions by Professor Sands, in *Transcripts of the Hearing on 8 July 2015*, pp. 138~139.

140 Paragraph 4.32 of the Memorial admitted that “[i]n a 21 June 2011 demarche to the Philippine Embassy in Beijing, General Hong Liang, Deputy Director of the Asia Department of China’s Ministry of Foreign Affairs, asserted that, while the Philippines has rights under UNCLOS, ‘China also has ‘historical rights’ which are acknowledged under UNCLOS. Historical rights cannot be denied and must be respected’. General Hong Liang further elaborated: ‘China’s 9-dash line claim and map is based on the 1948 declaration by the Kuomintang government. UNCLOS also has a provision that historic rights cannot be denied and should be respected. UNCLOS is there, and the parties can use any clause that is useful to support its claim ... China understands that the Philippines claim is based on its 200 mile EEZ. China hopes, however, that its historic rights in the SCS be respected by the Philippines’.” See *Philippines’ Memorial*, pp. 81~82.

141 See remarks by Mr. Xiao Jianguo quoted by the Philippines, *infra* note 243.

in KIG. For detailed counter-arguments, please see Sections III-C-1 and III-A-4 of this paper. Not focusing on China's exact opposition, Submission 5 therefore cannot constitute any "dispute" for the Tribunal to settle.

B. Lack of Legal Dispute

It is fundamental that a legal dispute¹⁴² must exist before the Tribunal can work. This is exactly the reason why the Tribunal requested the Philippine team on 10 July 2015 to, *inter alia*, "direct the Arbitral Tribunal to the sources relied upon for ascertaining China's position with respect to each of the Philippines' specific submissions in the context of establishing the existence of a legal dispute." Section III-A of this paper has provided the obstacles for Submissions 1~7 to establish any "dispute" in the first place. Section III-B will indicate extra problems to prevent Submissions 2 and 11 from creating any "legal dispute".

1. For Submission 2: The U-Shaped Line as a Possible "Provisional Maritime Boundary" Is a Political Claim Subject to Political Negotiations Leading to Boundary Delimitation Agreement

It was stated by the Philippines' lawyer at the Hearing of July that the U-Shaped Line was not the target of this arbitration for the Philippines to challenge.¹⁴³ What the Philippines opposes is China's historic right claims in the

142 As said by Professor Sands in the Hearing on 8 July 2015, "Mr Reichler explained what we understand by the concept of a 'legal dispute' in the annex that you prepared: namely that China has adopted a position that is positively opposed by the Philippines, and that the difference can be resolved by the interpretation and then the application of the Convention." See First-round submissions by Professor Sands, in *Transcripts of the Hearing on 8 July 2015*, p. 134. Also see J. Collier and A. V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford: Oxford University Press, 1999, pp. 10, 13, 156~157. After the heading "Justiciability" the two eminent scholars say that "[i]t was mentioned above that not all disputes are suitable for judicial settlement. To be suitable, the dispute must be justiciable. A dispute is said to be justiciable if, first, a specific disagreement exists, and secondly, that disagreement is of a kind which can be resolved by the application of rules of law by judicial (including arbitral) processes ... Thus far we have been concerned with the task of establishing that a dispute has come into existence. In the case of most (but not all) tribunals a further aspect of this precondition of justiciability is that the dispute remains in existence up to the point that the judgment or award is given. To put it another way, most tribunals will refuse to give rulings on disputes that are hypothetical or have become moot."

143 First-round submissions by Mr. Reichler, in *Transcripts of the Hearing on 7 July 2015*, p. 49.

SCS region enclosed by the U-Shaped Line.¹⁴⁴ In this sense, U-Shaped Line is seen by the Philippines as the boundary or outer limits of China's maritime claim based on historic rights in the SCS. Therefore, it is fair to say that the legality issue of the U-Shaped Line is one side of the coin, while the legality of China's maritime claims in the SCS based on the historic right is on the other side of the coin. As has been discussed in Sections III-A-2, III-A-3, and III-A-4 of this paper, Submission 2 does not contain any real dispute concerning the alleged China's maritime claims in the SCS based on the historic rights. This section is meant to address the other side of the coin, which is the legality issue of the U-Shaped Line. It is submitted that the dispute concerning the use of the U-Shaped Line as a boundary of China's maritime claim in the SCS is not a legal issue, but a non-justiciable political position in the context of maritime boundary delimitation negotiations.

As discussed by this author's paper in *China Oceans Law Review*,¹⁴⁵ the original (1948) eleven-dash line, the 2009 nine-dash line, and the present (2013) ten-dash line are relating to and concerning maritime boundary delimitation negotiation between China and other States with opposite coasts, based on (1) the diplomatic practice by China related to its negotiations with Vietnam concerning the disputes in the Gulf of Tonkin, (2) one of the dashes between Taiwan and the Philippines, and (3) another one dash between Taiwan and Japan.

The original U-Shaped Line or eleven-dash line was placed on the Location Map of the South China Sea Islands published by the Republic of China Government in 1948 (see Fig. 5 of this paper). There were two dashes between China's Hainan Island and Vietnam. These two dashes were removed in 1960s. The PRC Government did not explain the reason. Based on his observation, Professor Zou Keyuan is of the opinion that such removal might have been related to the transfer of the sovereignty over the Bai Long Wei (or Bach Long Vi) Island in the Gulf of Tonkin from China to Vietnam.¹⁴⁶ If Professor Zou's observation is correct, then those two dashes would have a bearing on China's territorial claim while not directly related to China's maritime claims. Still, an indirect impact would be made upon maritime boundary delimitation negotiations between China and Vietnam as

144 First-round submissions by Mr. Reichler, in Transcripts of the Hearing on 7 July 2015, pp. 31-33.

145 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 193-196.

146 Keyuan Zou, *Law of the Sea in East Asia: Issues and Prospects*, London: Routledge, 2005, p. 50.

Bai Long Wei Island would affect and be important to the process of delimitation in Vietnam's favor.¹⁴⁷ If Professor Zou's observation is untrue, the fact that those two dashes were removed before China and Vietnam reached maritime boundary delimitation agreement in Gulf of Tonkin¹⁴⁸ would strongly suggest that those two dashes were previously used by China as a provisional maritime claim that cannot co-exist with the boundary agreed upon by these two States in that area. If those two dashes had nothing to do with China's maritime claims, there wouldn't have been any need for their deletion after the maritime boundary agreement was reached. It follows that the presence of these two dashes could affect the negotiation process. Making the dashes negotiable or even dispensable would then facilitate Sino-Vietnamese maritime boundary delimitation negotiations. Put differently, after drawing the maritime boundary in Gulf of Tonkin through successful negotiations, the maintenance of those two dashes (as China's previous maritime claims in the same area) would have been both redundant and confusing.

There is another dash between Taiwan and the Philippines which appears both in the 1948 Map and 2009 Map, which is attached to the China's NV (Fig. 1 of this paper). To be added, the U-Shaped Line appearing in the most recent map published in January 2013 by China, as indicated by the Memorial in Figure 4.4,¹⁴⁹ has one more dash between Taiwan and Japan (see Fig. 6 of this paper). It is well-known that the maritime boundary between Taiwan and the Philippines, and the boundary between Taiwan and Japan have yet to be drawn. Given this, nobody will believe that these two dashes represent Taiwan-Philippine and Taiwan-Japan maritime boundaries. However, when the time comes for such boundary to be drawn after an agreement is reached by the parties concerned, such dashes will be removed without any doubt. Thus, it is hard to deny that the U-Shaped Line or the present ten-dash line drawn by PRC is relating to or concerning sea boundary delimitation between China and other States with opposite coasts in the SCS.

To conclude, the U-Shaped Line has served and will serve as a negotiable and dispensable provisional maritime claim that constitutes China's political position on

147 Keyuan Zou, *Maritime Boundary Delimitation in the Gulf of Tonkin*, *Ocean Development and International Law*, Vol. 30, 1999, pp. 245-246, 248.

148 The Sino-Vietnam Agreement on the Delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf in the Beibu Gulf (which is also called Gulf of Tonkin) was signed on 25 December 2000 and entered into force on 30 June 2004. See Keyuan Zou, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, *Ocean Development and International Law*, Vol. 36, 2005, pp. 13-24.

149 Figure 4.4 is placed after p. 74 of the Philippines' Memorial.

the negotiation table for resolving territorial disputes and/or maritime delimitation issues. Hence, the dispute concerning the U-Shaped Line becomes a political issue to be settled by a package deal. The controversy concerning the U-Shaped Line or its deletion cannot be a legal dispute.

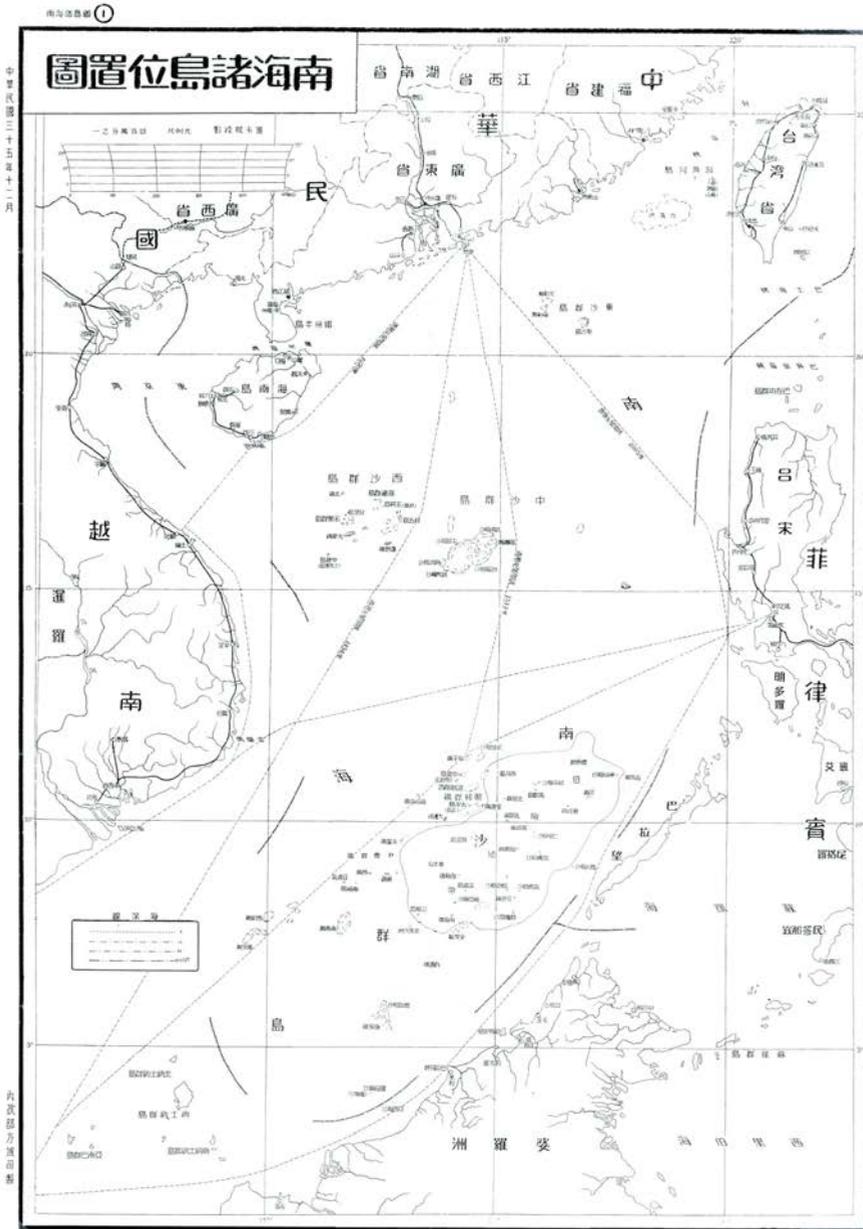


Fig. 5 The Location Map of the South China Sea Islands



Fig. 6 2013 Chinese Map Containing 10-Dash Line

2. For Submission 2: The Broken Nature of the U-Shaped Line Is in Agreement with Philippines' Comparable Practice

China's practice of using dashed or broken line in the South China Sea is actually in agreement with the practice of the Philippines that criticizes the U-Shaped Line as China's maritime claim in this arbitration. Figure 3.4 of the Philippines' Memorial (see Fig. 7 of this paper), entitled "The Encroachment of China's Nine-dash Line into the Philippines' EEZ and Continental Shelf",¹⁵⁰ has something very similar to the U-Shaped Line. We can take a close look at the dotted lines between Taiwan and the Philippines on the one hand, and between the Philippines and Indonesia, on the other hand. The common name given by the Philippines for these two dotted lines is "Provisional Equidistance Lines". It is well-

150 Figure 3.4 is placed after p. 46 of the Philippines' Memorial.

known that no Philippine-Taiwan and Philippine-Indonesia maritime boundaries had been concluded before the Philippines' Memorial was submitted (31 March 2014). So what such dotted lines represent are definitely not the "settled" maritime boundaries, but the provisional ones unilaterally proposed by the Philippines during the negotiations. It is safe to say that such provisional lines will have to be deleted once such maritime boundary lines are drawn by the agreements between the parties concerned.¹⁵¹ Such practice of the Philippines confirms the nature of the U-Shaped Line being understandable and opposable to the Philippines as a political position subject to change in sea boundary delimitation negotiations. Under such a circumstance, there cannot be any Sino-Philippine legality dispute for China's use of the broken or dashed line that is also being used by the Philippines.

In other words, the fact that the Philippines is opposed to China's use of the U-Shaped Line does not create a Sino-Philippine legal dispute. It is because what is disputed by the Philippines cannot be the lawfulness of China's practice that is shared by the Philippines. Clearly, the only Sino-Philippine dispute left regarding China's use of the U-Shaped Line as a political position in boundary negotiations is caused by Philippines' rejection of such China's position as, perhaps, too intrusive to accept.

3. For Submission 11: Article 8(c)-(d) of Convention on Biological Diversity ("CBD") Invoked by the Philippines Imposes No Legal Obligations

In Section II-C-3 of Chapter 6 of Philippines' Memorial the Philippines argues that China has violated the 1992 CBD.¹⁵² Professor Boyle, on behalf of the Philippines, astonishingly said in the Hearing that the Philippines did not want to pursue such a position.¹⁵³ Irrespective of such difference between Philippines' Memorial and Oral Arguments, it is important to review the provisions of CBD cited by the Memorial. The provisions identified by the Philippines as having been

151 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 196-197.

152 The text of Convention on Biological Diversity (CBD), at <http://www.cbd.int/convention/text/>, 14 March 2015.

153 First-round submissions by Professor Boyle, in *Transcripts of the Hearings of 8 July 2015*, p. 97. Also see Second-round submissions by Professor Boyle, in *Transcripts of the Hearing of 13 July 2015*, pp. 42-44, 46.

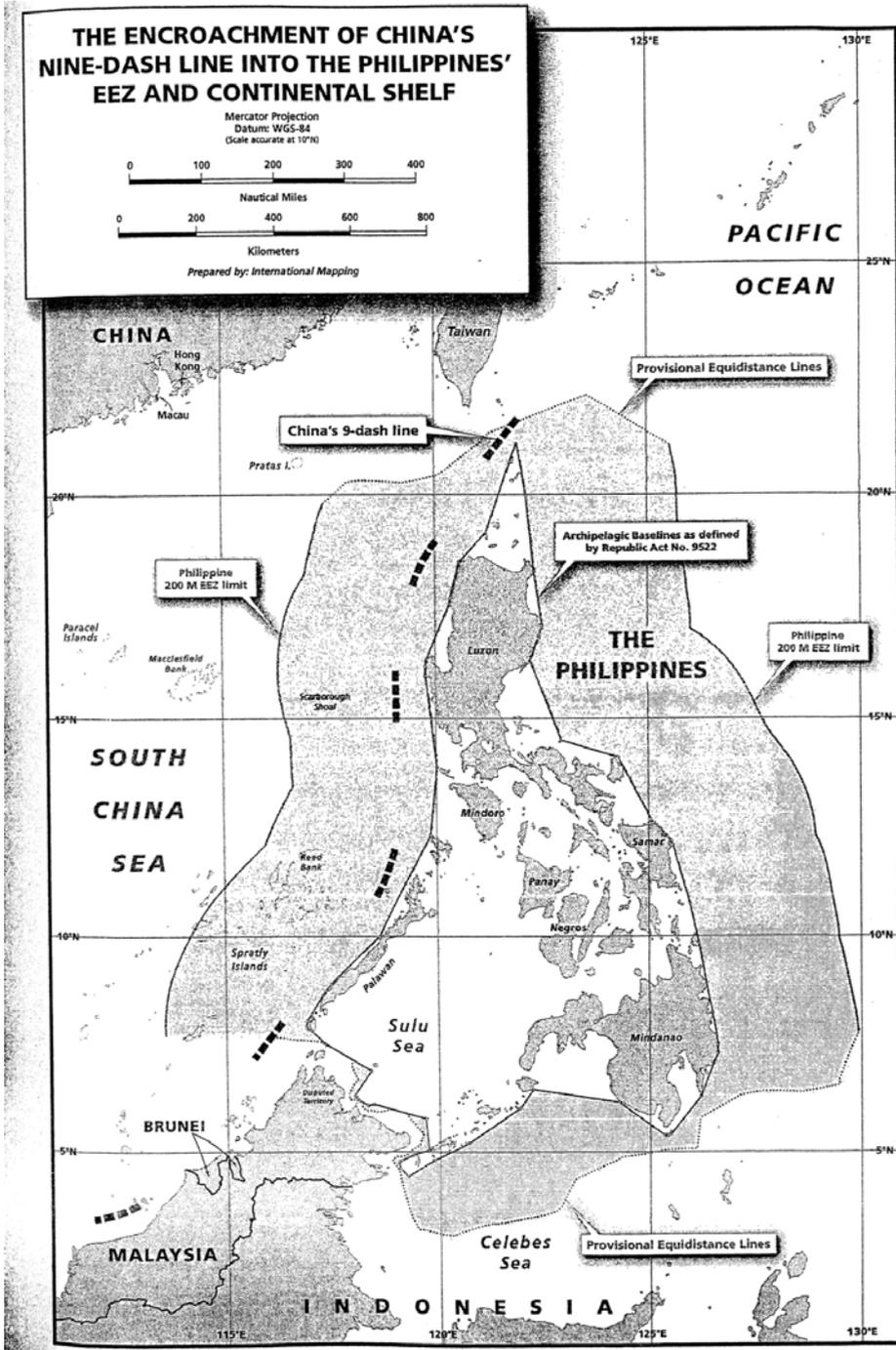


Fig. 7 Philippines' Maritime Boundary from Figure 3.4 of Its Memorial, Also Using Dotted-Line Method (i.e. Provisional Equidistance Lines) to the North and South of the Philippines

violated by China are Article 8(c)~(d),¹⁵⁴ which reads:

Each Contracting Party shall, as far as possible and as appropriate: ...

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

*(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.*¹⁵⁵

Importantly, the ambiguous wording “as far as possible and as appropriate” and “promote” demonstrates the hortative nature of these provisions. They lack clear standards to judge when any legal obligations will be created, what obligations would be produced, or how these obligations will be violated. In other words, no strict legal obligation has been imposed by these provisions for the Contracting Party to comply with. Therefore, it is hard to tell when a violation of these two provisions will occur by China or any other Contracting Party to the CBD, not to mention that it is difficult to know how China could avoid violating such obligations in the first place. Perhaps this is the reason for Professor Boyle to give up the position said in Philippines’ Memorial that China violated Article 8(c)~(d) of CBD.¹⁵⁶ To be noted, for another possible reason for such abandonment, see Section III-D-1 of this paper.

C. Lack of Dispute concerning the Interpretation or Application of UNCLOS

Assuming the matters presented to the Tribunal are considered sufficient to create legal disputes, additional problems may preclude these disputes from being characterized as concerning the interpretation or application of UNCLOS. This Section provides the information to prove that the real issues underlying Submissions 3~7 and 10~13 are not concerning the interpretation or application of

154 Philippines’ Memorial, p. 192. paras. 6.85 & 6.87, footnotes 732 & 736.

155 The text of CBD, at <http://www.cbd.int/convention/articles/default.shtml?a=cbd-08>, 14 March 2015.

156 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 271~272.

UNCLOS. These Submissions should be deemed inadmissible by the Tribunal.

