

**The Tribunal's Award in the "South China Sea Arbitration"**  
**Initiated by the Philippines Is Null and Void**

Chinese Society of International Law

10 June 2016

Since 22 January 2013 when the Philippines unilaterally initiated arbitration with respect to certain issues in the South China Sea ("Arbitration"), China has maintained its solemn position that it would neither accept nor participate in the Arbitration, having stated that the tribunal constituted at the unilateral request of the Philippines ("Arbitral Tribunal" or "Tribunal") manifestly has no jurisdiction. On 7 December 2014, the Chinese Government released the Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines ("Position Paper"), which elaborated on these positions. The Chinese Society of International Law strongly supports the positions of the Chinese Government.

China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. The core of the disputes between China and the Philippines in the South China Sea is issues of territorial sovereignty resulting from the Philippines' illegal seizure and occupation of certain maritime features from China in the Nansha Islands, and issues concerning maritime delimitation between the two States. These are also exactly the essence of the Arbitration instituted by the Philippines.

On 29 October 2015, the Tribunal issued its Award on Jurisdiction and Admissibility ("Award on Jurisdiction" or "Award"), in which it found that disputes between China and the Philippines concerning the interpretation or application of the United Nations Convention on the Law of the Sea ("UNCLOS" or "Convention") existed with respect to the matters raised by the Philippines in all of its Submissions. The Tribunal further found that it had jurisdiction over some of the Submissions made by the Philippines, and reserved consideration of its jurisdiction with respect to the other Submissions to the merits phase. This finding is full of errors in both the determination of fact and the application of law, at least in the following six respects:

First, the Tribunal errs in finding that the claims made by the Philippines constitute disputes between China and the Philippines concerning the interpretation or application of the UNCLOS;

Second, the Tribunal errs in taking jurisdiction over claims which in essence are issues of sovereignty over land territory and are beyond the purview of the UNCLOS;

Third, the Tribunal errs in taking jurisdiction over claims concerning maritime delimitation which have been excluded by China from compulsory procedures in line with the UNCLOS;

Fourth, the Tribunal errs in denying that there exists between China and the Philippines an agreement to settle the disputes in question through negotiation;

Fifth, the Tribunal errs in finding that the Philippines had fulfilled the obligation to “exchange views” regarding the means of disputes settlement with respect to the claims it made;

Sixth, the Tribunal’s Award deviates from the object and purpose of the dispute settlement mechanism under the UNCLOS, and impairs the integrity and authority of the Convention.

The Chinese Society of International Law is of the view that having jurisdiction over the claims is a prerequisite for the Tribunal to initiate its proceedings on merits, and a basis for the validity of any final decisions. In the present Arbitration, the Tribunal does not have jurisdiction over any of the claims made by the Philippines. Its Award on Jurisdiction is groundless both in fact and in law, and is thus null and void. Therefore, any decision that it may make on substantive issues in the ensuing proceedings will equally have no legal effect.

**I. The Arbitral Tribunal errs in finding that the claims made by the Philippines constitute disputes between China and the Philippines concerning the interpretation or application of the UNCLOS**

The Arbitral Tribunal recognizes that, under Article 288(1) of the UNCLOS, its jurisdiction is limited to “disputes concerning the interpretation and application of this Convention” (Award, para.130). The Tribunal also recognized that, to find its jurisdiction in the present Arbitration, it must be satisfied that 1) disputes existed between China and the Philippines with respect to the claims made by the Philippines, and 2) the disputes, if they existed, concerned the interpretation or application of the UNCLOS. It concludes that “disputes between the Parties concerning the interpretation and application of the Convention exist with respect to the matters raised by the Philippines in all of its Submissions in these proceedings” (Award, para.178). This conclusion, however, is untenable.

**1. The Arbitral Tribunal erroneously determines that the relevant claims constitute disputes between China and the Philippines**

A dispute in an international judicial or arbitral procedure is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (Award, para.149, quoting from *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No.2, p.11). This classic definition of “dispute” has been followed extensively in practice by the International Court of Justice (“ICJ”) and other international judicial or arbitral bodies.

In international practice, to determine the existence of a dispute, one must first demonstrate that specific subject-matters on which the parties disagree have come into existence before the judicial or arbitral proceedings are initiated. As the ICJ pointed out in 2011 in the *Georgia v. Russian Federation* Case, a State, prior to the initiation of proceedings, “must refer to the *subject-matter* of the treaty *with sufficient clarity* to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v.*

*Russian Federation*), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.85, para.30, emphasis added). Second, apart from the existence of subject-matter of disagreement, one must also demonstrate that there is “clash of propositions” or “point of contention” on *the same* subject-matter or claim. In the *South West Africa Cases*, the ICJ held in 1962 that to prove the existence of a dispute, “[i]t must be shown that the claim of one party is *positively opposed* by the other” (Award, para.149, quoting from *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p.328, emphasis added). Therefore, a mere assertion by one party does not suffice to prove the existence of a dispute. It must be shown that the parties maintain “opposing attitudes” or “opposite views” on the same subject-matter. It is based on these criteria that the ICJ has found the existence of a dispute in a number of cases (See e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, pp.29-32, paras.67-79; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, pp.84-85, paras.30-31; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p.99, para.22).

In the present Arbitration, it is obvious that the Tribunal did not follow the above-mentioned rules and practice of international law in determining the existence of disputes. To take a few examples:

In its Submission No. 3, the Philippines argues that Scarborough Shoal (Huangyan Dao) generates no entitlement to an exclusive economic zone or continental shelf. In order to prove that this claim constitutes a dispute between China and the Philippines, it must be shown, with factual proof, that prior to the initiation of arbitration the Philippines had made such a claim to China and the claim had been positively opposed by China. The Tribunal should have done this, but it did not.

In its Submission No. 4, the Philippines argues that Mischief Reef (Meiji Jiao), Second Thomas Shoal (Ren'ai Jiao) and Subi Reef (Zhubi Jiao) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic

zone or continental shelf. In order to prove that this claim constitutes a dispute between China and the Philippines, it must be shown, with factual proof, that prior to the initiation of arbitration the Philippines had made such a claim to China and the claim had been positively opposed by China. The Tribunal should have done this, but it did not.

In its Submission No. 6, the Philippines argues that Gaven Reef (Nanxun Jiao) and Mckennan Reef (Ximen Jiao) (including Hughes Reef (Dongmen Jiao)) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf. In order to prove that this claim constitutes a dispute between China and the Philippines, it must be shown, with factual proof, that prior to the initiation of arbitration the Philippines had made such a claim to China and the claim had been positively opposed by China. The Tribunal should have done this, but it did not.

In its Submission No. 7, the Philippines argues that Johnson Reef (Chigua Jiao), Cuarteron Reef (Huayang Jiao) and Fiery Cross Reef (Yongshu Jiao) generate no entitlement to an exclusive economic zone or continental shelf. In order to prove that this claim constitutes a dispute between China and the Philippines, it must be shown, with factual proof, that prior to the initiation of arbitration the Philippines had made such a claim to China and the claim had been positively opposed by China. The Tribunal should have done this, but it did not.

As is clear from the above analysis, the Tribunal should have concluded that the above-mentioned claims of the Philippines did not constitute disputes between China and the Philippines. But, regrettably, the Tribunal does not apply the above-mentioned requirements to the Philippines' claims, one by one, in accordance with international law. It attempts to infer the existence of disputes between China and the Philippines with respect to the above claims, simply by bundling them together and asserting that they "reflect a dispute concerning *the status of the maritime features and the source of maritime entitlements in the South China Sea*" (Award, para.169, emphasis added). By generalizing claims regarding the status and maritime entitlements of "specific" features into a "general" disagreement concerning *the status of maritime features and the source of maritime entitlements in the South China Sea*, the Tribunal, *sub silentio*,

replaces one concept with another, in order to conceal its incapability to prove that the Philippines' claims regarding the status and maritime entitlements of the nine features constitute disputes between China and the Philippines. The Tribunal then attempts to justify its approach by asserting that a dispute concerning the maritime entitlements generated in the South China Sea "is not negated by the absence of granular exchanges with respect to each and every individual feature" (Award, para.170), without giving any legal ground for this assertion, and further, says only evasively that it must "distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute" (Award, para.170). The conclusion of the Tribunal is thus unconvincing.

