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The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections

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Abstract

This article first highlights in Part I the procedural posture of the *South China Sea Arbitration (the Philippines v. China)* case and the affirmative duty of the Arbitral Tribunal under Article 9 of Annex VII to the UNCLOS, faced with the absence of China, to investigate conscientiously its own jurisdiction by taking notice of all available information and materials whether or not they are submitted to the Tribunal. Part II summarizes the Philippines' claims and highlights their nature as well as the delimitation geographical framework and the delimitation situation in this matter. The Philippines "skillfully" fragments a big dispute with China into various free-standing-appearing entitlement claims and activities claims in order to conceal the sovereignty-delimitation nature of the dispute or claims. Part III discusses the jurisdictional obstacles or objections *ratione temporis* and *ratione materiae*. The dispute is outside the jurisdiction of Section 2 courts and tribunals, because it predated the entry into force of the UNCLOS with respect to China. Furthermore, the Philippines' claims are essentially land territorial sovereignty matters, not concerning the interpretation or application of the UNCLOS, or are dependent on the resolution of land territorial sovereignty claims. Part IV discusses the jurisdictional obstacles or objections based on Article 298 of the UNCLOS and China's 2006 optional exceptions declaration as well as the Philippines' related Understanding. When

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defragmented as they must be because of the delimitation geographical framework and/or delimitation situation, the Philippines' claims constitute one delimitation dispute with China. In any event, a dispute "concerning" the interpretation or application of the provisions on delimitation or "relating to" "delimitation" within the meaning of Article 298 has a broader scope than a delimitation dispute, however strict a reading one gives to that term. All these issues have been excluded by China from the jurisdiction of Section 2 courts and tribunals. Such a defragmentation approach must be applied by the Tribunal. In addition, the "nine dash line" claims may present disputes involving historic title or historic rights as relevant circumstances in a potential delimitation between the Philippines and China, all being excluded matters. The Philippines' Understanding may also serve to exclude this case from the Tribunal's jurisdiction. Part V summarizes the arguments made in this article.

I. Procedural posture and the duties of the Arbitral Tribunal under Article 9 of Annex VII to the UNCLOS

1. Part XV of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS or Convention)[1] sets up a complex system for the settlement of disputes regarding its interpretation or application. Briefly stated, that system is as follows. First, under Section 1 of Part XV ("Section 1"[2]), as usual, the States parties have an obligation to settle disputes peacefully and also enjoy their freedom of choice as to the peaceful means of voluntary settlement. Second, if by their free choice of means (or by making no choice) the parties cannot settle their disputes, a dispute may be submitted under Section 2 of Part XV ("Section 2") by any party to "compulsory procedures entailing binding decisions", unless the dispute falls within special exceptions. Third, these special exceptions—some automatic, some optional—are provided for or permitted under Section 3 of Part XV ("Section 3"). Some of these excepted disputes may be submitted by any party to the compulsory procedure for conciliation under Annex V, Section 2 ("compulsory conciliation" in short), leading to non-binding recommendations for the parties, while others are completely excepted from all compulsory procedures, be it adjudication, arbitration or conciliation, though such disputes are still subject to Section 1.

2. Under Section 2, the parties enjoy freedom of choice of forums in advance by making a written declaration under Article 287. The forums include the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration under

1 For text and other materials, see http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

2 Sometimes "section", "article", with a lower case "s" and "a", are used to refer to the sections and articles in the UNCLOS. Such a usage will cause confusion in this long paper and is not adopted here. Furthermore, "the Philippines' Notification" will used throughout the paper, although "the Philippines's Notification" would be more correct grammatically, as the former is more generally used.

Annex VII or Annex VIII, and the overlapping choice will be the forum to decide their dispute; if the choices do not overlap (or no choice has been made by a party), arbitration under Annex VII becomes the default forum. The parties can further agree to override this result. Neither the Philippines nor China had made any choice of forum under Article 287 at the time when this arbitration was initiated or now.

3. Under Section 3, Article 297 provides for automatic "Limitations on applicability of Section 2", while Article 298 provides for "Optional exceptions to applicability of Section 2", thus excepting some categories of disputes from the applicability of Section 2 "compulsory procedures entailing binding decisions". The automatic exceptions provided for under Article 297 essentially deal with the exercise of discretion by a coastal State, an issue not relevant to our discussion here, and will not be discussed. The optional exceptions that can be made by a party under Article 298 may cover disputes relating to sea delimitation or those involving historic bays or titles (under paragraph 1 (a)), as well as disputes concerning military activities and law enforcement (under paragraph 1(b)) or disputes in respect of which the UN Security Council is exercising its functions under the Charter of the United Nations (UN Charter) (under paragraph 1(c)). Furthermore, Article 298(3) provides for reciprocal application of any optional exceptions, and Article 299 reminds the parties that although various disputes are or may be excepted from Section 2 binding decision procedures, they can nonetheless agree by, and only by, additional agreement to submit them to a Section 2 procedure. Finally, Article 309 prohibits reservations or exceptions unless expressly permitted by other articles of the Convention.

4. China filed such a declaration in 2006. In simple and concise terms, this declaration states:

> The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a) (b) and (c) of Article 298 of the Convention.[3]

This declaration makes clear China's intent to except and has excepted all the disputes mentioned in Article 298(1)(a), (b) and (c) from the applicability of Section 2 compulsory procedures. Simply put, anything that can be excepted or excluded by China has been excepted or excluded.

5. The Philippines filed an understanding upon signature which was confirmed upon ratification of the UNCLOS in 1984 (the "Philippines' Understanding"). The import or effect of that Understanding is not clear. Several paragraphs seem to address domestic law issues or other issues not relevant to our discussion here. Of significance are paragraphs 4 and 8, which state[4]:

3 http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm

4 Ibid. (The Philippines).

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

Obviously this understanding is susceptible to various interpretations.

6. On 22 January 2013, the Philippines handed to the Ambassador of China a note verbale together with a Notification and Statement of Claim (the "Philippines' Notification" or "Notification"), claiming to initiate arbitral proceedings under Article 287 and Annex VII, "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea".[5] The materials on the website of the Permanent Court of Arbitration simply name the case as "*The Republic of the Philippines v. The People's Republic of China*" or "*The Philippines v. China*".[6] Such a title is fine but does not give any indication of the subject-matters of the claims. For the purposes of our discussion, I personally decide to choose "*The South China Sea Arbitration (The Philippines v. China)*" as the name for this case. Obviously, the naming of a case is an art, and a controversial one at that.[7] The Philippines' note verbale uses a recently minted name, "West Philippine Sea" to describe the area in question. Even if such an attempt to change an age-old usage in order to advance its claims has any value, this newly named area is only a part of the area at issue, as the Philippines' Notification makes clear in paragraphs 1, 10-11. Thus, the name chosen here more accurately denotes the scope of the case. However, regarding the names of the various features involved, in order to avoid confusion, I will follow the use of terms in the Philippines' Notification, but add Chinese terms where appropriate. Sometimes I will put Chinese terms first if a feature is not yet mentioned in the Philippines' claims. In the tables next to paragraph 45 below, the Chinese terms will be placed first.

5 Note verbale No. 13-0211 of the Philippines, Dept. of Foreign Affairs, dated 22 Jan. 2013 (http://www.dfa.gov.ph/index.php/downloads/doc_download/523-notification-and-statement-of-claim-on-west-philippine-sea)(accessed 2013.05.25); Statement: The Secretary of Foreign Affairs on the UNCLOS Arbitral Proceedings against China, 22 Jan. 2013 (http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/).

6 The Republic of the Philippines v. The People's Republic of China (http://www.pca-cpa.org/showpage.asp?pag_id=1529).

7 See Sienho Yee, Article 40, in Andreas Zimmermann, et al. (eds), The Statute of the International Court of Justice: A Commentary (2d ed. 2012), 922, at 965-968, MN 79-82.

On 19 February 2013, China rejected and returned the note verbale and the attached Notification and Statement of Claim, refusing to accept or participate in the arbitral proceedings.[8] The Philippines moved to have the Arbitral Tribunal constituted (the "Arbitral Tribunal" or "Tribunal"). On 25 April 2013, a press release[9] from the International Tribunal for the Law of the Sea ("ITLOS") stated that the President[10] had appointed all the arbitrators that he was required to appoint and that the composition of the Arbitral Tribunal is as follows: Chris Pinto, president (Sri Lanka), Jean-Pierre Cot (France), Stanislaw Pawlak (Poland), Alfred Soons (The Netherlands) and Rüdiger Wolfrum (Germany). On 26 April 2013, China reaffirmed its rejection of the arbitration and outlined its view that "the request for arbitration by the Philippines is manifestly unfounded" and that the rejection "has a solid basis in international law".[11] Subsequently President Pinto resigned and Thomas A. Mensah, of Ghana, was appointed in his place.[12] In a note verbale dated 1 August 2013 to the Permanent Court of Arbitration (PCA) which acts as the Registry of the Arbitral Tribunal, China reiterated "its position that it does not accept the arbitration initiated by the Philippines".[13]

7. This situation brings into play Article 9 ("Default of appearance") of Annex VII. Under that provision,

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

8. There does not appear to be any experience in the application of this provision itself. That is to say, there are no reported cases in which an arbitral tribunal has had to apply Article 9 of Annex VII.

8 Remarks by the Spokesperson of the Foreign Ministry of China, 19 Feb. 2013 (http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/jzhsl_602247/t1014798.shtml) (accessed 25 May 2013).

9 ITLOS/Press 191 (25 April 2013).

10 On the role of the President and potential problems, see Sienho Yee, The Presidency of the International Tribunal for the Law of the Sea and the "National State Extension" Concern, 10 Chinese JIL (2011), 739-770.

11 Remarks by the Chinese FM Spokesperson (http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/dhdw_602249/t1035477.shtml) (accessed 2013.05.25); English version at: (http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml) (accessed 2013.05.25).

12 See ITLOS/Press 197 (24 June 2013).

13 See PCA website, http://www.pca-cpa.org/showpage.asp?pag_id=1529.

9. In order to analyze how the Tribunal may deal with this situation and this case, we go to the applicable law first. Under Article 4 of Annex VII, an arbitral tribunal duly constituted under Article 3 of Annex VII "shall function in accordance with this Annex and the other provisions of this Convention". This means that the Tribunal in this arbitration shall apply the whole Convention, particularly the provisions relating to its jurisdiction and competence such as Articles 286-299, especially Article 293 which provides that, "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention". These provisions govern the Tribunal's application of Article 9 of Annex VII as well as all other aspects of the case. Accordingly, both the provisions of UNCLOS and other rules of international law which may inform the Tribunal's decisions will be considered throughout this article.

10. First of all, one cannot fail to notice that compared to Article 288(4), which appears to impose a *passive* duty on a court or tribunal to settle a dispute as to whether it has jurisdiction "in the event of" such a dispute, Article 9 of Annex VII imposes an *active* duty on the tribunal to "satisfy itself" that "it has jurisdiction over the dispute". It is not completely clear what such an active duty would entail. It would seem, however, that whatever measures that a tribunal operating under Article 9 must take, it must reach a final conclusion, satisfactory to itself, that it has jurisdiction before proceeding to deal with the merits. That is to say, it is a "result obligation" that is imposed on the tribunal.

11. The model for Article 9 of Annex VII is Article 53 of the Statute of the International Court of Justice (ICJ). Article 53 provides:

> (1) Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
> (2) The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

This provision has been applied several times.[14] Regarding jurisdiction, the ICJ took the view that under its Statute and its settled jurisprudence, it "must examine *proprio motu* the question of its own jurisdiction" to entertain an application, that this duty is, in a case of non-appearance of a party, reinforced by the language of Article 53, and that, "the Court, in examining its own jurisdiction, will consider those objections

14 For general discussions, see, e.g., Shabtai Rosenne, 3 The Law and Practice of the International Court: 1920-2005 (4th ed. 2006),1359-1374; Hans von Mangoldt and Andreas Zimmermann, Article 53, in Andreas Zimmermann, et al. (eds), n.7 above, 1324-1354; H.W.A. Thirlway, Non-appearance before the International Court of Justice (1985); Geneviève Guyomar, Le défaut des parties à un différend devant les juridictions internationals: etude de droit international public positif (1960).

which might, in its view, be raised against its jurisdiction".[15] As recognized by governments, this duty applies even when the respondent has not informed the Court of its attitude,[16] although the putative respondent State may, through a variety of measures not considered part of the proceedings, inform the Court of its attitude including any objections to its jurisdiction.

Sometimes, the scope of jurisdiction may vary according to whether the respondent "may enforce" a reservation in the applicant's acceptance of jurisdiction and a question may be raised as to whether some action from the respondent is necessary. In *Aegean Sea Continental Shelf (Greece v. Turkey)*, Greece essentially argued that in the absence of Turkey, the Court should not "enforce" (on the reciprocity principle), on behalf of Turkey, Greece's reservation in its instrument of accession to the 1928 General Act for Pacific Settlement of International Disputes because of the express wording of that Act. The Court took as sufficient enforcement the non-appearing respondent's informal letter which "opposed" the reservation to Greece's application, a letter Turkey sent at the invitation of the Court at the provisional measures stage.[17]

There seems to be a need to invoke or enforce a reservation under the Optional Clause system reflected in Article 36(2) of the ICJ Statute—where, it is generally believed,[18] a reservation is not automatically triggered but must be invoked formally, as can be inferred from the Court's decisions in *United States Nationals in Morocco (France v. United States)*[19] and *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*)[20] not to apply the subjective or self-judging reservation of domestic jurisdiction[21] (known as the Connally Amendment after the US Senator who sponsored it), which was not invoked by either party in either case,

15 Fisheries Jurisdiction (UK v. Iceland), Jurisdiction of the Court, ICJ Reports 1973, 3 at 7-8, para.12. To the same effect, see, e.g., Fisheries Jurisdiction (F.R. Germany v. Iceland), Jurisdiction of the Court, ICJ Reports 1973, 49, para.13; Aegean Sea Continental Shelf (Greece v. Turkey), ICJ Reports 1978, 3. Shabtai Rosenne, 2 The Law and Practice of the International Court: 1920-2005 (4th ed. 2006), 858, was of the view that, "Article 53 does not so much 'reinforce' a general duty imposed on the Court as impose a special duty on the Court in a defined set of circumstances".

16 As observed in Aegean Sea Continental Shelf, ICJ Reports 1978, 42, paras.15, 42.

17 Ibid., paras.39, 43, 47.

18 Rosenne, 2 Law and Practice, n.15 above, 750.

19 Case concerning rights of nationals of the United States of America in Morocco (France v. USA), Judgment, ICJ Reports 1952, 176.

20 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392.

21 Under this reservation, the United States' acceptance of the Court's jurisdiction under Article 36(2) of the Statute does not apply to "(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America". ICJYB 1951-1952, 197.

although in the former case each party had one "in force", while in the latter, the respondent State had one.

Part XV of the UNCLOS is different from the 1928 General Act or the Optional Clause system, however. Under the UNCLOS, the scope of jurisdiction of a court or tribunal under Part XV, Section 2 is fixed at the time when the optional exceptions are made and additional agreement is required to alter this result. The express terms of Article 298(2) and (3) and, especially, Article 299 make it very clear that there is no need for any "additional enforcement" or even invocation of an optional exception. Otherwise, Article 299(1), which states that "[a] dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute", is meaningless.

Another kind of "objections" that need no additional enforcement would result from the inherent limitations on the jurisdiction of a Section 2 court or tribunal. Any matters beyond the system scope of UNCLOS dispute settlement would be beyond the jurisdiction of such a court or tribunal. As will be made clearer later on, disputes about land territorial sovereignty would be such matters, for example.

In the light of the above, objections based on the limitations on the scope of the UNCLOS dispute settlement system and those based on Article 297 as well as on Article 298 and the optional exceptions declarations are more accurately described as "jurisdictional obstacles" that need not be invoked, not objections that need to be made. However, as the ICJ made clear long ago, in cases of non-appearance of the putative respondent, the Court itself has to consider what objections might be made against its jurisdiction, and thus may be making objections on behalf of the putative respondent, where appropriate, leading to the same result whether or not the putative respondent makes an objection, at least in those situations where "no additional enforcement" is required. For the purposes of our discussion here, I will lump all kinds together as "jurisdictional obstacles or objections".

12. Although we are concerned here only with jurisdiction, it is well for us to draw some inspiration from what has been said on the burden of proving law on the merits of a case. In this regard, the ICJ held in *United Kingdom v. Iceland* that:

> The Court […] as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court. In ascertaining the law applicable in the present case the Court has had cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained

> in various communications addressed to it by the Government of Iceland, and in documents presented to the Court. […] It should be stressed that in applying Article 53 of the Statute in this case, the Court has acted with particular circumspection and has taken special care, being faced with the absence of the respondent State.[22]

13. The same reasoning—the Court knows the law and no burden of proving the law can be imposed on the parties, for short—would apply also at the jurisdictional stage, and with stronger force. The law applies at the jurisdictional phase as much as at the merits phase. In fact, as the ICJ held, "[t]he existence of jurisdiction of the Court in a given case is […] not a question of fact, but a question of law to be resolved in the light of the relevant facts".[23] Of course, the judicial knowledge of the Court also exists at the jurisdictional stage as much as at the merits stage.

As far as burden of proof relating to factual allegations is concerned, the Court continued, after the quoted language, that "[t]he determination of the facts may raise questions of proof".[24] Though not crystal clear from this case, one may infer from this that the burden of proof of a fact rests squarely upon the party to whose claim of jurisdiction that fact is necessary.

A contrast between Article 36(6) and Article 53 of the ICJ Statute shows strong support for an affirmative duty on the ICJ to initiate, *proprio motu*, an assessment of its jurisdiction in a non-appearance case. While Article 36(6) provides "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court", thus implying that where there is no such a dispute, the Court need not address this issue, Article 53 imposes an affirmative duty on the part of the Court to "satisfy itself" that it has jurisdiction before proceeding forward.[25] That is to say, silence under Article 36(6) will lead to the presumption of an implicit agreement on jurisdiction, while silence under Article 53 has no such effect.

14. The duty on the ICJ to satisfy itself that it has jurisdiction was so hefty that in the cases where Article 53 of the ICJ Statute was applied, the Court often, if not always,[26]

22 Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, ICJ Reports 1974, 3, 9-10, para.17. To the same effect, Fisheries Jurisdiction (F.R. Germany v. Iceland), Merits, Judgment, ICJ Reports 1974, 175, 181, para.18. Subsequently, the ICJ further elaborated on the principles relating to Article 53 in US Diplomatic and Consular Staff in Tehran (USA v. Iran), Judgment, ICJ Reports 1980, 3, 18, para.33; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), ICJ Reports 1986, 14, 23, paras.26-31; 40, para.59; 42, para.67.

23 Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, 69, 76, para.16.

24 Ibid.

25 See Hans von Mangoldt and Andreas Zimmermann, n.14 above, 1344-345.

26 The only exception seems to be US Diplomatic and Consular Staff in Tehran (USA v. Iran), Judgment, ICJ Reports 1980, 3, in which no bifurcation of proceedings

decided that it was necessary to first resolve the issue of jurisdiction and ordered the written proceedings to be addressed to the question of jurisdiction, thus bifurcating the proceedings.[27] This course of action was taken in the two *Fisheries Jurisdiction* cases (*UK v. Iceland*[28]; *F.R. Germany v. Iceland*[29]), the two *Nuclear Tests* cases (*Australia v. France*[30]; *New Zealand v. France*[31]), the *Pakistani Prisoners of War* case (*Pakistan v. India*),[32] and the *Aegean Sea Continental Shelf* case (*Greece v. Turkey*).[33] In *Fisheries Jurisdiction*,[34] the Court first decided that it had jurisdiction and then proceeded in a second phase to decide on the merits. In *Nuclear Tests*, the Court dismissed the cases on grounds of mootness, similar to inadmissibility, without a decision on jurisdiction.[35] The *Pakistani Prisoners of War* case was discontinued without reaching a decision on jurisdiction.[36] In *Aegean Sea Continental Shelf*,[37] the Court in the first phase of examination held that it had no jurisdiction to entertain the dispute.

15. One would expect that an arbitral tribunal constituted under Annex VII of UNCLOS would follow the same approach regarding both jurisdiction[38] and merits. What the ICJ applies is very much general principles of law, reinforced by the wording of Article 53 of its Statute. General principles as part of international law must be applied by the Tribunal, under Article 293 of the UNCLOS. Under the relevant constitutional instruments, there is no difference between the exercise of judicial function by the ICJ and the exercise of arbitral function by an Annex VII tribunal.

was ordered. Apparently in that case the existence of jurisdiction was more than clear to the Court, as was discussed in its order on provisional measures. ICJ Reports 1979, 7, esp. paras.22-24. To this list of cases with bifurcated proceedings one can add Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). See Order of 14 May 1984, ICJ Reports 1984, 209, fixing time-limits for the written proceedings on the questions of jurisdiction and admissibility.