To be noted at the outset, the Tribunal has attached importance to the *Mauritius v U.K.* and posed questions to the Philippines' legal team during the July Hearing.¹⁵⁷ Somehow, all the remarks made by Philippines' counsel¹⁵⁸ ignored the most important and central issue of the *Mauritius v U.K.*, which is both relevant and applicable to the present case. Paragraphs 203~211 of the award on *Mauritius v U.K.* provide the Tribunal's decision and reasoning to the First Submission of Mauritius. Four relevant and applicable rules are declared by the Annex VII Tribunal in this regard, as follows.

(1) When the Parties disagree as to how the disputes presented to the Tribunal should be characterized,¹⁵⁹ the Tribunal, while giving particular attention to the formulation of the dispute chosen by the Applicant, must¹⁶⁰ determine this "characterization dispute" through finding out the real issue in the case and the

157 On the last day of the July Hearing, Professor Sands answered Question 2 (to elaborate on the relevance of the reference to the *Mauritius v United Kingdom* decision to the present case). See Second-round submissions by Professor Sands, in Transcripts of the Hearing on 13 July 2015, pp. 24~25.

158 Three Philippines' counsels, namely, Professor Sands, Mr. Martin, and Professor Boyle, have discussed the *Mauritius v U.K.* during the July Hearing. See First-round submissions by Professor Sands, in Transcripts of the Hearing on 7 July 2015, pp. 73~78; First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, pp. 26~28, 33~35; First-round submissions by Professor Boyle, in Transcripts of the Hearing on 8 July 2015, pp. 96~98, 101, 104~107; First-round submissions by Professor Sands, in Transcripts of the Hearing on 8 July 2015, pp. 141~142; Second-round submissions by Professor Sands, in Transcripts of the Hearing on 13 July 2015, p. 24; and Second-round submissions by Mr. Martin, in Transcripts of the Hearing on 13 July 2015, p. 29.

159 Chagos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 164.

160 Chagos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 229. "229. The Tribunal agrees with Mauritius that the issues presented by its First and Second Submissions are distinct, but is nevertheless of the view that Mauritius' Second Submission must be viewed against the backdrop of the Parties' dispute regarding sovereignty over the Chagos Archipelago. Although in its Second Submission Mauritius asks only for the Tribunal to determine that it has rights as 'a coastal State', the Tribunal considers that such a determination would effectively constitute a finding that the United Kingdom is less than fully sovereign over the Chagos Archipelago. As with Mauritius' First Submission, the Tribunal evaluates where the weight of the Parties' dispute lies. In carrying out this task, the Tribunal does not consider that its role is limited to parsing the precise wording chosen by Mauritius in formulating its submission. On the contrary, the Tribunal is entitled, and indeed obliged, to consider the context of the submission and the manner in which it has been presented in order to establish the dispute actually separating the Parties. Again, the Tribunal finds that the Parties' underlying dispute regarding sovereignty over the Archipelago is predominant. The question of the 'coastal State'—now presented in terms of the 'attributes of a coastal State'—remains merely an aspect of this larger dispute."

object of the claim.¹⁶¹ Such determination must be done on an objective basis through examining the position of both Parties.¹⁶² During this process the “record” plays a role of indicating the real nature of dispute dividing the Parties;¹⁶³ (2) It is possible for the two Parties to have multi-layered disputes, while only part of them are submitted for judicial resolution. For the purpose of characterizing the

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- 161 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 230. “230. The Tribunal accepts that a dispute exists between the Parties concerning the manner in which the MPA was declared. Nevertheless, the Tribunal is of the view that the true ‘object of the claim’ (*Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30) in Mauritius’ Second Submission is to bolster Mauritius’ claim to sovereignty over the Chagos Archipelago. The Tribunal also notes that the relief sought by Mauritius in its First and Second Submissions is the same: a declaration that the United Kingdom was not entitled to declare the MPA. Accordingly, and notwithstanding the difference in presentation, the Tribunal concludes that Mauritius’ Second Submission is properly characterized as relating to the same dispute in respect of land sovereignty over the Chagos Archipelago as Mauritius’ First Submission. The Tribunal therefore finds itself without jurisdiction to address Mauritius’ Second Submission.”
- 162 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 208. “Ultimately, it is for the Tribunal itself ‘while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties’ (*Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 30) and in the process ‘to isolate the real issue in the case and to identify the object of the claim’ (*Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30).”
- 163 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 209. “In the Tribunal’s view, the record (see paragraphs 101–107 above) clearly indicates that a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago. Since at least 1980, Mauritius has asserted its sovereignty over the Chagos Archipelago in a variety of fora, including in bilateral communications with the United Kingdom and in statements to the United Nations. Mauritius has also challenged the circumstances by which the Archipelago was detached; questioned the validity of the Mauritius Council of Ministers’ approval of that decision; enshrined a claim to sovereignty over the Archipelago in its Constitution and legislation; and declared its own exclusive economic zone in the surrounding waters. Finally, the pleadings in these proceedings are replete with assertions of Mauritian sovereignty over the Chagos Archipelago.”

dispute, the Tribunal must evaluate where the relative weight of the dispute lies.¹⁶⁴ The Tribunal must decide which dispute (as ancillary dispute) is only an aspect of a larger dispute (as the real dispute).¹⁶⁵

(3) If the “real issues in the case” or “object of the claims” do not relate to the interpretation or application of UNCLOS (e.g. territorial dispute in *Mauritius v. U.K.*), the Annex VII Tribunal is powerless to settle such a dispute, even if the ancillary issue to such a dispute relates to the interpretation or application of UNCLOS.¹⁶⁶

(4) However, if the territorial issues are neither the real issues nor the object of the claim, but are ancillary to a dispute concerning the interpretation or application

164 Chagos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), paras. 210~211. “210. In the Tribunal’s view, however, a dispute also exists between the Parties with respect to the manner in which the MPA was declared and the implications of the MPA for the Lancaster House Undertakings, made by the United Kingdom in connection with the detachment of the Archipelago. This dispute is distinct from the matter of sovereignty and will be the subject of further consideration in connection with Mauritius’ Fourth Submission. 211. Finally, the Parties clearly differ regarding the identity of the ‘coastal State’. For the purpose of characterizing the Parties’ dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties’ dispute primarily a matter of the interpretation and application of the term ‘coastal State’, with the issue of sovereignty forming one aspect of a larger question? Or does the Parties’ dispute primarily concern sovereignty, with the United Kingdom’s actions as a ‘coastal State’ merely representing a manifestation of that dispute? In the Tribunal’s view, this question all but answers itself. There is an extensive record, extending across a range of fora and instruments, documenting the Parties’ dispute over sovereignty. In contrast, prior to the initiation of these proceedings, there is scant evidence that Mauritius was specifically concerned with the United Kingdom’s implementation of the Convention on behalf of the BIOT ...”

165 Chagos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 212. “Accordingly, the Tribunal concludes that the Parties’ dispute with respect to Mauritius’ First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago. The Parties’ differing views on the ‘coastal State’ for the purposes of the Convention are simply one aspect of this larger dispute.”

166 Chagos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 220. “As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (*see Certain German Interests in Polish Upper Silesia, Preliminary Objections, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 4 at p. 18*). Where the ‘real issue in the case’ and the “object of the claim” (*Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30*) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).”

of UNCLOS,¹⁶⁷ such territorial issues may be addressed as a minor issue or incidental issue by the Tribunal.¹⁶⁸

As the following sub-sections will prove, the real issues underlying Submissions 3~7, 10~11 and 13 are all territorial disputes between China and the Philippines, which are not concerning the interpretation or application of UNCLOS. Based on the foregoing ruling of *Mauritius v. U.K.*, the Tribunal should declare these Submissions as inadmissible. Even assuming those territorial issues involved in these Submissions are not deemed the real issues but ancillary ones, the Tribunal still will not be given jurisdiction over such territorial disputes by the fact that the “real disputes” formally submitted by these Submissions relate to the interpretation or application of UNCLOS. The reason is that in the South China Sea Arbitration, the Philippines has made it clear that it is not presenting any case that needs the Tribunal to directly or indirectly address the Sino-Philippine territorial disputes as ancillary issues,¹⁶⁹ while China repeatedly refused to have its territorial disputes settled by third party judicial body.

Therefore, the Sino-Philippine territorial issues, even if treated as an ancillary issue, may still be untouchable by the Tribunal, the jurisdiction of which has been deprived due to withholding of such jurisdiction by the Parties. Most importantly, as indicated by Section II-B of this paper such territorial disputes are the core issues underlying all the Philippines’ Submissions that are merely “ancillary disputes” or “surface disputes” (i.e. consequences of the lack of settlement of the core disputes), the fact that such core disputes may not be settled by the Tribunal leads to the conclusion that the “ancillary and surface” disputes built on such core disputes should still be deemed inadmissible by the Tribunal.

1. For Submissions 3~7: Territorial Sovereignty Dispute as the Real Dispute

For Submissions 3~7, the Philippines’ lawyers argue that these disputes are purely concerning the interpretation or application of Articles 13 and 121

167 Chargos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 220.

168 Chargos Marine Protected Area Arbitration (*Mauritius v United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 221. “The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention. That, however, is not this case, and the Tribunal therefore has no need to rule upon the issue. The Parties’ dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention. Accordingly, the Tribunal finds itself without jurisdiction to address Mauritius’ First Submission.”

169 See *supra* notes 57~59 and corresponding text.

of UNCLOS with no need to address territorial sovereignty issues, as these submissions only request the Tribunal to decide the legal status of nine China-occupied maritime features and the maritime entitlements these features may generate.¹⁷⁰ However, these Submissions are built upon a premise that all the UNCLOS-consistent maritime entitlements China “may claim” in the SCS should be limited to those generated by the maritime features currently occupied by China.¹⁷¹ Foreign-occupied maritime features claimed by China do not count. The underlying rationale is that in terms of Sino-Philippine territorial sovereign dispute in the SCS, China is a new comer without “original titles”.¹⁷²

As the ICJ in *FRG v. Iceland* said, the dispute before the Court must be considered in all its aspects.¹⁷³ One question arises. Is China a new comer in the Sino-Philippine territorial disputes in the SCS? The answer is no, due to much earlier and more comprehensive territorial claims China has made in SCS. This has been explained in detail by the author’s article published in *China Oceans Law Review*.¹⁷⁴

China’s older and wider territorial claims in SCS serve to put in perspective the four Philippines’ military invasions in 1970, 1971, 1978, and 1980 which seized from China eight maritime features in the KIG,¹⁷⁵ as part of the Spratly Islands Group. They are Nanshan Island, Loaita Island, Thitu Island, West York

170 See First-round submissions by Mr. Reichler, in Transcripts of the Hearing on 7 July 2015, pp. 46~47. Also see First-round submissions by Professor Sands, in Transcripts of the Hearing on 7 July 2015, p. 76.

171 See Philippines’ Memorial, paras. 5.96, 5.137, and Submissions 3~7, pp. 142, 159, 271.

172 For the concept of original title, see *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, *I.C.J. Reports*, 2008, p. 12, paras. 37~38.

173 *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *I.C.J. Reports*, 1974, p. 190, para. 40.

174 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 210~217.

175 Kalayaan Island Group (KIG), consisting of 53 maritime features within Spratly Islands Group, became part of Philippines territories on 11 June 1978 in accordance with Presidential Order No. 1596. KIG is administered under Palawan. See Map of the Republic of the Philippines, No. 200, Edition 1, 30 June 1978.

Island, Northeast Cay, Flat Island, Loaita Nan, and Commodore Reef (Fig. 8).¹⁷⁶ Each and every one of them has been claimed by China since 1930s till now. To be added, the 1983 List of Partial Standard Names for China's Islands in South China Sea produced by the PRC Government also covers each of these features.¹⁷⁷ Such Philippines' military actions from 1970s to 1980s ignored by both the Memorial and the July Hearings warrant special attention of the Tribunal.¹⁷⁸ With such territorial disputes in mind, it will be fair and imperative for the Tribunal to check all the maritime features in the Spratly Islands Group (despite Philippines' refusal to cooperate) when assessing China's maritime entitlements in the SCS, instead of looking at those nine features currently occupied by China.¹⁷⁹

As the Tribunal is not authorized to settle territorial disputes,¹⁸⁰ its award shall refrain from affecting the legal positions of either Party concerning its respective territorial claims. The scope of the Sino-Philippine territorial disputes in the SCS covers all the maritime features within the KIG and Scarborough Shoal. However, the Philippines only requests the Tribunal to look at those nine China-occupied

176 Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective*, Oxford: Chandos Publishing, 2013, p. 132. Also see the position paper released by spokesperson Zhang Hua from Chinese Embassy in Manila on 3 April 2014, entitled "China's Position Paper on Sea Disputes with Philippines", at <http://www.philstar.com/disputed-seas/2014/04/03/1308385/chinas-position-paper-sea-disputes-philippines>, 14 March 2015.

177 The name-list was said to be only part of the complete names of maritime features China claims in SCS. It appeared on page A4 of *People's Daily* on 25 April 1983. It was reproduced on the website of <http://www.unanhai.com/nhzddm.htm>.

178 If the Tribunal overlooks such profound history of territorial disputes, it will be very easy for the Tribunal to accept the points made by Professor Oxman on 8 July 2015, "China's expansive reading of the scope of the exception to compulsory jurisdiction would undermine the effectiveness of compulsory jurisdiction precisely in that context. There are many places in the world with actual or potential delimitation disputes. On China's reading, Article 298 would preclude challenges to unlawful assertions of maritime jurisdiction on the grounds that such challenges come within the orbit of the exception for delimitation disputes. All a [S]tate need do to insulate its maritime claims from arbitration or adjudication initiated by a neighbouring coastal [S]tate would be to assert claims that overlap the entitlements of its neighbour, to file a declaration under Article 298, and to then argue that the dispute is one 'relating to sea boundary delimitations', even if Articles 15, 74 and 83 do not have to be interpreted and applied. As is evident in this very case, that might be done at any time. But the premise is plainly wrong." See First-round submissions by Professor Oxman, in Transcripts of the Hearing on 8 July 2015, pp. 54-55.

179 See Submissions 3-7 of the Philippines' Memorial, p. 271. However, Philippines' counsel simply refused to cooperate on this critical matter. *Supra* note 109. It is not at all unmanageable or unreasonable to look at those 12-15 islands in the Spratly Islands Group indicated in Table 1 and the factual situation of Itu Aba released by Taiwan.

180 Notification, p. 3, para. 7. Also see Philippines' Memorial, p. 271.

features for assessing the scope of China's maritime entitlements in the SCS.¹⁸¹ It is based on a factually and legally groundless premise that China's territorial claims over numerous foreign-occupied maritime features in the Spratly Islands Group should be dismissed or ignored by the Tribunal as non-existent. Irrespective of the disclaimer made by Philippines' counsel,¹⁸² it is not what the Philippines submitted that will touch upon territorial disputes. Instead, what is not directly submitted by the Philippines can indirectly serve to settle Philippines' territorial disputes with

181 See First-round submissions by Mr. Reichler, Transcript of the Hearing on 7 July 2015, pp. 44–45. “Mr President, the dispute between the parties over their respective maritime entitlements is just as apparent in the southern half of the South China Sea. Here, there are two different disputes over entitlements. The Philippines claims a 200-mile EEZ and continental shelf from Palawan. China claims a 200-mile entitlement for the Spratly Islands, over all of which it claims sovereignty. As you can see, almost all of the Philippines' entitlement in this part of the sea is overlapped by China's 200-mile claim in regard to the Spratlys. The Philippines disputes China's claim to a 200-mile entitlement for the Spratly features because, in our view, none of them is entitled to an EEZ or continental shelf under the Convention.”

182 Based on these reasons, it is unjustified for Professor Sands to say on 7 and 13 July 2015 that “[t]here is nothing that you have read in the pleadings to address the question of which [S]tate does or does not have sovereignty over a particular insular feature, and the Tribunal is not asked to – and does not need to – make any determination as to sovereignty over any island or any rock in order to determine the maritime entitlements of that feature ... Unlike Mauritius's first submission, the Philippines' claim is concerned solely with the interpretation and application of the Convention. In this way, the Philippines' case is directly analogous to Mauritius's second submission, and that submission was framed in the following way by Mauritius: ‘Independently of the question of sovereignty, the ‘MPA’ is fundamentally incompatible with the rights and obligations provided for by the Convention. This means that, even if the UK were entitled in principle to exercise the rights of a coastal State, *quod non*, the purported establishment of the ‘MPA’ is unlawful under the Convention.’ In its award of 18th March this year, the tribunal, as I mentioned, found unanimously that it had jurisdiction over this part of Mauritius's case. And we say that, in exactly the same way, this Tribunal has jurisdiction over the entirety of the Philippines' claims, which are directly analogous ... The question therefore arises: what is the dispute between the parties? In our submission, it concerns the interpretation and application of various provisions of the Convention, but in particular Articles 13 and 121, as well as Articles 56, 57, 76 and 77. In order to interpret and apply those provisions, the Tribunal is bound to ask itself another question: do we have to make any prior determination as to an issue of sovereignty? And the answer to that question, we say, is absolutely plain: no, you do not. You are free and able to interpret and apply those provisions to the facts of this case, without having to determine which [S]tate, if any, has sovereignty over any disputed insular feature. [7 July]” “With respect to Question 2, the Tribunal has invited us to elaborate on the relevance of the reference to the *Mauritius v. United Kingdom* decision to the present case, and second, the *Mauritius v. United Kingdom* case did raise a question about which [S]tate had sovereignty over land territory, while the present case very obviously does not raise such a question. [13 July]” See First-round submissions and Second-round submissions by Professor Sands, in Transcripts of the Hearing on 7 July 2015, pp. 75–78, Transcripts of the Hearing on 13 July 2015, p. 24.

China in Philippines' favor.

In its Memorial, the Philippines did identify three biggest maritime features in the KIG (i.e. Itu Aba Island, Thitu Island, and West York Island) while considering them only rocks under Article 121(3) of UNCLOS. However, Philippines' 2011 NV and its Supreme Court Ruling (see Section III-A-6 of this paper) have defeated this position, not to mention that more maritime features located in KIG or Spratly Islands Group have been widely considered as islands (see Section III-A-4). Given these facts, Philippines' Memorial and its oral statements at the July Hearing still turn a blind eye on these remaining features.

As a result, Philippines' competitive territorial claims will be strengthened massively through this arbitration. The formulation of Submissions 3~7, which deliberately omits all foreign-occupied maritime features in the Spratly Islands Group, reflects the Philippines' goal pursued secretly on its "real disputes" with China, i.e., territorial disputes. To be noted, the Annex VII Tribunal in *Mauritius v U.K.* ruled that

*Although in its Second Submission Mauritius asks only for the Tribunal to determine that it has rights as "a coastal State", the Tribunal considers that such a determination would effectively constitute a finding that the United Kingdom is less than fully sovereign over the Chagos Archipelago.*¹⁸³

A fortiori, Philippines' Submissions 3~7 of South China Sea Arbitration are requesting this Tribunal to make a decision which in effect serves as a declaration that China is not sovereign at all over all the foreign-occupied maritime features in the Spratly Islands Group (including KIG). The true object of the Philippines' claim is obviously territorial.¹⁸⁴ To wit, these Submissions in effect serve to bolster Philippines' claim to sovereignty over those KIG maritime features not occupied by China.

As territorial disputes are not concerning the interpretation or application of UNCLOS, the Tribunal has no power to entertain Submissions 3~7, the real disputes of which are territorial ones. Assuming the Tribunal chooses to take jurisdiction over these Submissions, the acceptance of the premise underlying such

183 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 229.

184 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 230.

Submissions will constitute an *ultra vires* decision. That is to say, such acceptance presupposes Tribunal’s dismissal of China’s territorial claims over all foreign-occupied maritime features within Spratly Islands Group. This is tantamount to an indirect resolution of the territorial disputes in Philippines’ favor.