In fact, there exists no real "clash of propositions" between China and the Philippines with respect to the latter's Submissions No. 3, 4, 6 and 7. China has always maintained and enjoyed territorial sovereignty over the Zhongsha Islands (including Huangyan Dao (Scarborough Shoal)) and the Nansha Islands (including the above-mentioned eight features such as Meiji Jiao (Mischief Reef)) in their entirety. It has neither expressed its position on the status of individual features referred to by the Philippines such as Huangyan Dao (Scarborough Shoal), Meiji Jiao (Mischief Reef) and Ren'ai Jiao (Second Thomas Shoal), nor claimed maritime entitlements based on individual features in question, each separately as a single feature. The Philippines, on the other hand, formulated its claims on the status and maritime entitlements of certain individual features as separate features. These facts reflect that the propositions of China and the Philippines concern different issues and do not pertain to the same subject-matters. There are no positively opposed disagreements, thus no disputes, with respect to the same subject-matters.

It is undeniable that disagreements exist between China and the Philippines with respect to issues regarding the South China Sea. However, the disagreements, in essence, concern territorial sovereignty over certain features and maritime delimitation between the two States in the South China Sea, and constitute no dispute with respect to the claims advanced by the Philippines. An international judicial or arbitral body shall address "real" disputes between "real" parties with respect to "real" issues. However, in the present Arbitration the Tribunal distorts China's arguments

and erroneously finds that there exist disputes between China and the Philippines over the latter's claims.

## **2. The Arbitral Tribunal erroneously determines that the relevant claims concern the interpretation or application of the UNCLOS**

Even if a claim constitutes a dispute, the Arbitral Tribunal would still have no jurisdiction over it if it does not concern the interpretation or application of the UNCLOS (UNCLOS, art. 288). Obviously, the interpretation or application of general international law, including customary international law, shall not be regarded as falling within the scope of the Tribunal's jurisdiction. As written by Rothwell and Stephens, both Australian international lawyers, "[t]he Part XV dispute settlement mechanisms ... do not have jurisdiction over disputes arising under general international law" (Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2010), p.452).

In the present case, in its Submissions No. 1 and 2, the Philippines in essence requests the Tribunal to declare that China's maritime entitlements in the South China Sea are beyond those permitted by the UNCLOS and thus are without lawful effect. The Tribunal finds that the relevant dispute between China and the Philippines is "a dispute about historic rights in the framework of the Convention", and "a dispute concerning the interpretation and application of the Convention" (Award, para.168). However, "historic rights" had come into existence long before the conclusion of the UNCLOS. Although the nature and scope of "historic rights" remain undetermined, it can be safely asserted that they originated from and are governed by general international law including customary international law, and rules of customary international law regarding "historic rights" operate in parallel with the UNCLOS. Accordingly, disputes concerning "historic rights" do not concern the interpretation or application of the Convention. In the Continental Shelf Case between Tunisia and Libya, the ICJ pointed out in 1982 that "the notion of historic rights or waters ... are governed by distinct legal régimes in customary international law" (*Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p.74, para.100). Ted L. McDorman, a Canadian international lawyer, also wrote that, "whether historic rights exist is not a matter regulated by UNCLOS ... when these rights involve

fisheries and the resources of the continental shelf UNCLOS does become engaged” (Ted L McDorman, “Rights and jurisdiction over resources in the South China Sea: UNCLOS and the ‘nine-dash line’”, in S. Jayakumar, Tommy Koh and Robert Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing, 2014), p.152).

To prove that a dispute concerns the interpretation or application of the UNCLOS, it is not adequate to show that it falls within the purview of the Convention. It must also be shown that the dispute is related to certain substantive provisions of the Convention, and a real link exists between them. In the M/V “Louisa” Case, the International Tribunal for the Law of the Sea (“ITLOS”) stressed in 2013 that “it must establish a link between the facts advanced by [the Applicant] ... and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by [the Applicant]”, in deciding whether the dispute between the parties concerned the interpretation or application of the UNCLOS (*The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No.18, Judgment of 28 May 2013, p.32, para.99). In 2012, Wolfrum and Cot, both sitting in the present case, stated in the Ara Libertad Case that “[i]t is for the Applicant ... to invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the views on the interpretation of these provisions are positively opposed by the Respondent” (*The “ARA Libertad” Case (Argentina v. Ghana)*, Provisional Measures, ITLOS Case No.20, Order of 15 December 2012, Joint Separate Opinion of Judge Wolfrum and Judge Cot, p.12, para.35). Furthermore, in the Georgia v. Russian Federation Case, Judge Koroma observed in 2011 that “a link must exist between the substantive provisions of the treaty invoked and the dispute ... any jurisdictional title founded on CERD’s compromissory clause must relate to, and not fall outside, the substantive provisions of the Convention” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, Separate Opinion of Judge Koroma, p.185, para.7).

In the present Arbitration, with regard to the Philippines’ Submissions No. 1 and 2 concerning “historic rights”, the Tribunal makes a sweeping conclusion that the relevant claims constitute a dispute concerning the interpretation or application of the



UNCLOS, without identifying which specific provisions that the “dispute” relates to, and whether a real link exists between the “dispute” and the specific provisions. The conclusion is thus groundless in law.

## **II. By exercising jurisdiction over subject-matters about territorial sovereignty in essence, the Arbitral Tribunal acts *ultra vires*, beyond the authorization of the UNCLOS**

Under the UNCLOS, the jurisdiction of the Arbitral Tribunal is limited to “any dispute concerning the interpretation or application of this Convention” (UNCLOS, art. 288(1)). This naturally does not cover disputes concerning sovereignty over land territory, which are beyond the purview of the Convention. That sovereignty over land territory is a matter beyond the scope of the interpretation and application of the UNCLOS was upheld by the Tribunal in 2015 in the Chagos Marine Protected Area Arbitration under Annex VII of the Convention (See *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No.2011-3, Award of 18 March 2015, pp.88-90, paras.213-221). This is further confirmed by the stipulation on the exclusion of matters from compulsory conciliation in the UNCLOS. Article 298(1)(a), while laying down the obligation of accepting compulsory conciliation for States Parties that have made an optional exceptions declaration, provides 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 [the compulsory conciliation]”. With disputes concerning sovereignty over land territory excluded from compulsory conciliation which is a complementary mechanism to compulsory procedures provided for in Part XV, Section 2 of the UNCLOS and does not entail binding decisions, there is no reason why they are not excluded from arbitration, which is compulsory third-party procedure entailing binding decisions.

In the present Arbitration, in an attempt to circumvent the above-mentioned jurisdictional hurdle, the Philippines tried its best to conceal the intrinsic linkage between its claims and the issue of territorial sovereignty, and requested the Tribunal

to rule on the limits of China's maritime entitlements, the status and maritime entitlements of relevant features, and the lawfulness of China's maritime activities in the South China Sea, without deciding on the territorial sovereignty over any maritime features. In this regard, China rightly stated in its Position Paper that "[t]he essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which does not concern the interpretation or application of the Convention" (See Position Paper, Section II).

The Arbitral Tribunal, however, did not accept China's above position, holding that it "does not accept, however, that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings" (Award, para.152). The Tribunal itself creates two criteria for the determination that the Philippines' Submissions could be understood to relate to the issue of sovereignty, i.e. "(a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly ['the first criterion']; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty ['the second criterion']" (Award, para.153). The Tribunal then proceeded to find that neither of the situations was the case, and none of the Philippines' Submissions reflected disputes concerning sovereignty over maritime features. This finding, however, is completely erroneous.

**1. The objective link between the Philippines' claims and the issue of territorial sovereignty over certain maritime features in the South China Sea is such that a decision on the latter is the precondition to deciding on the former and the Tribunal errs in treating the former in isolation from sovereignty**

In its application of the first criterion mentioned above, the Tribunal holds that "[t]he Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing. The Tribunal likewise does not see that any of the Philippines' Submissions require an implicit determination of sovereignty" (Award, para.153). It simply subscribes to the one-sided statement of the Philippines without giving any reasoning. Nor did it examine the objective link between the Philippines' claims and the issue of territorial

sovereignty.

As a matter of fact, there is an inextricable link between the Philippines' claims and the issue of territorial sovereignty between China and the Philippines. In order to address the Philippines' claims, the Tribunal must first ascertain territorial sovereignty over certain maritime features in the South China Sea. According to the principle "the land dominates the sea" in international law (*North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p.51, para.96; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p.36, para.86), territorial sovereignty over the land is the basis of and precondition for maritime entitlements. As pointed out by the ICJ in several cases, "maritime rights derive from the coastal State's sovereignty over the land" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p.97, para.185), and "[i]t is the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p.97, para.185; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p.696, para.113). Maritime rights under the framework of the UNCLOS are based on a State's sovereignty over land territory. The Convention recognizes at the outset in its Preamble "the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans". It is self-evident that no due regard could be paid to the sovereignty of relevant States if maritime rights are decided upon with the relevant territorial sovereignty unresolved. Therefore, the ascertainment of the scope of a State's territorial sovereignty is the prerequisite for the determination of its maritime rights according to the UNCLOS.