27 Cf. Rosenne, 2 Law and Practice, n.15 above, 856-861.

28 ICJ Reports 1972, 181.

29 ICJ Reports 1972, 188.

30 ICJ Reports 1973, 99.

31 ICJ Reports 1973, 135.

32 ICJ Reports 1973, 328.

33 ICJ Reports 1976, 3, 14.

34 ICJ Reports 1973, 49.

35 ICJ Reports 1974, 253 (Australia v. France); ibid., 457 (New Zealand v. France).

36 ICJ Reports 1973, 347.

37 ICJ Reports 1978, 3.

38 The procedural posture at this moment shows that the Arbitral Tribunal has not ordered bifurcation of written proceedings (see PCA Press Release of 27 August 2013 (http://www.pca-cpa.org/showfile.asp?fil_id=2311)("The Arbitral Tribunal directs the Philippines to fully address all issues, including matters relating to the jurisdiction of the Arbitral Tribunal, the admissibility of the Philippines' claim, as well as the merits of the dispute").

Furthermore, to the extent that the language of Article 9 of Annex VII and of Article 288(4) of the UNCLOS models after Article 53 and Article 36(6) of the ICJ Statute, respectively, the jurisprudence spawned by Article 53, before Annex VII was adopted or entered into force, can be considered to have been borrowed into Annex VII, as a special species of *travaux préparatoires*, or serves as a special point of reference for the interpretation and application of the corresponding provision in Annex VII.

This is only natural. For example, when the drafters of the ICJ Statute essentially copied the language of the Statute of the Permanent Court of International Law (PCIJ), they expected that the ICJ would follow the jurisprudence of the PCIJ. It is so natural that Article 92 of the Charter of the United Nations just stated that the new Statute was based on the Statute of the PCIJ, and that the report of a relevant committee simply explained why the numbering of the articles was adopted this way: "To make possible the use of the precedents under the old Statute the same numbering of the articles has been followed in the new Statute."[39] No need was felt to explain why the new Court would use the precedents of the old one. In the UNCLOS dispute settlement system, the ITLOS has in many cases, such as the *M/V "LOUISA" Case (Saint Vincent and the Grenadines v. Spain)*,[40] cited to ICJ cases and followed the essential holdings of the ICJ where applicable.

Last but not least, the Tribunal in this arbitration is dealing with matters of the same magnitude and gravity as the ICJ has been addressing in those cases, i.e., sovereignty and boundary issues. As the Court pointed out, boundary matters are of "grave importance".[41] Accordingly, the Tribunal should give such grave matters the same kind of consideration as has the ICJ.

16. In sum, the Tribunal has a duty, despite China's refusal to appear before it, under Article 9 of Annex VII, to examine its jurisdiction, that is, to "satisfy itself [...] that it has jurisdiction over the dispute". In so doing, the Tribunal must, under Article 293 of UNCLOS, apply the entire Convention as well as other rules of international law not incompatible with it, where applicable. It must consider those obstacles or objections to its jurisdiction which might, in its view, be raised against its jurisdiction, whether or not China somehow informs it of the obstacles or objections, and whether or not China presents any elaboration of international law rules and principles to support them. It must, *proprio motu,* take judicial or arbitral notice of all relevant facts, data and public statements not communicated to the Tribunal such as the

39 13 UNCIO 381, 384.

40 M/V "LOUISA" Case (Saint Vincent and the Grenadines v. Spain), ITLOS Case No.18, Judgment of 28 May 2013, available at the ITLOS website (http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/judgment/C18_Judgment_28_05_13-orig.pdf).

41 Territorial and Maritime Dispute, between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007 (II), 735, para. 253; Maritime Dispute (Peru v. Chile), ICJ Reports 2014, 37, para.91.

above-mentioned statement made on 26 April 2013 by the spokesperson of the Chinese Foreign Ministry, and apply its judicial or arbitral knowledge in international law to its examination of the matter. This would be required as part of the duty of a tribunal constituted under Annex VII to "satisfy that it has jurisdiction" as well as under international judicial practice. Thus, in the *Nuclear Tests* case, although France refused to appear before the Court, it published a white paper on the subject-matter of the claims. As observed by Judge *ad hoc* Barwick, "[The content] of the French White Paper on Nuclear Tests, published but not communicated to the Court during the hearing of the case, [has] in fact been fully considered."[42]

The above discussion makes it clear that there is no penalty for an alleged party not to appear in a case. This is the position of serious scholars.[43] As has been pointed out, any refusal to take cognizance of relevant information seems to be inconsistent with Article 53 of the ICJ Statute,[44] and the same would obtain with Article 9 of Annex VII.

In any event, this no-penalty approach is dictated by the judicial function. A judicial decision must be a conscientious, well informed one. Indeed, it is in the judge's self-interest to make a thorough inquiry on the matters *sub judice,* or else neither the world nor history will treat him or her kindly. Thus, Judge Francis Biddle at the Nuremberg Trial subsequently recounted in this way the decision to allow the motion of Kranzbuehler, a lawyer for Dönitz, to issue interrogatories in an apparent attempt to pave the way for a *tu quoque* defense on the basis that the British and the Americans committed, in the Atlantic and the Pacific, the same crime his client was accused of:

> [Kranzbuehler's] was a masterly argument, convincing and from the large view, unanswerable. Aside from the law the force of the moral appeal was compelling—if Dönitz had fought in the Atlantic precisely as Nimitz had fought in the Pacific, and the British Admiralty in the Skagerrak, how could we convict his client?
>
> All of which I argued as persuasively as I could to my associates when we met the same afternoon to pass on Kranzbuehler's motion. I said we would look like fools if we refused and it later appeared that Nimitz had torpedoed without warning.[45]

A similar kind of conscientiousness is in order here in this arbitral matter under consideration.

17. Against this background and in the light of the fact that at the present we have available only the Philippines' Notification and Statement of Claim, this article aims

42 See Judge ad hoc Barwick, sep. op., Australia v. France, ICJ Reports 1974, 391, 401.

43 See, e.g., Von Mangoldt/Zimmermann, n.14 above, 1326, MN4; 1349, MN65. See also Stanimir A. Alexandrov, Non-Appearance before the International Court of Justice, 33 Columbia JTL (1995), 41, 57-58.

44 Alexandrov, ibid.

45 Francis Biddle, In Brief Authority (1962), 452.

to sketch out some, not all, potential jurisdictional obstacles or objections.[46] I am treading on perilous waters, as the Memorial of the Philippines, reported to have been filed on 30 March 2014, is not yet made public.[47] Furthermore, the mass media reported that China has made clear its intention not to appear before the Tribunal, but its statements on this topic are brief. Furthermore, the current limited availability of documents and arguments is such that in this article I can only primarily work with the Philippines' Notification. But I console myself with the belief that this is only a limited handicap as far as assessing the Philippines' claims are concerned, because the Notification serves to delimit the scope of the arbitration; further materials cannot, according to general principles of procedure, turn the case into a new one, especially when the putative respondent refused to appear. This refusal to appear must be taken as an *omnibus* objection to all procedural applications that require some kind of response from the putative respondent. To this extent, it is surprising that claims relating to the Ren'ai Jiao (Second Thomas Reef or Ayungin Shoal) were allowed to be added, as reported

46 For discussions of this arbitration, see Stefan Talmon and Bing Bing Jia (eds), The South China Sea Arbitration: A Chinese Perspective (2014); Michael Sheng-ti Gau, The Sino-Philippine Arbitration of the South China Sea Nine-Dash Line Disputes: Applying the Rule on Default of Appearance, 28 Ocean Yearbook (2014), 81-133; Robert C. Beckman and Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, 29 IJ Marine and Coastal L. (2014), 193-243; Andreas Zimmermann and Jelena Bräumler, Navigating Through Narrow Jurisdictional Straits: The Philippines–PRC South China Sea Dispute and UNCLOS, 12 Law and Practice of Int'l Courts and Tribunals (2013), 431–461.

For general discussions of the jurisdictional issues under UNCLOS, see Shabtai Rosenne and Louis B. Sohn (eds), 5 United Nations Convention on the Law of the Sea 1982: A Commentary ("Virginia Commentary") (1989); Md. Saiful Karim, Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System, in Natalie Klein (eds), Litigating International Law Disputes: Weighing the Balance (2014), 260-283; HONG Nong, UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea (2012), reviewed in this Journal at: 12 Chinese JIL (2013), 443; Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (2005); A.O. Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea (1987).

For general discussion of jurisdictional issues under the ICJ Statute, see Andreas Zimmermann, et al. (eds.), n.7 above, 585-730; Shabtai Rosenne, 2 The Law and Practice, n.15 above; Ibrahim F.I. Shihata, The Power of the International Court to Determine its Own Jurisdiction: Compétence de la Compétence (1965); Georges Abi-Saab, Les exceptions préliminaires dans la procedure de la Cour internationale: Étude des notions fondamentales de procedure et des moyens de leur mise en œuvre (1967).

47 For information see PCA case website for this arbitration: http://www.pca-cpa.org/showpage.asp?pag_id=1529; Press Release 2 (3 June 2014), http://www.pca-cpa.org/showfile.asp?fil_id=2638.

in the mass media.[48] Nevertheless, as a result of these limitations, the views presented below are based on various inferences. In order to make my arguments in the clearest possible way, I am presenting them in the legal brief writing style. As the paper is getting very long, this style may help one navigate through the discussions on a complex topic.

18. In any event, the potential jurisdictional obstacles or objections are based on two basic considerations. First, the Arbitral Tribunal has no jurisdiction over a dispute under Article 288(1) unless it is one concerning the interpretation or application of the UNCLOS. Second, the Arbitral Tribunal has no jurisdiction over a dispute if it has been excluded from the applicability of Section 2 procedures by a party pursuant to Article 298. The issues relating to the conditions for the exercise of jurisdiction or seisin such as the effect of non-exhaustion of negotiation as well as admissibility are not dealt with in this article. Nor will I address whether another agreement may have served to exclude the resort to Section 2 procedures. Furthermore, third party's claims, such as those of Vietnam, on the same features at issue in this arbitration (other than Scarborough Shoal (Huangyan Dao)) should preclude the exercise of jurisdiction by the Tribunal, but these matters are not discussed in this article.[49]

48 See PH Expands Territorial Claims Includes Ayungin (http://www.newsflash.org/2004/02/hl/hl112867.htm).

49 However, it may be worth noting here briefly that that the obstacles to jurisdiction presented by prior agreement as well as third party interest are strong. Regarding the issue of agreement, the Declaration on the Conduct of Parties in the South China Sea (principally Article 4) and a series of bilateral joint statements and declarations between China and the Philippines on using negotiation as the means of settling their disputes no doubt form an agreement excluding other means of settlement, within the meaning of Article 281 of the UNCLOS. Worth pinpointing is the fact that these bilateral instruments included a 1995 joint statement that used the phrase "eventually negotiating a settlement of bilateral disputes" to describe the two countries' commitment and resolve (as quoted in Press Release, China's Position on the Territorial Disputes in the South China Sea between China and the Philippines, Chinese Embassy in Manila, 3 April 2014, para.2 (http://ph.china-embassy.org/eng/xwfb/t1143881.htm)). "Eventually negotiating" obviously reveals an intent to exclude other means of settlement.

Regarding third party interest, to the extent that some cases on land boundaries may give the impression that third party interests are somehow not given sufficient consideration and weight, that is only an impression. The truth is that thirty party interests no doubt play a most important part in the decisions of the ICJ, even in land boundary cases because there is always an *aspect of finality* to those decisions. Thus, the Court said in Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998, 275, para.79, that, "Certainly, the request to 'specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea' […] may affect the tripoint, i.e., the point where the frontiers of Cameroon, Chad and Nigeria meet. However, the request to specify the frontier between Cameroon and Nigeria from Lake Chad to the sea *does*

Before proceeding to that discussion, it is necessary to conduct a brief review of the Philippines' Notification and its claims and to assess the nature of these claims.

II. The Philippines' Notification: the claims and their nature

19. The Philippines' Notification states in paragraph 1 that the Philippines

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

The Notification uses "M" as the abbreviation for "nautical miles" many times and this usage will be followed here, so as to avoid confusion. From time to time "exclusive economic zone" will also be referred to as "Exclusive Economic Zone" or "EEZ".

The Notification, in paragraphs 9 and 10, describes South China Sea, the area in issue, thus:

> 9. The South China Sea, part of which is known in the Philippines as the West Philippine Sea, is a semi-enclosed sea in Southeast Asia that covers approximately 2.74 million square kilometres. The Sea is surrounded by six States and Taiwan. To the north are the southern coast of mainland China, and China's Hainan Island. To the northeast lies Taiwan. To the east and southeast is the Philippines. The southern limits of the sea are bounded by Brunei, Malaysia and Indonesia. And to the West is Vietnam.
>
> 10. There are many small insular features in the South China Sea. They are largely concentrated in three geographically distinct groups: the Paracel Islands in the northwest; Scarborough Shoal in the east; and the Spratly Islands in the southeast. The Paracel Islands are not relevant to this arbitration. Scarborough

not imply that the tripoint could be moved away from the line constituting the Cameroon-Chad boundary." (Emphasis added.) In other words, the tripoint may be moving but it is only moving from one point to another on the same line. Furthermore, the Court has taken a tougher line in maritime delimitation cases. In the judgment on the merits, the Court did not accept "Cameroon's contention that the reasoning in the Frontier Dispute (Burkina Faso/Republic of Mali) (I.C.J. Reports 1986, p. 554) and the Territorial Dispute (Libyan Arab Jamahiriya/Chad) (I.C.J. Reports 1994, p. 6) in regard to land boundaries is necessarily transposable to those concerning maritime boundaries. These are two distinct areas of the law, to which different factors and considerations apply." ICJ Reports 2002, 421, para.238. To the extent that various features (other than Scarborough Shoal (Huangyan Dao)) have also been claimed by Vietnam, it would be impossible for the Arbitral Tribunal to make a decision that would respect the principles embodied in these observations by the ICJ.

> Shoal, located approximately 120 M west of the Philippines' coast and more than 350 M from China, is a submerged coral reef with six small protrusions of rock above sea level at high tide. The Spratly Islands are a group of approximately 150 small features, many of which are submerged reefs, banks and low tide elevations. They lie between 50 and 350 M from the Philippine island of Palawan, and more than 550 M from the Chinese island of Hainan. None of the Spratly features occupied by China is capable of sustaining human habitation or an economic life of its own.

20. The Notification describes its complaints in several respects. The first relates to the "nine dash line", a term used by the Philippines but "dotted line" is more often used in China. In paragraph 2, the Notification states:

> Despite China's adherence to UNCLOS in June 1996, and the requirement of Article 300 that States Parties fulfil in good faith their obligations under the Convention, China has asserted a claim to "sovereignty" and "sovereign rights" over a vast maritime area lying within a so-called "nine dash line" that encompasses virtually the entire South China Sea. By claiming all of the waters and seabed within the "nine dash line", China has extended its self-proclaimed maritime jurisdiction to within 50 nautical miles ("M") off the coasts of the Philippine islands of Luzon and Palawan, and has interfered with the exercise by the Philippines of its rights under the Convention, including within its own exclusive economic zone and continental shelf, in violation of UNCLOS.

21. In paragraph 11, the Notification dwells upon the same point:

> Notwithstanding its adherence to UNCLOS, China claims almost the entirety of the South China Sea, and all of the maritime features, as its own. Specifically, China claims "sovereignty" or "sovereign rights" over some 1.94 million square kilometers, or 70% of the Sea's waters and underlying seabed within its so-called "nine dash line." China first officially depicted the "nine dash line" in a letter of 7 May 2009 to the United Nations Secretary General. […] According to China, it is sovereign over all of the waters, all of the seabed, and all of the maritime features within this "nine dash line".

The mention in the Philippines' Notification of the "nine dash line" as being first depicted in 2009 obviously is a deliberate distortion of history. This line has a much longer pedigree, as will be made clear below in paragraph 27, as well as in Part IV.F.

22. The Notification lodges these further complaints:

> 3. Further, within the maritime area encompassed by the "nine dash line", China has laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as islands under the Convention, but are parts of the Philippines' continental shelf, or the international seabed; and

China has interfered with the exercise by the Philippines of its rights in regard to these features, and in the waters surrounding them encompassed by China's designated security zones.

4. In addition, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are "rocks" under Article 121(3) of UNCLOS. China has claimed maritime zones surrounding these features greater than 12 M, from which it has sought to exclude the Philippines, notwithstanding the encroachment of these zones on the Philippines' exclusive economic zone, or on international waters.

5. In June 2012, China formally created a new administrative unit, under the authority of the Province of Hainan, that included all of the maritime features and waters within the "nine dash line". In November 2012, the provincial government of Hainan Province promulgated a law calling for the inspection, expulsion or detention of vessels "illegally" entering the waters claimed by China within this area. The new law went into effect on 1 January 2013.

23. The Philippines declares, in paragraph 6 of its Notification, that it

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

24. The Philippines' Notification, in paragraph 31, asserts 10 claims as follows (the numbers and Chinese names are added for convenience, and the tables next to paragraph 45 below show further details about the various features):

- [1] China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;
- [2] Accordingly, China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to UNCLOS and invalid;
- [3] Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention;

- [4] Mischief Reef [Meiji Jiao], McKennan Reef [Ximen Jiao], Gaven Reef [Nanxun Jiao] and Subi Reef [Zhubi Jiao] are submerged features that are not above sea level at high tide, are not islands under the Convention, are not located on China's Continental Shelf; and China has unlawfully occupied and engaged in unlawful construction activities on these features.
- [5] Mischief Reef [Meiji Jiao] and McKennan Reef [Ximen Jiao] are part of the Philippines' Continental Shelf under Part VI of the Convention.
- [6] Scarborough Shoal [Huangyan Dao], Johnson Reef [Chigua Jiao], Cuarteron Reef [Huayang Jiao] and Fiery Cross Reef [Yongshu Jiao] are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which qualify as "rocks" under Article 121(3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M; and China has unlawfully claimed maritime entitlements beyond 12 M from these features.
- [7] China has unlawfully prevented Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal [Huangyan Dao] and Johnson Reef [Chigua Jiao];
- [8] The Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V, and VI of UNCLOS, measured from its archipelagic baselines;
- [9] China has unlawfully claimed rights to, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting the living and non-living resources within its Exclusive Economic Zone and Continental Shelf; and
- [10] China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the Convention.

25. In paragraph 41, the Philippines' Notification sets out a list of 13 requests for relief, essentially corresponding to the 10 claims, with some concretization of some of them. These are set out in the footnote here.[50]

50 Paragraph 41 of the Philippines' Notification states (item numbers and Chinese names are added for convenience, and the tables next to paragraph 45 below show further details on the various features):

> [T]he Philippines respectfully requests that the Arbitral Tribunal issue an Award that:
>
> - [1] Declares that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;
> - [2] Declares that China's maritime claims in the South China Sea based on its so-called "nine dash line" are contrary to UNCLOS and invalid;
> - [3] Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS;

26. Wary of potential jurisdictional obstacles, the Philippines professes in paragraph 7 that it "does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries." Attempting to go around China's 2006 declaration excepting all the categories of disputes mentioned in Article 298(1) from the applicability of Section 2 procedures, the Philippines' Notification claims:

> 39. None of these exceptions is applicable to the Philippines' claims in this arbitration. The present dispute concerns (a) whether, in light of China's repeated assertions of alleged "sovereign rights and jurisdiction" within the so-called "nine dash line", the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by the provisions of UNCLOS, including but not limited to Articles 3-14 of Part II, Articles 55 and 57 of Part V, Article 76 of Part VI, Article 121 of Part VIII and Article 300 of Part XVI; (b) whether China's Claims based on the "nine dash line" are inconsistent with those provisions; (c) whether, under Article 121 of UNCLOS, certain of the maritime features in the South China Sea are islands, low tide elevations or

- [4] Declares that Mischief Reef [Meiji Jiao] and McKennan Reef [Ximen Jiao] are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China's occupation of and construction activities on them violate the sovereign rights of the Philippines;
- [5] Requires that China end its occupation of and activities on Mischief Reef [Meiji Jiao] and McKennan Reef [Ximen Jiao];
- [6] Declares that Gaven Reef [Nanxun Jiao] and Subi Reef [Zhubi Jiao] are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China's Continental Shelf, and that China's occupation of and construction activities on these features are unlawful;
- [7] Requires China to terminate its occupation of and activities on Gaven Reef [Nanxun Jiao] and Subi Reef [Zhubi Jiao];
- [8] Declares that Scarborough Shoal [Huangyan Dao], Johnson Reef [Chigua Jiao], Cuarteron Reef [Huayang Jiao] and Fiery Cross Reef [Yongshu Jiao] are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 M; and that China has unlawfully claimed maritime entitlements beyond 12 M from these features;
- [9] Requires that China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal [Huangyan Dao] and Johnson Reef [Chigua Jiao], and from undertaking other activities inconsistent with the Convention at or in the vicinity of these features;
- [10] Declares that the Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;
- [11] Declares that China has unlawfully claimed, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines form exploiting living and non-living resources within its Exclusive Economic Zone and Continental Shelf;
- [12] Declares that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under the Convention in areas within and beyond 200 M of the Philippines' archipelagic baselines; and
- [13] Requires that China desist from these unlawful activities.

submerged banks, and whether they are capable of generating entitlements to maritime zones greater than 12 M; and (d) whether China has violated the right of navigation of the Philippines in the waters of the South China Sea, and the rights of the Philippines in regard to the living and non-living resources within its exclusive economic zone and continental shelf.

40. 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 delimitations; 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.