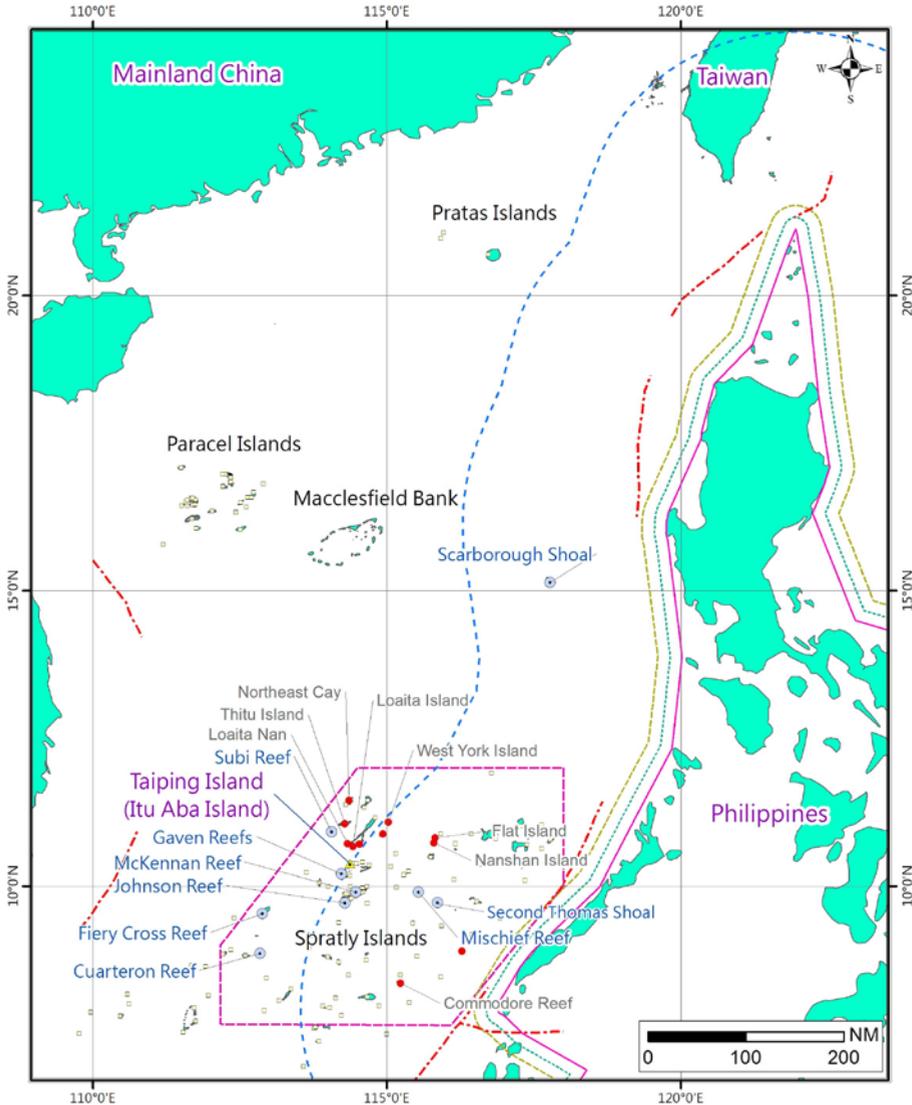


Fig. 8 Locations of 8 and 9 Maritime Features Occupied by the Philippines and China Respectively¹⁸⁵

185 The red dots are the 8 maritime features occupied by the Philippines. The frog-egg like points are the 9 maritime features occupied by Chinese Mainland and identified by the Philippines’ Memorial. Taiping Island (Itu Aba) is occupied by Taiwan. This map is drawn by Mr. Jui-Hsien Huang for the author.

2. For Submission 10: No Dispute Exists concerning the Interpretation or Application of UNCLOS

In Submission 10, the Philippines requests the Tribunal to adjudge and declare that “China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal”. It is submitted that such claim fails to bring any dispute concerning the interpretation or application of UNCLOS and, hence, should be considered as inadmissible, for the following reasons.

Firstly, Paragraphs 6.39~6.42 of the Memorial provide that China since April 2012 started to exercise control over Scarborough Shoal and stopped Philippine fishermen from pursuing their traditional fishing activities in the adjacent water thereto. The last sentence of Paragraph 6.42 reads “these acts violate China’s obligations under the Convention.” However, as said in Paragraph 6.40, “the Philippines wishes to make clear that it does not here make a claim to ‘historic rights’ that were, as described in Chapter 4, superseded by UNCLOS.” Then in Paragraph 6.43 the Philippines moves on by saying “[u]nder Article 279 of UNCLOS, China and the Philippines are required to ‘settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations’”. Clearly, the Philippines argues that China fails to comply with the requirements under Article 279.¹⁸⁶

The problem is, to apply Article 279 in the present case there must be a dispute between China and the Philippines concerning the interpretation or application of a separate article of UNCLOS. Without such condition Article 279 can open the door for any dispute (e.g. trade dispute under WTO legal regime) to be brought to and settled by the procedures under Part XV of UNCLOS.

What is exactly the provision of UNCLOS whose interpretation or application has been disputed by China and the Philippines here? No answer can be found in Section I-B of Chapter 6 of the Memorial or in the oral statements of the Philippines’ counsel in July Hearings. The only thing close to this is in Paragraph 6.45 of Philippines’ Memorial, which reads:

186 Article 279 (Obligation to settle disputes by peaceful means) of UNCLOS provides: “States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.”

*China's actions have also unlawfully endangered justice by exacerbating the dispute between it and the Philippines concerning their maritime rights and entitlements in the vicinity of Scarborough Shoal. This is also inconsistent with China's obligation (and the Philippines' right) under Article 279 to settle the dispute by peaceful means, a long-recognized corollary of which is the prohibition of any acts that might aggravate or extend the dispute.*¹⁸⁷

Summing up, apart from “justice” that is far from an issue concerning the interpretation or application of UNCLOS, the Philippines is only invoking Article 279 to build up a dispute concerning interpretation or application of UNCLOS between China and the Philippines. It would be fair to conclude that, before any separate article of UNCLOS can be invoked by the Philippines, Article 279 remains inapplicable.

Secondly, as the Tribunal has no power to settle Sino-Philippine territorial disputes in SCS, the Tribunal may not deny the territorial claims of China over Scarborough Shoal. Thus, the Tribunal is also powerless to deny that the 12 NM water surrounding Scarborough Shoal constitutes China's territorial sea. As UNCLOS contains no provisions that impose specific and clear obligations on the coastal State concerning how to conserve and manage living natural sources in its territorial water, China's prevention of Philippines' fishing vessels from harvesting living resources in this water cannot be an issue of interpretation or application of UNCLOS, apart from the UNCLOS rules governing innocent passage. However, the Philippines does not invoke the rules concerning innocent passage in presenting its Submission 10, so as to prove the existence of a dispute concerning interpretation or application of UNCLOS and to make Article 279 applicable. This inaction confirms the position that the “dispute” to be created by Submission 10 is far from concerning interpretation or application of UNCLOS.

Thirdly, the traditional fishing rights or historic fishing rights, if any, must exist in territorial water of another State, according to Section II-A-1 of Chapter 4 of Philippines' Memorial.¹⁸⁸ However, the Philippines itself claims sovereignty over Scarborough Shoal and 12 NM waters adjacent thereto. Such territorial water claim is irreconcilable with its traditional fishing right claim in the same water.

187 Philippines' Memorial, p. 173.

188 Philippines' Memorial, pp. 84-91, paras. 4.38-4.54.

To be noted, during the July Hearing Professor Sands invoked Article 2(3) of UNCLOS and the award of *Mauritius v. U.K.* to the effect that China is required to act in good faith in its relations with the Philippines in the territorial water surrounding Scarborough Shoal. In other words, Philippines' Submission 10 is treating China as a coastal State in that water.¹⁸⁹ This conflict in legal positions may result in defeating Submission 10. Besides, the Mauritius-U.K. relation concerning Chagos Archipelagos is totally different from the Sino-Philippine relations concerning Scarborough Shoal, as nobody will expect what happened in April 2012 in Scarborough Shoal to occur in Chagos Archipelago. This makes such an analogy unreasonable. In short, before the Philippines formally abandons its claim of territorial sovereignty over the area concerned, its traditional fishing can hardly exist in the same area in the first place. Consequently, it remains doubtful whether any legality dispute can exist concerning China's interference with the exercise by the Philippine fishermen of their so-called traditional fishing right in the "Philippines' territorial water".

Fourthly, the core, primary, real and predominant¹⁹⁰ issue underlying the maritime confrontation indicated by Submission 10 in the territorial water surrounding Scarborough Shoal is the Sino-Philippine competition of territorial title over Scarborough Shoal.¹⁹¹ Before resolving this territorial dispute, as the

189 See First-round submissions by Professor Sands, in Transcripts of the Hearing on 8 July 2015, pp. 141~142. "The Philippines' tenth submission is that: 'China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at or near Scarborough Shoal ...' This legal dispute is premised on fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal. The dispute arises out of Article 2(3) of the Convention, which 'contains an obligation on States to exercise their sovereignty subject to 'other rules of international law'', which, we say, in turn require China to act in good faith in its relations with the Philippines, and to respect traditional fishing rights of Filipino fishermen at Scarborough Shoal."

190 Chagos Marine Protected Area Arbitration (*Mauritius v. United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 229.

191 See China's Position Paper, paras. 6, 49. Also see First-round submissions by Mr. Martin, in Transcripts of the Hearing on 8 July 2015, p. 30, especially footnote 36 on that page. Also see Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, pp. 15~16. As said by Mr. Reichler, "Submission 10 concerns China's denial of traditional fishing rights at and within 12 miles of Scarborough Shoal in and after 2012. The main sources are two Chinese statements. One, 24th May 2012: 'Philippines should withdraw its vessels from Huangyan Island waters.' Huangyan Island is China's name for Scarborough Shoal. And two, 26th July 2012: 'Philippine vessels, including fishing vessels, should not return to the area ... The two sides can talk about the possibility of Philippine fishing vessels in the area, under the condition that Chinese sovereignty is guaranteed.' That has remained China's position."

real dispute, it is pointless to examine the legality of (1) the alleged Philippines' traditional fishing rights in this water, and (2) China's interference with such fishing rights. The reason is simple. Should the Philippines win the territorial title for Scarborough Shoal after settling such a territorial dispute with China, it would be unnecessary for this Tribunal to address the Philippines' traditional fishing rights in this water, as this issue becomes moot and the Philippines' fishermen can harvest in that water without legal problems. However, this Tribunal is powerless to resolve such territorial dispute (not concerning the interpretation or application of UNCLOS) while giving a chance to the Philippines for winning the territorial dispute.

More importantly, only after the Philippines (1) loses such territorial title when such territorial dispute is settled, or (2) formally abandons the territorial claim over Scarborough Shoal, will it make sense for this Tribunal to address the issue whether the Philippines has nevertheless acquired any traditional fishing rights in China's territorial water and whether China's interference violated international law. However, the Tribunal has no role to play for the first condition, while the second condition cannot be fulfilled by the Philippines. This is strengthened by the relevant ruling of *Mauritius v. U.K.* that the Tribunal has no jurisdiction over a dispute, the real issue (i.e. territorial dispute) of which is not concerning the interpretation or application of UNCLOS.¹⁹² Even assuming such underlying territorial issue is treated as only an ancillary issue, the Tribunal is still powerless to settle it, due to the deprivation of its jurisdiction by both Parties' withholding of jurisdiction.

To conclude, the Philippines has given a mission impossible to the Tribunal to address Submission 10. The Tribunal first has to settle a territorial issue that is not concerning the interpretation or application of UNCLOS. After overcoming such an impossible hurdle, the Tribunal has to announce that the Philippines has lost in that case so as to make it possible for the Philippines' traditional fishing right to exist in China's territorial water surrounding Scarborough Shoal. Then again, the Tribunal will still find it hard to address this issue of traditional fishing right, as such right is not concerning the interpretation or application of UNCLOS. Summing up, due to lots of issues brought to the Tribunal totally not concerning the interpretation or application of UNCLOS, Submission 10 should be considered inadmissible.

192 Chagos Marine Protected Area Arbitration (*Mauritius v. United Kingdom*), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 220.

3. For Submissions 11 and 13: Territorial Sovereignty Dispute as the Real Dispute

Submissions 11 and 13 of the Philippines complained about China's certain actions and omissions occurring in territorial water surrounding Scarborough Shoal: first, China has violated its obligations under UNCLOS to protect and preserve the marine environment there (Submission 11); and second, China has breached its obligation under UNCLOS by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in that water (Submission 13). It is submitted that the disputes brought by the Philippines are all symptoms or consequences of the unsettled core territorial dispute. In other words, the real dispute as reflected by the confrontations stated in Submissions 11 and 13 is a territorial one, which is not concerning the interpretation or application of UNCLOS. Below is the detailed reasoning.

Firstly, regarding Submission 11, it is alleged by the Philippines that, in the territorial water of Scarborough Shoal the Philippines' law enforcement vessels discovered illegal poaching resulting in destruction of marine environment by Chinese fishermen. However, under the protection of China's law enforcement vessels in that water, such illegal fishing activities have gone unpunished. With respect to Submission 13, the Philippines complained about two series of dangerous actions conducted by China's law enforcement vessels in that water against Philippines' law enforcement vessels in April and May of 2012. What China's government vessels did was to obstruct the navigation of their Philippine counterparts, causing near-collision at sea. It is alleged by the Philippines that China thus violated Articles 21(4), 24, and 94 of UNCLOS, as well as the 1972 Convention on the International Regulations for Preventing Collisions at Sea (hereinafter "COLREGS").

Secondly, the Philippine side of the story goes like this. In that water the Philippines is entitled to enforce its domestic laws against illegal fishing activities of Chinese vessels because territorial sovereignty over Scarborough Shoal belongs to the Philippines. Chinese fishing vessels in that water only have innocent passage which excludes the right to fish. The fishing activities engaged by them are already illegal. *A fortiori*, the Philippines has even stronger justification to punish Chinese fishing activities which destroyed Philippines' marine environment. As to Chinese law enforcement vessels, the only right they have there is innocent passage, which excludes the right to obstruct Philippines' law enforcement activities. Therefore, it is more than legitimate for the Philippines' law enforcement vessels to complain

(and even counter) against such China's obstructive activities.

For the near-collision incident caused by China's government vessels, the Philippines will contend that since the law enforcement vessels of both Parties encounter in the Philippines' territorial water, the only right China's law enforcement vessels have is innocent passage. In its own territorial water, the Philippines' law enforcement vessels can exercise sovereignty. What has been done in Submission 13 by the Philippines' vessels is legal under both national law and international law. It is China's law enforcement vessels that violated the rule of innocent passage by obstructing the navigation of their Philippines' counterpart. There is every reason for the Philippines to complain and counter against China for such obstructive activities.

Thirdly, China would have its story as follows. The water surrounding Scarborough Shoal is China's territorial water, as China enjoys territorial sovereignty over Scarborough Shoal which this Tribunal may not dismiss. It is lawful for Chinese fishing vessels to harvest the living natural resources in China's own territorial waters. As to Philippines' law enforcement vessels, the only right they have there is innocent passage, which excludes the activities of enforcing Philippines' (foreign) law upon Chinese fishing vessels. It is thus reasonable for China's law enforcement vessels to consider the attempted law enforcement activities by the Philippines' vessels in China's territorial water as signifying Philippines' competitive territorial claim there, which undeniably is the national policy of the Philippines. As a Sino-Philippine territorial dispute exists over this water, it is impossible to expect China's government vessels to tolerate Philippines' law enforcement activities against Chinese fishing vessels there.

For the alleged near-collision incidents caused by China's government vessels, the incidents occurred in China's territorial water. The only right Philippines' law enforcement vessels has there is innocent passage. However, what these Philippines' law enforcement vessels have been engaging are activities prejudicial to the peace, good order or security of China, the coastal State. Such Philippines' activities have been considered by China as the threat of use of force against the sovereignty and territorial integrity of China with regard to Scarborough Shoal. Scarborough Shoal had been under illegal control by the Philippines before April 2012. From then on China regained effective control of this land territory. China is aware of Philippines' unmistakable intentions to grab this territory when possible. In this connection, China's obstructive actions against Philippines' government vessels in that water fully demonstrate the on-going territorial dispute between

these two States.¹⁹³ To answer the question posed by the Tribunal to the Philippines, the territorial issues involved here and other Philippines' Submissions are by no means minor or ancillary.¹⁹⁴ The territorial issues are in fact the primary and real disputes.

Fourthly, if we push the logic further, from Philippines' perspective, as the Tribunal has no mandate to settle territorial dispute, the Philippines' territorial claim over Scarborough Shoal shall remain intact after the award of this arbitration is issued. Winning this case or not, the legality of the above-mentioned Philippines' counter-measures against China as reflected by Submissions 11 and 13 shall remain unaffected. On the other hand, China would argue that, since this Arbitration will not affect China's territorial claims over, *inter alia*, Scarborough Shoal, the alleged China's obstructive action against Philippines' law enforcement vessels in that water indicated by these two Submissions may and will continue justifiably, no matter which Party wins the case. What have been reflected by Submissions 11 and 13 are perfectly clear. They are the consequences of the unsettled Sino-Philippine territorial dispute over the land and the territorial water of Scarborough Shoal, as the underlying real dispute that is "predominant".¹⁹⁵ The behavior of either Party has been aiming at bolstering its exclusive claim of sovereignty over Scarborough Shoal and the territorial water thereof.¹⁹⁶ Besides, such territorial

193 This is evidenced by the oral statements of Mr. Reichler on 13 July 2015. As said by Mr. Reichler, "China's opposition to the claim set forth in submission 13 is well established, *inter alia*, by an exchange of notes in April and May 2012. The Philippines' note of 30th April 2012 asserted that Chinese law enforcement vessels were threatening Philippine search and rescue vessels at Scarborough Shoal by making 'provocative and extremely dangerous manoeuvres' against them. China rejected the Philippines' claim on 25th May 2012: 'The various jurisdiction measures adopted by the Chinese government over Huangyan Island and its waters...' That's China's name for Scarborough Shoal: '... and activities by Chinese ships, including government public service ships and fishing boats, in Huangyan Island and its waters are completely within China's sovereignty.' See Second-round submissions by Mr. Reichler, in Transcripts of the Hearing on 13 July 2015, p. 19.

194 Question 6 posed by the Tribunal to the Philippines during the Hearing has been answered by Professor Sands. According to him, "[t]he Tribunal has also asked in that question whether any issues of sovereignty that may be implicated in this case can be considered 'minor issue[s] of territorial sovereignty' that fall within the Arbitral Tribunal's 'ancillary' jurisdiction." See Second-round submissions by Professor Sands, in Transcripts of the Hearing on 13 July 2014, p. 25.

195 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 229.

196 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), UNCLOS Annex VII Tribunal, Award (18 March 2015), para. 230.

dispute is the core dispute that needs to resolve before the confrontations indicated by these two Submissions can end (see conclusion of Section III-C-2 of this paper). However, such real and core (territorial) dispute is not concerning the interpretation or application of UNCLOS. It is submitted that these two Submissions, the real dispute of which is a territorial one, should be declared inadmissible by the Tribunal.

4. For Submission 11: Philippine Claims Based on Stockholm Declaration, Agenda 21, and Article 8(c)-(d) of CBD Cannot Assist in Interpreting Article 192 of UNCLOS so as to Create a Dispute concerning the Interpretation or Application of UNCLOS

For Submission 11, Philippines' Memorial cited Principle 21 of the Stockholm Declaration and Principle 17 of Agenda 21 for the purpose of interpreting Article 192 of UNCLOS.¹⁹⁷ In the July Hearing, Professor Boyle further invoked Article 8(c)-(d) of CBD as relevant rules of international law to assist in interpreting Article 192.¹⁹⁸ However, it is still hard to believe that any dispute concerning the interpretation or application of UNCLOS has been submitted this way. This has been addressed by the paper published in *China Oceans Law Review* by this author.¹⁹⁹

To begin with, Article 192²⁰⁰ is too imprecise to apply and needs other detailed provisions to substantiate its legal meaning and scope of application. Principle 21 of Stockholm Declaration²⁰¹ has been subsumed to paragraph 2 of Article 194 of

197 See Section II-C-1 of Chapter 6 of the Philippines' Memorial.

198 See First-round submissions by Professor Boyle, where he said: "we will not be alleging any separate breach of the Convention on Biological Diversity or of the UN Agreement on Straddling and Highly Migratory Fish Stocks, although it is true that both parties to this arbitration are also parties to those treaties. Our argument with respect to these agreements is simply that the Biological Diversity Convention and the Fish Stocks Agreement are 'relevant rules of international law' for the purposes of Article 31(3)(c) of the Vienna Convention on the Law of Treaties." See Transcripts of the Hearing on 8 July 2015, p. 97.

199 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 268-269.

200 Article 192 (General obligation) of UNCLOS reads: "States have the obligation to protect and preserve the marine environment."

201 Principle 21 of the 1972 Stockholm Declaration reads: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." At <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>, 14 March 2015.