Specifically, the Philippines claimed in its Submissions No. 1 and 2 that China's claim of maritime rights in the South China Sea extended beyond those permitted by the UNCLOS. The Tribunal held that the claims reflected a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention and that it is not a dispute concerning sovereignty (See Award, paras.164, 398 and 399). However, without first having determined China's territorial sovereignty over the relevant

maritime features in the South China Sea, the Arbitral Tribunal will not be in a position to determine what maritime rights China enjoys and the extent to which China may claim maritime rights therein, not to mention whether China's claims exceed the extent allowed under the Convention. Hence, without first resolving the issue of territorial sovereignty over relevant maritime features between China and the Philippines, the Tribunal is not in a position to decide on the Philippines' Submissions No. 1 and 2.

The Tribunal held that the Philippines' Submissions No. 8 through 14 concerned the lawfulness of China's activities in the South China Sea and not sovereignty, which are concerned with the interpretation or application of the UNCLOS (See Award, paras.173, 405-411). However, to determine the lawfulness of China's activities in the South China Sea, the Tribunal has to first decide on the holder of maritime entitlements with respect to the maritime zones where the activities took place, which derives from the sovereignty over the land territory. China's activities in the relevant maritime zones are lawful acts in exercise of its sovereignty over the features and in enjoyment of maritime rights derived therefrom. With respect to the Philippines' claims, it would be impossible, without first ascertaining the sovereignty over the features in question, to determine the entitlements with respect to the maritime zones, and to further decide upon the legality of China's activities in issue.

The Tribunal held that the Philippines' Submissions No. 3 through 7 concerned the status and maritime entitlements of Scarborough Shoal (Huangyan Dao) and eight other features, and did not concern sovereignty over the features (See Award, paras.169-172, 400-404). It put the cart before the horse and acted contrary to the UNCLOS, by determining that it had jurisdiction over the claims, with the sovereignty over the features undetermined.

First, the maritime entitlements generated by a maritime feature belong to the coastal State that has sovereignty over the feature, rather than the feature itself. The UNCLOS, in its regulations on the territorial sea, contiguous zone, exclusive economic zone and continental shelf, explicitly ties the maritime entitlements to the "coastal State" in respect of the maritime zones in question. For instance, regarding the territorial sea, "[t]he sovereignty of a *coastal State* extends, beyond *its* land territory and internal

waters and, in the case of an archipelagic State, *its* archipelagic waters, to an adjacent belt of sea” (UNCLOS, art.2(1), emphasis added). The contiguous zone is a zone “contiguous to *its* territorial sea” in which the “coastal State” may exercise the control with respect to customs, fiscal, immigration or sanitary matters (UNCLOS, art.33(1), emphasis added). The exclusive economic zone is an area “beyond and adjacent to the territorial sea”, in which the “coastal State” has sovereign rights and jurisdiction over certain matters (UNCLOS, arts.55, 56). And the continental shelf of a “coastal State” comprises “the seabed and subsoil of the submarine areas that extend beyond *its* territorial sea throughout the natural prolongation of *its* land territory to the outer edge of the continental margin” (UNCLOS, art.76(1), emphasis added). As written by Klein, an Australian international lawyer, “[maritime entitlements] are rights of sovereignty, of sovereign rights to the marine resources, and of jurisdiction over activities occurring in designated marine areas ... These entitlements belong to a state, a political entity, and have no relevance to a physical land mass” (Natalie Klein, “The Limitations of UNCLOS Part XV Dispute Settlement in Resolving South China Sea Disputes”, p.18, <http://ssrn.com/abstract=2730411>, last visited 8 June 2016). Therefore, when not under State territorial sovereignty, maritime features do not generate any maritime entitlement by themselves.

The wording of Article 121 of the UNCLOS regarding the regime of islands shows that whether an island or a rock can generate maritime entitlements is closely related to the “coastal State” it belongs to. Paragraph 1 of the Article provides a general definition of islands, and paragraph 2 provides that “the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to *other land territory*” (emphasis added). It follows that Article 121 shall be interpreted and applied in conjunction with other provisions of the UNCLOS regarding maritime entitlements, rather than in isolation. It also follows that for the determination of maritime entitlements generated by an island, as those generated by other land territories, the determination of the “coastal State” is the prerequisite. Treating rocks as a special category of islands, paragraph 3 of the Article stipulates that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”, which indicates that such rocks shall have territorial sea and contiguous zone. To determine whether a maritime feature is a

rock, one should examine whether it can sustain human habitation or economic life of its own, for which one should further examine the relation between the feature and the relevant State in terms of the population, society and economy. Therefore, to determine the maritime entitlements concerning its territorial sea and contiguous zone is also dependent on the ascertainment of its “coastal State”. The ascertainment of the “coastal State” in respect of relevant maritime features is the prerequisite for the determination whether they are “rocks” and what maritime entitlements they can generate. Maritime entitlements of features cannot and shall not be determined with their “coastal States” undetermined.

Second, the Philippines’ claims regarding the status and maritime entitlements of relevant features, before territorial sovereignty over them is determined, do not constitute “real” disputes. The Philippines argued that “[t]he maritime entitlement that feature may generate is ... a matter for objective determination”, and “the same feature could not be a ‘rock’ if it pertains to one State but an island capable of generating entitlement to an EEZ and continental shelf if it pertains to another”, therefore “sovereignty is wholly irrelevant” (Award, para.144). Again, the Arbitral Tribunal subscribes to the Philippines’ position that the claims do not concern sovereignty over maritime features, without any analysis on this point (See Award, para.153). If the questions whether a maritime feature, as an *object* of international law, is an “island”, “rock”, or “low-tide elevation” and whether it can generate an exclusive economic zone or continental shelf are considered in isolation from its holder’s sovereignty, there will be no “real” disputant party, as a *subject* of international law, and these questions can not constitute a “real” dispute. The Philippines thus lacks the legal standing to request arbitration on such a hypothetical question. It is obvious that in the context of the Nansha Islands where China and the Philippines have disputes on the territorial sovereignty over some maritime features, maritime entitlements shall not be considered in isolation from the sovereignty over relevant land territory.

Third, whether or not low-tide elevations can be appropriated is a question of territorial sovereignty in itself and beyond the scope of the UNCLOS. The Philippines in its Submission No. 4 requested the Arbitral Tribunal to declare that “Mischief Reef (Meiji Jiao), Second Thomas Shoal (Ren’ai Jiao) and Subi Reef (Zhubi Jiao) are low-tide elevations ... and are not features that are capable of appropriation by

occupation or otherwise” (Award, para.101). In this connection, China pointed out clearly in its Position Paper that “whether or not low-tide elevations can be appropriated is plainly a question of territorial sovereignty” (Position Paper, para.23). The Tribunal concluded without reasoning that “[t]his is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty” (Award, para.401). China expressly maintains that the above-mentioned maritime features are a part of its land territory, while the Philippines, by claiming them as part of its exclusive economic zone and continental shelf in its Submission No. 5, takes them as part of the seabed and subsoil. The Philippines does not recognize the nature of relevant maritime features as land territory. According to the UNCLOS, “a low-tide elevation is a *naturally formed area of land* which is surrounded by and above water at low tide but submerged at high tide” (UNCLOS, art.13(1), emphasis added). Regarding low-tide elevations as part of the seabed and subsoil of the exclusive economic zone and continental shelf is clearly inconsistent with the UNCLOS.

Low-tide elevations are distinct from islands. The UNCLOS is silent on the question whether low-tide elevations can be appropriated. But it is clear that land territory in international law includes both continental and insular land territory. Whether low-tide elevations can be appropriated concerns the question whether they have the qualification to constitute land territory, and further the question who is entitled to appropriate them. Both questions are issues concerning sovereignty over land territory and beyond the scope of the interpretation or application of the UNCLOS. In practice, the nature of low-tide elevations was addressed by the ICJ in 2001 in the Qatar v. Bahrain Case and in 2012 in the Nicaragua v. Colombia Case, but the Court made no reference to the UNCLOS (See e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, pp.101-102, paras.205-206; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, para.26). This also illustrates that the question whether low-tide elevations can be appropriated is beyond the scope of the UNCLOS. The Tribunal’s arbitrary decision to exercise jurisdiction over the issue whether Mischief Reef (Meiji Jiao), Second Thomas Shoal (Ren’ai Jiao) and Subi Reef (Zhubi Jiao) are capable of appropriation is thus groundless in law.