27. As is clear, the Philippines fragments what is essentially a delimitation dispute into free-standing-appearing entitlement claims, which are often considered pre-delimitation matters, and activities claims, which are post-delimitation matters, while steadfastly avoiding "delimitation proper" (that is, final line drawing). At another and deeper level, the claims dress up many land territorial matters as simple questions of status or qualification of certain maritime features or skirt these territorial matters and take a shortcut to the entitlement questions, reversing the logical sequence. Obviously the Philippines' Notification betrays no lack of design in an attempt to secure jurisdiction for the Arbitral Tribunal.

In formulating the claims this way, the Philippines seeks to stamp China as some distant flag State or distant-water fishing State whose home coast is more than 870 M away on the mainland or Hainan Island,[51] whose ships roam the waters more than 870 M away and whose personnel seized islands and rocks far away from home, well inside the waters under the jurisdiction of the Philippines, and thus proceeds on the assumption that China is not an opposite or adjacent coastal State vis-à-vis the Philippines. In this scenario, the entitlements of the Philippines or China would extend outward to the open sea, resulting in no overlap and necessitating no delimitation.

Of course, this picture is so painted by the Philippines in an attempt at rewriting history. Steadfastly professing that it does not ask the Tribunal to decide any sovereignty issues and presenting what it considers pure entitlement claims only regarding the features under China's control, without mentioning its own unlawful seizures of various features from China, the Philippines is scheming to hide away these sovereignty disputes and conceal the sovereignty nature or sovereignty-dependent nature of its claims, as well as to legitimate, *sub rosa*, its unlawful seizure of the features. Anyone with some knowledge in history knows that for over 2000 years Chinese people and China have been actively exploring and exploiting the South China Sea Islands.[52]

51 Cf., the Philippines' Notification, para.1.

52 See, e.g., Position Paper of the People's Republic of China on the Issue of the South China Sea, 17 Nov. 2000; Jianming Shen, China's Sovereignty over the South China Sea Islands: A Historical Perspective, 1 Chinese JIL (2002), 94-157.

Gradually China has, through various measures, grouped various islands and other maritime features into four archipelago units as the Dongsha Qundao (Dongsha Archipelago or Islands), Zhongsha Qundao (Zhongsha Archipelago or Islands, including Huangyan Dao), Xisha Qundao (Xisha Archipelago or Islands) and Nansha Qundao (Nansha Archipelago or Islands).[53] China has affirmed its sovereignty and maritime entitlements and rights to the full in the South China Sea, through many acts such as the 1947-48 official formulation and publication of the dotted line or "nine dash line" in the South China Sea (which can be traced to a predecessor or early precursor in 1914,[54] the 100th anniversary of which this year witnesses) and subsequent declarations and legislations such as the 1958 Declaration on the Territorial Sea, the 1992 Law on the Territorial Sea and the Contiguous Zone and the 1998 Law on the Exclusive Economic Zone and the Continental Shelf, and its continuing protests to relevant authorities. On the other hand, the territory of the Philippines has traditionally been confined to the Philippine archipelago, as laid down in its 1935 Constitution[55] following the various treaties, and has nothing to do with the Chinese islands. It was only since the early 1970s that the Philippines through various measures attempted to seize and indeed physically seized some of the islands of the Nansha Qundao and established the so-called Kalayaan Island Group on some of the features there. Of course, since the Kellogg-Briand Pact of 1928, which is generally thought to have codified the "no use of force" principle, such unlawful, forcible seizure or occupation of territory cannot be hidden away, not the least to make way for deciding derivative questions of entitlement.

The picture painted by the Philippines is also an attempt at refashioning geography so as to conceal the delimitation nature of its claims. The Philippines did

53 Sometimes Dongsha Qundao is referred to in the West as Pratas Islands, and Zhongsha Qundao as Macclesfield Bank, Xisha Qundao as Paracel Islands, and Nansha Qundao as Spratly Islands. The differences in the names may not stop at that, and may go to the geographical scope, extent and content. For example, Zhongsha Qundao, although referred to in the West as Macclesfield Bank, has always been considered in Chinese usage and law to include Huangyan Dao (Scarborough Shoal). Often "Islands" is used to render "Qundao" in English, but the more accurate translation is "Archipelago", which is used from time to time in this article. "Island", in the singular, is the translation of "Dao", while "reef" is of "Jiao".

54 See, e.g., Zou Keyuan, The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands, 14 IJ Marine & Coastal L (1999), 27, 32 ("The line first appeared in the map in December 1914, which was compiled, according to some known sources, by Hu Jinjie, a Chinese cartographer.").

55 See Constitution of the Philippines (1935), art. I, http://en.wikisource.org/wiki/Constitution_of_the_Philippines_(1935).

so by disregarding China's just-mentioned four archipelagos or island groups situated in the South China Sea between the main coast of China and the Philippines and their effect on the political and geographical relations and delimitation, treating components of an archipelago or island group as isolated units and, even then, ignoring the effect of some of the "full islands", as distinct from rocks, within the meaning of Article 121 of UNCLOS. Geographical reality tells us that the dotted line (or "nine dash line") is obviously within 200 M from the relevant Philippine coast, that the distance from Scarborough Shoal (Huangyan Dao) side of the Dongsha Qundao to the Luzon coast of the Philippines is only about 120 M, well within 200 M from that coast, and that the rest of the maritime features about which the Philippines makes claims in this arbitration (Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao), Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao) and Fiery Cross Reef (Yongshu Jiao)) are all part of the Nansha Qundao, which as a unit is well within 200 M of the Palawan coast of the Philippines.

Obviously this geographical reality in the South China Sea constitutes a delimitation geographical framework and the situation there presents a delimitation situation, as will be discussed further below, especially in Part IV.A.

Under such a framework or in such a situation, the entitlements of the Philippines and China would potentially overlap, necessitating delimitation. Thus, it is not meaningful to talk about entitlement in isolation; rather, when one speaks about entitlement, one has in mind delimitation. The Philippines is attempting to finish the job of delimitation by deploying entitlement claims, as if one cannot see the motive behind this approach.

28. Because of various uncertainties such as how and the extent to which a non-archipelagic State may benefit from the regime of archipelagos or island groups, how the geographical framework and historical fact may affect entitlement and delimitation is difficult to predict, but the fact that it should have an effect is clear. Any conscientious decision-maker, including the Arbitral Tribunal in this case, must wrestle with this, as such matters deal with both geography and how people perceive themselves. Cavalier treatment of such issues will surely not be conducive to the peaceful settlement of the disputes or peace and security in the world, in the long run. The dramatic reaction of Colombia to the 2012 ICJ judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*[56] including withdrawing its acceptance of the Court's jurisdiction is a warning to any tribunal which aims to settle a dispute rather than to leave behind a big mess. In grave matters involving maritime rights, entitlements and delimitation, emotions usually run very high and deep. The ICJ decision in this case to connect

56 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, 624.

the Colombian islands as an integrated unit, rather than to give each island a separate enclave domain, reflects some recognition of the State practice relating to the regime of archipelagos for a non-archipelagic State. The extent of that recognition apparently did not go far enough for Colombia, provoking the angry withdrawal by Colombia from the American Treaty on Pacific Settlement, the "Pact of Bogotá", signed on 30 April 1948. The delimitation part of the ICJ Judgment received denunciation from the head of State of Colombia himself in these terms:

> Inexplicablemente—después de reconocer la soberanía de Colombia sobre todo el Archipiélago y de sostener que éste, como una unidad, generaba derechos de plataforma continental y zona económica exclusiva—la Corte ajustó la línea de delimitación, dejando los cayos de Serrana, Serranilla, Quitasueño y Bajo Nuevo separados del resto del archipiélago. Esto es inconsistente con lo que la propia Corte había reconocido y no es compatible con la concepción geográfica de lo que es un archipiélago. Todo esto realmente son omisiones, errores, excesos, inconsistencias, que no podemos aceptar.[57]

The judgment apparently has managed to aggravate the situation in that area, throwing the relations between the two States into more unpredictable troubled waters, the opposite to what was hoped for.

29. Thus, one can tell, as will be demonstrated below, that the dispute between the Philippines and China is a sovereignty-delimitation combined dispute. As a result, the jurisdictional obstacles are still insurmountable, despite all the efforts on the part of the Philippines. An attempt will be made in the following pages to sketch out some potential jurisdictional obstacles or objections based on Articles 288(1) and 286 (essentially because the claims had arisen before the entry of the UNCLOS with respect to China or because the claims are land territorial sovereignty matters or consequential upon a decision on such matters, not matters concerning the interpretation or application of the Convention) and/or based on Article 298(1)(a) and China's

57 Alocución del Presidente Juan Manuel Santos sobre el fallo de la Corte Internacional de Justicia, Nov. 19, 2012 (http://www.cancilleria.gov.co/newsroom/news/2012-11-19/4661). For further reports, see Colombia withdraws from UN Justice Court angry at latest ruling on Caribbean islands, 28 Nov. 2012 (http://en.mercopress.com/2012/11/28/colombia-withdraws-from-un-justice-court-angry-at-latest-ruling-on-caribbean-islands). For comments, see Colombia and Nicaragua Hot Waters, 29 Nov. 2012 (http://www.economist.com/blogs/americasview/2012/11/colombia-and-nicaragua); David Nato, Colombia and Nicaragua Territorial Dispute Gets Complicated, Nasty, 30 Nov. 2012 (http://latino.foxnews.com/latino/news/2012/11/30/colombia-and-nicaragua-territorial-gets-complicated-and-nasty/). On how archipelagos are treated in State practice and literature, see Sophia Kopela, Dependent Archipelagos in the Law of the Sea (2013).

2006 optional exceptions declaration (essentially because the claims are related to delimitation or consequential upon it) as well as the Philippines' Understanding.

III. Jurisdictional obstacles or objections based on Article 288(1) of the UNCLOS: *ratione temporis* and *ratione materiae*

30. The scope of application of Part XV of the UNCLOS is limited to a dispute "concerning the interpretation or application of this Convention", as stated in Article 279, the general obligation provision. This is repeated in Article 281 on the application of Part XV, in Article 286 on the application of Section 2 of Part XV, and in Article 288(1)[58] specifically on the jurisdiction of a court or tribunal under Section 2. Article 286 states that, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section". Article 288(1) states: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part". Accordingly, the interpretation of "any dispute concerning the interpretation or application of this Convention" is crucial to the jurisdiction of the Arbitral Tribunal. In a general and common sense manner, one may say that, for it to fall within this jurisdictional ambit or the system scope of UNCLOS dispute settlement, a dispute must concern an issue that the Convention deals with and must arise after the UNCLOS goes into force with respect to the parties to the dispute. Otherwise there would not have been an UNCLOS to be interpreted or applied. Any issue that would bring the dispute at issue out of this scope would present a jurisdictional obstacle, whether *ratione temporis* or *ratione materiae*. This Part of the article will analyse the obstacle or objection *ratione temporis* and those *ratione materiae*.

III.A. The Tribunal does not have jurisdiction *ratione temporis* over the dispute which had arisen at the latest in 1995 before the entry into force of UNCLOS with respect to China

31. The non-retroactivity principle is of fundamental importance in the law of treaties. That principle is reflected in Article 28 of the Vienna Convention on the Law of Treaties as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." According to the International Law Commission,

58 By additional agreement, the parties to a dispute may expand, under Article 288(2), the scope of application of Part XV somewhat. No such additional agreement between the Philippines and China exists in this arbitration.

"when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause."[59] There is nothing in the UNCLOS that would point to a different rule.

32. Applied to Part XV, which, although complex, is in nature a compromissory or jurisdictional clause embedded in the more complex UNCLOS,[60] the non-retroactivity principle has the effect of limiting the jurisdiction of a Section 2 court or tribunal to only those disputes that arise after the entry into force of the UNCLOS with respect to the parties in a dispute. Accordingly, Article 288(1) only applies to disputes that arise subsequent to the entry into force of the UNCLOS with respect to a party, as do Articles 279, 281 and 286.

This is confirmed by the *travaux préparatoires* of the UNCLOS. During the negotiation process, it was recognized that:

> As to the question of a distinction between "future" and "past" disputes, it should be borne in mind that the provisions of Part XV of the ICNT deal with disputes "relating to the interpretation and application of the [...] Convention". If it were clear enough that disputes which have arisen before the entry into force of the Convention, never belong to that category and thus are not governed by the provisions of Part XV, including Article 297 [later 298], an express distinction between and new disputes would not appear necessary.[61]

33. Subsequently, explicit mention of "when such a dispute arises subsequent to the entry into force of this Convention" was made in the language on the scope of compulsory conciliation in Article 298(1)(a), limiting the jurisdiction of a compulsory Conciliation Commission to disputes that arise subsequent to the entry into force of UNCLOS, out of an overabundance of caution against the possibly liberal tendencies of a conciliation process. After all, the conciliators are not required to strictly apply the law. As we know, conciliation commissions do not usually have their hands tied to existing law, and may resort to a variety of factors in making their recommendations. The language at issue in Article 298(1) can be considered a pre-emptive strike against that kind of tendency.

34. In the case at hand, the dispute the Philippines has with China had existed before the entry in force of the UNCLOS with respect to China and, as such, was excluded from the jurisdiction of any court or tribunal under Section 2. As will be elaborated below (Part IV, paras.59-109), the Philippines' claims address the pre-steps to and

59 ILC Draft Articles on the Law of Treaties, Art.24, commentary, para.(2), ILCYB (1966, II), 212.

60 See Paul Irwin, Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations, 8 Ocean Dev. & IL (1986), 105, 114.

61 Statement of Chairman of the Negotiating Group, as reproduced in Shabtai Rosenne and Louis B. Sohn (eds), 5 Virginia Commentary (1989), 123-124. "ICNT" is the abbreviation for "Informal Composite Negotiating Text".

the rights and obligations consequential upon delimitation in the South China Sea, while avoiding the "delimitation proper", and all have their root cause in, or at least in large part impacted by, the "nine dash line" and thus in essence constitute one big dispute regarding delimitation and shall be considered one.

In addition, it is also common knowledge, as pointed out by China (quoted in para.39 below), that the most immediate cause for the dispute was the Philippines' unlawful occupation of several Chinese islands and reefs in the South China Sea. It does not take too much for one to imagine that the dispute does contain two aspects—sovereignty over islands and reefs and other features and maritime delimitation between China and the Philippines.

In similar situations the parties to the dispute would reckon all the issues as constituting one big case. In the *Qatar v. Bahrain* case[62] which presented, with surprising similarity to the South China Sea situation, a scenario in which the parties fought over sovereignty over various islands and other features as well as delimitation, the parties agreed that, "All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together."[63] Similarly, all the issues relating to the South China Sea, i.e., sovereignty over islands and other features and delimitation, really constitute one big case and should be treated as such by the Tribunal.

It is well known that the "nine dash line" was officially prepared in 1947 and officially published in 1948, but has a pedigree of 100 years.[64] And the unlawful occupation by the Philippines of China's islands and reefs started in the 1970s. In any event, at the latest, the dispute had arisen before August 1995, as that was the time when the Philippines claims (Notification, para.28) to have started negotiations with China on the claims, before the UNCLOS entered into force in 1996 with respect to China.

III.B. The Tribunal does not have jurisdiction over this dispute because its resolution would constitute a decision on sovereignty over many islands or insular features, or necessarily involve the concurrent consideration of unsettled disputes concerning sovereignty or other rights over these islands or insular features including China's archipelagos and/or Taiping Dao (Itu Aba Island) or Zhongye Dao (Thitu Island), or depend on a decision on the sovereignty over them

35. It is elemental that the law of the sea does not address sovereignty over continental or insular land territory. Being a treaty on the law of the sea, the UN Convention on the

62 Qatar v. Bahrain, Jurisdiction and Admissibility, ICJ Reports 1994, 112, paras.31-39.

63 Ibid., para.37.

64 The Geography Department of the Ministry of Internal Affairs, Nanhai Zhudao Weizhitu [Nanhai Islands Location Map], 1947, as discussed in Li Jinming and Li Dexia, The Dotted Line on the Chinese Map of the South China Sea: A Note, 34 Ocean Dev. & IL (2003), 287–295; Zou Keyuan, n.54 above.

Law of the Sea in this respect does what its title preaches by confining itself to the law of the sea and staying clear of issues on sovereignty over continental or insular land territory. There is no provision in the Convention that substantively deals with such questions. As a result, a dispute regarding sovereignty over continental or insular land territory cannot be a dispute concerning the interpretation or application of the Convention and is therefore outside the jurisdiction of a court or tribunal under Article 288(1). This is confirmed by the *travaux préparatoires* of the Convention. States expressed their fear about a court or tribunal assuming jurisdiction over such a dispute. This was taken account of when the President of the Conference proposed new language on dispute settlement, which ultimately became the current system.[65]

36. Furthermore, it emerges from the UNCLOS that mixed disputes that "necessarily involve […] the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" are also outside the jurisdiction of an Article 287 court or tribunal. Although this position is not stated in so many words in the Convention, it is implied by and can be inferred from the lack of any language authorizing or excluding (even optionally) jurisdiction for or from a Section 2 court or tribunal over such mixed disputes and from the language in Article 298(1)(a) showing that the Convention first requires that the disputes excepted by optional declaration from the applicability of Section 2 be submitted to compulsory conciliation but then hastens to make clear that "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission". This apparently embodies the effort to alleviate the fear of some States, recorded in the *travaux préparatoires*, that, in the words of the *Virginia Commentary*, "under the guise of a dispute relating to a sea boundary delimitation, a party to a dispute might bring up a dispute involving claims to land territory or an island".[66] Thus, when interpreting Article 298(1)(a), M.C.W. Pinto observed that:

> The Convention seems to concede that one type of dispute is to remain *wholly outside the ambit of even compulsory conciliation*: "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory […]"[67]

The phrase "even compulsory conciliation" reveals it all: compulsory adjudication or arbitration of such a dispute under Section 2 is apparently already presumed to be out of the question.

65 5 Virginia Commentary, above n.46, 112 (para.298.9), 117 (para.298.20).

66 5 Virginia Commentary, above n.46, 117 (para.298.20). Cf. also Paul Irwin, n.60 above, 114.

67 M.C.W. Pinto, Maritime Boundary Issues and Their Resolution: An Overview, Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds.), Liber Amicorum Judge Shigeru Oda (2002), 1115, 1130. Emphasis added.

Thus, on an ordinary reading, it is clear that disputes involving sovereignty or other rights over continental or insular land territory or mixed disputes, which, according to Article 298(1)(a), "necessarily involve [...] the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory", are outside the system scope of UNCLOS dispute settlement.[68] The quoted language in Article 298(1)(a) on mixed disputes can be considered a pre-emptive strike against the perceived liberal tendency of conciliation commissions not to have their hands tied to existing law, just as the language on the temporal scope of the competence of such commissions. An expansionist *a contrario* interpretation of Article 298(1)(a) is said to somehow help the jurisdiction of a Section 2 court or tribunal. This argument essentially posits that if no optional declaration has been filed by States involved in a dispute under that article, then a Section 2 court or tribunal will have jurisdiction over such mixed disputes.[69] This argument is wrong and may persuade more States to file an optional declaration under Article 298 to make a blanket exception of all delimitation matters just in order to prevent a Section 2 court or tribunal from taking jurisdiction over just mixed disputes (because there is no option for a State to exclude just such mixed disputes), leading to further reduction of the total scope of jurisdiction of Section 2 courts or tribunals.

In any event, that argument, even if valid as championed, would come to life only if no optional declaration has been filed. Since China has filed such a declaration, that argument would not have any bite as far as China is concerned.

37. Such a mixed dispute is also outside the jurisdiction of any court or tribunal under Article 287 on the ground that its resolution depends on or is consequential upon the resolution of a dispute relating to sovereignty over continental or insular land territory. This is rooted in the fundamental rule that no State may be compelled to third party adjudication or arbitration without its consent. This rule has been applied

68 For analysis, see Sienho Yee, Conciliation and the 1982 UN Convention on the Law of the Sea, 44 Ocean Dev. & IL (2013), 315, at 324-25, and the sources cited therein.

69 Tullio Treves, "Compulsory" Conciliation in the U.N. Law of the Sea Convention, in Volkmar Götz, Peter Selmer and Rüdiger Wolfrum (eds), Liber Amicorum Günther Jaenicke—zum 85 (1998), 626; Tullio Treves, What Have the United Nations Convention and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes, in Rainer Lagoni and Daniel Vignes (eds), Maritime Delimitation (2006), 63, 77; Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, 4–5 (http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf); P. Chandrasekhara Rao, Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures, in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (2007), 877, 887–892.

in *Monetary Gold*[70] and refined in its progeny at the International Court of Justice. In *Monetary Gold*, Italy brought proceedings against France, the United Kingdom and the United States, seeking to obtain a share of a certain amount of monetary gold taken from Rome by Germany during World War II and ruled by an arbitrator to belong to Albania, on the ground that Albania had incurred State responsibility for nationalizing the property of certain Italian nationals. The Court essentially held that when a decision on the "legal interests" over which the Court has no jurisdiction (i.e., responsibility of Albania for its acts) would "not only be affected by a decision, but form the very subject matter of the decision" in a case *under consideration* (i.e., whether Italy was entitled to a share of the gold), the Court cannot proceed in the matter.[71]

In *Nauru*, the Court elaborated the link between the two decisions as "not purely temporal but also logical"[72] and refined the critical point "form the very subject matter for the decision" into being needed as "a prerequisite" or "a basis" for the Court's decision on the second matter.[73] Accordingly, when a decision on a question over which the Court has no jurisdiction would "be needed as a basis for the Court's decision" in a case *under consideration*, the Court cannot proceed in the matter. Finding that was not the case in *Nauru*, the Court held it had jurisdiction over Nauru's claims against Australia. Subsequently, the Court reiterated in *East Timor*[74] this refinement and referred to it "as a prerequisite". The Court found that was the case there and proceeded to hold that it had no jurisdiction over the claims made by Portugal against Australia because "in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent".[75]

One might wonder whether the *Monetary Gold* principle is confined to the law of the ICJ. In *Larsen v. Hawaii Kingdom*, the Arbitral Tribunal held:

> In assessing this argument, it needs to be stressed that, in accordance with the agreement between the parties, the Tribunal is called on to apply international law to a dispute of a non-contractual character in which the sovereign rights of a State not a party to the proceedings are clearly called in question. The position in contractual disputes governed by some system of private law and involving the rights of a third party might conceivably be different. But in proceedings such as the present, the Tribunal is not persuaded that the *Monetary Gold* principle is

70 Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, ICJ Reports 1954, 19.