UNCLOS (which is a separate rule invoked by the Philippines' Submission 11) and will be discussed in the next section. Principle 17 of Agenda 21²⁰² is a soft law and devoid of legally binding force. What is contended by the Philippines is that Principle 21 of Stockholm Declaration and Principle 17 of Agenda 21 can be used to interpret and substantiate Article 192 of UNCLOS. However, Principle 21 of Stockholm Declaration will only serve to defeat the legal arguments of the Philippines, as will be said in the next section. Principle 17 of Agenda 21, with its non-binding nature, may only weaken, instead of substantiating, Article 192. Besides, the Philippines fails to establish the linkage between such non-legally-binding and inapplicable "rules" on the one hand, and UNCLOS on the other hand, so as to present a dispute concerning the interpretation or application of UNCLOS to the Tribunal.

As to Article 8(c)~(d) of CBD, it is hard to say that these provisions can assist in interpreting Article 192 of UNCLOS in the capacity of "relevant rule of international law". As said by Section III-B-3 of this paper, Article 8(c)~(d) of CBD lack clear standards to judge when any legal obligations will be created, what obligations would be produced, or how these obligations will be violated. It is impossible for these ambiguous "rules" to play the role of substantiating Article 192 of UNCLOS that is no less ambiguous in order to make the latter applicable to the present case.

5. For Submission 11: Article 194 of UNCLOS Relied on by the Philippines Is Inapplicable

As said in the preceding section, Principle 21 of Stockholm Declaration has been used by Philippines' Memorial to assist in interpreting Article 192 of UNCLOS. However, Principle 21 has been subsumed to Article 194(2) of UNCLOS. Using Article 194(2) to define the scope of obligations imposed by Article 192 will be a good choice as the latter is too imprecise to apply. On the other hand, when using Principle 21 to interpret Article 192, the problem of linkage still needs to be addressed by the Philippines. As Article 192 is too imprecise to apply, substantiating this article by Article 194(2) which incorporates Principle 21 will be tantamount to invoking Article 194(2) against China.

It is the position of the Philippines that China violated the obligations under certain paragraphs of Article 194 to protect and preserve the marine environment

202 Agenda 21, at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, 14 March 2015. See Philippines' Memorial, p. 187, paras. 6.71~6.72.

at Scarborough Shoal and Second Thomas Shoal. Paragraphs 6.75~6.81 of the Memorial apply Article 194(1), (3), and (5) as the legal basis to establish the State responsibility of China for tolerating its fishermen who use cyanide in the waters concerned.²⁰³ However, the fundamental question is the applicability of Article 194²⁰⁴ to the alleged actions or omission of China in the first place. For the following reasons, Article 194 should be considered inapplicable to the incidents in Scarborough Shoal and Second Thomas Shoal. Consequently, the “disputes” presented by Submission 11 can hardly concern the interpretation or application of UNCLOS.

Clearly, for the purpose of Article 194(2) the “measures” China is obligated to take are confined to those necessary to ensure that activities under its jurisdiction or control are so conducted as not to cause damage by pollution to “other States and their environment”, and that pollution arising from incidents or activities

203 Philippines’ Memorial, pp. 188~190.

204 Article 194 (Measures to prevent, reduce and control pollution of the marine environment) of UNCLOS reads: “1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection. 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels; (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices; (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices. 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention. 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”

under China's jurisdiction or control does not spread "beyond the areas where they exercise sovereign rights" in accordance with UNCLOS. So far no sufficient evidence has been provided by Philippines' Memorial to demonstrate the existence of pollution on the ground. Even assuming there is any pollution in the areas concerned, the measures as defined by Article 194(2) are still inapplicable to China.

Based on previous discussions on legal status of Scarborough Shoal²⁰⁵ and Second Thomas Shoal²⁰⁶ and the waters surrounding them, none of the conditions indicated above, namely, "causing damage to other State (that is: the Philippines) and their environment" and "pollution ... spread beyond the areas where they (that is: China) exercise sovereign rights", can be fulfilled. More important is the lack of evidences detailing the "wide-spread impact" of the use of cyanide from the Memorial. Somehow the Philippines has overlooked Article 194(2), while identifying Article 194(1), (3) and (4) as legal bases to criticize China. However, for the geographic scope of application the "measures" under Article 194(1), (3) and (5) that China is required to take are all defined by Article 194(2). As Article 194(2) does not apply to the measures that China is requested to take in the "maritime areas concerned", the obligations imposed by Article 194(1), (3) and (5) are all rendered inapplicable to China. To conclude, as the legal basis, i.e. Article 194 is inapplicable to China's measures expected by the Philippines by Submission 11.

6. For Submission 11: Breaching CBD Does Not Necessarily Lead to a Violation of UNCLOS

As said by Section III-B-3 of this paper, Article 8(c)~(d) of CBD should be deemed too imprecise to apply against China in this case. However, assuming the violation of these two provisions constitutes a breach of China's legal obligations under CBD, the Philippines has not proved that such breach of obligation under CBD is equivalent to a breach of China's legal obligation under UNCLOS. Put differently, the Philippines has not proved the existence of any Sino-Philippine dispute concerning the interpretation or application of UNCLOS based on the alleged China's violation of two provisions of CBD.

In this context, the Philippines' Memorial does mention that Article 22 is involved in two different ways that makes CBD related to UNCLOS. On the one hand, the Philippines argues that "to the extent that Chinese activities cause serious

205 See Section III-C-3 of this paper.

206 See Section III-A-4 and Table 2 of this paper.

damage or threat to biological diversity at Scarborough Shoal or Second Thomas Shoal, the CBD ‘affect[s] the rights and obligations’ of China under UNCLOS’.²⁰⁷ Then the Philippines put a citation for this statement, which is footnote 729. That footnote invokes Article 22(1) of CBD which reads:

*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.*²⁰⁸

Clearly, the wording of Article 22(1) of CBD serves to warn how two parallel treaty regimes might clash and admits that an implementation of CBD may in exceptional situations undermine the rights or obligations of UNCLOS that a certain Contracting Party has. It does not touch upon the issue of violation of CBD rules. Hence, it is still hard to conclude that a breach of CBD is a breach of UNCLOS.

On the other hand, the Philippines argues that “the CBD must be implemented ‘consistently with the rights and obligations of States under law of the sea’.”²⁰⁹ To support this statement, footnote 727 was used which cited Article 22(2) of CBD, which reads “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.”²¹⁰ To be submitted, such wording indicates that an action or omission inconsistent with UNCLOS may lead to a violation of CBD, not necessarily the other way around. It is still insufficient to justify the position that a breach of Article 8(c)~(d) of CBD definitely and necessarily constitutes a breach of any provision of UNCLOS, without proving the breach of concrete “applicable rules” of UNCLOS in each case. Section III-C-5 of this paper has proved that Article 194(1), (3), and (5) of UNCLOS is inapplicable to what is requested of China by the Philippines in Submission 11, while Article 192 of UNCLOS is too ambiguous to apply to any State. More efforts may have to be devoted by the

207 See Philippines’ Memorial, p. 191, para. 6.83.

208 The text of Convention on Biological Diversity, at <http://www.cbd.int/convention/text/>, 14 March 2015.

209 See Philippines’ Memorial, p. 191, para. 6.83.

210 The text of Convention on Biological Diversity, at <http://www.cbd.int/convention/text/>, 14 March 2015.

Philippines to identify really applicable provisions of the UNCLOS, in order to justify the value of those CBD provisions. Before then, the conclusion to be drawn for Submission 11 will be that all the legal bases invoked by the Philippines against China are either too ambiguous to apply, or unambiguous but inapplicable in terms of the geographic limitation. Consequently, this Submission should be deemed conveying no dispute concerning the interpretation or application of UNCLOS.

7. For Submission 12: Articles 192, 194(5), and 206 of UNCLOS Relied on by the Philippines Are Either Too Imprecise to Impose Legal Obligations or Unambiguous but Inapplicable

Submission 12 also suffers from lack of dispute concerning the interpretation or application of UNCLOS, as said by this author's paper published in *China Oceans Law Review*.²¹¹ Here, the Philippines argues that "since January 1995, China – without obtaining the Philippines' authorization – has constructed artificial islands on top of Mischief Reef".²¹² According to the Philippines, Mischief Reef is "part of Philippines' territory"²¹³ and "not within 200 M of any other feature claimed by China that is capable of generating an EEZ or a continental shelf".²¹⁴ Under Philippines' protests, China responded by saying that the structures built on there were not military but of civilian nature and for civilian purposes.²¹⁵ The Philippines contends that China has violated Articles 192 and 194(5) of UNCLOS, as China constructed artificial islands on the coral reef at Mischief Reef.²¹⁶ Moreover, the Philippines considers that China violates Article 206 of UNCLOS due to lack of an environmental impact assessment and communication of its results.²¹⁷ However, for the following reasons, Submission 12 should be deemed inadmissible as it does not convey any dispute concerning the interpretation or application of UNCLOS.

Firstly, the Philippines invokes Article 192²¹⁸ as a legal basis to condemn China's environmental violation by building artificial island on Mischief Reef. However, this provision is too imprecise to create any concrete legal obligation.

211 Michael Sheng-ti Gau, The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 278–280.

212 Philippines' Memorial, p. 193, para. 6.92.

213 Philippines' Memorial, p. 194, para. 6.93.

214 Philippines' Memorial, p. 198, para. 6.103.

215 Philippines' Memorial, pp. 194–196, paras. 6.93–6.94, 6.96–6.97.

216 Philippines' Memorial, pp. 200–201, paras. 6.108–6.111.

217 Philippines' Memorial, pp. 201–202, paras. 6.112–6.113.

218 Article 192 (General obligation) of UNCLOS reads: "States have the obligation to protect and preserve the marine environment."

Moreover, it is doubtful whether China's action as identified by Submission 12, which is only a tiny part of the massive subsequent practices of many State Parties to UNCLOS (including those bordering the SCS), can be singled out as a violation of this article and constitutes any dispute concerning the interpretation or application of this article.

Secondly, the Philippines also invokes Article 194(5)²¹⁹ as legal basis. However, Section III-C-5 of this paper has indicated the inapplicability of this provision due to inapplicability of Article 194(2) to the activities done by China on the maritime feature within the EEZ and continental shelf China claims while the wide-spread damaging effect of such activities is yet to be proved by the Philippines.

Thirdly, the Philippines invokes Article 206²²⁰ to accuse China for not making environmental impact assessment. However, Article 206 again imposes no strict legal obligation for making such assessment in the first place. Hence, the dispute as indicated by the Philippines in Submission 12 cannot be considered as any legal dispute concerning the interpretation or application of Article 206.

8. For Submission 13: Article 21(4) of UNCLOS Relied on by the Philippines Is Not Only Inapplicable but Also Conflicting with Article 24 as Another Legal Basis of the Philippine Claim

Philippines' Submission 13 complains about China's endangering of Philippine navigational safety in the territorial waters of Scarborough Shoal. The Philippines' position is that it has territorial sovereignty over Scarborough Shoal and considers the adjacent water thereto its own territorial water. Based on this position, the Philippines invokes Article 21(4)²²¹ of UNCLOS as a legal basis to condemn China's "dangerous" actions. However, Article 21(4) is inapplicable to China's vessels while in the territorial water of Scarborough Shoal, before a preliminary decision is made to (1) deny China the status of being "a coastal State" and (2)

219 Philippines' Memorial, pp. 188–190.

220 Article 206 (Assessment of potential effects of activities) of UNCLOS reads: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205."

221 Article 21(4) of UNCLOS reads: "4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea."

make China's vessels "foreign Ships". Such a decision is tantamount to a settlement of a territorial dispute which is not concerning the interpretation or application of UNCLOS. Without mandate to settle Sino-Philippine territorial dispute over, *inter alia*, Scarborough Shoal, the Tribunal may not address such a preliminary territorial issue, not to mention to resolve such a dispute in Philippines' favor so as to put China's vessels into a position of foreign ships. Lacking such pre-conditions, the Philippines' claim as reflected by Submission 13 based on the inapplicable Article 21(4) should not be considered as any dispute concerning the interpretation or application of UNCLOS.

After applying (the still inapplicable) Article 21(4) of UNCLOS, the Philippines invokes Article 24 of UNCLOS²²² against China, based on a contradictory premise by taking China as a "coastal State". It is requesting the Tribunal to perform the equally impossible task to come to an opposite conclusion that China should be considered as a "coastal State" for the purpose of applying Article 24. By the same token as just mentioned, the impossible task of the Tribunal renders Article 24 equally inapplicable to China in Submission 13. Invoking two inapplicable and contradictory provisions (Articles 21(4) and 24 of UNCLOS) as legal bases, Submission 13 cannot constitute any dispute concerning the interpretation or application of UNCLOS.

D. The Situations Precluding Part XV-Section 2 Mechanism from Taking Jurisdiction according to Articles 281, 283 and 286 of UNCLOS

Even if the Philippines' Submissions are considered to have conveyed disputes concerning the interpretation or application of UNCLOS, extra legal problems would prevent these "disputes" from passing the thresholds erected by Articles 281, 283, and 286 of UNCLOS so as to preclude an Annex VII-Tribunal from exercising jurisdiction over these "disputes". This Section will provide reasons

222 Article 24 (Duties of the coastal State) of UNCLOS reads: "1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not: (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State. 2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea."

why Philippines' Submissions 1~14 cannot pass such thresholds and should be considered inadmissible by the Tribunal.

1. For Submission 11: The Existence of Breach of CBD and the Application of Article 27 of CBD Will Deprive the Tribunal of Its Jurisdiction according to Article 281 of UNCLOS

Professor Boyle, as one of Philippines' counsels, said in the Hearing of July 2015 that it is not the Philippines' position that China has violated rules of the CBD in its Submission 11, as said in Philippines' Memorial dated 31 March 2014. Instead, the CBD rules are now used to interpret the rules of UNCLOS as "relevant rules of international law".²²³ It would be the Philippines' position that the rules of CBD, i.e. Article 8(c)~(d), serves to substantiate the meaning of Article 192 of UNCLOS. The meaning of Article 192 would cease to be imprecise²²⁴ any longer after being embodied by Article 8(c)~(d). Thus, it cannot be denied by the

223 See First-round submissions by Professor Boyle, in Transcripts of the Hearing on 8 July 2015, pp. 96~98, 109~110. As said by Professor Boyle, "With regard to Scarborough Shoal, Second Thomas Shoal and Mischief Reef, we will therefore argue at the merits stage -- assuming that you conclude that you have jurisdiction -- that Articles 192 and 194 establish the following obligations: (a) to take measures to protect and preserve marine ecosystems, including coral reefs; (b) to ensure sustainable use of the biological resources which those coral reefs represent; (c) to protect and preserve endangered species found in the reefs; (d) to apply a precautionary approach in all these respects; and finally (e) to consult and cooperate with the Philippines and other relevant states in the management of the biological resources, ecosystems and marine environment of all of the reef systems in the South China Sea. In doing so, we will not be alleging any separate breach of the Convention on Biological Diversity or of the UN Agreement on Straddling and Highly Migratory Fish Stocks, although it is true that both parties to this arbitration are also parties to those treaties. Our argument with respect to these agreements is simply that the Biological Diversity Convention and the Fish Stocks Agreement are "relevant rules of international law" for the purposes of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In our view, the normative content of Articles 192 and 194 should be informed by reference to those treaties and other relevant instruments. Previous UNCLOS tribunals have taken that approach. In the *Saiga (No. 2)* case, for example, the ITLOS took into account the Convention on the Conditions of Registration of Ships, the FAO Compliance Agreement and the UN Fish Stocks Agreement when interpreting Article 94 of the Convention."... "I can now proceed to the final section of what I have to say this afternoon, which is to deal with the Convention on Biological Diversity and to argue that it does not affect your jurisdiction. If it had appeared in these proceedings, China might have said that, in substance, the environmental dispute is about protection of biodiversity, and that it should be settled in accordance with the dispute settlement procedures of the Convention on Biological Diversity. Let me explain why this would be a bad argument. There are two reasons. First, this is not a dispute about the interpretation and application of the Convention on Biological Diversity, and references to biological diversity and marine ecosystems do not make it one." Also see Second-round submissions by Professor Boyle, in Transcripts of the Hearing on 13 July 2015, pp. 42~43.

224 See Section III-C-4 of this paper and Article 192 of UNCLOS.

Philippines that the meaning of Article 192 is overlapping, if not identical, with that of Article 8(c)~(d) of CBD. Consequently, when a certain action by a Contracting State to CBD violates Article 8(c)~(d) of CBD, that State will be committing a breach of Article 192 of UNCLOS if it happens to be a Party to UNCLOS.

By the same token, for that State an act violating obligations imposed by Article 192 of UNCLOS will also violate the obligations under Article 8(c)~(d) of CBD, irrespective of the above-mentioned “denial” by Professor Boyle. Such a position is actually confirmed by the Philippines’ Memorial (that is not denied by Professor Boyle during the Hearing) that “the CBD must be implemented ‘consistently with the rights and obligations of States under law of the sea’.”²²⁵ This statement was supported by footnote 727 of the Philippines’ Memorial citing Article 22(2) of CBD which reads “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.”²²⁶ Making this point in the beginning of this section is critical. As there is an undeniable issue of violation of Article 8(c)~(d) of CBD following the logic of Professor Boyle and the unmodified part of Philippines’ Memorial, Article 27 of CBD (premised on the existence of a dispute concerning the interpretation or application of CBD) would be activated undoubtedly. This “one act, two violations of rules, and parallel dispute settlement mechanisms” situation will be discussed in the following paragraphs.

Assuming a violation of “obligation” under Article 192 (which is supposed to obtain a clear legal meaning after incorporating Article 8(c)~(d) of CBD according to the Philippines) on the part of China occurs in Submission 11 and a dispute concerning the interpretation or application of UNCLOS is materialized,²²⁷ the jurisdiction of this Tribunal would be however excluded because the conditions imposed by Article 281 of UNCLOS have not been fulfilled. Article 281(1) reads:

225 Philippines’ Memorial, p. 191, para. 6.83.

226 Convention on Biological Diversity, at <http://www.cbd.int/convention/text/>, 10 March 2015.

227 Such kind of assumption should not be done lightly. The award on jurisdiction and admissibility for *Southern Bluefin Tuna (SBT) Case* suggests that caution must be exercised when linking the UNCLOS with an “implementing treaty” so as to put the dispute concerning the interpretation or application of the implementing treaty into the compulsory dispute settlement procedure entailing binding decisions. See *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, Decision of August 4, 2000, pp. 45~46, para. 63, at http://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf, 10 March 2015.

*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.*²²⁸

Therefore, Philippines' Submission 11 involves the situation of "one act, two violations of rules, and parallel dispute settlement mechanisms activated and interacting", while one mechanism (under CBD) would yield to another mechanism (under UNCLOS) only when conditions said in Article 281(1) of UNCLOS are fulfilled.

In other words, if apart from UNCLOS, there is an agreement between China and the Philippines providing a separate dispute settlement mechanism as a peaceful means of their own choice which is also activated, the Annex VII-Tribunal, as one of the procedures provided in Part XV of UNCLOS, may have jurisdiction to try such dispute if and only if (1) no settlement has been reached between China and the Philippines by recourse to such separate dispute settlement mechanism; and (2) the agreement providing such separate and activated dispute settlement mechanism does not exclude recourse to the Annex VII-Tribunal as the further procedure of dispute settlement. As both of the two conditions are unfulfilled in the present case, the jurisdiction of this Tribunal would be removed for trying the dispute concerned, if any. The detailed reasoning is as follows.

First, as proved by the Philippines itself,²²⁹ CBD is not only an agreement between China and the Philippines, but also a legally binding treaty which doubtlessly fulfils the requirement of "the agreement" under Article 281(1). More importantly, CBD has a dispute settlement mechanism of its own, which is embodied in Article 27. It is a peaceful means of the common choice of China and the Philippines within the meaning of Article 281(1). Such mechanism is autonomous,²³⁰ self-sufficient, self-contained, and, most importantly, activated by the undeniable existence of a dispute concerning the interpretation or application of

228 Art. 281 of UNCLOS.

229 Philippines' Memorial, p. 190, para. 6.82.

230 Compare with the reasoning of the Annex VII-Tribunal on the *SBT Case*. See Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of August 4, 2000, pp. 43-44, para. 57.

CBD.