## **2. The Arbitral Tribunal selectively neglects the real object and practical effect of the Philippines' initiation of the Arbitration, namely to deny China's territorial sovereignty in the South China Sea**

In its application of the second criterion (see above), the Tribunal determines arbitrarily without any analysis that “[it] does not see that success on these Submissions would have an effect on the Philippines’ sovereignty claims”, and decides that the claims do not concern sovereignty (See Award, para.153). The fact is, however, that the Philippines’ claims are all directly aimed at denying China’s territorial sovereignty in the South China Sea, thus concern the issue of sovereignty.

There is abundant evidence showing that the real object of the Philippines in initiating the South China Sea Arbitration is to deny China’s territorial sovereignty over Huangyan Dao (Scarborough Shoal) and the Nansha Islands.

For instance, on 22 January 2013, the day of the initiation of the Arbitration, the Philippine Department of Foreign Affairs released a Q&A on the arbitral proceedings (See “Statement of Secretary Albert del Rosario: On the UNCLOS Arbitral Proceedings against China to achieve a peaceful and durable solution to the dispute in the West Philippine Sea”, <http://www.gov.ph/2013/01/22/dfa-guide-q-a-on-the-legal-track-of-the-unclos-arbitral-proceedings/>, last visited 8 June 2016). It explicitly described the purpose of the case as “to protect our national territory and maritime domain” (Question 1) or “to defend the Philippine territory and maritime domain” (Question 3), declared not “surrendering our national sovereignty” (Question 15), and stressed that “[o]ur action is in defense of our national territory and maritime domain” (Question 26).

In the 2014 State of Nation Address (SONA) Technical Report, published by the Office of the President of the Philippines in July 2014, the development of the South China Sea Arbitration was presented under the title of “Protected Territorial Integrity through the Promotion of the Rule of Law” (See The Office of the President of the Philippines, “The 2014 SONA Technical Report”, pp.64-65, <http://www.gov.ph/2014/07/28/2014-sona-technical-report/>, last visited 8 June 2016). In the 2015 SONA Technical Report, published in July 2015, a summary of the further



development of the Arbitration was placed under the title of “Protected our National Territory and Boundaries” (See The Office of the President of the Philippines, “The 2015 SONA Technical Report”, pp.61-62, <http://www.gov.ph/downloads/2015/2015-SONA-TECHNICAL-REPORT.pdf>, last visited 8 June 2016).

It is thus obvious that the real object of the Philippines in its initiation of the Arbitration is to legitimize its unlawful seizure and occupation of some of China’s maritime features in the Nansha Islands. That it “has not asked the Tribunal to rule on sovereignty” is nothing but an outright lie.

In hearing a case, an international judicial or arbitral body is obliged to examine all relevant official statements made by the parties in and outside the court or tribunal, to define accurately the real object of the claims. In the Nuclear Tests Cases, the ICJ stated in 1974 that “the Court must ascertain the true subject of the dispute, the object and purpose of the claim ... it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court’s attention, and public statements made on behalf of the applicant Government” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p.263, para.30; See also, *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p.467, para.31). This requirement was reiterated by the Court in 1995 when it examined the relevant situation of its 1974 Judgment (*New Zealand v. France*) at the request of New Zealand (See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, p.304, para.56). In the present Arbitration, it is extremely abnormal of the Tribunal to turn a blind eye to the real object of the Philippines in its initiation of the Arbitration, so clearly stated in the materials presented above.

In addition, the Arbitral Tribunal fails to evaluate objectively the practical effect of its processing of the Philippines’ claims on China’s territorial sovereignty in the South China Sea. In the Award, the Tribunal expresses its intention to “ensure that its decision neither advances nor detracts from either Party’s claims to land sovereignty in the South China Sea” (Award, para.153). However, in practical terms its

establishment of jurisdiction over and endorsement of the Philippines' claims will inevitably detract China's territorial sovereignty in the South China Sea.

China has always enjoyed sovereignty over the Nansha Islands as a whole. For instance, both the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958 and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 expressly provide that the territory of the People's Republic of China includes, *inter alia*, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands. The Nansha Islands, which consists of a large number of maritime features, is included in China's land territory as a whole. The islands, reefs, islets and shoals, as components of the Nansha Islands, are all part of China's land territory. The Philippines, by claiming that features such as Mischief Reef (Meiji Jiao), Second Thomas Shoal (Ren'ai Jiao) and Subi Reef (Zhubi Jiao) are low-tide elevations and are incapable of appropriation, directly aims at challenging China's territorial sovereignty over the Nansha Islands. If the Tribunal takes jurisdiction over and supports the claims, it will amount to an attempt to deny China's territorial sovereignty over the Nansha Islands as a whole.

The Tribunal's possible support for the Philippines' claims regarding the status and maritime entitlements of certain maritime features each as a separate single feature will likewise amount to, in practical terms, an attempt to deny China's territorial sovereignty over the Nansha Islands as a whole. The Nansha Islands, taken as a whole, is capable of generating a territorial sea, exclusive economic zone and continental shelf. The purpose of the Philippines, in requesting the Tribunal to decide on the status and maritime entitlements of a small number of selected maritime features of China's Nansha Islands, is to deny China's maritime interests based on the Nansha Islands as a whole to further deny China's territorial sovereignty over the Nansha Islands.

**III. The Arbitral Tribunal disregards the fact that there exists an issue of maritime delimitation between China and the Philippines, distorts Article 298 of the UNCLOS, and acts *ultra vires* to exercise jurisdiction over claims concerning maritime delimitation**

Even assuming, *arguendo*, the Philippines' claims constitute disputes between China and the Philippines concerning the interpretation or application of the UNCLOS, the Tribunal still may not exercise its jurisdiction over the disputes, as the resolution of these disputes forms an integral part of the maritime delimitation between China and the Philippines and they have been excluded from the applicability of compulsory procedures, including arbitration, by China's 2006 Declaration made under Article 298 of the Convention.

Pursuant to Article 298 of the UNCLOS, a State Party may declare in writing that it does not accept any one or more of the procedures provided for in Section 2, Part XV of the Convention, including arbitration, with respect to disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitation (Article 298(1)(a)), disputes involving historic bays or titles (Article 298(1)(a)), disputes concerning military activities or law enforcement activities (Article 298(1)(b)), and disputes in respect of which the Security Council is exercising the functions assigned to it by the Charter of the United Nations ("the UN Charter") (Article 298(1)(c)). The exceptions made pursuant to Article 298 are opposable to other States Parties. In other words, other States Parties may not initiate compulsory procedures against a State Party with respect to the above subject-matters which it has excluded by declaration, and the Tribunal has no jurisdiction over them. In 2006, China declared that "[t]he Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention", which clearly excludes disputes concerning maritime delimitation and other subject-matters from the applicability of compulsory procedures.

With a view to circumventing the jurisdictional hurdle posed by China's 2006 Declaration and to justifying its jurisdiction over relevant claims made by the Philippines, the Arbitral Tribunal disregards the fact that between China and the Philippines there exists an issue of maritime delimitation, and narrows the interpretation of the term "disputes concerning or relating to sea boundary delimitation" in Article 298 down to "disputes over maritime boundary delimitation"

itself”. Such moves are groundless in fact or law.

### **1. The Arbitral Tribunal ignores the fact that between China and the Philippines there exists an issue of maritime delimitation**

China pointed out in its Position Paper that “[t]here exists an issue of maritime delimitation between the two States. Given that disputes between China and the Philippines relating to territorial sovereignty over relevant maritime features remain unresolved, the two States have yet to start negotiations on maritime delimitation. They have, however, commenced cooperation to pave the way for an eventual delimitation” (Position Paper, para.59). In its Award, the Tribunal deliberately ignores this fact, and finds that the Philippines’ claims do not concern maritime delimitation between the two States (See Award, paras.156-157).