71 Ibid., at 32.

72 Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 261, para.55.

73 Ibid., 261-262, para.55.

74 Case concerning East Timor (Portugal v. Australia), Judgment, ICJ Reports 90, 104-105, paras.33, 35.

75 Ibid., para.35.

> inapplicable. On the contrary, it can see no reason either of principle or policy for applying any different rule. As the International Court of Justice explained in the *Monetary Gold* case (ICJ Reports, 1954, at p. 32), an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction. That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.[76]

This cogent reasoning applies with equal force to any arbitral proceedings instituted under Annex VII of the UNCLOS.

It would seem that either the terminology used in Article 298(1)(a), "necessarily involve the concurrent consideration", reflects, or is covered in, *Monetary Gold* and its progeny, or the line between the two is very thin. Furthermore, "necessarily" and "concurrent" when used together do seem to indicate a relationship broader than just temporal; a logical, sequential connection (for want of better phrasing), as the ICJ has its fingers on in *Nauru*, is the essence of the relationship between the two decisions. Coupled with the fundamental principle in the law of the sea that "land dominates the sea", the resolution of the dispute relating to the sovereignty status of continental or insular land territory must go first logically. For this reason, for the purposes of this discussion, *Monetary Gold* and its progeny will be considered as encompassing the idea expressed in the phrase "necessarily involve the concurrent consideration".

The tall shadow of a third party in *Monetary Gold* and its progeny gives one the impression that that principle applies only to situations where the responsibility and/or legal interests of a third party are at stake,[77] not to situations where both the first and second decisions involve legal interests of the same parties only. At first glance, this distillation of *Monetary Gold* and its progeny has its appeal. However, the gravamen of the Court's decision in these cases is that no consent was given to its jurisdiction over the first matter on which a decision was necessary as a basis for a decision on the second matter. As far as jurisdiction is concerned, this deeper level concern weighs the same when consent to jurisdiction over the first matter was not given by a third party as when it is not given by a party in the case.

76 Larsen v. Hawaii Kingdom, Award of 5 February 2001 (http://www.pca-cpa.org/showfile.asp?fil_id=455), 32-33, para.11.17.

77 Indeed, the legal interests of third parties are at stake in this arbitration, but, as mentioned above (n.49 and text thereto), this aspect of the proceedings is excluded from the scope of my inquiry in this article.

This point was so elemental that the Court in *Pedra Branca (Malaysia/Singapore)* did not feel the need to provide any explanation for stopping short of finally and completely deciding upon the second matter, other than laying out the situational context and the fact that no consent was given regarding the first matter. In that case, the second matter was the sovereignty over or legal status of the low-tide elevation called South Ledge, while the first matter was delimitation of overlapping territorial seas in the relevant area. After quoting from *Qatar v. Bahrain* where it held that "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself",[78] the Court proceeded to state:

> 297. In view of its previous jurisprudence and the arguments of the Parties, as well as the evidence presented before it, the Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia. In this regard the Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks.
>
> 298. The Court recalls that in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.
>
> 299. In these circumstances, the Court concludes that for the reasons explained above sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.[79]

The fact that the first matter (delimitation) and the second matter (sovereignty over the low-tide elevation) concerned the same parties, without any third party involved, did not play a role in the Court's decision. The decisive factor was the fact that the parties did not give consent to the Court's jurisdiction over delimitation of their overlapping territorial seas in the relevant area. This took the decision on the second matter out of the Court's jurisdiction because that decision depends upon a prior decision on the first matter.

In the light of the above analysis of the relationship between consent to jurisdiction over the first matter and that over the second matter, it would seem that simply describing the first consent (referring to the consent to jurisdiction over the first matter, for simplicity) as a prerequisite for the decision on the second matter is not perfect, as

78 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, ICJ Reports 2001, 101, para. 204.

79 Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Reports 2008, 12, at 100-101.

we know consent is always a prerequisite for any decision in international dispute settlement, and thus such a term would not be able to distinguish easily between the first consent and the second consent. It would seem that the first consent can be better described as the "upstream consent", upon which everything else depends, but without prejudice to the need for any further consent if necessary (at the risk of being repetitive, if additional consent is required for the second decision, the first consent is not sufficient for the second decision). For example, in *Pedra Branca (Malaysia v. Singapore)*, the consent to delimitation of the overlapping territorial seas was the upstream consent for the decision on the status of the low-tide elevation, but, for that decision to be made, there must be a second consent for that decision also. Such reasoning leaves no room for the creative functionalist argument that if a tribunal having jurisdiction over delimitation does not have competence to deal with mixed disputes, it would not be able to finish with the job of delimitation. If the upstream consent was not given, finishing the job was not envisioned by the parties, masters of their own consent, and cannot be *deemed* envisioned, in such matter of grave importance, simply because the third party settlement decision-makers think it is a good idea or even a better idea. That was observed meticulously by the Court and, one hopes, will also be by other courts and tribunals too.

In the arbitration under consideration, the consent to jurisdiction over land territorial sovereignty would be the upstream consent required but neither given nor envisioned under the UNCLOS, while the consent (with all the exceptions) to jurisdiction over the interpretation or application of the UNCLOS would be the second consent, the scope of which is in dispute, as will be discussed below.

38. On the framework of these legal rules and principles, the present dispute (or the main part of the claims, Nos. 3-7) is outside the jurisdiction of the Tribunal. The Philippines' note verbale says that the Philippines brings this arbitration case over "the maritime jurisdiction of the Philippines in the West Philippine Sea". Its Notification in paragraph 7 states that the Philippines "does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them". Sovereignty over these islands, however, is the heart or the root cause of the dispute. The Philippines also treats this dispute as one on sovereignty over territory, deep at heart, so to speak. For example,

- The day after the initiation of arbitral proceedings, a document of the Philippine Department of Foreign Affairs titled "Q & A on the UNCLOS Arbitral Proceedings against China to Achieve a Peaceful and Durable Solution to the Dispute in the West Philippine Sea"[80] dated 23 January 2013 describes the purpose of

80 Philippine DFA Q & A, http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7300-statement-by-secretary-of-foreign-affairs-albert-del-rosaro-on-the-unclos-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps (accessed 25 May 2013).

the case as "to protect our national territory and maritime domain" (Question 1) or "to defend the Philippine territory and maritime domain" (Question 3), states that "at this stage, the legal track presents the most durable option to defend the national interest and territory on the basis of international law" (Question 6), talks about not "surrendering our national sovereignty" (Question 15), "President's constitutional mandate to protect Philippine territory and national interest" (Question 19), not putting a price on efforts to defend "territory" (Question 25), and concludes that "Our action is in defense of our national territory and maritime domain" (Question 26).

- The Philippine Senate passed a resolution supporting the arbitration, stating that the "Philippines is left with no other option to peacefully settle the dispute but to proceed with bringing China to arbitration under Part XV of UNCLOS in order to protect Philippine sovereignty, territorial integrity and sovereign rights over its maritime domain".[81]
- The Philippine Undersecretary of Foreign Affairs stated that "the areas under dispute are legally the territory of the Philippines as guaranteed by international law".[82] All these references to territory or territorial integrity testify to the territorial essence of the claims presented by the Philippines in its Notification.

39. The essence and origins of the dispute of course are not lost on China. A statement by a spokesperson of the Foreign Ministry on 26 April 2013 recounts that:

> Since the 1970s, the Philippines, in violation of the Charter of the United Nations and principles of international law, illegally occupied some islands and reefs of China's Nansha Islands, including Mahuan Dao, Feixin Dao, Zhongye Dao, Nanyao Dao, Beizi Dao, Xiyue Dao, Shuanghuang Shazhou and Siling Jiao, […][83]

The statement continued,

> by initiating the arbitration on the basis of its illegal occupation of China's islands and reefs, the Philippines has distorted the basic facts underlying the disputes

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

82 Statement of the Department of Foreign Affairs (DFA) Undersecretary Erlinda F. Basilio, in: PHL-Israel Meet to Strengthen Relations, Unveil Blueprint of Cooperation, 15 March 2013 (http://www.dfa.gov.ph/index.php/news-from-rp-embassies/7674-phl-israel-meet-to-strengthen-relations-unveil-blueprint-of-cooperation) (accessed 25 May 2013).

83 Remarks of the FM of China, 26 April 2013, n.11 above.

> between China and the Philippines. In so doing, the Philippines attempts to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of legality.[84]

40. Thus, both the Philippines and China are at one in treating the dispute as one in essence regarding sovereignty over territory. Under the framework as discussed above, a decision on this dispute would be one on a matter outside the jurisdiction of any Article 287 court or tribunal.

41. In any event, this dispute (or the Philippines' claims, if they can be treated separately) would necessarily involve the concurrent consideration of matters concerning sovereignty or other rights over continental or insular land territory. Although the Philippines' Notification states in paragraph 7 that the Philippines "does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them", its note verbale states that it seeks a "peaceful and durable resolution of the dispute". This phrase is also used in a statement of the Philippine Secretary of Foreign Affairs on 22 January 2013 and many times more in the above mentioned Q and A document of the Philippine Department of Foreign Affairs.[85] As pointed out in the statement of the spokesperson of the Chinese Foreign Ministry, these Philippine statements are "contradictory".[86] No durable peaceful resolution of the dispute can be achieved without first settling the dispute or claims on territory over the islands and other features.

42. Furthermore, the Philippines' concrete formulation of its claims, especially Claims 3-7, is intended to execute an unstated double-whammy on China's sovereignty over its islands in the South China Sea: implied denial of China's sovereignty over the islands it (including via the Taiwan authorities) now controls as well as those that are now unlawfully controlled by the Philippines, as named in the statement of the spokesperson of the Chinese Foreign Ministry (above para.39). The resolution of the dispute or these claims would necessarily involve the concurrent consideration of the unsettled disputes concerning, or depend on the resolution of the question of, sovereignty over these islands. As a result, the Tribunal has no jurisdiction over the dispute or these claims, under the framework as discussed above.

43. More specifically, Claim No. 3 asserts that, "Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention". Claim No. 4, following from Claim 3, argued that "Mischief Reef [Meiji Jiao], McKennan Reef [Ximen Jiao], Gaven Reef [Nanxun Jiao], and Subi Reef [Zhubi Jiao] are submerged features that are not above sea level at high tide,

84 Ibid.

85 DFA of the Philippines, Q & A, n.80, above.

86 Remarks of the Spokesperson of the FM of China, n.11 above.

are not islands under the Convention, are not located on China's Continental Shelf'. First of all, since these submerged features (or low-tide elevations) have traditionally been considered to be part of Nansha Qundao, the Philippines' formulation of these claims in this way proceeds therefore on the unstated assumption that these features are not part of that archipelago. A decision on these claims would necessarily involve consideration of disputes on the sovereignty over Nansha Qundao including its scope and domain and its components, or an implied decision on these issues if the Tribunal proceed on the route as proposed by the Philippines, without an express decision on those issues. Indeed, such a decision would be chopping off a chunk of or dismembering Nansha Qundao. The fact that these features may not qualify as islands does not affect this argument as the definition of archipelago under Article 46(2) of the UNCLOS envisions the inclusion of "other natural features" and case law buttresses this treatment.[87]

44. Moreover, assuming that the Tribunal had jurisdiction over Claim No. 3 (which it does not have, as argued below (Part III.C, paras.50-51) and that it agreed with the Philippines on Claim No. 3, for Claim No. 4—the main point of which is that the features named therein are not located on China's continental shelf—to be true, the decision would have to ignore the fact that, as showed in Tables 1 and 2 (next to para.45), Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao), and Subi Reef (Zhubi Jiao) are all comfortably within 200 M of Taiping Dao (Itu Aba Island), which China (via the Taiwan authorities) controls, and also comfortably within 200 M of Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines but is claimed by China—both islands are capable of generating full maritime entitlements[88]—and would further have to first deny China sovereignty over both Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island) so that China has no entitlement projected from these islands that would cover Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao), a territorial sovereignty matter over which the Tribunal has no jurisdiction. The other part of Claim No. 4 (on the alleged unlawful activities by China) as well as Claim No. 5 (on two features' alleged being part of the Philippines' continental shelf) are dependent upon the denial of China's sovereignty and accordingly are outside the Tribunal's jurisdiction under *Monetary Gold* and its progeny.

45. A similar situation obtains with respect to Claim No. 6. This claim asserts essentially, in part, that Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), and Fiery Cross Reef (Yongshu Jiao) qualify as "rocks" under Article 121(3) of the Convention, and generate an entitlement only to a territorial sea no broader than 12 M, and that

87 Cf. Eritrea/Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) (http://www.pca-cpa.org/showfile.asp?fil_id=458) (9 Oct. 1998), para.527, treating low-tide elevations as part of an island group.

88 See, e.g., Robert C. Beckman and Clive H. Schofield, n.46 above, 210-211.

Table 1

Name of maritime feature	Location (coordinates)	Distance from another Chinese Island (M)	Name of Chinese island
Meiji Jiao (美济礁, Mischief Reef)	9°55′27″N and 115°32′33″E	73	Taiping Dao (太平岛, Itu Aba Island)
Ximen Jiao (西门礁, McKennan Reef)	9°54′34″N and 114°29′46″E (East); 9°54′12″N and 114°27′58″E (West)	29 (East); 30 (West)	Taiping Dao (太平岛, Itu Aba Island)
Nanxun Jiao (南薰礁, Gaven Reef)	10°12′37″N and 114°13′35″E	13	Taiping Dao (太平岛, Itu Aba Island)
Zhubi Jiao (渚碧礁, Subi Reef)	10°54′48″N and 114°3′40″E	37	Taiping Dao (太平岛, Itu Aba Island)
Huangyan Dao (黄岩岛, Scarborough Shoal)	15°9′15″N and 117°45′21″E	301	Yongxing Dao (永兴岛, Woody Island), measured from the baseline of Xi'sha Qundao
Chigua Jiao (赤瓜礁, Johnson Reef)	9°42′51″N and 114°17′11″E	41	Taiping Dao (太平岛, Itu Aba Island)
Huayang Jiao (华阳礁, Cuarteron Reef)	8°51′53″N and 112°49′52″E	125	Taiping Dao (太平岛, Itu Aba Island)
Yongshu Jiao (永署礁, Fiery Cross Reef)	9°32′20″N and 112°52′50″E	101	Taiping Dao (太平岛, Itu Aba Island)

(Compiled based on data supplied by Dr. Li Mingjie, Scientist at China Institute for Marine Affairs, Beijing)

Table 2

Name of Maritime Feature	Location (coordinates)	Distance from an island unlawfully controlled by the Philippines but claimed by China (M)	Name of island unlawfully controlled by the Philippines but claimed by China [in the so-called Kalayaan Island Group]
Meiji Jiao (美济礁, Mischief Reef)	9°55′27″N and 115 °32′33″E	101	Zhongye Dao (中业岛, (Thitu Island))
Ximen Jiao (西门礁, McKennan Reef)	9°54′34″N and 114°29′46″E (East); 9°54′12″N and 114°27′ 58″E (West)	70	
Nanxun Jiao (南薰礁, Gaven Reef)	10°12′37″N and 114°13′35″E	50	
Zhubi Jiao (渚碧礁, Subi Reef)	10°54′48″N and 114°3′40″E	14	
Huangyan Dao (黄岩岛, Scarborough Shoal)	15°9′15″N and 117°45′21″E	315	
Chigua Jiao (赤瓜礁, Johnson Reef)	9°42′51″N and 114°17′11″E	79	
Huayang Jiao (华阳礁, Cuarteron Reef)	8°51′53″N and 112°49′52″E	157	
Yongshu Jiao (永署礁, Fiery Cross Reef)	9°32′20″N and 112°52′50″E	124	

(Compiled based on data supplied by Dr. Li Mingjie, Scientist at China Institute for Marine Affairs, Beijing)

China has unlawfully claimed maritime entitlements beyond 12 M from these features. Since Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao) and Fiery Cross Reef (Yongshu Jiao) have traditionally been considered to be part of Nansha Qundao, the Philippines' formulation of this claim in this way proceeds therefore on the unstated assumption that these "rocks" are not part of that archipelago. A decision on this claim would necessarily involve consideration of disputes on the sovereignty over Nansha Qundao including its scope and domain and leaving, as the Philippines claims, the sovereignty over the "rocks" for the future, which still would be a decision on the sovereignty issues regarding the integrity of the archipelago, or an implied decision on these issues if the Tribunal proceed on the route as proposed by the Philippines, without an express decision on those issues, and would dismember the archipelago.

46. Furthermore, assuming that the Tribunal had jurisdiction over the definition or status (or qualification) of Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), and Fiery Cross Reef (Yongshu Jiao) and agreed they qualify as "rocks" only, for the Tribunal to reach the conclusion that, therefore, China has unlawfully claimed maritime entitlements beyond 12 M from these features it would have to ignore the fact that, as showed in Tables 1 and 2 (next to para.45), Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao) and Fiery Cross Reef (Yongshu Jiao) are all comfortably within 200 M of Taiping Dao (Itu Aba Island), which China (via the Taiwan authorities) controls, and are also comfortably within 200 M of Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines and claimed by China—both islands, prima facie, are capable of generating full maritime entitlements—and would further have to first deny China sovereignty over both Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island) so that China would have no entitlement generated from these islands that would cover the areas beyond 12 M from Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), and Fiery Cross Reef (Yongshu Jiao), a territorial sovereignty matter over which the Tribunal has no jurisdiction. The part of Claim No. 7 that deals with alleged unlawful activities by China around Johnson Reef (Chigua Jiao) obviously is consequential on the above purported decision and is thus also outside the jurisdiction of the Tribunal under *Monetary Gold* and its progeny, as discussed above.

47. The argument presented in paragraph 45 above applies with equal force to Scarborough Shoal (Huangyan Dao) (also alleged as a rock in Claim No. 6), except that this feature has traditionally been considered part of Zhongsha Qundao, rather than Nansha Qundao.

48. Furthermore, to the extent that Claim Nos. 6 and 7 deal also with continental shelf, the argument made in paragraph 46 above also applies to Scarborough Shoal (Huangyan Dao). This is because, as shown in Tables 1 and 2, Scarborough Shoal (Huangyan Dao) is within 350 M from the baseline of Xisha Qundao, of which Yongxing Dao (Woody Island) is a part and which China has sovereignty over and controls, and is within 350 M from Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines and is claimed by China. The seabed area beyond 12 M from it is thus potentially within the extended continental shelf of China. This possibility is a live one.

In *Nicaragua v. Colombia*,[89] the ICJ held in 2012 that Nicaragua's claim for an extended continental shelf, which would reach into the regular continental shelf entitlement of Colombia, was admissible but decided not to adjudicate upon it because Nicaragua's extended continental shelf has to be first recommended by the Commission on the Limits of the Continental Shelf.

The EEZ component of Claims Nos. 6 and 7 may distinguish Scarborough Shoal (Huangyan Dao) from the rest of the "rocks", as it is not within 200 M of Yongxing Dao (Woody Island) or Zhongye Dao (Thitu Island). The claims relating to Scarborough Shoal (Huangyan Dao) will be further discussed below (especially Part IV.E, paras.99-104).

49. An alternative argument may be that the Philippines' claims only necessitate denial of entitlements based on these islands (including not only Scarborough Shoal (Huangyan Dao), Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao) and Fiery Cross Reef (Yongshu Jiao), but also Yongxing Dao (Woody Island), Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island)), without more. This would require a presumption that these islands are in fact free-standing "rocks" under Article 121(3). As argued below (Part III.D, paras.52-55), the Tribunal has no power to decide on the status of such features, much less to presume it. Such an argument is also improper on the face because of the large size of some islands involved, such as Yongxing Dao (Woody Island), Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island), which are to enjoy their full entitlements.[90] This alternative argument may have an impact on the arguments relating to the qualification of the dispute as one relating to delimitation, and will be discussed below (Part IV, paras.59-104).