Second, no evidence has been provided by either the Memorial or the oral statements of Philippines' legal team during July Hearing, nor can any information be obtained from the news papers and internet, that the Philippines has ever negotiated (as required by Article 27 of CBD)²³¹ or exchanged views (as requested by Article 283 of UNCLOS)²³² with China for seeking solution of the dispute concerning the interpretation or application of both CBD (Article 8(c)~(d)) and UNCLOS (Article 192) arising from the same act of China, prior to the initiation of this arbitration.²³³ In other words, the first requirement of "by recourse to such means" under Article 281(1) cannot be deemed as fulfilled. As rightly quoted by the Philippines in its Memorial, "It was considered to be consistent with international jurisprudence that a party may submit a case to the procedure specified in Part XV whenever it [i.e. the Applicant State] considers that the procedure chosen by the parties is no longer likely to lead to a settlement".²³⁴ Given this, it will still be unfair to accept the Philippines' conclusion that the dispute settlement mechanism under Article 27 of CBD is no longer likely to lead to a settlement between it and China, when the Philippines has not even had any recourse to such mechanism in the first place.

The Philippines may invoke *Guyana v. Suriname* to argue that there is no need to request for a separate exchange of views with respect to this particular dispute

231 Article 27(1) of CBD provides the obligation to negotiate as a way to seek solution of the dispute concerning the interpretation or application of CBD.

232 Article 283 of UNCLOS considers negotiation as a way to exchange views for the purpose of settling disputes. It proves that one of the purposes for having negotiations is to exchange views between the disputing parties. It is inconceivable for any dispute to be settled without exchanging views even if the parties have been sitting together around the negotiating table. Therefore, it is safe to say that an integral part of the obligation to negotiate is the obligation to exchange views. Judicial decisions put emphasis on the importance of exchange of views. See *Southern Bluefin Tuna*, Order of 27 August 1999, *ITLOS Reports*, 1999, p. 280; *MOX Plant*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports*, 2001, p. 95, para. 60; *Land Reclamation*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports*, 2003, p. 10, para. 47.

233 One of the possible reasons for this absence may be that no such dispute concerning the interpretation or application of CBD ever exists between China and the Philippines.

234 Philippines' Memorial, p. 236, para. 7.60, and footnote 903.

which has been subsumed within the main disputes between the two Parties.²³⁵ However, *Guyana v. Suriname* is fundamentally different from the present case, making such analogy inappropriate. The main disputes in the present case are maritime boundary delimitation in the SCS plus territorial issues hidden inside as the core.²³⁶ Unlike Guyana and Suriname, China as the respondent has made written declaration according to Article 298 of UNCLOS to exclude Annex VII Tribunal from settling maritime boundary delimitation disputes. Such excluded main disputes are not formally and directly submitted by the Philippines to this Tribunal that is incapable of resolving such disputes in the first place. It will be impossible for the particular issues identified by Submission 11 concerning violation of CBD to be subsumed within such “unsubmitted main disputes” so as to do away with the requirement of exchange of views on the part of the Philippines.

Third, no matter whether the Philippines has been seeking a resolution of such dispute with China concerning the interpretation or application of both UNCLOS and CBD by recourse to the means provided by Article 27 of CBD, this article has undoubtedly excluded²³⁷ the recourse to Annex VII-Tribunal as one of the compulsory dispute settlement procedures entailing binding decisions. So the second requirement under Article 281(1) is unfulfilled, either. Article 27 (Settlement of Disputes) of CBD reads:

235 *Guyana v. Suriname*, Award (17 September 2007), Annex VII Tribunal, para. 410, at http://www.pca-cpa.org/showpage.asp?pag_id=1147, 10 March 2015. “This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchange of views with Suriname on issues of threat or use of forces. These issues can be considered as being subsumed within the main dispute.”

236 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration of the South China Sea Nine-Dash-Line Dispute: Applying the Rule of Default of Appearance*, *Ocean Yearbook*, Vol. 28, 2014, pp. 119~121.

237 To be noted, the Annex VII-Tribunal for the *Southern Bluefin Tuna* case even allows implied exclusion of further procedure. See *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, p. 43, para. 57. In the Memorial of the Philippines, the dissenting opinions of Judge Keith was quoted as against such implied exclusion. However, such opinion has been outvoted by the majority of the Tribunal. It proves that the majority ruling supporting implied exclusion is more justified. See Philippines’ Memorial, p. 239, para. 7.68.

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.

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.

*5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.*²³⁸

Strictly speaking, the conciliation under Article 27(4) is the only real compulsory means for dispute settlement provided by this article. However, it is a means not entailing binding decisions, unlike Annex VII-Tribunal. For the rest of the means of dispute settlement to be utilized, the consent in each case of all parties to the dispute is required. In other words, what Article 27 rules out includes any compulsory dispute settlement mechanism entailing binding decision, including UNCLOS Annex VII Tribunal.

Critically, what needs to be done to employ “compulsory” procedures entailing binding decisions provided by this article (i.e. Arbitration or ICJ) is by “opting in” by all the disputing parties before a dispute arises according to Article 27(3), instead of “at the request of any party to the dispute” (that is, after the dispute arises) in the words of Article 286 of UNCLOS. Such an arrangement is totally against the spirit of compulsory mechanism demonstrated by “opting out” formula under

238 The text of Convention on Biological Diversity, at <http://www.cbd.int/convention/text/>, 14 March 2015.

Article 298 of UNCLOS.²³⁹ It reaffirms that all “compulsory” dispute settlement procedures entailing binding decisions have been ruled out and excluded from Article 27 of CBD. *In toto et pars continetur*.²⁴⁰ Hence, the Annex VII Tribunal as one of such procedures should naturally be considered excluded by Article 27 as a matter of course. Even if we take the broader view by considering the two means under Article 27(3) as also real compulsory methods, the Arbitration under Article 27(3)(a) of CBD²⁴¹ is still different from Annex VII Tribunal of UNCLOS. In other words, what may be opted in by the operation of Article 27(3) as the “compulsory means” does not include Annex VII Tribunal. It proves the exclusion of Annex VII Tribunal under the dispute settlement regime of Article 27.

To be noted, the last five words of Article 27(4) provides an opportunity of creating compulsory dispute settlement procedure apart from the means identified by this article, if agreed by all the parties to the dispute in advance. However, China has not agreed to use Annex VII Tribunal to settle the disputes under Philippines’ Submission 11 with the Philippines before (and even after) such “dispute” concerning the interpretation or application of UNCLOS and CBD arises. Therefore, the last chance of using this Annex VII Tribunal as a compulsory means to settle the present dispute has been missed.

To conclude, assuming there is a dispute concerning interpretation or application of UNCLOS (which undeniably leads to a dispute on interpretation or application of CBD), the jurisdiction of this Annex VII-Tribunal to try Submission 11 is still removed in accordance with Article 281 of UNCLOS in joint operation of Article 27 of CBD.

2. For Submissions 1~14: Philippines’ Partial Submission of Its SCS Disputes with China for Arbitration Is Inconsistent with Articles 283 and 286 of UNCLOS

The Sino-Philippine disputes in the SCS are complicated with many layers. From inside out they are: (1) territorial disputes over Scarborough Shoal and all the

239 See also the reasoning of the Annex VII-Tribunal on the *SBT Case*, which would be supportive for this line of arguments. Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of August 4, 2000, pp. 43~44, para. 57.

240 The part is also included in the whole. See Guide to Latin in International Law, at <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-993>, 10 March 2015.

241 See Part I of Annex II to CBD. It is clear that the Arbitration under CBD is definitely not the same as Annex VII-Tribunal of UNCLOS.

maritime features within Philippines' KIG, which is part of China's Nansha Islands (Spratly Islands Group);²⁴² (2) maritime boundary delimitation disputes due to overlapping maritime claims of EEZ and continental shelf by both States generated by the land territories they claim;²⁴³ (3) disputes concerning legal status of maritime features located in Spratly Islands Group (i.e. whether they are islands, rocks, or low-tide elevations) and maritime entitlements they produce (i.e. whether they can generate territorial water, EEZ, continental shelf, or nothing), as conditions taken into account in the settlement of maritime boundary delimitation disputes;²⁴⁴ (4) dispute over the legality of China's alleged invocation of historic rights to justify its maritime claims in the SCS enclosed by the U-Shaped Line;²⁴⁵ (5) dispute over the legality of the U-Shaped Line as the "starting price" offered by China in its political negotiations with the Philippines in drawing/settling their maritime boundaries in the SCS;²⁴⁶ (6) various kinds of maritime confrontations between their government vessels and personnel that rather reflect the unsettled and deteriorated situations of the core (territorial and maritime boundary delimitation) disputes.²⁴⁷

It is obvious that not all of these layers of disputes have been submitted by the Philippines to the Tribunal for resolution. Only the (3)~(6) kinds of disputes have been submitted by the Philippines to the Tribunal. Such partial submission of disputes is inconsistent with the requirement of Article 286 of UNCLOS, as

242 See Section III-A-6 of this paper, especially the exchange of NVs between China and the Philippines between 2009 and 2011.

243 See First-round submissions by Mr. Reichler, in Transcripts of the Hearing on 7 July 2015, p. 46, especially footnote 23. "23 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 Apr. 2011) (*italics omitted*) (*emphasis added*). MP, Vol. VI, Annex 201. China made this claim in the context of responding to the Philippines' Note Verbale of 5 April 2011 protesting the legality of China's nine-dash line. See also Memorandum of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98 (reporting on a meeting between Minister Evangeline Jimenez-Ducrocq of the Philippines Embassy in Beijing and the Representative Xiao Jiangguo of the Department of Boundary and Ocean Affairs of the Chinese Ministry of Foreign Affairs in which Mr. Xiao stated: 'we claim territorial sea, EEZ, and continental shelf from the Nansha Islands, and any overlapping claims we can engage in delimitation'.)."

244 Philippines' Memorial, Submissions 3~7.

245 Philippines' Memorial, Submissions 1~2.

246 Philippines' Memorial, Submissions 1~2.

247 Philippines' Memorial, Submissions 8~14.

discussed by a paper of this author published in *Ocean Yearbook*.²⁴⁸

More fundamentally, the Philippines has failed to perform its duty of exchange of views under Article 283. As the Tribunal has been concerned about such an obligation and its application to the behaviors of both Parties to this case, Mr. Martin, as Philippines' counsel, provided information on 8 July 2015 at the Hearing. The evidences provided by Mr. Martine only demonstrate that for the above-mentioned (1)~(2) categories of unsubmitted (core) disputes between China and the Philippines, the exchange of views between them touched upon the means for dispute settlement. However, for those evidences provided for the foregoing (3)~(6) kinds of disputes by the Philippines to the Tribunal, the exchange of views fails to live up to the standard requested. They did not touch upon the "means" for dispute settlement concerning how to settle these kinds of ancillary and surface disputes.²⁴⁹ This is too important to be overlooked by the Tribunal.

Equally important is the higher standard of fulfilling the conditions of exchange of views under Article 283. This has been touched upon at the July Hearing. On 8 July 2015 Mr. Martin said this:

In its 23rd June questions, the Tribunal asked – assuming Article 283 requires an exchange of views on the substance of the parties' dispute – "at what level of specificity must such an exchange of views occur", and whether the Philippines has sufficiently exchanged views "with respect to each of its specific, individual submissions".

Mr President, the award of the Annex VII tribunal in Guyana v Suriname sheds important light on these questions. The primary issue in that case was the delimitation of the parties' maritime boundary, a subject on which they had negotiated literally for decades. But Guyana's submissions also included a claim relating to Suriname's forcible eviction from the disputed area of an oil rig operated under licence from Guyana. Suriname objected to the tribunal's jurisdiction over this submission on the grounds that the two [S]tates had never exchanged views on that subject.

The tribunal rejected Suriname's challenge, holding:

248 Michael Sheng-ti Gau, The Sino-Philippine Arbitration of the South China Sea Nine-Dash-Line Dispute: Applying the Rule of Default of Appearance, *Ocean Yearbook*, Vol. 28, 2014, pp. 89, 118~123.

249 First-round submissions by Mr. Martin, in the Transcripts of the Hearing on 8 July 2015, pp. 28~32, especially footnotes 33~40.

*“The Parties have ... sought for decades to reach agreement on their common maritime boundary. The CGX incident ... may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can be considered as being subsumed within the main dispute.”*²⁵⁰

...

It is also useful to recall the manner in which the Chagos Islands tribunal addressed the issues arising under Article 283 with respect to Mauritius’s fourth and final submission,

...

*We think several general propositions can be extracted from the Guyana and Chagos Islands cases: (1) it is not necessary to exchange views on the substance of each and every submission per se; (2) 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...*²⁵¹

However, *Guyana* and *Chagos Islands Cases* are fundamentally different from the present case, making such analogy inappropriate. The primary and real disputes in the present case are maritime boundary delimitation in the SCS plus territorial issues hidden inside as the core.²⁵² China as the respondent has made written declaration according to Article 298 of UNCLOS to exclude Annex VII Tribunal from settling maritime boundary delimitation disputes. Such excluded primary and real disputes are not formally and directly submitted by the Philippines to this Tribunal that is incapable of resolving such disputes even when submitted indirectly. It will be impossible for the particular issues identified by Submissions 1~14 to be subsumed within such “unsubmitted primary and real disputes” so as to

250 *Guyana v. Suriname*, Merits, Award of the Arbitral Tribunal, 17 September 2007, para. 410. MP, Vol. XI, Annex LA-56.

251 First-round submissions by Mr. Martin, in the Transcripts of the Hearing on 8 July 2015, pp. 32~35.

252 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration of the South China Sea Nine-Dash-Line Dispute: Applying the Rule of Default of Appearance*, *Ocean Yearbook*, Vol. 28, 2014, pp. 89, 119~121.

do away with the requirement of exchange of views on the part of the Philippines.²⁵³ Therefore, Mr. Martin's invocation of *Guyana* and *Chagos Islands Cases* is again unhelpful.

Due to Philippines' default of fulfilling the requirements under Articles 283 and 286, the Annex VII Tribunal should not have been established in the first place, while Submissions 1~14 should be declared as inadmissible by the Tribunal which has been established nevertheless.

E. The Situations Excluding Jurisdiction of the Tribunal according to Article 298 of UNCLOS and China's 2006 Declaration

Assuming the Philippines' Submissions are deemed conveying legal disputes concerning the interpretation or application of UNCLOS, while the requirements under Section 1 of Part XV of UNCLOS are considered fulfilled completely, such disputes are nevertheless covered by Article 298 of UNCLOS as well as by China's 2006 Declaration. This section will prove why Submissions 2~4, 6~9, 11~14 should still be deemed caught by Article 298. As a result, the jurisdiction of the Tribunal to try these Submissions has been excluded.

1. For Submission 2: Disputes concerning the Historic Rights Are "Concerning" the Application of Articles 74 and 83 of UNCLOS

Philippines' Submission 2 challenges the alleged invocation of historic rights by China to justify its maritime claim in the SCS within the U-Shaped Line which goes beyond what is allowed by UNCLOS. Apart from many unsettled preliminary issues that may turn this Submission inadmissible,²⁵⁴ China's 2006 Declaration also deprives the Tribunal of its jurisdiction to entertain the issue of historic rights which is "a dispute concerning the application of Articles 74(1) and 83(1) relating to sea boundary delimitations" covered by Article 298(1)(a)(i).

Here, a clarification for a preliminary issue is needed. Is there a room for Articles 74(1) and 83(1) of UNCLOS to apply to the confrontations between China and the Philippines in the Relevant Area? The answer from the Philippines is no,

253 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, p. 275.

254 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 172~186, 223~228.

because China simply has no EEZ and continental shelf in the Relevant Area.²⁵⁵ As no Sino-Philippine disputes concerning overlapping EEZ and continental shelf claims will arise,²⁵⁶ Articles 74(1) and 83(1) become inapplicable in the Relevant Area. However, Sections III-A-4 and III-E-4 of this paper prove that China is undeniably entitled to claim EEZ and continental shelf in the SCS. Inevitably, the Sino-Philippine overlapping claims of EEZ and continental shelf exist in the SCS, making Articles 74(1) and 83(1) applicable.

As Articles 74(1) and 83(1) apply in the Relevant Area, we now address the issue whether the disputes concerning the legality of China's historic rights claims, if any, to support its sovereign rights in the area enclosed by the U-Shaped Line are concerning the application of Articles 74(1) and 83(1). The question for decision is not whether the disputes in question are legally to be considered as "EEZ or continental shelf delimitation",²⁵⁷ as argued by the Philippines.²⁵⁸ However, the key issue is the interpretation of the term "concerning" as the second word in the first sentence of Article 298(1)(a)(i).²⁵⁹ The ordinary meaning to be given to the term²⁶⁰

255 See Figures 4.1 and 4.2 after p. 70 of Philippines' Memorial.

256 In footnote 374 of Philippines' Memorial, the Philippines argues: "the question before this Tribunal is whether China's claim to 'historic rights' survives its adherence to the Convention and can trump the Philippines' entitlements to an EEZ and continental shelf..." Philippines' Memorial, p. 98.

257 The ICJ was careful in such differentiation, see Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, *I.C.J. Reports*, 1978, p. 36, para. 86.

258 See First-round submissions by Professor Oxman, in the Transcripts of the Hearing on 8 July 2015, pp. 49~51. Strangely, Professor Oxman completely ignores the 2nd word "concerning" in the first sentence of Article 298(1)(a)(i) in his interpretation of Article 298(1)(a) of UNCLOS.

259 That is "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations ..."

260 Articles 31~32 of the 1969 Vienna Convention on the Law of Treaty provide general principles for the treaty interpretation. The starting point for interpretation is finding the ordinary meaning for the term to be interpreted. The ordinary meaning for the term to be interpreted can be found in standard dictionaries. At <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, 10 March 2015.

“concern” as a verb is²⁶¹ (1) have relation to, (2) affect,²⁶² and (3) be of importance to. Therefore, the term “concerning” should be interpreted as (1) having relation to or relating to,²⁶³ (2) affecting, and (3) being important to. It follows that any dispute relating to, affecting, or important to the application of Articles 74(1) and 83(1) should be considered as concerning the application of these two articles and caught by Article 298(1)(a)(i).

Most interestingly, the Philippines itself admits that the legality dispute concerning China’s historic rights claims is relating to, affecting, or important to the application of Articles 74(1) and 83(1). Contending that “there is no basis for China’s claim of ‘historic rights’ in the EEZ or continental shelf of the Philippines, or any other State”,²⁶⁴ the Philippine Memorial invoked international judicial decisions (in Chapter 4, Section II-A-2 entitled The Case Law) as evidences. Paradoxically, those judicial decisions all aim at resolving maritime delimitation disputes. They are the *Anglo-Norwegian Fisheries Case*, the *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*,

261 A. S. Hornby ed., *Oxford Advanced Learner’s Dictionary of Current English*, Oxford: Oxford University Press, 1980.

262 As confirmed by the ICJ in the *Greece v. Turkey*, the meaning of the term “concern” as a verb can be interpreted as “affect”. See *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, *I.C.J. Reports*, 1978, p. 37, para. 89. “In the present case, moreover, quite apart from the question of the status of the above-mentioned Greek islands for the purpose of determining Greece’s entitlement to continental shelf, the Court notes that during the hearings in 1976 the Greek Government referred to a certain straight base-line claimed by Turkey which is, however, contested by Greece. Although it recognized that the resulting discrepancy between the Greek and Turkish views of the limits of Turkey’s territorial sea in the area is not great, it observed that the discrepancy ‘obviously affects the question of the delimitation of the continental shelf’. The question of the limits of a State’s territorial sea, as the Greek Government itself has recognized, is indisputably one which not only relates to, but directly concerns territorial status.”

263 The term “relating to” has been interpreted by the ICJ in *Aegean Sea Continental Shelf Case* as “emanating from” and “being an automatic adjunct of”. “86. ... The question for decision is whether the present dispute is one ‘relating to the territorial status of Greece’, not whether the rights in dispute are legally to be considered as ‘territorial’ rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status ... In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial regime – the territorial status – of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law. A dispute regarding those rights would, therefore, appear to be one which may be said to ‘relate’ to the territorial status of the coastal State.” *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, *I.C.J. Reports*, 1978, p. 36, para. 86.