As a matter of fact, there exist between China and the Philippines a delimitation geographical framework and overlapping claims of maritime entitlements. None of the nine features in the South China Sea that are concerned in the Philippines’ Submissions is over 400 nautical miles from the baseline of the Philippine archipelago, with Huangyan Dao (Scarborough Shoal) of the Zhongsha Islands less than 200 NM; Zhubi Jiao (Subi Reef), Huayang Jiao (Cuarteron Reef) and Yongshu Jiao (Fiery Cross Reef) of the Nansha Islands between 230 and 260 NM; other features less than 200 NM. As China has been all long taking the Zhongsha Islands and the Nansha Islands as a unitary whole, respectively, to claim territorial sea, exclusive economic zone and continental shelf, while the Philippines has been claiming such rights based on its coast, there is obviously an issue of maritime delimitation between the two States. As far as the relevant claims of the Philippines are concerned, particularly in the specific context of geographical framework of the South China Sea and overlapping claims of maritime rights between the two States, any determination of the status and maritime entitlements of features will have an inevitable effect on the future delimitation between China and the Philippines. Therefore, the Philippines’ claims regarding the status and maritime entitlements of features constitute an integral part of maritime delimitation between China and the Philippines and have been excluded from compulsory procedures by China via its 2006 Declaration.

An examination of the Philippines' claims also reveals that the relevant Submissions reflect a dispute concerning maritime delimitation. For instance, by requesting the Tribunal to determine that Mischief Reef (Meiji Jiao) and Second Thomas Shoal (Ren'ai Jiao) are part of its exclusive economic zone and continental shelf and that certain Chinese activities unlawfully interfered with its enjoyment and exercise of sovereign rights in its exclusive economic zone, the Philippines was asking the Tribunal to declare that the relevant maritime zones were part of its exclusive economic zone and continental shelf and it enjoyed sovereign rights and jurisdiction in the zones. This is a request for maritime delimitation in disguise. The Philippines' claims practically comprise the major steps and principal issues of maritime delimitation. If the Tribunal decides on the claims at the merits stage, it will amount to conducting maritime delimitation indirectly.

## **2. The Arbitral Tribunal's interpretation of "disputes concerning/relating to sea boundary delimitation" as "disputes over maritime boundary delimitation itself" is not consistent with international law and practice**

First, the Tribunal is of the view that a dispute concerning the existence of an entitlement to maritime zones is distinct and independent from a dispute concerning the delimitation of those zones, and that by its 2006 Declaration China only excludes disputes over maritime boundary delimitation itself from compulsory procedures. The Tribunal's interpretation of relevant terms in Article 298 of the UNCLOS, however, does not conform to their ordinary meaning. The meaning of the terms "concerning" and "relating to" is essential to properly understand the scope of disputes concerning maritime boundary delimitation under Article 298(1)(a)(i). According to the rule of customary international law that treaty provisions shall be interpreted in accordance with the ordinary meaning of its terms, as reflected in Article 31(1) of the Vienna Convention on the Law of Treaties, the terms "relating to" and "concerning" used in Article 298(1)(a)(i) indicate that "disputes concerning sea boundary delimitation" include but are not limited to "disputes over maritime boundary delimitation itself". This interpretation finds the support in international jurisprudence.

In expounding the term of "concerning" (arrest or detention of vessels) in the M/V "Louisa" Case, the ITLOS held in 2013 that "the use of the term 'concerning' in the

declaration indicates that the declaration does not extend only to articles which expressly contain the word ‘arrest’ or ‘detention’ but to any provision of the Convention having a bearing on the arrest or detention of vessels” (*The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No.18, Judgment of 28 May 2013, p.28, para.83). Similarly, in analyzing the scope of disputes “relating to the territorial status” in the Aegean Sea Continental Shelf Case, the ICJ held in 1978 that “[t]he question for decision is whether the present dispute is one ‘relating to the territorial status of Greece’, not whether the rights in dispute are legally to be considered as ‘territorial’ rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status”. (*Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction of the Court, Judgment of 19 December 1978, I.C.J. Reports 1978, p.36, para.86, emphasis added). It follows from the above judicial practice that if the determination of the status of maritime features has potential effect on the delimitation of territorial sea, exclusive economic zone or continental shelf (UNCLOS, arts.15, 74, 83), it should be regarded as falling within the scope of “disputes concerning sea boundary delimitation” in Article 298 (See Sienho Yee, “*The South China Sea Arbitration (The Philippines v. China)*: Potential Jurisdictional Obstacles or Objections”, 13 *Chinese Journal of International Law* (2014), pp.711-717, paras.65-76).

Second, the Tribunal’s interpretation is inconsistent with the drafters’ intention in the negotiation of Article 298 of the UNCLOS to limit the application of compulsory procedures. In order to safeguard the right of States to settle disputes through means of their choice and to attract universal participation, the UNCLOS contains a series of limitations and exceptions to the applicability of compulsory procedures, including the optional exception of disputes concerning or relating to sea boundary delimitation allowed by Article 298(1). The *travaux préparatoires* of Article 298 shows that there were disagreements among negotiating States upon the scope of subject-matters that could be excluded from compulsory procedures. The original “1974 formula” suggested that the scope of exclusion might be confined to the actual process of delimitation, i.e. drawing a line on a map; The “1979 formula” which was adopted eventually is much wider in terms of the scope of exclusion, encompassing any preliminary issues such as the determination of maritime entitlements (See Chris

Whomersley, “The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China - A Critique”, 15 *Chinese Journal of International Law* (2016), para.24). Thus it is apparent that the drafters’ intention is to constrain the application of compulsory procedures. In the present Arbitration, the Tribunal’s misinterpretation of the “optional exceptions” clause in an attempt to expand the scope of the compulsory procedures is inconsistent with the intention of drafters of Article 298.

Third, that the status and entitlements of maritime features form an integral part of maritime delimitation is not only widely supported by international practice, but also widely accepted among international publicists.

Disputes concerning or relating to sea boundary delimitation under Article 298 of the UNCLOS is a broad term. China pointed out in its Position Paper that “[m]aritime delimitation is an integral, systematic process” (Position Paper, para.67). Maritime delimitation is not a single-step operation of drawing a maritime boundary line. It also includes pre-steps and elements indispensable thereto, including the determination of the status and maritime entitlements of maritime features, principles and methods of delimitation, and all relevant elements that need to be taken into consideration to achieve equitable solutions. And as written by Nuno Marques Antunes, a Portuguese expert of international law, “[maritime] [d]elimitation stems from entitlement; it is founded on it” (Nuno Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, Durham theses, Durham University, 2002, p.139, <http://etheses.dur.ac.uk/4186/>, last visited 8 June 2016).

China also argued in clear terms that “such legal issues as those presented by the Philippines in the present arbitration, including maritime claims, the legal nature of maritime features, the extent of relevant maritime rights, and law enforcement activities at sea, are all fundamental issues dealt with in past cases of maritime delimitation decided by international judicial or arbitral bodies and in State practice concerning maritime delimitation. In short, those issues are part and parcel of maritime delimitation” (Position Paper, para.66).

The Tribunal's narrow interpretation of disputes concerning or relating to sea boundary delimitation is also inconsistent with international practice of maritime delimitation. The intimate connection between the status of maritime features and maritime delimitation was confirmed by the ICJ, for instance, in the Territorial and Maritime Dispute Case between Nicaragua and Colombia. In practice, the status of maritime features and maritime entitlements form an integral part of maritime delimitation. In the present Arbitration, the Philippines' claims concerning China's maritime rights in the South China Sea and the extent of the rights include pre-steps and elements indispensable to the further maritime delimitation between China and the Philippines, hence within the scope of disputes concerning or relating to sea boundary delimitation under Article 298 of the UNCLOS.

Furthermore, at least two arbitrators sitting in the present Arbitration expressed in their past publications the view that the determination of the status and maritime entitlements of maritime features and maritime delimitation shall not be dealt with separately. Mr. Alfred H.A. Soons, for instance, wrote with a co-author on the relationship between the two issues on at least two occasions. As early as in 1990, well before the UNCLOS entered into force, he and his co-author pointed out that "the 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" (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 Yearbook of International Law* (1990), p.181). In 2011, he wrote again with the same co-author that "[i]n fact, with a single exception of Okinotorishima, the issues 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" (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), p.114). Mr. Soons has been maintaining expressly and consistently over 20 years that disputes concerning the status and maritime entitlements of features shall not be addressed in isolation in practice, but form an indispensable part of maritime delimitation.



Mr. Jean-Pierre Cot, another arbitrator in the present Arbitration, wrote in 2012 that while the definition of entitlement of a coastal State and the delimitation between opposing claims are distinct, the two operations are interrelated (See Jean-Pierre Cot, “The Dual Function of Base Points”, in Holger Hestermeyer, et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff, 2012), pp.820-824).