III.C. The Tribunal has no jurisdiction over certain claims relating to the sovereignty over or status of certain "submerged features" or whether they are subject to appropriation because they either do not constitute disputes concerning the interpretation or application of the UNCLOS or are consequential upon the resolution of a land territorial sovereignty issue over which the Tribunal has no jurisdiction

50. Alternatively and subsidiarily, if the various claims may be considered separately as aspects of a dispute or distinct disputes and to the extent that Claims Nos. 3, 4, and 5 of the Philippines assert that various submerged features in the South China Sea "cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf', that the four named features—Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi

89 ICJ Reports 2012, 624, paras.104-131. For an instance of State practice on dealing with special characteristics in areas beyond 200 miles, see Bjørn Kunoy, Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between Greenland and Iceland in the Irminger Sea, 12 Chinese JIL (2013), 124-142.

90 See, e.g., Beckman and Schofield, n.46 above.

Jiao)—"are not located on China's Continental Shelf", and that "China has unlawfully occupied and engaged in unlawful construction activities" on some of them, or that some of them are part of the Philippines' continental shelf, these claims essentially address which State has sovereignty over these features; they are not regulated under the UNCLOS. Articles 7(4), 13 and 47(4) of the UNCLOS, where low-tide elevation is mentioned, do not deal with these questions. These provisions do not say these features *are* subject to sovereignty. They do not say these features *are not*, either.

The question whether or not these features are subject to sovereignty is in itself a question relating to sovereignty over these features, whether as insular land territory or as a *sui generis* category of features. The silence of the UNCLOS on point does not transmogrify the question into one not about sovereignty or into one about the interpretation or application of the UNCLOS. Accordingly, these aspects of the dispute or these claims cannot be disputes concerning the interpretation or application of the UNCLOS. As a result, the Tribunal has no jurisdiction over these claims, or over the other aspects of the claims stated in Claims Nos. 3, 4 and 5 which are consequential upon the questions over which the Tribunal already has no jurisdiction.

51. The fact that the ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* asserted that "low-tide elevations cannot be appropriated"[91] does not affect the above argument. One must not forget first of all that the Court was not interpreting or applying the UNCLOS when it made that assertion, Colombia not being a party to the UNCLOS. Jurisdiction over that case was not grounded on the UNCLOS. Even assuming *arguendo* that the Court were correct, the fact that the Court gave this answer to the question whether or not low-tide elevations can be appropriated or are subject to sovereignty does not change the nature of this question as one relating to sovereignty over the features, which is not an issue concerning the interpretation or application of the Convention and thus falls outside the scope of jurisdiction of the Tribunal. The fact that a substantive rule of law is challenging or even clearly unfavourable to a party should not affect a tribunal's analysis of the bases for its jurisdiction. That is to say, if a matter is kept outside the jurisdiction of the court or tribunal by the Convention as a whole or excluded from that jurisdiction by a particular State party through an optional exception declaration, whether or not the State's treatment of that matter is unlawful does not affect the assessment of the validity of that exclusion; nor does the fact that that treatment is accepted as unlawful therefore invalidate the exclusion. Indeed, when examining jurisdiction, the Court does not inquire into the validity of the treatment being challenged.[92]

91 ICJ Reports 2012, 624, 641, para.26.

92 Cf. Fisheries Jurisdiction (Spain v. Canada), Judgment, ICJ Report 1998, 432, 455-456:

> 44. […] In point of fact, reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy. Nowhere in the Court's case-law has it been suggested that interpretation

Finally, while not important at the stage of jurisdiction, substantively the Court's assertion is open to question and an arbitral tribunal with proper jurisdiction may well take a contrary position. It should be pointed out that the Court gave no support for making that assertion, but played a kind of *legerdemain* by placing that assertion in between two uncontroversial positions on islands and on low-tide elevations within the territorial sea of a coastal State, as if hoping for some sort of "proven by association" effect:

> 26. It is well established in international law that islands, however small, are capable of appropriation (see, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 206). By contrast, low-tide elevations cannot be appropriated, although "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself" (ibid., p. 101, para. 204) and low-tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea (see paragraph 182 below).[93]

There is of course more than meets the eye in this mundane-looking statement. Before making that squeezed-in-between assertion, the Court had never ruled *in a holding* on the question whether or not a low-tide elevation situated beyond the territorial sea of any State is subject to appropriation. The *Qatar v. Bahrain* judgment (2001) quoted by the Court affords no support for the assertion, as that decision only deals with low-tide elevations within the territorial sea of one of the parties; any perceived support from the loose language in that judgment would be based on *obiter dictum*, going beyond the matter *sub judice*. There the Court recognized that, "International treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations."[94] There Judge Oda expressly stated that he considered

> in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations […] The fact that a State may lack confidence as to the compatibility of certain of its actions with international law does not operate as an exception to the principle of consent to the jurisdiction of the Court and the freedom to enter reservations. […]
>
> 45. There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties.

93 ICJ Reports 2012, 641, para.26.

94 ICJ Reports 2001, 40, at 101, para.205.

this an "open matter".[95] Indeed, just in 1998 the arbitral tribunal in the *Eritrea/Yemen* arbitration took a contrary decision, assigning, without explanation, sovereignty over low-tide elevations beyond the territorial sea to the parties in whose exclusive economic zones the features are found.[96] In any event, open or not substantively, the question whether low-tide elevations are subject to appropriation is one about territorial sovereignty not within the jurisdiction of a Section 2 court or tribunal.

III.D. The Tribunal has no jurisdiction over certain claims relating to the definition or status of certain "rocks" because these claims relate to sovereignty over insular land territory and they either do not constitute disputes concerning the interpretation or application of the UNCLOS or are consequential upon the resolution of a sovereignty issue over which the Tribunal has no jurisdiction

52. Philippine Claim No. 6 (above, para.24) attempts to address the definition, status and the entitlement of Scarborough Shoal (Huangyan Dao), Johnson Reef (Chigua Jiao) and other features to a maritime zone, while avoiding sovereignty issues. The definition or status of such features is inherently part of the bundle of sovereignty over them—indeed, a decision on their status will dramatically affect the quantum of sovereignty. Sovereignty over these features is the basis for the decision on definition or status thereof. Thus if a tribunal has no jurisdiction over the former, it does not have over the latter, either, under *Monetary Gold* and its progeny, as discussed above (Part III.B, para.37). Furthermore, it would be a violation of fundamental fairness if a tribunal decides upon some rights without the right holder having been ascertained. Since the tribunal has no jurisdiction to decide on the sovereignty over these features, it has no jurisdiction over the status of the features mentioned in Claim No. 6.

53. Moreover, the entitlement that an island has is really not that of the island as such, but that of the sovereign over the island. That is to say, the entitlement or right holder is the coastal State, not the island. Only the sovereign has the capacity to enjoy entitlement. Indeed, the sovereign may claim a smaller slice of maritime space than allowed or may give up one or part of it even if it belongs to the sovereign *ab initio*. As

95 Judge Oda, Sep. Op., ibid., 124, para.7. See also Prosper Weil, Les hauts-fonds découvrants dans la délimitation maritime: À propos des paragraphes 200-209 de l'arrêt de la Cour internationale de Justice du 16 mars 2001 en *l'affaire de la Délimitation maritime et questions territoriales entre Qatar et Bahreïn*, in: Nisuke Ando, Edward McWhinney, Rüdiger Wolfrum (eds), 1 Liber Amicorum Judge Shigeru Oda (2002), 307-321.

96 Eritrea/Yemen Arbitration Award, n.87 above, para.527 (iv), (v), as analyzed in W. Michael Reisman, The Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 93 AJIL (1999), 668, 680. See also Roberto Lavalle, The Rights of States over Low-tide Elevations: A Legal Analysis, 29 IJ Marine & Coastal L (2014), 1–23.

can be gleaned from international cases,[97] whether an island is a sole unit for entitlement or is considered more or less part of a continental or larger coast *may* have an impact on its entitlement. As a result, before deciding who is the sovereign over the island, the Tribunal may not decide upon its entitlement. The language of Article 121, while crafted in a way suggestive of islands or rocks having maritime spaces, in fact indicates that any final determination of the entitlement projected from islands or rocks is premised on the prior determination of who is the sovereign over them in the first instance. That is to say, the language of Article 121 presumes the certainty of who is the sovereign over a feature at issue. Without such certainty, Article 121 cannot be applied.

For these reasons, readily available materials do not seem to reveal any international case in the world in which a court or tribunal before adjudicating upon sovereignty over a maritime feature has proceeded to decide, as part of the holding, its status as island or rock.[98] Loose statements in the form of *obiter dicta* are not of value, especially in grave matters such as the ones under consideration.

54. Accordingly, the entitlement of any of these features to any maritime zone is consequential on who is the sovereign over them and their definition and/or status, over which the Tribunal has no jurisdiction. As a result, the Tribunal has no jurisdiction to rule on their entitlement either, under *Monetary Gold* and its progeny.

55. Similarly, since Philippine Claim No. 7 (above, para.24) addresses activities in the waters adjacent to Scarborough Shoal (Huangyan Dao) and Johnson Reef (Chigua Jiao) ultimately depends on the status of and sovereignty over these two features, the Tribunal has no jurisdiction over this claim.

97 Cf. Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (Anglo-French Arbitration), Award (1977, 1978), 18 RIAA, 3, paras.186, 190; Libya/Malta, ICJ Reports 13, 42, para.53 ("Malta being independent, the relationship of its coasts with the coasts of its neighbours is different from what it would be if it were a part of the territory of one of them"). See also Prosper Weil, The Law of Maritime Delimitation – Reflections (1989), 52-53.

98 In Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, the parties did not contest the Court's jurisdiction over Nicaragua's new claim regarding sovereignty over certain islands (para.116) and neither claimed for these islands maritime areas beyond the territorial sea (para.137), all out of their own volition. The discussion on whether a claim is implicit in an earlier one, paras.111-115, is not about jurisdiction, but formulation of claims. The two are different matters, although they may have managed to confuse some. For these reasons, this case has no value as far as the South China Sea arbitration is concerned.

III.E. To the extent that the Philippines' Understanding is meaningful regarding the interpretation of the scope of Article 288(1), it reinforces the position that disputes relating to sovereignty over continental or insular land territory are outside the jurisdiction of a Section 2 court or tribunal

56. As will be discussed below (Part IV.G, paras.110-120), the Philippines' Understanding in paragraphs 4 and 8 (quoted in para.5 above) can be interpreted as an attempt to exclude sovereignty disputes from Section 2 compulsory procedures. Sovereignty disputes would include disputes relating to continental or insular land territory and others.

57. Our discussion above shows that disputes relating to sovereignty over continental or insular land territory are outside the jurisdiction of any Section 2 court or tribunal by force of Part XV itself, without any need for any additional declaration. Accordingly, if the Philippines' intent is to exclude disputes regarding sovereignty over continental or insular land territory, the Understanding may have been a superfluous exercise. As far as this category of disputes as such is concerned (other aspects will be dealt with below (Part IV.G, paras.110-120)), the Philippines' Understanding does not appear to present any effective optional exception under Article 298(1) or permitted under another article, and thus may be in tension with Article 309.

58. Nevertheless, the Philippines' Understanding may be considered an interpretative statement, and may be taken as an element in interpreting the UNCLOS.[99] As such, it evidences the understanding or intent of the Philippines that disputes relating to sovereignty over continental or insular land territory are outside the jurisdiction of any court or tribunal under Section 2. Thus, the Understanding reinforces the analysis conducted and the conclusions reached above.

IV. Jurisdictional obstacles or objections based on Article 298 of the UNCLOS and China's 2006 optional exceptions declaration and/or the Philippines' Understanding confirmed on ratification of the UNCLOS

59. In addition to the jurisdictional obstacles or objections based on the phrase "any dispute concerning the interpretation or application of this Convention" in Articles 286 and 288(1), or alternatively, many jurisdictional obstacles or objections can also be based on Article 298 in Section 3 and the optional declarations made thereunder. This is clear from Article 286 which subjects the application of Section 2 to Section 3. Under Article 298 of Section 3 a State party may make a written declaration to provide for optional exceptions to the applicability of Section 2 compulsory procedures. That article provides in relevant part:

99 See ILC, Guide to Practice on Reservations to Treaties, Guidelines 4.7 to 4.7.3, and commentary thereto. ILC Annual Report 2011, A/66/10/Add.1.

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> > (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
> > […]

Paragraphs 1(b) and (c) allow exclusions of categories of disputes concerning military activities and law enforcement or disputes in respect of which the UN Security Council is exercising its functions under the UN Charter. These two categories are not discussed in this article.

Furthermore, Article 298(3) provides for the reciprocal application of optional exceptions. As a result, between two States parties, the total applicable exceptions would be the sum of those that have been made by each party. The cumulative effect of these exceptions thus serves to delimit the jurisdiction of a Section 2 court or tribunal. At this juncture, it is worth repeating that the express terms of Article 298(2) and (3) and Article 299 make it very clear that there is no need for any "additional enforcement" or even invocation of an optional exception.

60. As related above in paragraph 4, China filed in 2006 a declaration under Article 298, making it clear in facially plain, clear and comprehensive language that it exercised, to the full, the option to except all the disputes mentioned in Article 298(1)(a), (b) and (c) from Section 2 compulsory procedures.

The Philippines filed an Understanding upon signature, which was confirmed upon ratification of the UNCLOS in 1984. That Understanding presents challenges to an interpreter, as will be made clear below.

61. In its Notification the Philippines asserts 10 claims. In paragraph 39 of that Notification the Philippines places these claims in four categories (reproduced above in Part II, para.26) and argues that none of the exceptions made in China's 2006 declaration is applicable to the Philippines' claims in this arbitration. As is clear, Categories (a) and (b) attempt to present questions of China's entitlement to certain rights, as well

as rights consequential on delimitation of China's maritime zones. Category (c) attempts to present questions of the status of various maritime features and their entitlement to maritime zones. Category (d) attempts to present questions regarding activities consequential on delimitation.

62. There is ample ground for the position that the Arbitral Tribunal has no jurisdiction under Article 298(1)(a) and the declaration of China or the Understanding of the Philippines. As China's declaration is clearer and its effect easier to grasp, I will first analyse the issues with a focus on China's optional exceptions, while leaving the Philippines' Understanding to the end in Part IV.G, paras.110-120.

IV.A. The Philippines' claims, when defragmented as they must be because of the delimitation geographical framework and/or delimitation situation, constitute in essence one big dispute on the delimitation in the South China Sea between the Philippines and China which has been excluded by China from Section 2 compulsory procedures

63. As highlighted earlier, the Philippines' claims, despite their fragmentation, address the pre-steps to, and the rights and obligations consequential upon, delimitation in the South China Sea, while avoiding "delimitation proper" in its final step. Furthermore, all the claims have their root cause in the "nine dash line" or are in large measure impacted by it. Thus, all the claims in essence constitute one big dispute regarding delimitation. What the Philippines is doing is to fragment that big dispute into what appears as discrete claims for arbitration, so as to effect a delimitation of disputed areas between itself and China in the South China Sea, without asking the Tribunal to do so.

The well-known claims made by China and the Philippines, as well as the delimitation geographical framework as discussed, especially in paragraphs 27-28, clearly present a "delimitation situation", to borrow a phrase that Australia used in the *Whaling in the Antarctic* case[100] to describe the condition that, it admitted, would bring into play the reservation to its acceptance of the Court's jurisdiction excluding

> any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.[101]

No such a situation with overlapping claims was found by the Court, and Japan's objection to the Court's jurisdiction was rejected. Early on, while not dealing with jurisdictional matters, the ICJ in the *North Sea Continental Shelf* cases also fully appreciated the importance of the unity of a delimitation situation. Thus the Court observed that "although two separate delimitations are in question, they involve—indeed actually

100 Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), ICJ Reports 2014, para.34.

101 Ibid., paras.31-32.

give rise to—a single situation".[102] A slice-by-slice approach to a single situation would not do justice to it. The joinder of the two cases in *North Sea Continental Shelf* apparently spared the Court from the unenviable task of having to deal with the two delimitations separately.

Such a delimitation situation or just a delimitation geographical framework (as discussed in paras.27–28) serves to fuse otherwise discrete or free-standing issues into a delimitation dispute or complex of disputes if those issues are part of the delimitation or related to the situation or framework as discussed. For example, if a State's coast faces only the high seas (i.e., no delimitation geographical framework exists), the issue of the propriety of its baselines will be only a discrete issue about the baselines; if the coast faces another State's coast within 400 M, that issue would now be part of the delimitation complex to be solved. Another illustration is the contrast between the situation of a small feature located entirely of itself thousands of miles out in the ocean and that of a small feature located within a delimitation geographical framework. The status and entitlements of the former may be merely questions of status and entitlements. The status and entitlements of the latter, however, would be part of the delimitation complex to be settled.

In the face of a delimitation situation or a delimitation geographical framework, a court or tribunal is required to conduct a sort of *defragmentation* exercise, adopt a holistic approach, and consider all claims, including entitlement claims or claims regarding relevant circumstances, as forming one dispute of or relating to delimitation within the meaning of Article 298(1), rather than to treat each claim as a separate dispute. Since China's 2006 declaration has excepted all the categories of disputes mentioned in Article 298(1) from the applicability of Section 2, this entire case is outside the jurisdiction of the Tribunal. That is to say, the existence of a delimitation situation as discussed or a delimitation geographical framework as highlighted above is sufficient to trigger the operation of China's optional declaration under Article 298(1).

64. Such a holistic approach is required as a matter of the law regarding what constitutes a delimitation dispute itself. Articles 288, 286, 281, and 298 of UNCLOS all speak of "dispute" or "disputes", not "claim" or "claims". Furthermore, Article 298 (1)(a) permits the optional exclusion of "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles".[103] While Article 15 provides a method for delimiting

102 North Sea Continental Shelf, ICJ Reports 1969, 3, 19 (para.11).

103 Article 15 provides:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

the territorial sea, Articles 74 and 83 leave the delimitation of the exclusive economic zone and the continental shelf to the entire gamut of sources of law under Article 38 of the ICJ Statute, thus incorporating all relevant applicable international law.

Under the customary international law on delimitation, as applied in State practice as well as in the case law of international courts and tribunals, a delimitation process or operation at its irreducible core always includes the ascertainment of the entitlements of the parties and the overlap thereof and then effecting a delimitation of the overlapping area, resulting in an amputation of the entitlements of each, as so described by others. Briefly speaking, the delimitation of the exclusive economic zone or the continental shelf usually starts with identifying the relevant coasts, relevant areas and base points, then moves to the construction of a provisional delimitation line, then considers whether or not the provisional line need be adjusted to achieve an equitable solution because of various relevant circumstances, and finally conducts a disproportionality test on the effect of the line as adjusted or shifted to see whether the parties' respective shares of the relevant areas are markedly disproportionate to their respective relevant coasts.[104] This is essentially what Prosper Weil, practitioner and scholar, distilled in 1989 from State practice and case law; to him delimitation is a "single operation".[105] This essentially sums up the delimitation process applied by the ICJ in a long line of cases such as *Denmark v. Norway* (1993),[106] *Qatar v. Bahrain* (2001), *Romania v. Ukraine* (2009)[107] and *Nicaragua v. Colombia* (2012).[108] This was expounded already in 2010 by Shi Jiuyong, former President and long-time Judge at the ICJ, writing as commentator in this *Journal*.[109]

Article 74(1) provides:

> The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Article 83(1) provides:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

104 See, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia), ICJ Reports 2012, paras.137-193.

105 Prosper Weil, Reflections (1989), n.97 above, 203.

106 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, ICJ Reports 1993, 38.

107 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, 61.

108 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012, 624.

109 Shi Jiuyong, Maritime Delimitation in the Jurisprudence of the International Court of Justice, 9 Chinese JIL (2010), 271-291.

This understanding of the delimitation operation means that a delimitation dispute must be taken as including entitlement claims as well as claims relating to relevant or special circumstances, rather than just "delimitation proper", if understood as just the drawing of the final line of delimitation or maritime boundary. In the arbitration under consideration, the presence of the numerous islands and other features presents a particularly complex situation, because these features may present entitlement issues, and/or their presence may also be a relevant circumstance to be considered and taken into account.[110] This would also obtain with respect to the dotted line or "nine dash line". This complex situation will be made clearer below in Parts IV.B.1 (especially with regard to insular features) and IV.F (on the possible role of the "nine dash line"). In any event, the pre-line drawing matters of entitlement and post-line drawing but line drawing-dependent matters, which comprise the big part of the Philippines' claims, would together form one big dispute on delimitation under the law applicable to maritime delimitation.

65. Alternatively, the terms "concerning", "relating to" and "involving" used in Article 298(1)(a) of the UNCLOS, read in good faith in accordance with their ordinary meaning in their context in the UNCLOS, are all terms that give the word "dispute" a substantive scope or coverage broader than the content of "the interpretation or application of articles 15, 74 and 83", "sea boundary delimitations" or "historic bays or titles", even if such content is to be given a strict interpretation. Furthermore, the interpretation or application of Articles 15, 74 and 83 may involve also other articles that are referenced to or incorporated in these articles expressly or implicitly. In any event, the scope of a dispute *concerning* or *relating to* delimitation is broader than one that deals with only the final drawing of the line of delimitation.