264 Philippines’ Memorial, p. 91, para. 4.55.

Continental Shelf Delimitation Case (Tunisia v. Libyan Arab Jamahiriya), *Gulf of Maine case (Canada v. United States)*, *Qatar v. Bahrain*, *Eritrea/Yemen Arbitration*, and *Barbados/Trinidad and Tobago Arbitration*.²⁶⁵

As proved by these judicial decisions, under the equidistance/relevant circumstances method²⁶⁶ historic right may constitute a “relevant circumstance”²⁶⁷

265 Philippines’ Memorial, pp. 91~99, paras. 4.55~4.69.

266 According to the Annex VII Tribunal which decided *Barbados v. Trinidad and Tobago*, “the equidistance/relevant circumstances method is the method normally applied by international courts and tribunals in the determination of a maritime boundary. The two-step approach ... results in the drawing of a provisional equidistance line and the consideration of a subsequent adjustment, a process the International Court of Justice explained as follows: ‘The most logical and widely practiced approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances (Qatar v. Bahrain, I.C.J. Reports 2001, p. 40, at p. 94, para. 176).’” See *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 April 2006), para. 304, at http://www.pca-cpa.org/showpage.asp?pag_id=1152, 10 March 2015; *Guyana/Suriname*, Award, UNCLOS Annex VII Tribunal (17 September 2007), paras. 340~342, at http://www.pcacpa.org/showpage.asp?pag_id=1147, 1 March 2015; *Bangladesh v. Myanmar*, Judgement, para. 229; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports*, 1993, p. 62, paras. 55~56.

267 As to what constitute relevant circumstances, ICJ in *Denmark v. Norway* quoted the judgments of *North Sea Continental Shelf Cases (I.C.J. Reports, 1969, p. 50, para. 93)* and *Libya/Malta Case (I.C.J. Reports, 1985, p. 40, para. 48)*. “[U]nder the heading of ‘special circumstances’ and that of ‘relevant circumstances’, as to what circumstances are juridically relevant to the delimitation process ... In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.” And, “although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion.” See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports*, 1993, p. 63, para. 57. Also see *Continental Shelf (Libya v. Malta) Judgment, I.C.J. Reports*, 1985, p. 48, para. 65.

to be considered when certain conditions are met.²⁶⁸ This happens when applying Articles 74(1) and 83(1) of UNCLOS to achieve “an equitable solution or result”

268 The conditions for historic fishing rights to qualify as a relevant circumstance are “catastrophic” and “long usage” tests, originated in the *Anglo-Norwegian Fisheries Case* of 1951. They were brought forward in the provisions *inter alia* of Article 7(5) of UNCLOS, and applied to the delimitation for overlapping EEZ and continental shelf as happening in the *Eritrea v. Yemen*. See *Eritrea v. Yemen (Maritime Delimitation)*, Award, 1999, para. 50, at http://www.pca-cpa.org/showpage.asp?pag_id=1160, 10 March 2015. Also see *Barbados v. Trinidad and Tobago*, where the Annex VII Tribunal confirms the resource-related criteria, i.e. traditional fishing activities may under certain circumstance be treated as a special circumstance. “241. Resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance. As noted above, the *Jan Mayen* decision is most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute. However, as the question of fisheries might underlie a number of delimitation disputes, courts and tribunals have not altogether excluded the role of this factor but, as in the *Gulf of Maine*, have restricted its application to circumstances in which catastrophic results might follow from the adoption of a particular delimitation line. In the *Gulf of Maine* case the Chamber held: ‘It is, therefore, in the Chamber’s view, evident that the respective scale of activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation – cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (*I.C.J. Reports*, 1984, p. 342, para. 237).’” See *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 April 2006), para. 241, at http://www.pca-cpa.org/showpage.asp?pag_id=1152, 10 March 2015; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports*, 1993, p. 71, para. 75.

in settling maritime delimitation dispute.²⁶⁹ Put differently, historic right constitutes one of the factors to be addressed in the application of the delimitation process, i.e. the equidistance/relevant circumstances method, conceived by Articles 74(1) and 83(1), testified by, e.g. *Eritrea v. Yemen*,²⁷⁰ and *Tunisia v. Libya*.²⁷¹

Therefore, the dispute of legality of the alleged claim of historic rights by China, if any, as the basis to support its sovereign rights in the SCS enclosed by the U-Shaped Line would be concerning the application of Articles 74(1) and 83(1) of UNCLOS and caught by Article 298(1)(a)(i). Being covered by China's 2006 Declaration, such dispute falls outside the jurisdiction of the Tribunal.

2. For Submission 2: Disputes concerning the U-Shaped Line as a Maritime Claim Are “Concerning” the Application of Articles 74 and 83 of UNCLOS

269 The footnote 373 of the Memorial is worth quoting in this connection. It reads: “The question of whether, under UNCLOS, historic rights can exist in another State’s EEZ is fundamentally different from whether, in delimitating a maritime boundary between two States with overlapping EEZ entitlements, historic fishing practices can be taken into account as a ‘relevant circumstance’. In *Gulf of Maine*, the ICJ Chamber refused to treat the parties’ historic fishing practices as a relevant circumstance, because the economic consequence of depriving them of access to their traditional fishing grounds would not be ‘catastrophic’. *Canada v. United States*, para. 237. MP, vol. XI, Annex LA-12. The arbitral tribunal in *Barbados v. Trinidad and Tobago* applied the same standard; it found that the consequences of denying Barbados access to its allegedly traditional fishing areas in waters claimed by Trinidad as its EEZ would not be ‘catastrophic’ and therefore were not relevant to the delimitation. *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 Apr. 2006), para. 267. MP, Vol. XI, Annex LA-54. But in the *Jan Mayen Case (Norway v. Denmark)*, the ICJ noted, as one factor justifying its delimitation of the parties’ overlapping EEZ entitlements, that it would preserve Greenland’s access to its traditional capelin fishing grounds. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports*, 1993, p. 38. MP, Vol. XI, Annex LA-20.” Also see *Tunisia/Libya*, Judgment, *ICJ Reports*, 1982, p. 18, para. 50; *Guyana/Suriname*, Arbitral Award, 2007, pp. 107~108, paras. 332~333.

270 For example, in Arbitration between *Eritrea v. Yemen* (Maritime Delimitation), the question of fishing (including historical practice) in the red sea and the traditional fishing regime are both essential parts and addressed in Chapters II & IV, which is under the general title “Proceedings in the Delimitation Stage of the Arbitration”. Both Eritrea and Yemen were in agreement on the effect of historical fishing rights upon the application of Articles 74(1) and 83(1) of UNCLOS. Paragraph 51 is worth quoting: “They also found an echo in the ‘equitable solution’ called for by paragraph I of Articles 74 and 83 of the Convention, it being assumed that no ‘solution’ could be equitable which would be inconsistent with long usage, which would present a clear and present danger of a catastrophic result on the local economy of one of the Parties, or which would fail to take into account the need to minimize detrimental effects on fishing communities, and the economic dislocation, of States whose nationals have habitually fished in the relevant area.” The *Eritrea-Yemen Arbitration*, Award, para. 51, at http://www.pca-cpa.org/showpage.asp?pag_id=1160, 10 March 2015.

271 Case concerning the Continental Shelf (*Tunisia v. Libya*), Judgment, *I.C.J. Reports*, 1982, pp. 71~77, paras. 97~105.

Section III-B-1 of this paper explains that the U-Shaped Line as allegedly used by China to mark its outer limits of the maritime claim in the SCS is a political position subject to change in a political negotiation leading to the settlement of Sino-Philippine maritime boundary delimitation in the SCS. Therefore, the dispute of the U-Shaped Line is actually not a legal but a political one, which should be declared by the Tribunal as non-justiciable.

Alternatively, should the Tribunal consider the issue of the U-Shaped Line as a legal dispute, then based on the same arguments provided in Section III-B-1 of this paper, it is fair to treat the issue of U-Shaped Line as affecting, relating to, being important to, and, therefore, concerning the application of Articles 74(1) and 83(1) of UNCLOS. It follows that the legal dispute of the U-Shaped Line may not be entertained by the Tribunal as its jurisdiction over such a dispute has been excluded by China's 2006 Declaration.

3. For Submissions 3~4 and 6~7: Disputes concerning the Legal Status of Maritime Features Are “Concerning” the Application of Articles 74 and 83 of UNCLOS

It has been argued by Sections III-A-5 and III-A-6 of this paper that Submissions 3~4 and 6~7 brought no dispute to the Tribunal for settlement. The paper published by this author in *China Oceans Law Review* also discussed the reasons why these Submissions should be deemed inadmissible.²⁷² However, assuming that the “disputes” concerning the legal status of the four “rocks” and the five “LTEs” as identified by these Submissions do exist, such “legal status disputes” should be deemed affecting, relating to, important to, and, therefore, concerning the application of Articles 74(1) and 83(1) of UNCLOS to Sino-Philippine maritime boundary delimitation disputes covered by Article 298(1)(a)(i). Such “legal status disputes” then become the ones that Annex VII-Tribunal is precluded from settling due to China's 2006 Declaration. The reasons are as follows.

First, let us imagine, if China wins in any of the “legal status disputes”, a particular “rock” may turn into an island and generate entitlements of EEZ and continental shelf. One particular “LTE” may turn into a rock and generate territorial water or even EEZ and continental shelf for China. As China wins more of the “legal status disputes”, the size of the overlapping EEZ and continental shelf gets bigger.

272 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 229~233.

The final result of “equitable solution” as required by Articles 74(1) and 83(1) will be shifted accordingly.

If China loses in any of the “legal status disputes”, China will have one less territorial sea, EEZ or continental shelf generated by that particular feature. The size of total overlapping area of EEZ and continental shelf becomes smaller. The application of Articles 74(1) and 83(1) would lead to a different “equitable solution” accordingly. If China loses in all disputes of this kind, then from Philippines’ perspectives, China would have no EEZ and continental shelf in the Relevant Area.²⁷³ Under such a situation, Articles 74(1) and 83(1) will become inapplicable to the no-longer-existent delimitation dispute. It is hard to deny that such result affects the application of these two provisions. It simply ends the possibility for these rules to apply.

Therefore, the “legal status disputes” as brought by the Philippines through Submissions 3~4 and 6~7 should be considered as affecting and concerning the application of Articles 74(1) and 83(1). The optional exception mechanism established by Article 298 then applies and deprives the Tribunal of its jurisdiction to try such “legal status disputes”.

Second, it is argued by the Philippines that neither the disputes brought to the Tribunal nor the disputes of legal status of maritime features occupied by China are concerning maritime delimitation.²⁷⁴ However, such a disclaimer has already been repeatedly and impliedly negated by the oral statements of Philippines’ Foreign Secretary²⁷⁵

273 It is the Philippines’ position that China has no EEZ and continental shelf in the Relevant Area, as China only can rely on 5 LTEs and 4 “rocks” to claim maritime entitlements there. In short, there is no possibility for China to have any overlapping EEZ and continental shelf with Philippines’ EEZ and continental shelf claims in the SCS. See Philippines’ Memorial, Submissions 3~7 and Chapter 5.

274 Philippines’ Memorial, p. 149, para. 5.113.

275 On 7 July 2015 which is the first day of the Hearing, the Secretary of Foreign Affairs of the Philippines, Mr. Albert del Rosario, said: “China has pursued its activities in these disputed maritime areas with overwhelming force. The Philippines can only counter by invoking international law. That is why it is of fundamental importance to the Philippines, and, we would submit, for the law of rule in general, for the Tribunal to decide where and to what limit China has maritime entitlements in the South China Sea; where and to what limit the Philippines has maritime entitlements; where and to what extent the parties’ respective entitlements overlap, and where they do not.” It is obvious that the Philippines’ goal in this arbitration is maritime boundary delimitation in the SCS where maritime claims of China and the Philippines overlap. See First-round submissions by Secretary Del Rosario, in Transcripts of the Hearing, 7 July 2015, pp. 16~17.

and counsel²⁷⁶ at the July Hearing. Still, all the judicial decisions invoked by the Philippines in Chapters 5 and 7 of the Memorial are judgments on maritime boundary delimitations. They are (1) *Qatar v. Bahrain*,²⁷⁷ (2) *Nicaragua v.*

276 See First-round submissions by Mr. Reichler, in the Transcripts of the Hearing on 7 July 2015, pp. 42~44, 48, 58. “So now, if you will, let us take a look at where the parties’ maritime entitlements under the Convention do exist, where they overlap, where they do not, and how they are impacted by China’s claim of ‘historic rights’ within the nine-dash line. These matters may be best appreciated by looking at the northern half and southern half of the South China Sea separately. This is the northern half. To this map, we will first add a depiction of the maritime entitlements claimed by the Philippines, excluding entitlements generated by disputed insular features. In strict conformity with UNCLOS, the Philippines claims a 12-mile territorial sea under Article 3, a 200-mile EEZ under Article 57, and a 200-mile continental shelf under Article 76. To this depiction, we now add the entitlements of China under the same articles of UNCLOS. The Philippines accepts that China has 200-mile entitlements from its mainland coast and from Hainan Island, and we assume *quod non*, for purposes of these proceedings, that China has sovereignty over the Paracel Islands, and that at least one of these features may generate a 200-mile entitlement. You can see that there are large areas where only the Philippines has maritime entitlements under UNCLOS, and areas where the only entitlements under the Convention are China’s, as well as areas where the parties’ entitlements overlap with one another. We have now enclaved Scarborough Shoal within 12 miles. This is a disputed feature. Each of the parties claims sovereignty over it. Because parts of it protrude slightly above water at high tide, as you can see here, we accept that it is a rock; that is, a land feature. Because sovereignty over Scarborough Shoal is not at issue in these proceedings, we have here enclaved it within 12 miles. This shows that the Philippines has maritime entitlements under UNCLOS on all sides of the enclave, and that the Philippines’ entitlements are not overlapped by any entitlement that China could claim under the Convention. The Philippines’ third submission addresses the status of Scarborough Shoal under Article 121 of the Convention, and seeks confirmation that it is indeed a rock and does not generate an entitlement beyond 12 miles. This confirmation is required in order to establish precisely where the Philippines enjoys maritime entitlements that are not overlapped, or not potentially overlapped, by China’s entitlements ... Here are the Spratly Islands with 12-mile enclaves around those features that remain above water at high tide. In the Philippines’ view, these are the proper entitlements of the features under the Convention. Even assuming, *quod non*, that for purposes of these hearings all of the Spratlys belong to China, there are still large areas where the 12-mile entitlements generated by these features do not overlap the 200-mile entitlements attributed to Palawan, and where the Philippines therefore alone enjoys sovereign rights and jurisdiction under the Convention ... If you will kindly allow me to turn back to those submissions at tab 1, you will see that your jurisdiction in regard to submissions 5, 8 and 9 follows from the arguments I have presented. They are a consequence of your finding that you have jurisdiction to determine the limits of the parties’ maritime entitlements under the Convention, including where their entitlements overlap and where they do not. Submission 5 calls upon you to determine that certain low-tide features lie within the maritime zones of the Philippines but not of China. They do, if you agree with the Philippines’ submissions on the character of these features and the consequences that has for where the parties have maritime entitlements.”

277 Philippines’ Memorial, pp. 117, 139~140, footnotes 423, 498, 500 and paras. 5.14, 5.85~5.86.

Colombia;²⁷⁸ (3) *Libya v. Malta*;²⁷⁹ (4) *Eritrea v. Yemen*;²⁸⁰ (5) *Canada v. US*;²⁸¹ (6) *Romania v. Ukraine*;²⁸² (7) *Bangladesh v. Myanmar*.²⁸³ To be added, Professor Oxman, as Philippines' counsel, invoked *Nicaragua v. Colombia* case at the Hearing on 8 July 2015, when addressing the issues of maritime entitlement and sea boundary delimitation. Once again, it is the maritime boundary delimitation case.²⁸⁴

In those international judicial decisions settling maritime boundary delimitation disputes, the issues concerning legal status of maritime features and their legal capability to generate maritime entitlements constituted both preliminary and integral issues for the Court or Tribunal to address before coming to the delimitation issues proper.

After examining closely, *inter alia*, *Tunisia v. Libya*,²⁸⁵ *Canada v. US*,²⁸⁶ *Libya*

278 Philippines' Memorial, pp. 121, 139~140, 147~149, 258, footnotes 444~445, 497, 500, 540~544, 974~976 and paras. 5.23, 5.27, 5.85, 5.86, 5.107, 5.110~5.113, 7.122.

279 Philippines' Memorial, pp. 127~128, 152, footnotes 459, 552, and paras. 5.44, 5.120.

280 Philippines' Memorial, p. 128, footnote 460, and para. 5.45.

281 Philippines' Memorial, p. 138, footnote 489, and para. 5.79.

282 Philippines' Memorial, p. 147, footnote 538, paras. 5.107~5.108.

283 Philippines' Memorial, pp. 257~258, footnotes 971~973, para. 7.121.

284 See First-round submissions by Professor Oxman, in Transcripts of the Hearing on 8 July 2015, pp. 44~45. As said by Professor Oxman, "The question of maritime delimitation does not arise unless and until it is determined that there are overlapping maritime entitlements. To put it differently, 'Delimitation presupposes an area of overlapping entitlements'. That is how the International Tribunal for the Law of the Sea put it in paragraph 377 of its judgment in the *Bay of Bengal* case. In that case, the parties challenged each other's entitlement to a continental shelf beyond 200 miles. Only after those contentions were considered and rejected in the judgment did that judgment proceed to delimitation of the overlapping entitlements. The International Court of Justice applied the same approach in its 2012 judgment in the *Nicaragua v. Colombia* case. In the course of its analysis of entitlements generated by maritime features under the rules of international law articulated by the Convention, the court expressly declined (in paragraph 169 of its judgment) to consider whether an equitable delimitation would limit the islands' maritime zones to 12 miles. The court first determined the entitlements of the features in question, and only then did it turn to delimitation of the areas in which those features are found. That is the logical and, we believe, correct approach."

285 Case concerning the Continental Shelf (*Tunisia v. Libya*), Judgment, *I.C.J. Reports*, 1982, pp. 88~89, paras. 128~129. In this case, the Kerkennah Islands, surrounded by islets and low-tide elevations, and constituting by their size and position a circumstance relevant for the delimitation, and to which the Court must attribute some effect.

286 Delimitation of the Maritime Boundary in the Gulf of Maine Area (*Canada v. US*), Judgment, *I.C.J. Reports*, 1984, p. 329, para. 201.

v. *Malta*,²⁸⁷ *Eritrea v. Yemen*,²⁸⁸ *Qatar v. Bahrain*,²⁸⁹ and *Romania v. Ukraine*,²⁹⁰ it becomes clear that the issues of legal status of maritime features strongly affect the result of the settlement of maritime boundary disputes or, the application of Article 74(1) and 83(1) of UNCLOS. This observation is even admitted by the Philippines

287 ICJ in the *Libya v. Malta* invoked the Judgment of *North Sea Continental Shelf* cases to say that when drawing a median line, the Court needs to ignore “the presence of islets, rocks and minor coastal projections”. In this connection, “the islet of Filfla”, “the uninhabited islet of Filfla”, or “the uninhabited rock of Filfla” were repeatedly mentioned in the Judgment and was ignored as a base point at the first step of the delimitation when drawing the median line. See *Continental Shelf (Libya v. Malta)* Judgment, *I.C.J. Reports*, 1985, pp. 20, 47–48, 52, 57; paras. 15, 62, 64, 72–73, 79-C.

288 The award of *Eritrea v. Yemen* is worth quoting that “147. Yemen employed both the small island of al-Tayr and the group of islands called al-Zubayr as controlling base points, so that the Yemen-claimed median line boundary is ‘median’ only in the area of sea west of these islands. These islands do not constitute a part of Yemen’s mainland coast. Moreover, their barren and inhospitable nature and their position well out to sea, which have already been described in the Award on Sovereignty, mean that they should not be taken into consideration in computing the boundary line between Yemen and Eritrea. 148. For these reasons, the Tribunal has decided that both the single island of al-Tayr and the island group of al-Zubayr should have no effect upon the median line international boundary.” See Award (given on 17 December 1999) of the Arbitral Tribunal in the 2nd Stage of the Proceedings (Maritime Delimitation) pursuant to an agreement to arbitrate dated 3 October 1996 between Eritrea and Yemen, at http://www.pca-cpa.org/showpage.asp?pag_id=1160, 10 March 2015.

289 In the ICJ Judgment of *Qatar v. Bahrain*, the Court needs to determine the relevant coasts to measure territorial seas. “In order to determine what constitutes Bahrain’s relevant coasts and what are the relevant baselines on the Bahraini side, the Court must first establish which islands come under Bahraini sovereignty.” One of the issues is to decide whether Qit’at Jaradah is an island or low tide elevation. The ICJ decided that it should be considered as an island. “195. The Court recalls that the legal definition of an island is ... The Court has carefully analysed the evidence submitted by the Parties ... On these bases, the Court concludes that the maritime feature of Qit’at Jaradah satisfies the above-mentioned criteria and that it is an island which should as such be taken into consideration for the drawing of the equidistance line.” *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports*, 2001, paras. 184–187, 195.