In the present Arbitration, the above two arbitrators supported a decision that is contrary to their long-standing position, without providing any reasons for their dramatic change of position. It renders their impartiality questionable.

Therefore, the legal status and maritime entitlements of relevant features are matters concerning or relating to sea boundary delimitation, and constitute an integral part of maritime delimitation. The Tribunal disregards the fact that there exists an issue of maritime delimitation between China and the Philippines, and decides to consider disputes regarding the status and maritime entitlements of features in isolation from maritime delimitation, which is contrary to the provisions and spirit of the UNCLOS. No such precedent exists in international practice. Its finding of jurisdiction over such submissions concerning maritime delimitation between China and the Philippines is thus thoroughly erroneous.

**IV. The Arbitral Tribunal disregards the fact that there exist between China and the Philippines agreements to settle the relevant disputes through negotiation, distorts Article 281 of the UNCLOS, and erroneously exercises jurisdiction over the claims**

The Tribunal’s exercise of jurisdiction over the Philippines’ claims is subject to fulfillment of the terms in Article 281 of the Convention. This article provides that “if the Parties *have agreed to seek settlement of the dispute by a peaceful means of their own choice*”, the procedures provided for in Part XV apply “only where no settlement has been reached by recourse to such means and the *agreement* between the parties

does not exclude any further procedure” (UNCLOS, art.281(1), emphasis added). According to the provision, prior to a finding of jurisdiction, the Tribunal must examine whether there exists such an “agreement” between China and the Philippines to settle disputes through the means of their own choice, and if there does, whether the “agreement” excludes “any further procedure”, including, *inter alia*, arbitration.

What is the “agreement” under Article 281 of the UNCLOS? The provision employs the term “agreement” without prescribing any limitation on form. The terms of “have agreed to” and “agreement”, as interpreted in accordance with their ordinary meaning pursuant to the rule of interpretation as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, refer to the unanimous expression of intentions or consensus. They stress the *act* of consensus itself, rather than the *form* or *vehicle* which gives expression to the consensus. The parties would have an “agreement” within the meaning of Article 281 in so far as they have a consensus on their own will, be it expressed in oral or written form, embodied in a treaty or another international instrument, in the form of one or multiple instruments, or in specific provision(s) in one or more instruments. Once the parties “have agreed to” settle their disputes through the means of their own choice, they bear the international obligation to act in line with such “agreement”, according to the UNCLOS.

There exists an “agreement” within the meaning of Article 281 of the UNCLOS between China and the Philippines. This is evident from a series of bilateral instruments issued jointly by China and the Philippines and the Declaration on the Conduct of Parties in the South China Sea (“DOC”) jointly signed by both States, which confirm the consensus of settling disputes in the South China Sea through consultations and negotiations.

For instance, under the Joint Statement between the People’s Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation, issued on 10 August 1995, both sides “*agreed to abide by*” the principles that “[d]isputes *shall* be settled in a peaceful and friendly manner through *consultations* on the basis of equality and mutual respect” (Point 1, emphasis added); that “a gradual and progressive process of cooperation *shall* be adopted with a view to *eventually negotiating* a settlement of the bilateral disputes”

(Point 3, emphasis added); and that “[d]isputes *shall* be settled by *the countries directly concerned* without prejudice to the freedom of navigation in the South China Sea” (Point 8, emphasis added).

The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures, issued on 23 March 1999, states that “the two sides ... *have agreed* that the dispute should be peacefully settled through *consultation*” (para.12, emphasis added).

The Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century, issued on 16 May 2000, states in Point 9 that, “[t]he two sides *commit themselves* to the maintenance of peace and stability in the South China Sea. They *agree to* promote a peaceful settlement of disputes through bilateral friendly *consultations and negotiations* in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They *reaffirm* their adherence to the 1995 joint statement between the two countries on the South China Sea” (emphasis added).

The mutual understanding between China and the Philippines to settle relevant disputes through negotiation has also been reaffirmed in a regional multilateral instrument. On 4 November 2002, Mr. Blas F. Ople, the then Secretary of Foreign Affairs of the Philippines, the Ministers or Secretaries of Foreign Affairs of the other nine Member States of the Association of Southeast Asian Nations (“ASEAN”), and Mr. Wang Yi, the then Vice Foreign Minister and representative of the Chinese Government jointly signed the DOC. Paragraph 4 of the DOC explicitly states that, “[t]he Parties concerned *undertake to* resolve their territorial and jurisdictional disputes by peaceful means ... through friendly *consultations and negotiations* by *sovereign states directly concerned*, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea” (emphasis added).

Since then, the leaders of China and the Philippines have repeatedly reiterated in various documents their commitment to actively implement or comply with

provisions of the DOC, including its Paragraph 4 concerning the obligation to settle their disputes through negotiation. A Joint Press Statement between the Government of the People's Republic of China and the Government of the Republic of the Philippines was issued on 3 September 2004 during the State visit to China by Gloria Macapagal-Arroyo, the then Philippine President, which states that, “[t]hey *agreed* that the early and vigorous implementation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea will pave the way for the transformation of the South China Sea into an area of cooperation” (Paragraph 16, emphasis added). A Joint Statement between the People's Republic of China and the Republic of the Philippines was made on 1 September 2011 during the State visit to China by President Benigno S. Aquino III, which “reiterated their *commitment to* addressing the disputes through peaceful *dialogue*” and “reaffirmed their *commitments to* respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002” (Paragraph 15, emphasis added). This Joint Statement reaffirmed Paragraph 4 of the DOC on settlement of relevant disputes by negotiations.

On 1 August 2014, the Philippine Department of Foreign Affairs made a proposal, calling on the parties to the DOC to comply with Paragraph 5 of the DOC and to provide “the full and effective implementation of the DOC”.

The repeated employment of such terms as “agree”, “undertake” and “shall” in the above documents, when referring to the settlement of disputes through negotiation, evinces a clear intention to establish an obligation between the two States in this regard. The relevant provisions are mutually reinforcing and make clear the existence of a consensus on establishing international obligations. It shows that there is an “agreement” between China and the Philippines on the means of dispute settlement.

At the same time, China and the Philippines have excluded, in their “agreement” under Article 281 of the UNCLOS, any other procedures of dispute settlement, including arbitration. The Convention does not specify what amounts to exclusion of “any further procedure”. The Tribunal held that “the better view is that Article 281 requires some clear statement of exclusion of further procedures” (Award, para.223). This assertion is untenable. Whether an exclusion is made in an agreement essentially

depends on the genuine intentions of the parties, rather than the specific form of expression. As the arbitral tribunal in the *Southern Bluefin Tuna Case* stated in its Award of 2002, “the absence of an express exclusion of any procedure ... is not decisive” (*Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, para. 57). The intention of both China and the Philippines to exclude third-party dispute settlement procedures, including arbitration, is clear from relevant provisions of the bilateral instruments between China and the Philippines and the DOC.

By repeatedly emphasizing that any disputes in the South China Sea must be settled through negotiation between sovereign States directly concerned, the bilateral instruments and Paragraph 4 of the DOC obviously have produced the effect of excluding any means of third-party dispute settlement procedure. For instance, the Joint Statement between the People’s Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation of 10 August 1995 stipulates in Point 3 that “a gradual and progressive process of cooperation *shall* be adopted with a view to *eventually negotiating* a settlement of the bilateral disputes” (emphasis added). The term “eventually” in this context clearly serves to emphasize that “negotiation” is the only means the parties have chosen for dispute settlement, to the exclusion of any other means including third-party settlement procedures. The Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century, issued on 16 May 2000, reaffirms in Point 9 “their adherence to the 1995 joint statement between the two countries on the South China Sea”. As another piece of evidence for the intention behind Paragraph 4 of the DOC to exclude other procedures, Vietnam stated that all disputes relating to the South China Sea “*must* be settled through peaceful negotiations, in accordance with international law, especially the 1982 United Nations Convention on the Law of the Sea and the Declaration on the Conducts of Parties in the South China Sea (Eastern Sea) - DOC” in a note verbale to the Secretary-General of the United Nations on 18 August 2009 (emphasis added).