This has already received the blessing of the ITLOS in the *"LOUISA" Case*. There the ITLOS interpreted the word "concerning" in a declaration made under Article 287 of the UNCLOS in which Saint Vincent and the Grenadines declares that, "it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels". The ITLOS held:

> [T]he use of the term "concerning" in the declaration indicates that the declaration does not extend only to articles which expressly contain the word "arrest" or "detention" but to any provision of the Convention having a bearing on the arrest or detention of vessels. This interpretation is reinforced by taking into account the intention of Saint Vincent and the Grenadines at

110 There are many judicial and arbitral cases touching upon the role of islands in delimitation, a most difficult topic. See, e.g., Guinea/Guinea-Bissau Maritime Delimitation (1985), 25 ILM 251; Black Sea Delimitation, ICJ Reports 2009, 61, 120-, 123, paras.179-188. There is also a huge body literature on this. See, e.g., Shi Jiuyong, n.109 above; Prosper Weil, Reflections (1989), n.97 above, 229-235.

> the time it made the declaration, as evidenced by the submissions made in the Application. From these submissions, it becomes clear that the declaration of Saint Vincent and the Grenadines was meant to cover all claims connected with the arrest or detention of its vessels. On the basis of the foregoing, the Tribunal concludes that the narrow interpretation of the declaration of Saint Vincent and the Grenadines as advanced by Spain is not tenable.[111]

As the term "concerning" is one frequently used to modify disputes in Part XV of the UNCLOS and elsewhere therein, it should be taken to have the same meaning throughout the entire UNCLOS dispute settlement system. That is to say, the term "concerning" in Article 287 has the same meaning as that in Article 298. Moreover, without more, a term used in a declaration made under a particular provision should have the same meaning as that term is used in that article itself. Thus, the word "concerning" has the same meaning in Article 287 and a declaration made thereunder. Similarly, a term has the same meaning in Article 298 and a declaration made thereunder. Accordingly, the use of the term "concerning" in Article 298 and a declaration made thereunder should be taken to have the same meaning as in the context of Article 287 and a declaration made thereunder, all within Part XV. There is no support in the UNCLOS for interpreting differently the same term simply because it is used in different articles and their associated declarations, all within the same Part XV.[112] Accordingly, the scope of a dispute concerning the application of Articles 15, 74 and 83 relating to see boundary delimitation would extend to any matters that have a bearing on the application of these articles or sea boundary delimitation. A dispute on entitlement or relevant circumstances, in the face of a delimitation situation or a delimitation geographical framework, would have such a bearing and must be considered with the meaning of an excludable dispute under Article 298(1).

66. Lending support to this position is the ICJ decision in *Aegean Sea Continental Shelf*,[113] elaborating on the term "relating to", among other matters. When analyzing whether the Greek exclusion of "all disputes relating to the territorial status of Greece", the Court said, "The question is not, as Greece seems to assume, whether continental shelf rights are territorial rights or are comprised within the expression 'territorial status'. The real question for decision is, whether the dispute is one which *relates* to

111 The M/S "LOUISA" Case, n.40, para.83.

112 Contra Andreas Zimmermann and Jelena Bräumler, n.46 above, 458-459 seemed to argue for a more limiting interpretation of the term in the context of a declaration, in contrast to a use of the term in the Convention itself. They seemed to make this distinction simply because of the placement of the same term in different places. Usually such a limiting interpretation, if at all, is based on intent, not simply on such different placements, as such different placements here do not show different intention. The same term, without more, should be given the same meaning throughout a system.

113 ICJ Reports 1978, 3.

the territorial status of Greece."[114] The Court then proceeded to hold that, "a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf."[115] Similarly, in this arbitration the question on jurisdiction is not what exactly is comprised within the "delimitation proper", but whether or not the dispute *relates to* the delimitation at issue, those deliberately avoided by the Philippines.

67. The holistic approach to assessing the nature and scope of a dispute within the meaning of Article 298(1)(a) is necessary in order to give full meaning to that term and full effect to the deal that was reached as a package by compromise[116] at UNCLOS III allowing optional exceptions under Article 298(1)(a) of the specified categories of disputes from Section 2 compulsory procedures. Adopting an approach that would permit fragmenting a dispute into its various components would upset this deal. Philippe Gautier's count of States which had relied on this deal and filed optional exception declarations under Article 298 at the end of 2012 is 34,[117] although a small number may not have excluded delimitation disputes. A computer check on the declarations conducted on 17 October 2014 in the UN database reveals that 32 States have made optional declarations under Article 298 that have a bearing upon delimitation disputes, in whole or in part or with respect to the type of tribunals.[118] All these declarations will be at risk if a "fragmentation approach" is adopted. Such an approach would do great harm to the dispute settlement system under Part XV, which is just "budding", so to speak, and still fragile.

68. The holistic approach also finds support in ICJ cases outside the context of interpreting and applying the UNCLOS.[119] This understanding was the premise on which Greece, the applicant, and the Court were proceeding in *Aegean Sea Continental Shelf*

114 Ibid., para.81.

115 Ibid., para.86.

116 5 Virginia Commentary, above n.46, 5-15; 107-141, especially 125-126.

117 Philippe Gautier, The International Tribunal for the Law of the Sea: Activities in 2012, 12 Chinese JIL (2013), 619, para.13; precise information is available for checking at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

118 Angola, Australia, Belarus, Canada, Chile, China, Cuba, Democratic Republic of the Congo, Denmark, Ecuador, Equatorial Guinea, France, Gabon, Guinea-Bissau, Iceland, Italy, Mexico, Montenegro, Nicaragua, Norway, Palau, Philippines [confusing declaration], Portugal, Korea, Russian Federation, Saudi Arabia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia, Ukraine (https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en) (accessed 17 October 2014).

119 For an analysis on how the ICJ deals with the concept of dispute, see Sienho Yee, Article 40, n.7 above, at 942-950, MN 36-46.

before UNCLOS was adopted.[120] In that case, Greece presented, as one dispute, various submissions and the Court also treated them as forming one dispute, without more. Chief among the Greek submissions were those about the entitlement of some Greek islands to a continental shelf, the delimitation of a continental shelf boundary between Greece and Turkey, and whether certain activities may be conducted.[121] The dispute was whether the dispute was one relating to the territorial status of Greece, not whether the claims constituted one dispute, which was accepted by all. On that basis, Greece's submissions in that case were similar to those presented by the Philippines in this case at hand, except that the Philippines deliberately left out the final line drawing submission.

69. The holistic approach was also what the International Court of Justice applied at the provisional measures stage in the *Legality of Use of Force* cases. There, the Federal Republic of Yugoslavia (FRY) made a long list of claims based on both *jus ad bellum* and *jus in bello*. But the Court found that its application was in essence directed against the bombing of the territory of the FRY and identified only one big legal dispute between the FRY and the various respondents "concerning the legality of those bombings as such, *taken as a whole*".[122]

70. The holistic approach was also adopted by the arbitral tribunal under Annex VII in the *Southern Bluefin Tuna Case* arbitration between Australia and New Zealand and Japan.[123] In that case, a critical question was raised as to whether there existed two disputes separately under the UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna (the "1993 Convention" or "CCSBT") or just one which was excluded by Article 16 of the CCSBT read together with Article 281(1) of the UNCLOS. The tribunal held:

> [T]his dispute, while centered in the 1993 Convention, also implicates obligations under UNCLOS. It does so because the Parties to this dispute—the real terms of which have been defined above—are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.[124]

120 ICJ Reports 1978, 3.

121 Ibid., 6, para.12.

122 E.g., Legality of Use of Force (FRY v. Belgium), Provisional Measures, ICJ Reports 1999, 134, para.28 (emphasis added).

123 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, 4 August 2000, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=7_10.pdf.

124 Ibid., para.54.

As a result, the dispute was held to be outside the jurisdiction of the tribunal.[125]

71. While scholars do not seem to have specifically dealt with our particular inquiry in a sustained and focused manner, their writings tend to show the importance of taking the holistic approach. As mentioned, Prosper Weil described the delimitation process as "a single operation".[126] He emphasized that "Delimitation is inextricably linked to title, being penetrated through and through by the theory of coastal projections which is the legal basis for the extension of territorial sovereignty seawards."[127] M.C. W. Pinto identified the origins of a maritime dispute in

> (1) the method used by a coastal State (or an island or archipelagic State) for drawing the baselines from which the breadth of its territorial sea, and essentially the breadth of each of its maritime zones, is measured; (2) the demarcation by a State of maritime zones which, in the perception of another State, exceed the entitlement of the former as prescribed by international law; and (3) the activity of foreign ships, such as fishing or mineral exploration, within a coastal State's demarcated maritime zones alleged to be inconsistent with international law or coastal State legislation, or both.[128]

72. Jean-Pierre Cot also noted that while the definition of entitlement of a coastal State and the delimitation between opposing claims are distinct, the two operations are interrelated.[129] Nuno Marques Antunes also stressed the interrelated relationship between title, entitlement and delimitation.[130] He noted that "title does to some extent govern delimitation" and that "[d]elimitation stems from entitlement; it is founded on it".[131]

73. Such a holistic approach in delimitation cases has much to commend it, as it would allow the decision-makers to see the essence of the legal and factual complex[132] involved in the dispute. Adopting a piecemeal approach may cause one to focus on a particular manifestation of the dispute but miss the general situation as well as the essence of it, resulting in seeing the trees but missing the forest, so to speak, and thus would ultimately run afoul of the principle that all relevant

125 Ibid., para.65. For a comment on this case, see Stephen M. Schwebel, Justice in International Law: Further Selected Writings of Stephen M. Schwebel (2011), 270.

126 Weil, Reflections (1989), n.97 above, 203.

127 Ibid., 279.

128 M.C.W. Pinto, n.67 above, 1117.

129 Jean-Pierre Cot, The Dual Function of Base Points, in Holger Hestermeyer (ed.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 820-822.

130 Nuno Marques Antunes, Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process (2003), 132-137.

131 Ibid., 135.

132 Cf. Oil Platform (Iran v. USA), Counter-Claim, ICJ Reports 1998, 190, at 205, para.38.

circumstances must be taken into account in delimitation, do violence to the integral nature of the delimitation process, and put at risk the prospect of an equitable solution, the goal specified in Articles 74 and 83 for delimitation of the EEZ and the continental shelf. Furthermore, a piecemeal approach would also, as the *Southern Bluefin Tuna Case* award has warned, lead to an artificial assessment of the legal and factual complex involved and, as a result, an artificial treatment of it.

74. The above analysis demonstrates that the term "dispute" under Article 298(1)(a) encompasses all questions relating to the pre-delimitation steps, the exact delimitation process, as well as post-delimitation steps taken as a result of delimitation, taken as an integrated whole when these questions arise from a delimitation situation or under a delimitation geographical framework. An optional exception of a dispute under Article 298(1)(a) must be construed as excluding a dispute relating to any and all of these aspects.

75. Such a holistic approach is also required in this particular case so as to implement the true intent of the Philippines at the deeper level or its true understanding of the nature of the controversy. Although the Philippines "cleverly" fragments the dispute into numerous claims giving us the impression or misimpression that there are many disputes involved, as will be described immediately below (Part IV.B), its various documents and the statements of its senior officials have all betrayed its true intent in treating all the claims as forming one integrated dispute. The very note verbale of 22 January 2013 of the Philippines to the Embassy of China and its Notification and Statement of Claim claiming to institute the arbitral proceedings are themselves the best evidence for this. That note verbale uses "with respect to *the dispute* with China" in the first paragraph and "seek a peaceful and durable resolution of *the dispute*" in the second paragraph (emphasis added).[133] Paragraphs 34 and 39 of the Notification also clearly state that the Philippines consider all claims as forming one dispute: the former states that, "As the Philippines and China have failed to settle *the dispute* between them by peaceful means of their own choice […]", while the latter, "The *present dispute* concerns […]". (Emphasis added.) In all these instances the term "dispute" is used in the singular. This is also the usage adopted by the Philippine Senate[134] and House[135] when each passed a resolution supporting the government's initiative

133 Note Verbale No. 13-0211 of the Philippines, n.5 above.

134 P.S. RES. No. 931, preambular para.7 ("settle the dispute"), n.81 above.

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

to bring the arbitration against China,[136] by the Philippine Secretary of Foreign Affairs[137] and his deputy[138] when speaking to the media or other governments.

76. The Arbitral Tribunal will be well advised to apply the holistic approach as discussed and take all the claims presented by the Philippines as forming one big dispute on the delimitation of the maritime spaces between it and China in the South China Sea. Such a dispute has been excepted from the jurisdiction of the Tribunal by the declaration filed by China in 2006.

Furthermore, the post-delimitation, but delimitation-dependent, matters in this case are beyond the jurisdiction of the Tribunal *also* by force of the principle embodied in *Monetary Gold* and its progeny, as discussed in paragraph 37. Delimitation of the relevant areas is a basis or prerequisite for deciding upon such matters.

IV.B. The Tribunal has no jurisdiction over the Philippines' claims because they either relate to (1) definition and/or status of certain features and their entitlement to maritime zones which are necessary first steps in or an inherent part of a delimitation process or (2) rights and activities consequential upon delimitation, the disputes about which have been excluded by China from the jurisdiction of Section 2 courts and tribunals

77. Alternatively, if the "one big case" approach is not taken, the Philippines' claims, though convoluted, in essence fall into two categories. The first category is "entitlement" claims: the maritime area or space which China or the Philippines is entitled to or which a certain maritime feature is entitled to. As regards submerged features and insular features, this entitlement issue also includes anterior decisions on the sovereignty over, and the status or definition of, these features. The resolution of all these claims is an inherent part of a delimitation between China and the Philippines, a question China has excluded from the Tribunal's jurisdiction. The second category of the Philippines' claims relates to certain rights or rightful activities which can only be assessed after delimitation of the relevant areas can be effected. These will be referred to as "claims consequential on delimitation". They are related to delimitation. In

136 Note Verbale No. 13-0211 of the Philippines, above n.5.

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

138 Statement of the Department of Foreign Affairs (DFA) Undersecretary Erlinda F. Basilio, in: PHL-Israel Meet to Strengthen Relations, Unveil Blueprint of Cooperation, 15 March 2013 (n.82 above).

any event, they are also outside the jurisdiction of the Tribunal under *Monetary Gold* and its progeny.

IV.B.1. Entitlement Claims

78. The Philippines' Claims (above, para.24) Nos. 1-6 and 8 in whole or in part are entitlement claims. Thus, Claim No. 1 asserts that, "China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI". Claim No. 2 asserts that, "Accordingly, China's maritime claims in the South China Sea based on its so-called 'nine dash line' are contrary to UNCLOS and invalid". These two claims in essence deal with China's entitlement to the various maritime zones as well as the special space within the "nine dash line", or whether this line can be a source for such entitlement. Claim No. 8 asserts that "[t]he Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V, and VI of UNCLOS, measured from its archipelagic baselines". This obviously relates to the Philippines' entitlement. Claim No. 3 argues that, "Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's Continental Shelf under Part VI of the Convention". This is a general assertion on the regime of submerged features not above sea level at high tide and also the entitlement of these features to maritime zones. Claim No. 4 alleges that, "Mischief Reef [Meiji Jiao], McKennan Reef [Ximen Jiao], Gaven Reef [Nanxun Jiao] and Subi Reef [Zhubi Jiao] are submerged features that are not above sea level at high tide, are not islands under the Convention, are not located on China's Continental Shelf; and China has unlawfully occupied and engaged in unlawful construction activities on these features". This in effect is a specific allegation on the status of these features and their lack of entitlement to maritime zones and their not being part of China's continental shelf. Claim No. 5 makes a similar assertion on two features: "Mischief Reef [Meiji Jiao], McKennan Reef [Ximen Jiao] are part of the Philippines' Continental Shelf under Part VI of the Convention". Claim No. 6 asserts in part that, "Scarborough Shoal [Huangyan Dao], Johnson Reef [Chigua Jiao], Cuarteron Reef [Huayang Jiao] and Fiery Cross Reef [Yongshu Jiao] are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which qualify as 'rocks' under Article 121(3) of the Convention, and generate an entitlement only to a Territorial Sea no broader than 12 M". This claim directly addresses the status of these features and their entitlement to maritime zones.

79. An entitlement claim in this category is an essential part of any claims on maritime delimitation between States; decisions on such claims are a necessary part of delimitation decision-making or even delimitation itself. The claims relating to the

definition or status of certain maritime features are also claims relating to entitlement, if in disguise, because a decision on the status of these features also constitutes *at once* a decision on entitlement. Or, the two decisions on status and entitlement are collapsed into one. Once status is decided, so too automatically is entitlement. If a feature is determined to be a low-tide elevation beyond the territorial sea of any State, its maritime entitlement is automatically fixed as zero; if determined to be a rock under Article 121(3), its maritime entitlement is automatically fixed as no more than a 12 M territorial sea. Moreover, these status claims are also delimitation claims in disguise because a decision on status also constitutes a decision on delimitation or the bulk of such a decision, not to mention just being related to it. If a feature is determined to be a low-tide elevation beyond the territorial sea of any State, its maritime zones are also automatically delimited (it has none of the zones); if determined to be a rock under Article 121(3), its maritime zones are also delimited (it has *no more* than a 12 M territorial sea with its outer limit being the maritime boundary with a State with an adjacent or opposite coast, if applicable, or the open sea). In each scenario, then, the territorial sea of each feature has been delimited. Special circumstances such as a feature's being part of an archipelago or its particular location may change this result to some extent; still a status decision confirming it as a low-tide elevation or a rock will automatically and dramatically affect delimitation and thus will constitute the bulk of such a decision. Since China has excluded all delimitation disputes from Section 2 compulsory procedures, this "entitlement" category of claims must be considered to have been excluded.

80. It is true that in the abstract entitlement and delimitation are two "distinct concepts", as the ITLOS observed in *Bay of Bengal (Bangladesh/Myanmar),*[139] the only delimitation case it has ever been entrusted with so far. That of course does not exhaust the relationship between entitlement and delimitation. The ITLOS itself pointed out in the very same sentence, immediately after noting the distinction, that the two concepts are "interrelated".[140] In fact, that sentence, which reads, "While entitlement and delimitation are two distinct concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated", stresses the interrelatedness, not the distinctness between the two. The rest of the paragraph in which this sentence appears further elaborates this stress.

81. The intertwined relationship between entitlement and delimitation has been already been analysed above. It is worth further elaborating and emphasizing. The International Court of Justice and States have recognized this close relationship. For example, in the *Aegean Sea Continental Shelf* case, the ICJ stated that "[a]ny disputed delimitation of a boundary entails some determination of entitlement to the areas to

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

140 Ibid.

be delimited".[141] Indeed the Court went so far as to note that the application in that case showed that, "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".[142] Furthermore, in *Libya/Malta*, the Court said:

> That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.[143]

The Court later in the same judgment observed that the criterion to employ to achieve a provisional position in that case was "linked with the law relating to a State's legal title to the continental shelf" and that it "seems logical to the Court that the choice of the criterion and the method which it is to employ in the first place to arrive at a provisional result should be made in manner consistent with the concepts underlying the attribution of legal title".[144]

82. Entitlement and delimitation were so intertwined with each other that that the regime and entitlement of islands were so enmeshed with the discussion of delimitation at UNCLOS III. According to Nuno Marques Antunes who has studied these records:

> During the Third Conference, the topic of delimitation was deeply intertwined with the topic of entitlement of islands to maritime zones. This fact had become obvious since the opening statements in 1974. As the Irish representative put it, "all states were greatly interested in the question of islands and rocks, their precise definition and their effect on delimitation". Other states—e.g. Greece, Tunisia, Turkey, and Cyprus—also made reference to the relationship between the two issues.[145]

83. Accordingly, Barbara Kwiatkowska and Alfred H.A. Soons were on safe ground when they said in 1990:

141 ICJ Reports 1978, 36, para.84.

142 Ibid., 35, para.83.

143 ICJ Reports 1985, 30, para.27.

144 Ibid., 46-47, para.61.

145 Nuno Marques Antunes, Conceptualization, n.130 above, original footnotes omitted, but they cited to Official Records of the Third UN Conference on the Law of the Sea (1973/82—I), 159 (emphasis added), and 129, 153, 168-169, 175. On the controversy regarding the islands, see also James Crawford, Brownlie's Principles of Public International Law (8th ed. 2012), 262-263.

> [T]he definition of rocks and their entitlement to maritime spaces, like the definition and entitlement of islands in general, forms an inherent part of maritime boundary delimitation between opposite/adjacent States and, as State practice clearly evidences, these issues will not give rise to controversies unless such delimitation is in dispute.[146]

Obviously an observation of what "State practice clearly evidences" should have its rightful weight in the decision-making of a serious and conscientious person in whatever context.

Revisiting this topic in a substantial, lengthy article published in the 2011 edition of a yearbook, Barbara Kwiatkowska and Alfred H.A. Soons repeated the same theme:

> In fact, with a single exception of Okinotorishima, *the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations*, often intertwined with disputes over sovereignty, such as those involving Serpents Island [...]. A complex maritime delimitation-related role took throughout the whole UNCLOS III a clear precedence over the original purpose of Article 121(3) envisaged by Ambassador Arvid Pardo (Malta) in 1967 of ensuring that insular features located far from their governing states—which he exemplified by such undoubtedly full Article 121(1)-(2) islands as Guam (United States), the Azores Archipelago (Portugal), and Easter Island (Chile), along with such potential Article 121(3) rock as Clipperton Island—could not generate broad maritime zones of these states in the middle of the oceans at the expense of International Seabed Area.[147]

The complexity involved is particularly acute in the South China Sea where each of China's four archipelagos is to be treated as a unit, while each unit includes islands which, evaluated separately, may have full entitlements.