290 See 2009 ICJ Judgment of *Romania v. Ukraine*, where the ICJ needs to address the controversial legal status of certain features (Sacalin Peninsula and Sulina dyke) under UNCLOS legal regime so as to know if they may be treated as base points for constructing provisional equidistance line in the process of maritime delimitation. See *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *ICJ Reports*, 2009, pp. 105–108, paras. 129–140.

itself,²⁹¹ and confirmed by leading law of the sea experts, e.g. Clive Schofield,²⁹² and Yann-Huei Song.²⁹³ That is why such disputes were requested to be handled first, and such requests were followed by ICJ in, e.g. *Nicaragua v. Honduras*.²⁹⁴ Most interestingly, in the judgment of *Nicaragua v. Colombia*, the ICJ put the subsection of “Entitlements generated by Maritime Features” under Section V entitled “Maritime Boundary”.²⁹⁵ It proves that the issue concerning legal status of maritime features constitutes an integral part of maritime boundary delimitation, as also

291 Philippines’ Memorial, p. 118, footnote 425. “As reflected in the Virginia Commentary (referring to the treatment of the issue in the United Nations Seabed Committee between 1971 and 1973): ‘The diversity of islands, and the questions of their status and the criteria to be applied in determining that status, were important and contentious issues in the light of their importance in the delineation of maritime space.’ United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. 3 (M. Nordquist, et al., eds., 2002), para. VIII.4. MP, Vol. XI, Annex LA-146”.

292 Clive Schofield, *The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation*, in Seoung-Yong Hong and Jon Van Dyke eds., *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden, Boston: Martinus Nijhoff Publishers, 2009, p. 33.

293 Yann-Huei Song, *Okinotorishima: A “Rock” or an “Island”?* Recent Maritime Boundary Controversy between Japan and Taiwan/China, in Seoung-Yong Hong and Jon Van Dyke eds, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, p. 168.

294 Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Judgment of 8 October 2007, *ICJ Reports*, 2007, pp. 35, 39, paras. 114, 135.

295 Territorial and Maritime Dispute (*Nicaragua v. Colombia*), Judgment, *ICJ Reports*, 2012, pp. 47~92, paras. 132~247.

noted in *Guyana v. Suriname*,²⁹⁶ and *Greece v. Turkey*.²⁹⁷

Third, one more comment must be made here on Professor Oxman's statement at the July Hearing on 8 July 2015.²⁹⁸ It is submitted, such interpretation of Professor Oxman has the following legal problems. Firstly, this over-narrow interpretation ignores the second word "concerning" in the first sentence of Article 298(1)(a)(i), as explained in Section III-E-1 of this paper. Secondly, even assuming the word "concerning" does not enlarge the scope of excluded disputes under Article 298(1)(a)(i), i.e. maritime boundary delimitation and nothing more (if adopting Professor Oxman's view), the integral parts of maritime boundary delimitation dispute should unavoidably be the substance being excluded by China's 2006 Declaration. *In toto et pars continetur*.²⁹⁹ *Accessorium non ducit sed*

296 "Turning to the question of whether there are any features in the geographical configuration of the relevant coastlines which justify an adjustment of the equidistance line, the Tribunal must mention the following observation found in the report of the independent expert appointed by Guyana: 'An important geographic reality in this case is that there are no offshore features, such as islands or low-tide elevations that influence the drawing of an equidistant line...'" See *Guyana v. Suriname*, Award (17 September 2007), Annex VII Tribunal, para. 376, at http://www.pcacpa.org/showpage.asp?pag_id=1147, 10 March 2015.

297 Aegean Sea Continental Shelf Case (*Greece v. Turkey*), Judgment, *I.C.J. Reports*, 1978, p. 35, para. 83. "83. The contention based on the proposition that delimitation is entirely extraneous to the notion of territorial status appears to the Court to encounter certain difficulties. Above all, it seems to overlook the basic character of the present dispute, clearly stated though it is in the first submission in Greece's Application. The basic question in dispute is whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own and entitle Greece to call for the boundary to be drawn between those islands and the Turkish coast. The very essence of the dispute, as formulated in the Application, is thus the entitlement of those Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question to be decided after, and in the light of, the decision upon the first basic question. Moreover, it is evident from the documents before the Court that Turkey, which maintains that the islands in question are mere protuberances on the Turkish continental shelf and have no continental shelf of their own, also considers the basic question to be one of entitlement."

298 See First-round submissions by Professor Oxman, in the Transcripts of the Hearing on 8 July 2015, pp. 50~51. As said by Professor Oxman, "China asserts that Article 298(1)(a) excludes disputes on other issues if they constitute an integral part of a delimitation dispute. That is not consistent with the text. That is not what the words say. Acceptance of China's assertion would, to put it charitably, require interpreting Article 298 very expansively indeed. The textual context of this provision indicates that such an expansive reading of the exception in Article 298(1)(a) is not justified."

299 The part is also included in the whole. See Guide to Latin in International Law, at <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-993>, 10 March 2015.

sequitur suum principale.³⁰⁰ And the logic is simple. When a gentleman in an Italian restaurant orders a steak and says no to Ragu Spaghetti, it means that he would not like to see pasta and minced meat sauce even presented separately on the table. When any Contracting Party to UNCLOS says no to sea boundary delimitation as the dispute that an Annex VII Tribunal may try, it means that Contracting Party does not want to see the “parts” of sea boundary delimitation to be reviewed by the Tribunal. Thirdly, it is a non-issue whether the “integral part” approach should prevail over the “strict construction” approach adopted by Professor Oxman or vice versa.³⁰¹ The two approaches exist in different levels. The “integral part” approach is used when defining the ordinary meaning to be given to the terms being interpreted. On the other hand, the “strict construction” approach looks at the context of the terms to be interpreted and comes after the ordinary meaning to be given to the terms is found. To sum up, Professor Oxman’s over-narrow interpretation of Article 298(1)(a)(i) is incorrect, as that version of interpretation is inconsistent with the first requirement in the treaty interpretation process under Article 31 of the 1969 Vienna Convention on the Law of the Treaties, i.e. the ordinary meaning to be given to the terms being interpreted.

Fourth, this said, it will greatly help if the Philippines can identify any international judicial decision addressing the legal status dispute of maritime features while not being a maritime boundary delimitation decision, like what the Philippines brings to the Tribunal now. Otherwise, the conclusion will most probably be that the legal status dispute of maritime features affects and, therefore, concerns the settlement of maritime boundary delimitation dispute, as confirmed by

300 The accessory does not lead, but follow its principal. At <http://legal-dictionary.thefreedictionary.com/Accessorium+non+ducit+sed+sequitur+suum+principale>, 10 March 2015.

301 See First-round submissions by Professor Oxman, in the Transcripts of the Hearing on 8 July 2015, pp. 51~52. As said by Professor Oxman, “The title of Section 3 is ‘Limitations and Exceptions to Applicability of Section 2’. Article 298 is part of Section 3. Its title is ‘Optional exceptions to applicability of section 2’. Paragraph 72 of the *Arctic Sunrise* award on jurisdiction specifically refers to ‘an exception that is permitted under article 298’. The permissible exceptions derogate from the principle that “any dispute” concerning the interpretation or application of the Convention may be submitted to the appropriate court or tribunal by a party to the dispute. This textual context suggests a strict construction, not a liberal one. It presents a classic case for applying the maxim that exceptions are to be narrowly construed, where a tightly framed exception derogates from a basic principle that is integral to the object and purpose of the instrument as a whole.”

the Philippines at the July Hearing.³⁰²

4. For Submissions 8~9, 11~12, and 14: Maritime Boundary Dispute as the Real Dispute

As said in this author's paper published in *China Oceans Law Review*,³⁰³ Submissions 8~9, 11~12 and 14 are premised on an overarching Philippine position that China does not have EEZ and continental shelf entitlements in the eastern part of SCS,³⁰⁴ which should be deemed Philippines' EEZ and continental shelf. Such a premise will be vindicated when the award on merits phase for Submissions 3~7 is given in Philippines' favor. When this happens, what China can have in the eastern part of SCS will be no more than four circles of territorial waters surrounding four "rocks" (i.e. Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef) with disputed territorial status. Consequently, all the law enforcement activities by China in exercising its sovereign rights and jurisdiction under EEZ and continental shelf claims in the eastern part of SCS as contested by these Submissions will become groundless. It follows that these Submissions should be considered as challenging China's actions overstepping Philippines' EEZ and continental shelf.³⁰⁵ However, due to the following reasons, the real and predominant³⁰⁶ disputes reflected by these Submissions are Sino-Philippine maritime boundary delimitation disputes which have been removed from the scope of jurisdiction of this Tribunal, based on China's 2006 Declaration and Article 298(1)(a)(i) of UNCLOS. Due to the nature of such real disputes reflected by Submissions 8~9, 11~12 and 14, these Submissions can only create disputes

302 See First-round submissions by Solicitor General Hilbay, in Transcripts of the Hearing on 7 July 2015, pp. 7~8. "Professor Oxman will also explain how your determination of the potential maritime entitlements of the parties will serve to narrow the disputes between them, reduce tensions, and facilitate the diplomatic resolution of those issues that lie outside your jurisdiction; namely, sovereignty over small maritime features and the delimitation of maritime boundaries."

303 Michael Sheng-ti Gau, The Sino-Philippine Arbitration of the South China Sea Nine-Dash-Line Dispute: Applying the Rule of Default of Appearance, *Ocean Yearbook*, Vol. 28, 2014, pp. 246~251.

304 Para. 6.15 of the Memorial said that China relied on historic right as the basis to exercise sovereign rights in all the waters enclosed by U-Shaped Line. Such Philippines argument is based on a theory that China has no EEZ and continental shelf in the Relevant Area to justify its exercise of sovereign rights and jurisdiction. See Philippines' Memorial, p. 164. Also see First-round submissions by Professor Oxman, in Transcripts of the Hearing on 8 July 2015, pp. 39~40.

305 China's Position Paper, para. 27.

306 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), UNCLOS Annex VII Tribunal, Award, 18 March 2015, para. 229.

beyond the jurisdiction of this Tribunal. The detailed reasons are as below.

Firstly, China and the Philippines have been maintaining territorial disputes for all the maritime features in the KIG and Scarborough Shoal,³⁰⁷ at least 12 of which have been recognized as islands according to Article 121 of UNCLOS.³⁰⁸ The objects of such territorial disputes thus go beyond those China-occupied 9 maritime features identified by Submissions 3~7. China and the Philippines have not submitted such territorial disputes to any third party judicial body (including this Tribunal) for resolution. Should the Philippines submit such disputes to this Tribunal either directly or indirectly, the Tribunal would not have power to resolve them, as such disputes are neither concerning the interpretation or application of UNCLOS, nor falling within the mandate of this Tribunal absent consent of the Parties.³⁰⁹ Besides, both Parties to this litigation have yet to start negotiations for resolving such disputes bilaterally. It will be highly unpractical for the Tribunal to expect such disputes to be settled during this arbitration so as to use such a settlement as a basis to adjudicate the disputes presented by the Philippines. Until the territorial disputes are resolved, it is impossible for China to concede that it has no sovereignty over, *inter alia*, those islands that can generate EEZ and continental shelf according to Article 121 of UNCLOS. It is thus inconceivable for China to abandon its position that it has maritime entitlement of EEZ and continental shelf in the eastern part of SCS generated by either Spratly Islands Group as a whole, or those “islands” fulfilling conditions of Article 121 of UNCLOS. By the same token, it is impossible for China to give up its status as a coastal State in this area.

Secondly, the EEZ and continental shelf China can claim in the SCS³¹⁰ will reach the sites of Reed Bank, Mischief Reef, and Second Thomas Shoal (see Table 2 of this paper). On the other hand, these 3 maritime features are all within EEZ and continental shelf claimed by the Philippines from its archipelagic baselines

307 See Section III-A-6 of this paper, China’s 2009 & 2011 NVs and Philippines’ 2011 NV, especially the exchange of NVs between China and the Philippines between 2009 and 2011; Notification, p. 8, para. 20; China’s Position Paper, paras. 6~7.

308 See Section III-A-4 and Tables 1 & 2 of this paper.

309 See First-round submissions by Professor Sands, in Transcripts of the Hearing on 7 July 2015, pp. 67~68. As said by Professor Sands, “... there is agreement between the parties that their differences in the South China Sea are complex and multifaceted. One aspect certainly concerns sovereignty over insular features in the South China Sea, but that issue is not before this Tribunal, not directly and not indirectly.”

310 Robert C. Beckman and Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, *The International Journal of Marine and Coastal Law*, Vol. 29, 2014, pp. 204~206.

facing the eastern part of SCS. Hence, these 3 maritime features (deemed as no more than LTEs by the Philippines) are located in the overlapping area claimed as EEZ and continental shelf by both China and the Philippines.³¹¹ According to *Qatar v. Bahrain* and *Malaysia v. Singapore* quoted by Philippines' Memorial, only after drawing maritime boundary can we know "on which State's EEZ and continental shelf these 3 LTEs stand".³¹² Hence, before Sino-Philippine maritime boundary delimitation in the eastern part of SCS (as the ancillary issue) is completed, either State is justified to claim that these 3 maritime features fall on its side of EEZ and continental shelf. The Tribunal can do nothing to settle this ancillary issue, due to its lack of competence to draw maritime boundary for these two States.³¹³ In other words, China is still justified to claim its sovereign rights and jurisdiction in the waters surrounding Reed Bank, Mischief Reef, and Second Thomas Shoal as a coastal State under UNCLOS.

Thirdly, as the Tribunal cannot draw Sino-Philippine maritime boundary in the SCS so as to know on whose (China's or Philippines') EEZ and continental shelf these 3 maritime features sit, the Tribunal cannot deny that China is in the position to claim EEZ and continental shelf covering the locations of Reed Bank, Mischief Reef, and Second Thomas Shoal, as a coastal State. Therefore, China's actions/omissions complained of by the Philippines in Submissions 8~9, 11~12, and 14 can all be justified by China's sovereign rights and jurisdiction derived from its EEZ

311 These 3 maritime features are considered by the Philippines as no more than LTEs and incapable of generating their own maritime entitlements under UNCLOS, not even territorial sea. Mischief Reef and Second Thomas Shoal are requested by the Philippines to be declared by the Tribunal as LTEs according to Submission 4 of the Philippines' Memorial, p. 271. Reed Bank is not even a LTE, as it is a submerged feature. This makes the legal status of the surrounding maritime areas very important. LTEs form part of the seabed and subsoil, and are subject to the regime of the maritime zone in which they are found and located. See United States Department of State, China: Maritime Claims in the South China Sea, *Limits in the Seas*, No. 143, p. 9, at <http://www.state.gov/documents/organization/234936.pdf>, 10 March 2015.

312 This is required by the rulings of *Qatar v. Bahrain* and *Malaysia v. Singapore* that were recognized by the Philippines itself in the Memorial: "The Court has made clear that 'low-tide elevation[s] cannot be appropriated under general international law, and that sovereignty and other rights in relation to them are determined by the law of the sea, namely by the maritime zones in which they are located ... In *Qatar v. Bahrain*, the Court held that Qatar had sovereignty over Fasht al-Dibl, a low-tide elevation, because it was located within Qatar's territorial sea. Likewise, in *Malaysia/Singapore*, the status of South Ledge, a low-tide elevation, was held to depend on the outcome of the as-yet unresolved maritime delimitation under UNCLOS still to occur between Malaysia and Singapore." See Philippines' Memorial, pp. 199~200, paras. 6.105~6.106.

313 See Philippines' Memorial, p. 257, para. 7.120. Also see the Notification, p. 16, para. 40.

and continental shelf entitlements according to UNCLOS, for the following details:

(1) For the Reed Bank Incident from February 2010 to March 2011 when China interfered with Philippines' survey vessel *MV Veritas Voyager* in the area "GSEC 101" near Reed Bank as identified by Philippines' Submissions 8~9: The situation should be fairly characterized as Philippines' marine scientific research for the purpose of the exploration and exploitation of natural resources on China's continental shelf as defined by Article 246(5)(a)~(c).³¹⁴ Accordingly, China as a coastal State in that water may withhold its consent and exercise jurisdiction by interfering with the team dispatched or authorized by the Philippines, i.e. the survey vessel *MV Veritas Voyager*.³¹⁵ The Philippines' objection to China's interference amounts to Philippines' denial of China's legal status as a coastal State here.

(2) For the actions of China's government vessels in interfering with Philippines' fishing activities in the waters adjacent to Mischief Reef and Second Thomas Shoal as identified by Submission 8~9:³¹⁶ For the living natural resources found in the water adjacent to these two LTEs, China as a coastal State for the EEZ may (1) exercise its sovereign rights for conservation and management purposes, and (2) exercise jurisdiction for protecting and preserving the marine environment,

314 Article 246(5)(a)~(c) of UNCLOS reads: "5. Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project: (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living; (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment; (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80..."

315 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 251~252.

316 See Philippines' Memorial, para. 6.35.

in accordance with Article 56 of UNCLOS.³¹⁷ It is fair to characterize the dispute as denying China's status of coastal State and relating to China's sovereign rights with respect to the living resources in China's EEZ and China's exercise of such sovereign rights under Article 56.

(3) For the actions of Chinese government vessels to obstruct Philippines' government vessels from enforcing the latter's laws upon Chinese fishing vessels in the water adjacent to Second Thomas Shoal as identified in Submission 11: As Second Thomas Shoal is undeniably lying in China's EEZ and continental shelf, the legality disputes concerning the obstruction of Philippines' law enforcement activities should be re-characterized as a dispute concerning the exercise of the sovereign rights of China (as a coastal State)³¹⁸ for "conserving and managing" the living resources in its EEZ according to Article 56(1)(a) of UNCLOS. Such sovereign rights have an exclusive nature. China cannot exercise such rights without first precluding the competing Filipino law enforcement activities against Chinese fishing vessels in the same water. Therefore, such obstruction of Filipino law enforcement activities should be deemed an inherent and inseparable part of the exercise of China sovereign rights under Article 56(1)(a). Again, the essence of the dispute is Philippines' denial of China's status as a coastal State here.

(4) For China's actions of occupation and construction on Mischief Reef as identified in Submission 12: As Mischief Reef is undeniably located in China's EEZ and continental shelf, China cannot be denied the status of "coastal State"

317 Article 56 (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone) of UNCLOS reads: "1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI."

318 To be noted, the Philippines denied China the status as a coastal State in this area. See First-round submissions by Professor Boyle, in *Transcripts of the Hearing on 8 July 2015*, p. 103. As said by Professor Boyle, "[i]n respect of Second Thomas Shoal and Mischief Reef, China is not the relevant coastal [S]tate. China is not bringing the case. It's the Philippines, less than 200 miles away, that is the relevant coastal [S]tate."

endowed with sovereign rights and jurisdiction to exercise in the water adjacent to Mischief Reef. According to Articles 56(1)(b), 60(1)~(2)³¹⁹ and 80³²⁰ of UNCLOS, China is entitled to have jurisdiction for building artificial islands in Mischief Reef as a part of China's EEZ and continental shelf, not to mention that what has been built on Mischief Reef is much less than artificial islands, but a normal land reclamation. Therefore, it is fair to re-characterize the dispute as reflected by Submission 12 to be the ones with regard to the exercise by China, as a coastal State, of its jurisdiction provided for in the UNCLOS. On the other side of the coin, the dispute here is concerning whether China has the status as a coastal State.

(5) For China's interference with Philippines' navigational rights, resupply and rotation of personnel stationed on *BRP Sierra Madre* at Second Thomas Shoal as identified by Submission 14: As China is undeniably a coastal State for the water adjacent to Second Thomas Shoal, China can exercise sovereign rights and jurisdiction under UNCLOS legal regimes of EEZ and continental shelf in that region. Articles 60(1)(c) and 80 of UNCLOS provide the coastal State with the exclusive right to authorize and regulate the operation and use of installations and structures which may interfere with the exercise of its rights as the coastal State in the zone. Besides, according to Article 60(2) the coastal State shall have exclusive jurisdiction over such installation and structures, including jurisdiction with regard to immigration laws and regulations. Applying the rules to the situation on the ground, as the immobile Filipino ship *BRP Sierra Madre* can serve as a solid military base which is highly expected to be used for interfering with China's exercise of its sovereign rights in its undeniable EEZ and continental shelf here, China as the coastal State may take actions to regulate the use of such immobile vessel according to Articles 60(1)(c) and 80. By appearance the vessel is not as permanent as an installation and structure. However, since China has the exclusive

319 Article 60(1)~(2) of UNCLOS (entitled Artificial islands, installations and structures in the exclusive economic zone) provides: "1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands; (b) installations and structures for the purposes provided for in article 56 and other economic purposes; (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone. 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations."