China adheres to the principle of peaceful settlement of international disputes, and respects the right of other States to freely choose the peaceful means of dispute

settlement. On issues concerning territorial sovereignty and maritime rights and interests, it is China's long-standing foreign policy and consistent practice to settle the disputes peacefully through negotiation and consultation, and not to accept any compulsory third-party procedures. There has never been any exception to this policy and practice. This position of China is based on the practical consideration that the "consensus" of the parties is the foundation for resolving any disputes, and is inherent in the centuries-long Chinese cultural tradition that advocates "harmony being the most precious" and "non-litigation". This position was made clear and is well known to the Philippines and other relevant parties during the drafting and adoption of the aforementioned bilateral instruments and the DOC.

To summarize, relevant provisions in a series of bilateral instruments and the DOC reflect an "agreement" between China and the Philippines under Article 281 of the UNCLOS, which excludes any other procedures. The two parties thus have the international obligation to settle their disputes through negotiation, and neither shall resort to compulsory procedures such as arbitration.

The Tribunal holds that neither the bilateral instruments nor the DOC constituted binding agreements between China and the Philippines (See Award, paras.217, 245). It proceeds to determine that there exists no agreement between the two States on the means of dispute settlement within the meaning of Article 281 of the UNCLOS. This is a distortion of the term "agreement" in Article 281 of the UNCLOS which stresses the act of consensus itself, rather than its form. The Tribunal's determination of the existence of agreement is based on the form and vehicle of the expression of will, and neglects that the essence of "agreement" is the act of consensus itself. This approach of the Tribunal runs counter to the ordinary meaning of the relevant provisions of the UNCLOS and its drafters' intention.

**V. The Arbitral Tribunal errs in finding that the Philippines had fulfilled the obligation to "exchange views" regarding the means of disputes settlement with respect to the claims it made**

The Tribunal's exercise of jurisdiction over the Philippines' claims is subject to the fulfillment of the precondition set in Article 283 of the Convention. That Article

provides that when a dispute arises between States Parties, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. This provision reflects the spirit to pay due respect to the intention of parties to a dispute and to ensure that they have sufficient opportunities to choose means of dispute settlement. According to Article 283 of the UNCLOS and relevant international practice, the exchanges of views must be centered on issues concerning the interpretation or application of the Convention, and must be those that are conducted after the emergence of the dispute. The fulfillment of the obligation shall be measured by certain specific criteria. In the present Arbitration, the Tribunal's determination that the Philippines had fulfilled the obligation is groundless in fact and law.

First, the Tribunal fails to identify the relevant subject-matters of the exchange of views between China and the Philippines. The exchange of views, which China and the Philippines made with respect to various issues of the South China Sea, mostly concerned the sovereignty over certain maritime features in the South China Sea, in particular Huangyan Dao (Scarborough Shoal) and Meiji Jiao (Mischief Reef), and the management and control of contingencies in the disputed areas, rather than issues concerning the interpretation or application of the UNCLOS. In the Award, the Tribunal concludes that the Philippines had fulfilled the obligation to exchange views, on the basis of two rounds of consultations that China and the Philippines conducted in 1995 and 1998, and the exchange of notes verbales surrounding the issue of Scarborough Shoal (Huangyan Dao) in April 2012. However, it also admits that the two rounds of consultations in 1995 and 1998 pertained to “*sovereignty over the Spratly Islands (Nansha Islands) and certain activities at Mischief Reef (Meiji Jiao)*” (Award, para.336, emphasis added); and as a matter of fact, under discussion in the 2012 notes verbales remained the *territorial sovereignty* over Huangyan Dao (Scarborough Shoal). Thus seen, the subject-matter of the exchange of views between China and the Philippines did not concern the interpretation or application of the UNCLOS. Therefore, it cannot be concluded that the Philippines had fulfilled the obligation to exchange views under Article 283 of the UNCLOS with respect to the subject-matter of its claims.

Second, the Tribunal relies on facts that occurred before the so-called “disputes” arose

as the evidence of exchange of views on the “disputes”. The exchanges of views pertaining to a dispute must be those that are conducted subsequent to the emergence of the dispute. In its demonstration for the existence of disputes between China and the Philippines on “historic rights” and the status of maritime features, the Tribunal refers to various bilateral notes verbales exchanged between 2009 and 2011, suggesting that the so-called “disputes” arose in as early as 2009. However, in the demonstration of the two States’ exchanges of views on the “disputes”, the consultations and exchange of notes verbales that the Tribunal relied on mostly happened before 2009. While admitting the above to be the facts (See Award, para.336), the Tribunal ultimately persisted in taking them as valid acts of exchange of views (See Award, para.342) for purposes of Article 283. This is absurd.

Third, the Tribunal deliberately lowered the criteria for the fulfillment of the obligation to exchange views. Given the variety of voluntary and compulsory means of dispute settlement provided for under the UNCLOS, the exchange of views is necessary for the parties to be aware of the means to be selected. In the *Chagos Arbitration*, the Tribunal stressed that Article 283 “was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings”, and it “requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed” (*In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No.2011-3, Award of 18 March 2015, p.149, para.382).

In the meantime, the obligation to exchange views stipulated in Article 283, as a part of voluntary choice of dispute settlement procedures, is a precondition to the initiation of compulsory procedures and reflects the drafters’ intention to give priority to dispute settlement procedures of the parties’ own choice. The obligation to exchange views is not merely a compulsory obligation, but also a priority obligation. Therefore, in performing the obligation under Article 283, the parties should be assured of having sufficient opportunities to express their preference regarding the means of dispute settlement. Therefore, the exchange of views must be meaningful and substantial consultations regarding the means of dispute settlement. As Judge P. Chandrasekhara Rao observed in 2003 in the *Malaysia v. Singapore Case*, “[t]he requirement of this article regarding exchange of views is not an empty formality” (*Case concerning*



*Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, ITLOS Case No.12, Order of 8 October 2003, Separate Opinion of Judge Chandrasekhara Rao, p.39, para.11). In the *Southern Bluefin Tuna Case*, the arbitral tribunal regarded the “prolonged, intense and serious” negotiations as fulfilling the obligation of exchange of views (*Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, para.55).

The criteria for the fulfillment of the obligation to exchange views were lowered substantially by the Tribunal in the present Arbitration. For instance, on the basis of the Philippines’ note verbale to China dated 26 April 2012 and China’s reply three days later, the Tribunal concluded that the Philippines had fulfilled the obligation with respect to claims regarding the Scarborough Shoal (Huangyan Dao) (See Award, paras.340-342). Leaving aside the fact that the core of the subject-matter of the above notes verbales is the *territorial sovereignty* over Huangyan Dao (Scarborough Shoal) rather than a matter concerning the interpretation or application of the UNCLOS, the criteria set by the Tribunal for assessing the fulfillment of the obligation to exchange views render Article 283 of the UNCLOS practically meaningless.

## **VI. The Arbitral Tribunal is neither objective nor impartial, and its Award deviates from the object and purpose of the dispute settlement mechanism of the UNCLOS and impairs the integrity and authority of the Convention**

### **1. The Arbitral Tribunal is neither objective nor impartial in applying the law and determining the facts**

The UNCLOS is a package-deal instrument. It affirms in the Preamble that “the problems of ocean space are closely interrelated and need to be considered as a whole”. As also stated by Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, when the Convention was adopted, “the Convention consists of a series of compromises and many packages ... they form an integral whole. This is why the Convention does not provide for reservations. It is

therefore not possible for States to pick what they like and to disregard what they do not like” (The Third United Nations Conference on the Law of the Sea, 185<sup>th</sup> Plenary Meeting, U.N. Doc.A/CONF.62/SR.185, p.14, para.53). In the present Arbitration, the integrity of the UNCLOS is impaired by the Tribunal which interprets and applies its relevant provisions in such a manner that it isolated the issues of the status and maritime entitlements of certain features from the sovereignty over the features and from maritime delimitation.

The Tribunal applies double standards in the interpretation and application of the relevant rules. In its reference to relevant international arbitration cases, the Tribunal deliberately discards majority decisions or opinions that are to the disadvantage of the Philippines, but follows the minority opinion that is in favor of it (See Award, para.223). While declaring its willingness to treat China’s Position Paper as constituting a plea concerning jurisdiction, it practically disregards or overlooks China’s positions expressed therein, thus failing to fulfill the duty of safeguarding the procedural and substantive rights enjoyed by the State not appearing before the Tribunal. The Award even contravenes the customary rules on treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties in the interpretation of relevant provisions of the UNCLOS, thus impairing the effectiveness of the Convention. For instance, such provisions as Articles 281, 283 and 298 are not interpreted in accordance with the ordinary meaning of the terms and the drafters’ intention.