Adding to the complexity is the fact that neither the UNCLOS nor customary international law provides a generally accepted, clear standard for deciding upon the status of an island or rock. No international court or tribunal seems to have ever made such a decision as part of its holding; when the occasion arose twice in its recent case law

146 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands YIL (1990), 139-181, at 181.

147 Barbara Kwiatkowska and Alfred H.A. Soons, Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3), The Global Community—Yearbook of International Law and Jurisprudence (2011), 111-154, at 114-15 (emphasis added; original footnotes omitted). Similarly, the inter-relatedness between the regime of islands and delimitation was pointed out in Andrew Jacovides, Some Aspects of the Law of the Sea: Islands, Delimitation and Dispute Settlement Revisited, in: Ole Kristian Fauchald et al. (eds), Dog fred er ej det bedste ... : festskrift til Carl August Fleischer pa° hans 70-a°rsdag 26. August 2006 (2006), 331, 333.

for that decision to appear appropriate, twice the ICJ eschewed that opportunity by resorting to what can be described as distinctive "delimitation" reasoning and decision, not "entitlement" reasoning or decision, if a distinction is to be drawn. In *Black Sea Delimitation*, the Court considered it unnecessary to decide on the island status of Serpents' Island because any continental shelf and exclusive economic zone entitlements it may generate are subsumed in the projections from the mainland of Ukraine.[148] In *Nicaragua v. Colombia*, the Court followed that approach.[149] Such distinctively delimitation decisions as these are beyond the jurisdiction of the Arbitral Tribunal in this matter as a result of China's 2006 optional exceptions declaration. And the wisdom of the delimitation part of the latter decision has received the condemnation of Colombia, described in paragraph 28 above, which is proof that excepting such matters from a Section 2 court or tribunal may serve to prevent regrets.

Scholars such as Robert Beckman and Clive Schofield have considered that it can be argued in good faith that in Nansha Qundao there are at least 12 features that would qualify as islands with full entitlements[150] and that "a strong argument can be that Woody Island [Yongxing Dao] is entitled to an EEZ and continental shelf of its own".[151] In such a situation, the entitlements of the various islands and other features, if assessed separately, would overlap with each other and may become relevant circumstances in the assessment or delimitation. All these issues would come together in any attempt to solve the delimitation situation in the South China Sea.

84. This drives it home to us all that, however the Philippines camouflages the dispute into or under various entitlement claims, the issues presented by the Philippines, in the face of the delimitation geographical framework and delimitation situation between itself and China, are an integral part of the delimitation dispute between the two States. Obviously what the Philippines does is, pure and simple, a shrewd attempt to ask the Tribunal to do the first part of the job of delimitation and avoid the other and more ostensible part of the delimitation process so as to circumvent the effect of China's 2006 declaration of optional exceptions.

Fortunately one can see through this tactic. One must not let that succeed. Since a decision on an entitlement claim, in the face of a delimitation situation or a delimitation geographical framework, is part and parcel of a decision on a delimitation claim, an entitlement claim must be considered part of a maritime delimitation dispute. Furthermore, as explained above (Part IV.A, paras.65-66), a claim on entitlement would be referenced or incorporated into a decision on the interpretation and application of Articles 15, 74 and 83. If an entitlement claim is considered somehow distinct from delimitation claims, it is still concerning the application of these articles, "relating

148 Black Sea Delimition, ICJ Reports 2009, 122-123, para.187.
149 Nicaragua v. Colombia, ICJ Reports 2012, 624, paras.180.
150 Beckman and Schofield, n.46 above, 210.
151 Ibid., 219.

to" delimitation or "involving" historic title in this case at hand. A dispute relating to maritime delimitation has a broader scope than a maritime delimitation claim, pure and simple, however strict a reading one gives to that term.

Just one example here—more in Parts IV.C-E below—will suffice to show the interrelated relationship between entitlement and delimitation in this case, given the delimitation situation and the delimitation geographical framework. Claims 4 and 5 read together indicate that the Philippines is not claiming that all the features that it has labelled as low-tide elevations are all on or part of the Philippines' continental shelf. A question thus arises as to why the Philippines has standing to ask for a decision on those features it is not so claiming, if it does not want to have a delimitation. The Philippines has not provided a rationale. This question of standing I will not address in this paper. But this problem can only be cured if China's claims for entitlement derived from these features not claimed by the Philippines to be on its continental shelf would have an effect on its continental shelf. If so, delimitation is called for.

85. Moreover, as highlighted earlier, entitlement claims relating to islands and other features may also present themselves as relevant circumstances to be taken into account in the delimitation process, although the Philippines never broaches this issue. It is one that the Tribunal cannot turn a blind eye to, however.

86. In any event, permitting the Philippines to secure jurisdiction by fragmenting its maritime delimitation dispute with China into entitlement claims and activities claims and deliberately leaving out "delimitation proper" would deprive China's optional exclusions under Article 298 of all meaning and allow the Philippines to circumvent them. This will upset the delicate balance in the UNCLOS dispute settlement regime, reached by difficult compromise.

IV.B.2. Claims consequential on delimitation

87. The Philippines' claims consequential on delimitation falling within the second category assert either that China or the Philippines has or does not have certain rights, that China has unlawfully claimed maritime entitlements, or that China violated the Philippines' rights to take measures to exploit resources in certain zones and its rights to navigation. This category of claims are dependent on a decision on the delimitation of the maritime zones between the Philippines and China; any decision on these claims will necessarily involve the prior or concurrent consideration or decision of the delimitation disputes between China and the Philippines. As a result, this category of claims must be considered to be within the disputes that have been excluded by China's declaration, as relating to delimitation or under the principle as refined in *Monetary Gold* and its progeny, as discussed above (Part III.B, para.37).

88. Claims Nos. 4-7, 9 and 10 or parts thereof fall within this category. Claim No. 4 in part alleges that "Mischief Reef [Meiji Jiao], McKennan Reef [Ximen Jiao], Gaven Reef [Nanxun Jiao] and Subi Reef [Zhubi Jiao] […] are not located on China's Continental Shelf; and China has unlawfully occupied and engaged in unlawful construction activities on these features". The latter allegation cannot be decided upon until

China's continental shelf and the waters around these features (apart from the sovereignty over these features) can be delimited. Claim No. 5 asserts that Mischief Reef (Meiji Jiao) and McKennan Reef (Ximen Jiao) are part of the Philippines' continental shelf. Apart from the issue of sovereignty over these two reefs, which was dealt with above (Parts III.B and III.D), this claim cannot be decided until after the Philippines' continental shelf has been decided and delimited. Claim No. 6 alleges that certain insular features are "rocks" and further that "China has unlawfully claimed maritime entitlements beyond 12 M from these features". Obviously whether or not China's conduct is lawful is consequential on a delimitation of the waters around these features. Claim No. 7 asserts that "China has unlawfully prevented Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal [Huangyan Dao] and Johnson Reef [Chigua Jiao]". This claim cannot be decided without having delimited the waters adjacent to the two features. Claims No. 9 argues that, "China has unlawfully claimed rights to, and has unlawfully exploited, the living and non-living resources in the Philippines' Exclusive Economic Zone and Continental Shelf, and has unlawfully prevented the Philippines from exploiting the living and non-living resources within its Exclusive Economic Zone and Continental Shelf". This claim cannot be decided until after the Philippines' exclusive economic zone and continental shelf in the South China Sea have been delimited. Claim No. 10 alleges that "China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the Convention". This apparently refers to navigation in the South China Sea only. This allegation cannot be decided until after the relevant areas in the South China Sea have been delimited. Accordingly, the Tribunal has no jurisdiction over Claims No. 5, 7, 9, and 10 and part of Claims No. 4 and 6 for the reason that the resolution of these claims is consequential on a delimitation question which has been excluded by China.

IV.C. The Tribunal has no jurisdiction over Claims Nos. 3-5 relating to or consequential on the definition or status of Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao), because these claims embody delimitation questions, or these features are to be considered as part of Nansha Qundao as a unit for entitlement and delimitation purposes, or, even if we proceed, *arguendo*, on the logic of the Philippines, these features are within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over these features, necessitating delimitation which has been excluded by China from the jurisdiction of Section 2 courts or tribunals

89. It has been demonstrated above (Part III.C) that Claims Nos. 3-5 regarding the definition or status of the submerged features (or low-tide elevations) named Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao) embody sovereignty issues, causing them to be outside the jurisdiction of the Tribunal. Assuming *arguendo* that the sovereignty issues present no

jurisdictional obstacle, the Tribunal still has no jurisdiction over Claims Nos. 3-5 relating to or consequential on the status of these features or the entitlements projected from another source. These claims are in essence delimitation questions which have been excluded by China from the jurisdiction of any Section 2 court or tribunal.

90. Situated as they are between the Philippines and the main coast of China, these named features have an important role to play in an eventual delimitation between them. Just like islands, the definition or status of these features only give rise to controversies when such a delimitation is in dispute and these issues are an inherent part of the delimitation, as analyzed above (Part IV.B, paras.78-86). They may also become relevant circumstances to be considered in that process.

91. Additionally, Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao) are traditionally considered by China to be part of Nansha Qundao. These features and/or the areas surrounding them may well be within the relevant maritime zones of the group as a unit and should be considered part of the Nansha Qundao for entitlement and delimitation purposes, thus on this ground also *potentially* resulting in overlapping entitlements between the Philippines and China, which will in turn necessitate delimitation.

92. Even if we proceed, *arguendo*, on the logic of the Philippines and if the Tribunal be tempted to agree that these features are not subject to appropriation and will become part of the applicable continental shelf of the relevant coastal State and that Mischief Reef (Meiji Jiao) and McKennan Reef (Ximen Jiao) are within the *pre-delimited* continental shelf entitlement of the Philippines, the Tribunal has no jurisdiction to make a determination on whether or not Mischief Reef (Meiji Jiao) and McKennan Reef (Ximen Jiao) are indeed part of continental shelf of the Philippines, because Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao) are all within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlement over these features, necessitating delimitation, which has been excepted by China's 2006 declaration from the jurisdiction of the Arbitral Tribunal. As showed in Tables 1 and 2 above (Part III.B, next to para.45), Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao) are all comfortably within 200 M of Taiping Dao (Itu Aba Island), which China (via the Taiwan authorities) controls, and also comfortably within 200 M of Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines but is claimed by China. Both Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island) are capable of generating full maritime entitlements, as scholars such as a Robert Beckman and Clive Schofield[152] have stated.

93. The part of Claim No. 4 that addresses China's activities is also a claim relating to the delimitation process, on the defragmentation framework built up above in Part IV.A.

152 N.46 above, 210-211.

Alternatively, it is part of the claim that is consequential on the delimitation of the relevant areas, and as such must be considered to be outside the Tribunal's jurisdiction under *Monetary Gold* and its progeny.

IV.D. The Tribunal has no jurisdiction over Claims No. 6 and 7 relating to or consequential on the definition or status of Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), Fiery Cross Reef (Yongshu Jiao) and their associated maritime areas, because making such decisions is an inherent part of a delimitation between the Philippines and China and because each is an island (rather than a rock) capable of generating full maritime entitlements, or, these features are to be considered as part of Nansha Qundao for entitlement and delimitation purposes, or, even if we proceed, *arguendo,* on the logic of the Philippines, each is within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over each feature's associated areas, with each scenario necessitating delimitation which has been excluded by China from the jurisdiction of Section 2 courts or tribunals

94. Just like the claims regarding the submerged features (or low-tide elevations), the Philippines' Claims No. 6 and 7 relating to the definition or status of what the Philippines labelled as "rocks" also embody land territorial sovereignty issues, putting them outside the jurisdiction of the Tribunal. Assuming *arguendo* that these sovereignty issues present no jurisdictional obstacle, the Tribunal still has no jurisdiction over Claims Nos. 6 and 7 relating to or consequential on the definition or status of these features or the entitlements projected from other sources. These claims are delimitation-related questions which have been excluded by China's 2006 declaration from the jurisdiction of any Section 2 court or tribunal.

95. Situated between the Philippines and the main coast of China, these islands (or rocks as the Philippines would label them) have an important role to play in a delimitation between them. As already demonstrated above (Part IV.B, paras.80-84), the definition or status of these features only give rise to controversies when such a delimitation is in dispute and decisions on these questions are an inherent part of the delimitation. These features may also become relevant circumstances to be considered in that process. Furthermore, each of these islands is capable of generating full maritime entitlements, presenting overlapping entitlements over the areas beyond 12 M measured from each island.

96. Moreover, Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), and Fiery Cross Reef (Yongshu Jiao) are traditionally considered by China to be part of Nansha Qundao. The areas surrounding them may well be within the relevant maritime zones of the group as a single unit and should be considered part of the Nansha Qundao for entitlement and delimitation purposes, thus on this ground also *potentially* resulting in overlapping entitlements between the Philippines and China, which will in turn necessitate delimitation.

97. Even if we proceed, *arguendo,* on the logic of the Philippines and if the Tribunal be tempted to agree with it that these features are rocks, each generating an entitlement only to a belt of territorial sea no broader than 12 M, the Tribunal has no jurisdiction to make a determination on, or to pronounce on China's claims regarding, the regime of the areas beyond 12 M because Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), and Fiery Cross Reef (Yongshu Jiao) are all within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlement over the areas beyond 12 M measured from each such feature, necessitating delimitation. As showed in Tables 1 and 2 above (Part III.B, next to para.45), Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), Fiery Cross Reef (Yongshu Jiao) are all comfortably within 200 M of Taiping Dao (Itu Aba Island), which China (via the Taiwan authorities) controls, and also comfortably within 200 M of Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines but is claimed by China. Both Taiping Dao (Itu Aba Island) and Zhongye Dao (Thitu Island) are capable of generating full maritime entitlements.[153]

98. The part of Claim No. 6 that addresses China's claim of entitlements beyond 12 M from these features and Claim No. 7 that addresses China's activities around Johnson Reef are also claims relating to the delimitation process, on the defragmentation framework built up above in Part IV.A. Alternatively, these are consequential on the delimitation of the relevant areas, and as such must be considered to be outside the Tribunal's jurisdiction under *Monetary Gold* and its progeny.

IV.E. The Tribunal has no jurisdiction over Claims No. 6 and 7 relating to or consequential on the definition or status of Scarborough Shoal (Huangyan Dao) and its associated maritime areas, because making such decisions is an inherent part of delimitation between the Philippines and China and because this feature is an island (rather than a rock) capable of generating full maritime entitlements, or, this feature is to be considered part of Zhongsha Qundao for entitlement and delimitation purposes, or, even if we proceed, *arguendo*, on the logic of the Philippines, it is within the relevant distance from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over the feature's associated areas, with each scenario necessitating delimitation which has been excluded by China from the jurisdiction of a Section 2 court or tribunal

99. The positions stated in Part IV.D, paras.94-98 apply with equal force to the Philippine Claims No. 6 and 7 relating to the definition or status of Scarborough Shoal (Huangyan Dao). That is to say, the Tribunal has no jurisdiction over Claims No. 6 and 7 relating to or consequential on the definition or status of Scarborough Shoal (Huangyan Dao) and its associated maritime areas, because making such decisions is an inherent part of delimitation between the Philippines and China and because it is

153 For an analysis on the status of these islands, see ibid.

an island (rather than a rock) capable of generating full maritime entitlements, giving rise to overlapping entitlements over the areas surrounding the feature, necessitating delimitation which has been excluded by China's 2006 declaration from the Tribunal's jurisdiction.

100. In addition, Scarborough Shoal (Huangyan Dao) is traditionally considered by China to be part of Zhongsha Qundao. The areas surrounding this feature may well be within the relevant maritime zones of the group as a single unit and this feature is to be considered part of the Zhongsha Qundao for entitlement and delimitation purposes, thus on this ground also *potentially* resulting in overlapping entitlements between the Philippines and China, which will in turn necessitate delimitation.

101. Even if we proceed, *arguendo,* on the logic of the Philippines and if the Tribunal be tempted to agree that Scarborough Shoal (Huangyan Dao) is a rock, generating an entitlement only to a territorial sea no broader than 12 M, the Tribunal has no jurisdiction to make a determination on, or to pronounce on China's claims regarding, the regime of the areas beyond 12 M because it is within the relevant distance from another Chinese island or one claimed by China, thus giving rise to potentially overlapping entitlement over the areas beyond 12 M measured from this feature, necessitating delimitation which has been excluded by China from the Tribunal's jurisdiction.

102. As showed in Tables 1 and 2 above (Part III.B, next to para.45), Scarborough Shoal (Huangyan Dao) is comfortably within 350 M of Yongxing Dao (Woody Island), which China controls, and also comfortably within 350 M of Zhongye Dao (Thitu Island), which is unlawfully controlled by the Philippines but is claimed by China. Both Yongxing Dao (Woody Island) and Zhongye Dao (Thitu Island) are capable of generating full maritime entitlements, including an extended continental shelf. As a result, there can be overlap between the continental shelf entitlement generated by Yongxing Dao (Woody Island) and/or Zhongye Dao (Thitu Island) and that by the Philippine island of Luzon. This is a live issue, as highlighted in paragraph 48 above, especially in the light of the 2012 ICJ Judgment in *Nicaragua v. Colombia*.[154]

103. As regards the regime of the waters beyond 12 M from Scarborough Shoal (Huangyan Dao), the situation becomes more complicated. Although ostensibly this feature is not within 200 M of another Chinese island of a large size, the fact that many issues such as baselines are not yet settled makes it difficult to ascertain whether the shoal may be within the 200 M entitlement generated by another maritime feature belonging to China.

104. The part of Claim No. 6 that addresses China's claim of entitlements beyond 12 M from Scarborough Shoal (Huangyan Dao) and of Claim No. 7 that addresses China's activities around it are also claims relating to the delimitation process, on the defragmentation framework built up above in Part IV.A. Alternatively, these are

154 ICJ Reports 2012, 624, paras.104-131.

consequential on the delimitation of the relevant areas, and as such are outside the Tribunal's jurisdiction under *Monetary Gold* and its progeny.

IV.F. The Tribunal has no jurisdiction over the claims regarding or consequential on the status of the "nine dash line" because they constitute claims relating to delimitation or involving historic title or historic rights, with that line potentially serving as a source of title and/or relevant circumstances in a delimitation operation

105. To the extent that several of Philippines's claims (No. 2 expressly and possibly all 10 claims) are based on, impacted by or addressing the "nine dash line", they have also been excluded by China from Section 2 compulsory procedures. Apparently the "nine dash line" is a line demarcating maritime areas based on historic title, which has been in turn reinforced by that line. As all delimitation disputes and disputes involving historic title have been excluded by China's 2006 declaration from Section 2 compulsory procedures, all of the Philippines' claims based on, impacted by or addressing this line have been excluded.

106. To the extent that the Philippines alleges (Notification, para.11) that "[a]ccording to China, it is sovereign over all of the waters, all of the seabed, and all of the maritime features within [the] 'nine dash line'", and assuming the truth of this allegation for the purpose of discussing this obstacle or objection to jurisdiction, the *sui generis* status of the area within the "nine dash line" is based on historic title,[155] which has been consolidated and strengthened by the official publication of the "nine dash line" in 1948 and the subsequent non-objection and thus acquiescence from the affected States as well as the international community as a whole for a very long period of time. The entire dispute presented by the Philippines is thus one involving historic title, which has been excluded by China's 2006 declaration from Section 2 compulsory procedures. Alternatively, if one were to make a distinction between the entire area within the "nine dash line" and just the waters within it, the "nine dash line" is a line demarcating historic waters based on historic title with the same consolidation and strengthening. Since all of the waters and maritime features that the Philippines addresses are within this line, all the claims have thus been excluded by China from Section 2 compulsory procedures.

The "nine dash line" apparently was intended by the drafters to be a line of delimitation. Thus, Li Jinming and Li Dexia observed that "[a]ccording to Wang Xiguang, who participated in the compilation of maps at the Geography Department of the Ministry of Internal Affairs, 'the dotted national boundary line was drawn as the

155 See "The Republic of China", South China Sea Policy Guidelines (Executive Yuan Letter No. 09692, 1993), Point 1 (preamble) (http://www.land.moi.gov.tw/law/chhtml/historylaw1.asp?Lclassid=224) (accessed 13 June 2013) For discussion, see Kuan-Hsiung Wang, 'The ROC's Maritime Claims and Practices with Special Reference to the South China Sea', in 41(3) Ocean Dev. & IL (2010), 237 at 243, 245.

median line between China and the adjacent states'".[156] The official debut of that line and the long period of silence of other States and the international community no doubt serve to strengthen the claims that have motivated and become embodied in that line. That is to say, the line has *constitutive* value and is not just a descriptive marker in the map.

107. Here it should be pointed out that Article 298(1) uses the phrase "those [disputes] involving historic bays or titles", making it clear that these disputes need not be about delimitation, but include one that involves historic bays or titles such as the validity of a claim based on historic bays or titles, even when such a claim does not relate to a State with an adjacent or opposite coast as such. To this extent, the scope of these disputes is larger than delimitation-related disputes.