320 Article 80 of UNCLOS (entitled Artificial islands, installations and structures on the continental shelf) provides: "Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf."

right to authorize and regulate the operation and use of installation and structure that is, by nature, fixed and more permanent than vessels. *A fortiori*, China should be no less entitled to such exclusive right for the less permanent thing like this foreign-occupied vessel which however can be more functional and threatening than a normal installation and structure. Not to be overlooked, such a heavy metal vessel is actually hard to move by force of its own or from outside, making it as fixed as a normal installation and structure.³²¹ On the other hand, since the Philippine personnel to be transported to such immobile vessel may serve to interfere with China's future exercise of its sovereign rights under its EEZ and continental shelf entitlements, China may invoke Article 60(2) to exercise jurisdiction to enforce China's immigration laws and regulations upon those personnel engaging in illegal rotation, too. Put differently, China would invoke Articles 60 and 80 to justify its actions while the Philippines will oppose the applicability of these articles due to Philippines' denial of China's status as a coastal State in the first place.

Fourthly, as indicated by Section III-A-6 of this paper and China's 2009 & 2011 NVs and Philippines' 2011 NV, the Philippines also claims territorial sovereignty over those 12~15 proper islands located in KIG (see Tables 1 & 2 of this paper). It denies China's status as a coastal State in the water adjacent to Mischief Reef, Second Thomas Shoal, and Reed Bank. As a consequence of such a core territorial dispute as the primary or principal dispute, the dispute materializes as to whether China can enjoy the status as a coastal State in these areas. This dispute will go beyond the jurisdiction of this Tribunal, if following the award of *Mauritius v. U.K.* which is both relevant and applicable to the present case.³²²

Fifthly, as the Tribunal cannot deny China's territorial claims over the entire Spratly Islands Group (including those proper islands therein), the real and predominant³²³ disputes as reflected by Sino-Philippine maritime confrontations identified by Submissions 8~9, 11~12, and 14 turn to be Sino-Philippine maritime boundary delimitation disputes, as evidenced by the oral statements of Philippines'

321 See China's Position Paper, para. 51.

322 Chagos Marine Protection Area Arbitration (*Mauritius v. United Kingdom*), UNCLOS Annex VII Tribunal, Award, 18 March 2015, paras. 203~221.

323 Chagos Marine Protection Area Arbitration (*Mauritius v. United Kingdom*), UNCLOS Annex VII Tribunal, Award, 18 March 2015, para. 229.

Foreign Secretary³²⁴ and counsel³²⁵ at the July Hearing. Put differently, such confrontations demonstrate the consequences of the unsettled sea boundary delimitation disputes.³²⁶ Should such real and predominant disputes be settled, no more issues will exist between China and the Philippines concerning “on whose EEZ and continental shelf those 3 maritime features lie”. Then all the complaints from these Philippines’ Submissions, as the consequences of such an unsettled real dispute, will die down,³²⁷ similar with *Mauritius v. U.K.*³²⁸ In other words, Submissions 8~9, 11~12, and 14 should be properly characterized as relating to sea boundary delimitation. The Parties’ differing views on “whether China may have the status of coastal State” in these Submissions are simply one aspect of this larger dispute.³²⁹ As a matter of course, the settlement of the maritime boundary delimitation dispute as the real disputes underlying these Submissions cannot be completed without resolving first the Sino-Philippine territorial disputes as the core dispute. This impossible mission for the Tribunal has been discussed by Sections III-C-1, III-C-2, and III-C-3 of this paper.

5. For Submission 13: The Alleged China’s Endangering of Filipino Navigational Safety at Scarborough Shoal Should Be Deemed as Military Activities under Article 298(1)(b) of UNCLOS

As known to the world, the Sino-Philippine territorial dispute over, *inter*

324 On 7 July 2015 which is the first day of the Hearing, the Secretary of Foreign Affairs of the Philippines, Mr. Albert del Rosario, said: “China has pursued its activities in these disputed maritime areas with overwhelming force. The Philippines can only counter by invoking international law. That is why it is of fundamental importance to the Philippines, and, we would submit, for the law of rule in general, for the Tribunal to decide where and to what limit China has maritime entitlements in the South China Sea; where and to what limit the Philippines has maritime entitlements; where and to what extent the parties’ respective entitlements overlap, and where they do not.” It is obvious that the Philippines’ goal in this arbitration is maritime boundary delimitation in the SCS where maritime claims of China and the Philippines overlap. See First-round submissions by Secretary Del Rosario, in Transcripts of the Hearing, 7 July 2015, pp. 16~17.

325 *Supra* note 276. Also see Professor Oxman’s oral statement on 8 July 2015, in Transcripts of the Hearing on 8 July 2014, pp. 47~48.

326 *Chargos Marine Protection Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS Annex VII Tribunal, Award, 18 March 2015, para. 211.

327 If the waters adjacent to these 3 maritime features are considered to be on China’s side of EEZ and continental shelf after boundary delimitation, then there will be no reason for the Philippines to enforce its domestic laws there and to treat those areas as Philippines’ EEZ and continental shelf any more, and vice versa.

328 *Chargos Marine Protection Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS Annex VII Tribunal, Award, 18 March 2015, para. 211.

329 Philippines’ Memorial, p. 194, para. 6.93.

alia, Scarborough Shoal continues and remains unsettled. From the observation of this author, China, as the one getting upper hand only since April 2012, has been vigilant for the danger of its territory to be lost again to the Philippines. No matter what kind of operations carried out by the Philippines, be it by civilians³³⁰ or officials, through fishing boats or law enforcement vessels, either navigable or immobile,³³¹ the reactions of China may be primarily for maintaining its territorial integrity by holding on to the territories it has recovered. The rules governing China's law enforcement vessels, in this context, turn to be the limitations imposed by the principle of self-defense under the United Nations Charter and customary international law.³³² When sovereignty is at stake, demanding China to apply Article 94 of UNCLOS and COLREGS to prevent the near-collision incidents in the territorial water of Scarborough Shoal is tantamount to asking China to tolerate the ever-increasing Philippines' forces and to accept the mounting risk of losing Scarborough Shoal once more. Under such kind of mentality and distrust between China and the Philippines, it will be naive to deny China's actions disputed by Submission 13 as military activities due to China's denial of such a nature. Thus, the dispute will be removed from the jurisdiction of the Tribunal, as it falls within the scope of disputes concerning military activities covered by Article 298(1)(b),³³³

330 The Philippine civilian, Cloma, who was an owner of a fishing company and director of the Philippine Maritime Institute, sailed to Spratly Islands and "discovered" Kalayaan Islands (the Freedomland) in May 1956. Then in December 1974, President Marcos of the Philippines received a document from Cloma transferring all the rights of Tomas Cloma & Associates in "Freedomland" to the Philippine Government. In June 1978 President Marcos issued a decree officially claiming part of the Spratly Islands and making it a municipality in Palawan province. The area claimed was almost identical with Cloma's claim. See Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective*, Oxford: Chandos Publishing, 2013.

331 On Second Thomas Shoal, the Philippines uses an immobile warship, *BRP Sierra Madre*, to occupy that maritime feature since 1999. See Philippines' Memorial, p. 61, para. 3.59.

332 For the two authoritative treatments of this topic, see D.W. Bowett, *Self-Defense in International Law*, Manchester: Manchester University Press, 1958; Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963; China's Position Paper, paras. 6~7.

333 Article 298(1)(b) of UNCLOS reads: "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: ... (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..."

and the scope of disputes excluded by China's 2006 Declaration.

6. For Submission 14: The Alleged China's Interference with Filipino Navigational Rights, Resupply and Rotation of Personnel at Second Thomas Shoal Fulfills the Conditions of Military Activities under Article 298(1)(b)

Apart from certain unsettled preliminary issues that make Philippines' claim in Submission 14 inadmissible³³⁴ (see Sections III-D-2 and III-E-4 of this paper), the dispute brought under this Submission also suffers from lack of jurisdiction on the part of the Tribunal. The Philippines itself has quoted the remarks made by Major General Zhang Zhaozhong concerning China's "cabbage strategy" at Second Thomas Shoal.

As said by the Philippines, China's strategy at Second Thomas Shoal and other features within SCS was explained by one Chinese senior military official, Major General Zhang Zhaozhong, who said that China was employing a cabbage strategy. China would seal and control a maritime feature by surrounding it with fishing administration vessels, marine surveillance vessels and navy warships until the feature is wrapped layer by layer like a cabbage. "Without the supply for one or two weeks, the troopers stationed there will leave the islands on their own. Once they have left, they will never be able to come back".³³⁵

As evidenced by the Philippines' Memorial indicated above,³³⁶ the "interference" carried out by those Chinese government vessels, i.e. China Marine Surveillance vessels, Chinese navy missile frigate, and China Coast Guard vessels, constituted military activities to obtain the exclusive presence on Second Thomas Shoal, as part of the continental shelf claimed by China (see Table 2 of this paper) as a coastal State in this water. Such activities are covered by Article 298(1)(b). As China's 2006 Declaration has removed the jurisdiction of Annex VII Tribunal to settle the category of dispute referred to in Article 298(1)(b), the Tribunal has no jurisdiction over such dispute as constituted by Submission 14.

334 Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, p. 288.

335 Philippines' Memorial, para. 3.67, p. 64.

336 Professor Oxman said in the July Hearing that China has to prove the existence of military activities. However, the Philippines itself has proved such a point. See First-round submissions by Professor Oxman, in *Transcripts of the Hearing on 8 July 2015*, pp. 81-93.

F. The Situations Limiting the Jurisdiction of the Tribunal according to Article 297(1) of UNCLOS

1. For Submission 12: The Dispute of China's Building of Artificial Islands in Mischief Reef as Part of China's EEZ and Continental Shelf Fits in the Chapeau of Article 297(1) of UNCLOS

Section III-C-7 of this paper has argued that the dispute brought by Philippines' Submission 12 should be considered inadmissible as no dispute concerning the interpretation or application of UNCLOS is being conveyed. Alternatively, should the Tribunal consider the dispute reflected by Submission 12 as concerning the interpretation or application of UNCLOS, the following extra reasons will deprive the Tribunal of its jurisdiction over such a dispute.

As demonstrated by Section III-E-4 and Table 2 of this paper, China has undeniable maritime entitlements of EEZ and continental shelf in the SCS that reach the location of, *inter alia*, Mischief Reef. According to Articles 56(1)(b), 60(1)~(2) and 80 of UNCLOS, China is entitled to have jurisdiction for building artificial islands or land reclamation less than artificial islands in Mischief Reef as part of China's EEZ and continental shelf. Therefore, it is fair to re-characterize the dispute as reflected by Submission 12 to be the ones concerning the interpretation or application of UNCLOS with regard to the exercise by China, as a coastal State, of its jurisdiction provided for in the UNCLOS. Such a dispute is covered by the chapeau of Article 297(1) concerning limitation on applicability of section 2 of Part XV.³³⁷ Consequently, the Tribunal may not have jurisdiction to try the dispute in

337 Article 297(1) of UNCLOS (entitled Limitations on applicability of section 2) provides: "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."

question.

2. For Submission 14: The Alleged China's Interference with Filipino Navigational Rights, Resupply and Rotation of Personnel at Second Thomas Shoal Fulfills the Conditions Said in the Chapeau of Article 297(1)

Sections III-E-4 and III-E-7 of this paper have argued that the dispute presented by Submission 14 has been excluded by China's 2006 Declaration as first, the real dispute of Submission 14 is a maritime boundary delimitation dispute, caught by Article 298(1)(a)(i) of UNCLOS; and second, China's interference with Philippines navigational rights, resupply and rotation of personnel should be deemed military activities, covered by Article 298(1)(b). Apart from these jurisdictional obstacles, there is one more hurdle that prevents the Tribunal from trying such a dispute.

As demonstrated by Section III-E-4 and Table 2 of this paper, China has undeniable maritime entitlement of EEZ and continental shelf in the SCS reaching the location of, *inter alia*, Second Thomas Shoal. Therefore, China should not be denied the status of a coastal State concerning Second Thomas Shoal for the purpose of application of chapeau of Article 297(1) of UNCLOS. Consequently, the legality dispute of China's interference with the actions of the Philippines to resupply its military personnel stationed on *BRP Sierra Madre* is concerning the exercise by China as a coastal State of its sovereign rights or jurisdiction of continental shelf and EEZ as provided for in Articles 60(1)(c), 60(2), and 80 of UNCLOS. The application of these provisions and legal arguments China may provide can be seen in Section III-E-4 of this paper. In short, the alleged China's interference with Philippines' navigational rights, resupply and rotation of personnel at Second Thomas Shoal fulfills the conditions said in the Chapeau of Article 297(1), and thus precludes the Tribunal from exercising its jurisdiction over Submission 14.³³⁸

IV. Conclusions: Insurmountable Obstacles of Admissibility and Jurisdiction for Each and Every Submission of the Philippines and the Prospects of This Arbitration

338 As to why such China's activities are not covered by Article 297(1)(a)-(c), see Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on South China Sea Disputes: Admissibility and Jurisdiction Issues*, *China Oceans Law Review*, Vol. 2015, No. 1, 2015, pp. 291~292.

Section III of this Paper answers 6 different levels of questions concerning admissibility and jurisdiction issues for the Philippines' Submissions 1~14. To wit, among these Submissions,

(1) which Submission suffers from lack of dispute and why – answered by Section III-A;

(2) which Submission does not convey legal dispute and why – answered by Section III-B;

(3) which Submission fails to provide a dispute concerning the interpretation or application of UNCLOS and why – answered by Section III-C;

(4) which Submission fails to fulfill the requirements contained in Section 1 of Part XV of UNCLOS and should be deemed as inadmissible for the dispute settlement mechanisms under Section 2 of Part XV to address and why – answered by Section III-D;

(5) which Submissions may not be entertained by the Tribunal due to application of Article 298 and why – answered by Section III-E;

(6) whether Article 297 limits the jurisdiction of this Tribunal to address Philippines' Submissions and why – answered by Section III-F.

To be noted, the (1)~(4) levels of questions relate to admissibility, while the (5)~(6) levels of questions concern jurisdictional issues. All these questions need to be scrutinized before an award on jurisdiction and admissibility can be granted. These questions obviously cover more issues than China's Position Paper. Hence, this paper serves as a private response to the second part of questions covered during the July Hearing (i.e. other possible issues of jurisdiction and admissibility). To comprehensively address this part of Tribunal's questions, the answers to the foregoing 6 levels of questions go far beyond what had been addressed by the Philippines' counsel during the Hearing. Meanwhile, as can be seen from the text and the footnotes of this paper, this author has attempted to comment on as many Philippines' statements made during the Hearing as possible.

Summing up, each of the Philippines' Submissions 1~14 encounters plural obstacles in admissibility and/or jurisdiction that are hard to surmount. Table 3 will assist the readers in having an overview of Section III of this paper and to quickly grasp first, what kinds of admissibility and jurisdictional hurdles each Philippines' Submission faces, and second, where to find such obstacles and the legal bases. Table 3 is entitled "Inadmissibility and Lack of Jurisdiction for Philippines' 14 Submissions Based on Reasons Provided by Identified Sections of This Paper". For both kinds of the obstacles facing Submissions 8~14, Table 4 entitled "Filipino

Submissions 8~14 & Admissibility/Jurisdiction: Some Common Grounds” is produced to assist the readers in understanding how these obstacles can jointly affect Philippines’ Submissions. After reading through Section III together with Table 3 and Table 4, it should be fair to say that no Submissions of the Philippines should survive these procedural challenges and enter into the merits phase by this Tribunal.

Taking a huge jump further, should the Tribunal finally consider any admissibility and jurisdiction hurdle raised by China’s Position Paper and by the academic papers being surmounted by Philippines’ legal arguments, one word of caution must be said. Namely, are the losing Party (be it the Philippines or China) in the merits phase really losing all the legal justifications to continue its disputed actions? If not, what will this arbitration look like? This author has ventured to provide all the possible legal arguments that the losing Party can use to justify the continuation of its disputed actions in Section II of this paper and another article in *Chinese (Taiwan) Yearbook of International Law and Affairs*. All such arguments are based on the unaffected legal positions of that Party in its territorial disputes and/or sea boundary delimitation disputes with the other Party in this arbitration. These two kinds of disputes are the core disputes but un-submitted to this Tribunal, as repeatedly confirmed by the Philippines’ counsel at the Hearing. All those legal arguments that the losing Party can advance demonstrate the fact that it is these core disputes that cause the Sino-Philippine maritime confrontations reflected by the Philippines’ Memorial. Even if the Tribunal has jurisdiction to try the ancillary and surface disputes submitted by the Philippines, the confrontations called by the Philippines as the consequences of those submitted disputes will remain, for overlooking the root causes of the confrontations. Unless the Tribunal can indirectly settle the core disputes despite both Parties’ withholding of authorization, the end result will show the ineffectiveness of the award. To wit, it is impossible for the award to settle anything, including the ancillary and surface disputes submitted. This is because they are not disputes *per se*, but simply the consequences of the unsettled core disputes. Such predictable impasse should render the continuation of arbitral proceedings unnecessary pursuant to Article 27(2) of ROP. The advice for the Tribunal will be to terminate the arbitral proceedings for the Sino-Philippine Arbitration on the South China Sea Disputes accordingly.

**Table 3 Inadmissibility and Lack of Jurisdiction for Philippines' 14 Submissions
Based on Reasons Provided by Identified Sections of This Paper**

	S-1	S-2	S-3	S-4	S-5	S-6	S-7	S-8	S-9	S-10	S-11	S-12	S-13	S-14
Lack of dispute	III-A-1	III-A-2 III-A-3 III-A-4	III-A-5	III-A-6 III-A-7	III-A-6 III-A-9	III-A-6 III-A-7	III-A-6 III-A-8							
Lack of legal dispute		III-B-1 III-B-2									III-B-3			
Lack of dispute concerning the interpretation or application of UNCLOS					III-C-1					III-C-2	III-C-3 III-C-4 III-C-5 III-C-6	III-C-7	III-C-3 III-C-8	
UNCLOS Arts. 281, 283, 286 bar Tribunal's jurisdiction					III-D-2						III-D-1 III-D-2		III-D-2	
Tribunal's jurisdiction excluded by Art. 298		III-E-1 III-E-2		III-E-3		III-E-3	III-E-3	III-E-4			III-E-4	III-E-4	III-E-5	III-E-4 III-E-6
Tribunal's jurisdiction limited by Art. 297												III-F-1		III-F-2

Table 4 Filipino Submissions 8-14 & Admissibility/Jurisdiction: Some Common Grounds

Unsettled core disputes, making the claims inadmissible	Territorial dispute as core dispute	Territorial dispute inside sea boundary delimitation dispute for overlapping EEZ & CS claims as core disputes			Disputes covered by Art. 297(1) chapeau & China's 2006 Declaration, thus excluded from the jurisdiction of the Tribunal
	Tribunal is powerless to answer the following preliminary questions	On which Party's EEZ & CS do these maritime features (LTE) & their adjacent waters sit?			
Conflict sites	Scarborough Shoal & adjacent water	2nd Thomas Shoal & adjacent water	Mischief Reef & adjacent water	Reed Bank	
Submission	PRC's actions & omissions complained by Filipino Submissions				
10	Preventing Filipino traditional fishing				
11	Fails to protect & preserve marine environment				Art. 298(1)(b) Military activities by government vessels engaged in non-commercial service To defending territorial integrity
13	Interfering with freedom of navigation				
14(a)		Interfering with freedom of navigation			
11 & 12(b)		Fails to protect/preserve marine environment			Art. 298(1)(b) law enforcement activities -> Art. 297(3)(a) Exercise of EEZ sovereign right -> Art. 56(1)(a)
8-9		Interfering with fishing activities			
12(a) & (c)			Building artificial islands/structure		
14(b)		Preventing rotation & resupply			Art. 297(1) chapeau ->Arts. 60 & 80 While Art. 297(1)(a)-(c) inapplicable
14(c)		Endangering health of Filipino personnel			

8-9				Interfering with exercise of sovereign rights for non-living natural resources	Art. 298(1)(b) law enforcement activities -> Art. 297(2)(a)(i) Exercise of a right/discretion according to Art. 246 -> Art. 246
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