The Tribunal is clearly not impartial in determining the facts. Facts advantageous to China are either ignored deliberately, or only briefly mentioned in order to downgrade their value in the present Arbitration. For instance, the Tribunal disregards the fact of integral wholeness of claims to Nansha Islands as consistently maintained by China. Nonetheless, the Tribunal persisted in dealing with the status and maritime entitlements of relevant individual features of the Nansha Islands as separate single features (See Award, paras.169-171). The Tribunal disregards the fact that the Philippines abandoned the consensus with China to settle relevant maritime disputes through negotiation, and arbitrarily denies the validity of the agreement between the two sides. The acts of the Tribunal deviate from the spirit of equality and justice in international law.

In handling evidence, the Tribunal did not comply with internationally prevalent rules. As indicated by the ICJ, the determination that a claim is “well founded in fact” shall be supported by “convincing evidence”, and the same degree of certainty must be attained in the case where a State has chosen not to appear (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.24, paras.28-29). Such a standard also applies at the stage of preliminary objections. The Court also pointed out that “[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact” (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p.31, para.45). In the present Arbitration, the Rules of Procedure adopted by the Tribunal provide that “[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence adduced” (Article 22(7)). However, it did not follow the above requirements, especially in that its standards for determination of evidence are not transparent and the evidence that it admitted is unconvincing. For instance, in its analysis of the Philippines’ claims concerning “historic rights” and the status of certain maritime features, the Tribunal erroneously determines that the relevant claims constitute disputes between China and the Philippines concerning the interpretation or application of the UNCLOS, on the basis of evidence that is irrelevant and weightless (See Award, paras.164-171). In addition, in its analysis on whether the Philippines has fulfilled the obligation to exchange views, it even accepts at face value the Philippines’ one-sided records of bilateral consultations with China, which are lack of materiality and weight (See Award, paras.334, 337), which is far from convincing.

## **2. The Arbitral Tribunal’s exercise of jurisdiction *ultra vires* over the case impairs the right of States Parties to the UNCLOS to choose freely the means of disputes settlement and destroys the priority of means of their own choice**

The UNCLOS lays down a two-tier dispute settlement mechanism, in which the means of the Parties’ own choice takes priority and compulsory procedures play a complementary role (See Thomas A. Mensah, “The Dispute Settlement Regime of the 1982 United Nations Convention of the Law of the Sea”, *Max Planck Yearbook of*

*United Nations Law* (1998), p.309; Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2<sup>nd</sup> edn., 2015), p.420). The parties concerned shall settle disputes concerning the interpretation or application of the UNCLOS through peaceful means of their own choice. Only when no settlement is reached by recourse to such means, and certain preconditions are met, can compulsory third-party procedures be resorted to.

The parties to a dispute remain the complete masters of means of its settlement. The Convention confirms that nothing in Part XV impairs the right of States Parties to settle a dispute by any peaceful means of their own choice (UNCLOS, art.280). It further provides that, before resorting to compulsory procedures, States have the right to freely choose means of dispute settlement. They can either select peaceful means as indicated in Article 33(1) of the UN Charter (UNCLOS, art.279), or resort to the means of dispute settlement of their own choice as provided for in the UNCLOS, including the obligation to exchange views (UNCLOS, art.283). States have the right to choose dispute settlement procedures by agreement (UNCLOS, art.281), or to submit the dispute to a procedure that entails a binding decision (UNCLOS, art.282). The Convention allows States Parties to declare in writing to exclude the applicability of compulsory procedures with respect to disputes concerning, *inter alia*, maritime delimitation (UNCLOS, art.298). It also provides that compulsory procedures can only be resorted to where no settlement has been reached through means of the parties' own choice, and are subject to limitations and exceptions provided for by the Convention (UNCLOS, art.286). The above provisions evince the Convention's respect for and safeguard of the right of its States Parties to freely choose means to settle their disputes and the priority of such means of their choice. As Robin Churchill and Vaughan Lowe wrote, "it is important to recognise that those compulsory procedures are of secondary importance", and "[o]nly where settlement is not possible by means freely chosen by the parties to the dispute do the elaborate compulsory dispute settlement provisions of the 1982 Convention come into play" (Robin Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 3<sup>rd</sup> edn., 1999), p.454).

In particular, it should be pointed out that Article 298 of the UNCLOS allows States Parties to declare in writing, at any time, that they do not accept compulsory

third-party procedures with respect to disputes concerning, *inter alia*, maritime delimitation. It shows that on issues concerning national sovereignty and sovereign rights and interests such as maritime delimitation, the Convention gives more freedom to the States Parties in the choice of means of dispute settlement. Therefore, in its determination of jurisdiction, the Tribunal must act prudently to safeguard the right of States Parties to freely choose the means of dispute settlement.

In an attempt to justify its establishment of jurisdiction, the Tribunal, instead of acting prudently, makes every effort to expand and misuse its power arbitrarily, and to lower the threshold to the applicability of arbitration under Annex VII of the UNCLOS. It denies the fact that China and the Philippines had agreed to settle relevant disputes through negotiation, and willfully narrows down the scope of exclusions made by China in its 2006 Declaration. The vicious precedent that it set may open the “floodgate of abuse lawsuits” regarding maritime disputes, which will not only impair China’s vital and lawful rights and interests, but also have an impact beyond the *inter-parte* relationship. It will impair the vital interests of States Parties in peaceful dispute settlement under the UNCLOS, especially the right to freely choose the means of dispute settlement. Accordingly, it will damage the international legal order of the oceans and harm the overall interest of the international community.

### **3. The Arbitral Tribunal acts contrary to the fundamental purpose of the dispute settlement mechanism under the UNCLOS**

The fundamental purpose of the dispute settlement mechanism under the UNCLOS, as a component of the modern legal order of the oceans established by the Convention, is to contribute to the settlement of maritime disputes peacefully. The Convention proclaims in its Preamble the common belief among States Parties that “the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations ...”. Part XV of the Convention is dedicated to the “Settlement of Disputes”, in which Article 279 obliges States Parties to settle their disputes concerning the interpretation or application of the Convention in accordance with the principle of peaceful settlement of disputes under Article 2(3) of the UN Charter, and through peaceful means indicated in its Article 33(1). Therefore, in its

settlement of disputes concerning the interpretation or application of the UNCLOS, the Tribunal shall be oriented towards resolving disputes and reconciling conflicts, so as to achieve its objectives of peaceful settlement of disputes and the promotion of friendly relations and cooperation between States.

Vital to the achievement of the above objectives is to interpret and apply the dispute settlement mechanism provided for in the UNCLOS in good faith and in a comprehensive and integral manner. As a matter of fact, on issues of core national interests such as territorial sovereignty, no State will accept the jurisdiction of a third-party mechanism that is not chosen by it voluntarily, not to mention accepting solutions imposed by such a mechanism. To persist in revolving issues such as territorial sovereignty, which are beyond the competence of the Tribunal, when the dispute settlement mechanism under the UNCLOS is abused, will make no contribution to the settlement of disputes, but can only intensify the conflicts and further complicate the situations.

In the present Arbitration, by unlawfully initiating the Arbitration, the Philippines seeks not to settle its disputes with China in the South China Sea in good faith, but to obtain bargaining chips in its quest for unlawful interests in the South China Sea. The Tribunal's tolerance of the Philippines' unlawful behaviors and its exercise of jurisdiction *ultra vires* have intensified rather than resolved the disagreements between China and the Philippines on relevant issues in the South China Sea, and have aggravated rather than alleviated the tense situation in the South China Sea. These acts of the Tribunal run counter to the fundamental purpose of peaceful settlement of disputes of the UNCLOS.

In conclusion, the Tribunal's establishment of jurisdiction over the Philippines' claims is completely erroneous. It disregards the fact and distorts the law so as to exercise jurisdiction *ultra vires*, beyond the authorization of the UNCLOS. It is obvious that the Tribunal does not act with impartiality and reasonable diligence, and makes an essentially political award. The Tribunal's exercise of jurisdiction *ultra vires* has been questioned by a number of scholars of international law from China and abroad. *Ex*

*injuria jus non oritur*. As the Tribunal unlawfully exercises jurisdiction over subject-matters which are manifestly beyond its competence, none of the further procedures that it takes or may take and the views that it expresses or may express has any legal basis. Any decision that the Tribunal may make on the substantive issues will not have any legal effect. China's non-acceptance of and non-participation in the Arbitration and its non-recognition of any award made or to be made by the Tribunal have solid legal basis, and are acts of justice to maintain and uphold international law.