108. To the extent that China's claims within the "nine dash line" are to "sovereign rights and jurisdiction", or even a looser kind of "historic rights", the claims are still disputes "involving historic [...] title" within the meaning of Article 298(1)(a), and thus have also been excluded by China. Often "historic title" and "historic rights"—a broader term—are used interchangeably, and thus historic title may be interpreted to cover both claims regarding sovereignty rights—territorial titles—and claims relating to non-sovereignty rights or non-territorial rights.

109. Sometimes it seems to have been argued that "historic title" within the meaning of Article 298(1) refers to only territorial (i.e., sovereignty type) historic title, not non-territorial historic rights. Sometimes it is argued that if the term "historic title" is interpreted this way, there is some redundancy in Article 298(1)(a), because the term "historic title" is already used in Article 15. However, Article 15 is not about delimiting "historic title", but territorial sea, which may be affected by historic title. Article 298 (1)(a) may be dealing with both the delimitation of historic title areas and disputes about whether historic title (claim over a gulf, larger than a bay) may exist. Thus there is no redundancy. Furthermore, the person proposing the language that

156 Li Jinming and Li Dexia, n.64 above, 290, quoting from Xu Sen'an, "Nanhai duanxu guojiexian de neihan" [The Connotation of the 9-Dotted Line on the Chinese Map of the South China Sea], in "21 shiji de nanhai: wenti yu qianzhan" yantaohui lunwen xuan [Paper Selections of the Seminar on "The South China Sea in the 21st Century: Problems and Perspective"], ed. by Zhong Tianxiang (Hainan Research Center on the South China Sea, 2000), 80. Li Jinming and Li Dexia, n.64 above, 294 n.5. For further commentaries, see Zou Keyuan, The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands, 14 IJ of Marine & Coastal L (1997), 52; idem, Historic Rights in International Law and in China's Practice, 32 Ocean Dev. & IL (2001), 160; idem, China's U-Shaped Line in the South China Sea Revisited, 43 Ocean Dev. & IL (2012), 18–34; Gao Zhiguo and Bing Bing Jia, The Nine-Dash Line in the South China Sea: History, Status, and Implications, 107 AJIL (2013), 98-124.

subsequently became part of Article 298(1)(a) seemed to have "territorial integrity" in mind.[157]

It is not clear which interpretation of the term "historic title" is the proper one. However, even if the term "historic title" in Article 298(1)(a) does not cover non-territorial historic rights, thereby bringing claims relating to such historic rights outside the scope of "those [disputes] involving historic bays or titles" in the sense of that provision, such non-territorial historic rights may still be relevant circumstances for the purposes of applying Articles 15, 74 or 83, where maritime areas are in dispute or overlapping maritime claims exist. Such a situation no doubt obtains given the delimitation geographical framework or the delimitation situation between the Philippines and China in the South China Sea. As a result, claims relating to whether or not such a right can be established, whether or not such a right, once established, would be a relevant circumstance, and, if so, what weight should be given to such a right in the delimitation operation would all be disputes "concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations" under Article 298(1)(a). As a result, such claims have been excluded by China's 2006 declaration.

IV.G. To the extent that the Philippines' Understanding presents optional exceptions regarding sovereignty-related disputes or disputes the resolution of which would adversely affect its sovereignty, the Tribunal has no jurisdiction by force of Article 298(3) over the dispute *under consideration* or alternatively over Claims No. 1-6 and 8, and then over Claims 7, 9 and 10 which depend on the resolution of the other claims

110. Article 298(1) allows a State party to make a declaration to present optional exceptions to the applicability of Section 2. Of course, there is a cost in making such exceptions. The UNCLOS provides for reciprocal application of the exceptions. Under Article 298(3), "A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party." As described in paragraph 5 above, the Philippines did file an understanding upon signature and confirmed upon ratification of the UNCLOS. Despite the challenges it presents to an interpreter, does the Philippines' Understanding present any effective optional exceptions? What effect does it have on the Tribunal's jurisdiction?

111. Before attempting to answer these questions, it is important for us to understand what the Philippines' Understanding means. As set out above (Part I, para.5), that Understanding in paragraph 4 says the signing by the Philippines of the UNCLOS "shall not in any manner impair or prejudice [its] sovereignty over any

157 See 5 Virginia Commentary, above n.46, 116 n.3.

territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto" and, in paragraph 8, that its agreement "to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered a derogation of [its] sovereignty". It is not crystal clear what these paragraphs mean. On one level, these paragraphs can be considered simply as an affirmation of sovereignty; that is to say, these paragraphs simply expressed the view that the Philippines' joining the UNCLOS regime as well as agreeing to submit "disputes under Article 298" for peaceful resolution was an exercise of sovereignty. So understood, paragraphs 4 and 8 of the Philippines' Understanding are simply superfluous, because that view is no doubt correct and well received, as the Permanent Court of International Justice held long ago in *SS. Wimbledon*.[158] There is no need for a State to go through the trouble declaring it internationally upon the signature or ratification of a treaty.

112. On another level, paragraph 4 of the Understanding of the Philippines may also be interpreted as saying that by signing the UNCLOS, the Philippines did not agree to anything that would negatively affect its sovereignty. As a decision on any sovereignty-related dispute could have such an effect, this paragraph would thus exclude sovereignty-related disputes from Section 2 compulsory procedures if such a procedure would produce a negative result for the Philippines. Here it is worth pointing out that such a dispute need not necessarily be one that disposes of sovereignty itself but need only be able to negatively affect sovereignty. As a result, such a dispute need only be a sovereignty-related dispute,[159] a larger genre. Similarly, paragraph 8 of the Understanding may be interpreted as stating that its agreement to submission for peaceful resolution of disputes under Article 298 did not mean agreeing to any derogation of Philippine sovereignty. Again, since a decision on any sovereignty-related dispute potentially could lead to a derogation of sovereignty, this paragraph would exclude sovereignty-related disputes from Section 2 compulsory procedures if such a procedure would yield a negative result. Paragraph 8 thus would have the same result as paragraph 4. Since an attempted exclusion cannot operate as a "one way street" so that it would exclude a dispute if the ultimate decision is not favourable to the Philippines,[160] this exclusion must obtain whether a future decision will be beneficial or prejudicial to a

158 PCIJ, 1923, A1, 25.

159 On the term relating to or related to, see above Part IV.A, esp. paras.65-66.

160 Cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Merits, Judgment, ICJ Reports 1986, 14, 23, para.27 ("Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party.").

party's ultimate sovereignty. In fact, there is no way to predict the ultimate result in advance. Thus, paragraphs 4 and 8 can be interpreted, if at all, as intending to exclude all sovereignty-related disputes from Section 2 compulsory procedures. This interpretation of the Philippines' Understanding usually is favoured, as principles on interpretation of written texts disfavour a result that would assign no meaning or no effect to a text, as would the alternative described paragraph 110 above.

113. Understood thus, the Philippines' Understanding may be quite potent. Read together with Articles 309, Article 298(1) gives one the impression that attempts to exclude sovereignty-related disputes from the applicability of Section 2 are invalid because such disputes do not constitute a category that can be excluded under Article 298(1). However, one should not reject these attempts too quickly, because sovereignty-related disputes may in fact comprise one or more of the categories enumerated under Article 298(1). Under such circumstances, it behooves the Tribunal to try its best to give effect to the Understanding by identifying those disputes under Article 298(1) that can be considered sovereignty-related. There are good reasons for taking such an approach. First of all, when dealing with consent to jurisdiction, international courts and tribunals usually privilege content over form, substance over language, so as to ensure the quality of consent.[161] Accordingly, the fact that the Understanding is not labeled as a declaration under Article 298 is not important; the intent behind and the effect of it are crucial for our purposes. If the intent and effect are to make optional exceptions, the Understanding should be reckoned as a declaration made under Article 298. Secondly, as has been observed:

> As the basic idea of the Conference was to limit to the maximum extent possible the available exceptions, it would be in the spirit of article 298 to permit narrower exceptions than those allowed therein. This also seems implied in paragraph 1(a)(i), where disputes relating to sea boundary delimitations are separated by a disjunctive "or" from disputes involving historic bays or titles, thus enabling a State to select only one of these subcategories for an exclusion through its declaration.[162]

This reasoning would support also permitting certain more specific disputes to be excluded as specific disputes are of an even narrower scope than a category under Article 298(1). Accordingly, if some of the categories of disputes or more specific disputes enumerated under Article 298(1) can be considered sovereignty-related disputes and thus excludable, they would have been excluded by the Philippines' Understanding, and Article 298(3) would prevent the Philippines from bringing any of these disputes to compulsory arbitration.

161 See, e.g., Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, ICJ Reports 1961, 17.

162 5 Virginia Commentary, 115, para.298.13. For further discussion, see Sienho Yee, Conciliation, n.68 above, 323-324.

114. It is thus of paramount importance for us to identify the sovereignty-related disputes from among the categories of disputes or simply disputes enumerated in Article 298(1), which will be called for convenience "sovereignty-related disputes excludable under Article 298(1)" and, further, such matters from among the dispute, disputes or claims presented by the Philippines in its Notification and Statement of Claim. On the face, sovereignty-related disputes would include disputes relating to sovereignty or rights over land territory (including insular features), territorial sea, historic bays or titles. Few would argue with this position. It only remains for us to see how these figure in Article 298(1) and also in the Philippines' formulation of claims.

115. First of all, as discussed earlier (Part III.E, paras.56-58), disputes relating to sovereignty over continental or insular land territory are not disputes within the meaning of Article 288(1) as concerning the interpretation or application of the Convention. Nor are they excludable disputes within the meaning of Article 298(1); they are already outside the Tribunal's jurisdiction and thus need not be and cannot be excluded.

116. Secondly, disputes involving historic bays or titles including those about the validity of such claims as well as those relating to their delimitation are clearly sovereignty-related disputes that are also disputes with the meaning of Article 298(1), as they are specifically enumerated. As discussed above (Part IV.F, paras. 105-109), possibly all 10 Philippine claims (especially Claim No. 2), according to the Philippines' allegations, are based on or impacted by the "nine dash line" or addressing the line, thus involving the line, which can be considered one indicating historic title. As a result, all 10 claims (at least Claim No. 2 in any event) have been excluded by the Philippine's Understanding and cannot be brought by the Philippines to compulsory arbitration.

117. Thirdly, as argued above (Part IV.B), the claims relating to various entitlements, the status of submerged features called low-tide elevations and "rocks" and their entitlements can all be considered delimitation-related disputes or inherent parts of them within the meaning of Article 298(1). Since the regime of the territorial sea gives the coastal State sovereignty over it, disputes relating to this regime would be sovereignty-related disputes. Therefore, disputes relating to territorial sea entitlement (asserted in the Philippines' Claims Nos. 1, 8) are excludable under Article 298(1) and have been excluded by the Philippines' Understanding and thus cannot be brought to compulsory arbitration. The same obtains with the disputes relating to the definition or status and entitlements of the low-tide elevations (Claims Nos. 3-4), and the definition or status and entitlements of the rocks (Claim No. 6) because these too have a territorial sea entitlement component, with zero for the former and 12 M for latter.

118. Fourthly, as also argued above, claims regarding contiguous zone, continental shelf and exclusive economic zone entitlement are also delimitation claims or disputes, or inherent parts thereof within the meaning of Article 298(1). Granted that these zonal entitlement claims are different from the territorial sea entitlement claims—because the latter directly deal with sovereignty while the former, sovereign rights—these former zonal claims too are related to sovereignty because after all the land territory

decides all these, ultimately. For this reason, the Court in *Aegean Sea Continental Shelf (Greece v. Turkey)*[163] considered continental shelf entitlement claims to be claims relating to the "territorial status" of the coastal State. One supposes that "territorial status" matters are sovereignty-related and a decision on territorial status can affect sovereignty. Therefore, continental shelf entitlement claims are also sovereignty-related claims excluded under Article 298(1).

The same reasoning applies to contiguous zone and exclusive economic zone entitlement claims so that they too are excludable claims under Article 298(1). Since the Philippines' Claims Nos. 1, 3-6 and 8 or parts thereof contain continental shelf, contiguous zone, and/or exclusive economic zone entitlement claims, they (or the relevant parts thereof) are excluded by the Philippines' Understanding and cannot be brought to compulsory arbitration.

119. To the extent that uncertainties exist on these points, the approach adopted by the International Court of Justice in its treatment of amorphous, broadly worded reservations to jurisdiction made by an applicant State, which tends to favour giving them maximum effect when they are invoked,[164] even without a formal decision on validity,[165] militates in favour of giving the Philippines' Understanding maximum effect, and its exclusions maximum scope, so that all the entitlement claims are excludable and have been excluded by that Understanding and, therefore, cannot be brought to compulsory arbitration. This would ensure the quality of consent (or non-consent) to the jurisdiction of the Tribunal that was in fact given by the Philippines, and it would give a warning to those States who may attempt to manipulate the consent process and the dispute settlement facility that there can be a "boomerang effect" from an attempt to exercise the right to make optional exceptions under Article 298. As discussed above in paragraphs 3 and 11, the effect of the express terms of Article 298(2), (3) and Article 299 is to put into operation such exclusions, without any further invocation of them.

163 ICJ Reports 1978, 3. See discussion above in paras.66, 68, 80.

164 Norwegian Loans, ICJ Reports 1957, 9; Aegean Sea Continental Shelf, ICJ Reports 1978, 3.

165 Norwegian Loans, ICJ Reports 1957. The Court's approach in Norwegian Loans persuaded the US to withdraw its application in Aerial Incident of 27 July 1955 (United States of America v. Bulgaria), ICJ Reports 1960, 146. See Letter to the Registrar from the Agent of the USA, http://www.icj-cij.org/docket/files/36/11001.pdf, at 677. For an analysis, see Leo Gross, Bulgaria Invokes the Connally Amendment, 56 AJIL (1962), 357-382. See also James Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 50 British YBIL (1979), 63-86; Shabtai Rosenne, 2 The Law and Practice, n.15 above, 712-714, section II.194 ("accepting the same obligation"); 731-737, section II.199 (reciprocity).

120. Claims No. 7, 9, 10 are consequential on other claims and therefore outside the jurisdiction of the Tribunal under the reasoning applied in *Monetary Gold* and its progeny, as discussed above.

V. Summary

121. As is clear from the above discussion, this arbitration presents many issues of first impression. The decision of the Arbitral Tribunal will be of some moment to the budding UNCLOS dispute settlement system or even to the entire UNCLOS system.[166] In the above pages, I have introduced the basic framework for analysing the Tribunal's jurisdiction or its lack thereof over the present dispute brought by the Philippines, presented and analysed some or selected potential jurisdictional obstacles or objections, and concluded that the Tribunal has no jurisdiction over this dispute or the Philippine claims. A brief summary of my main arguments is as follows, corresponding to the various parts of the paper:

I. The Tribunal has a duty, despite China's refusal to appear before it, under Article 9 of Annex VII, to examine its jurisdiction, that is, to "satisfy itself [...] that it has jurisdiction over the dispute". In so doing, the Tribunal must, under Article 293 of UNCLOS, apply the entire Convention as well as other rules of international law not incompatible with it, to the extent applicable to, and for the purposes of, deciding jurisdiction. It must consider those obstacles or objections to its jurisdiction which might, in its view, be raised against its jurisdiction, whether or not China somehow informs it of them, and whether or not China presents any elaboration of international law rules and principles to support them. It must, *proprio motu,* take judicial or arbitral notice of all relevant facts, data and public statements, as well as apply its judicial or arbitral knowledge in international law to its consideration of potential jurisdictional objections or objections.

II. The Philippines fragments its dispute with China into entitlement claims, which are pre-delimitation matters, and activities claims, which are post-delimitation matters, while steadfastly avoiding "delimitation proper". The claims dress up many land territorial matters as simple questions of status or qualification of certain maritime features or skirt these territorial matters and take a shortcut to the entitlement questions, reversing the logical sequence. In formulating the claims this way, the Philippines proceeds on the assumption that China is not an opposite or adjacent coastal State vis-à-vis the Philippines, but some kind of distant flag State or distant-water fishing State. Of course, this picture is so painted only at the cost of disregarding China's four archipelagos (Dongsha Qundao, Zhongsha Qundao, Xisha Qundao and Nansha Qundao) situated in the

166 Cf. Mark J. Valencia, Sea treaty mutiny simmers, Japan Times, 7 July 2013 (http://www.japantimes.co.jp/opinion/2013/07/07/commentary/sea-treaty-mutiny-simmers/#.UjCHMj2S3Sd).

South China Sea between the main coast of China and the Philippines, the delimitation geographical framework and/or the delimitation situation between the two States. However "skilful", the Philippines' fragmentation tactic cannot conceal the sovereignty-delimitation nature of its dispute with China.

III. The Arbitral Tribunal has no jurisdiction under Article 288(1) of the UNCLOS as the dispute (or disputes or claims) is not one concerning the interpretation or application of the UNCLOS. More specifically:

(A) The Tribunal does not have jurisdiction *ratione temporis* over the dispute which had arisen at the latest in 1995 before the entry into force of the UNCLOS with respect to China in 1996.
(B) The Tribunal does not have jurisdiction over this dispute because its resolution would constitute a decision on the sovereignty over many islands or insular features, or necessarily involve the concurrent consideration of unsettled disputes concerning sovereignty or other rights over these islands or insular features including China's archipelagos and/or Taiping Dao (Itu Aba Island) or Zhongye Dao (Thitu Island), or depend on a decision on the sovereignty over them.
(C) The Tribunal has no jurisdiction over certain claims relating to the sovereignty over or definition or status of certain "submerged features" or whether they are subject to appropriation because they either do not constitute disputes concerning the interpretation or application of the UNCLOS or are consequential upon the resolution of a land sovereignty issue over which the Tribunal has no jurisdiction.
(D) The Tribunal has no jurisdiction over certain claims relating to the definition or status of certain "rocks" because these claims relate to sovereignty over these insular land territory and they either do not constitute disputes concerning the interpretation or application of the UNCLOS or are consequential upon the resolution of a sovereignty issue over which the Tribunal has no jurisdiction.
(E) To the extent that the Philippines' Understanding is meaningful regarding the interpretation of the scope of Article 288(1) or Article 286, it reinforces the position that disputes relating to sovereignty over continental or insular land territory are outside the jurisdiction of a Section 2 court or tribunal.

IV. In addition or alternatively, the Tribunal has no jurisdiction under Article 298(1)(a) over this case because the dispute, disputes or claims presented by the Philippines have been excluded by China's 2006 declaration or by the Philippines' Understanding. More specifically:

(A) The Philippines' claims, when defragmented as they must be because of the delimitation geographical framework and/or delimitation situation, constitute in essence one big dispute on the delimitation in the South China Sea between

the Philippines and China which has been excluded by China from Section 2 compulsory procedures.

(B) The Tribunal has no jurisdiction over the Philippines' claims because they either relate to (1) definition or status of certain features and their entitlement to maritime zones which are necessary first steps in or an inherent part of a delimitation process or (2) rights and activities consequential upon delimitation, the disputes about which have all been excluded by China from Section 2 compulsory procedures.

(C) The Tribunal has no jurisdiction over Claims Nos. 3-5 relating to or consequential on the status of Mischief Reef (Meiji Jiao), McKennan Reef (Ximen Jiao), Gaven Reef (Nanxun Jiao) and Subi Reef (Zhubi Jiao), because, these claims embody delimitation questions, or these features are to be considered as part of Nansha Qundao as a unit for entitlement and delimitation purposes, or, even if we proceed, *arguendo*, on the logic of the Philippines, these features are within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over these features, necessitating delimitation which has been excluded by China from the jurisdiction of Section 2 courts and tribunals.

(D) The Tribunal has no jurisdiction over Claims No. 6 and 7 relating to or consequential on the definition or status of Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao), Fiery Cross Reef (Yongshu Jiao) and their associated maritime areas, because making such decisions is an inherent part of a delimitation between the Philipines and China and because each is an island (rather than a rock) capable of generating full maritime entitlements, or, these features are to be considered as part of Nansha Qundao for entitlement and delimitation purposes, or, even if we proceed, *arguendo*, on the logic of the Philippines, each is within 200 M from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over each feature's associated areas, with each scenario necessitating delimitation which has been excluded by China from the Tribunal's jurisdiction.

(E) The Tribunal has no jurisdiction over Claims No. 6 and 7 relating to or consequential on the definition or status of Scarborough Shoal (Huangyan Dao) and its associated maritime areas, because making such decisions is an inherent part of delimitation between the Philippines and China and because it is an island (rather than a rock) capable of generating full maritime entitlements or this feature is to be considered part of Zhongsha Qundao for entitlement and delimitation purposes or, even if we proceed, *arguendo*, on the logic of the Philippines, it is within the relevant distance from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over the feature's associated areas, with each scenario necessitating delimitation which has been excluded by China from the Tribunal's jurisdiction.

(F) The Tribunal has no jurisdiction over the claims regarding or consequential on the status of the "nine dash line" because they constitute claims relating to delimitation or involving historic title or historic rights, with that line potentially serving as a source of title and/or relevant circumstances in a delimitation operation.

(G) To the extent that Philippine's declaration presents optional exceptions regarding sovereignty-related disputes or disputes the resolution of which would adversely affect its sovereignty, the Tribunal has no jurisdiction, by force of Article 298(3), over the dispute *under consideration* or alternatively over Claims No. 1-6 and 8, and then over Claims 7, 9 and 10 which depend on the resolution of the other claims which are sovereignty-related.