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# The Sino-Philippine Arbitration of the South China Sea Nine-Dash Line Dispute: Applying the Rule on Default of Appearance

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## Introduction

On January 22, 2013, the Philippines presented a diplomatic notification to China under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). It aimed at initiating arbitral proceedings to challenge China's claims and entitlement to areas of the South China Sea (SCS) and the underlying seabed, which the Philippines requests the Tribunal to declare as its exclusive economic zone (EEZ) and continental shelf.<sup>1</sup> Based on the Philippines' claims and the relief sought under Sections III and V of the "Notification and Statement of Claim" (the Notification),<sup>2</sup> there are five groups of claims:<sup>3</sup>

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† This article is dedicated to Professor Thomas Mensah, who coached the author in 1993–1994 at Leiden University for the Manfred Lachs International Space Law Moot Court Competition. The points presented in this article only comment on the Philippines' statement and arguments contained in its diplomatic notification released on January 22, 2013. The opinions expressed here do not represent those of any government agency.

1 See online: <<http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/7300-statement-by-secretary-of-foreign-affairs-albert-del-rosario-on-the-unclos-arbitral-proceedings-against-china-to-achieve-a-peaceful-and-durable-solution-to-the-dispute-in-the-wps>>. For the information released by the Permanent Court of Arbitration, serving as Registry of this arbitration, see online: <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1529](http://www.pca-cpa.org/showpage.asp?pag_id=1529)>.

2 The Notification and Statement of Claims, issued by Department of Foreign Affairs of Republic of the Philippines in Manila to the Embassy of the People's Republic of China in Manila, serial no. 13-0211, January 22, 2013, available online: <[http://www.dfa.gov.ph/index.php/downloads/doc\\_download/523-notification-and-statement-of-claim-on-west-philippine-sea](http://www.dfa.gov.ph/index.php/downloads/doc_download/523-notification-and-statement-of-claim-on-west-philippine-sea)>.

3 See paras. 31 (Section III: The Philippines' Claims) and 41 (Section V: Relief Sought) of the Notification, id.

First, China's rights concerning the SCS maritime areas are those established by UNCLOS only and consist of the territorial sea, the contiguous zone, the EEZ and the continental shelf. China's maritime claims therein based on the "nine-dash line (U-shaped line)"<sup>4</sup> contravene UNCLOS and are invalid.<sup>5</sup> Secondly, the Mischief, McKennan, Gaven and Subi Reefs are submerged features not above sea level at high tide, and should not be deemed as islands or rocks according to Article 121 of UNCLOS. None of them are located on China's continental shelf. Rather, the Mischief and McKennan Reefs are part of the Philippines' continental shelf. China's occupation of these four maritime features and construction activities thereon are unlawful and should be terminated.<sup>6</sup> Thirdly, Scarborough Shoal and the Johnson, Cuarteron, and Fiery Cross Reefs should be considered as rocks under Article 121(3), and may only generate state entitlement to the territorial sea. Having unlawfully claimed maritime entitlements beyond 12 nautical miles (NM) from these features, China should refrain from preventing Philippine vessels from exploiting the living resources in waters adjacent to Scarborough Shoal and Johnson Reef, and from undertaking other activities inconsistent with UNCLOS at or in the vicinity of these features.<sup>7</sup> Fourthly, the Philippines is entitled under UNCLOS to a 12-NM territorial sea, a 200-NM EEZ, and a continental shelf measured from its archipelagic baselines. China has unlawfully claimed and exploited the living and non-living resources in this EEZ and continental shelf, and prevented the Philippines from exploiting the living and non-living resources therein.<sup>8</sup> Finally, China has unlawfully interfered with the Philippines' exercise of its navigational rights and other rights under UNCLOS within and beyond the Philippines' EEZ. China should desist from these unlawful activities.<sup>9</sup>

On February 19, 2013, China officially refused to join the litigation.<sup>10</sup> One of the reasons is that its 2006 Declaration covers the disputes brought by the Philippines and deprives the Arbitral Tribunal of necessary jurisdiction to

4 The term "nine-dash line" is interchangeable with "U-shaped line" and "eleven-dash line." For various names of this line, see K.Y. Zou, "China's U-Shaped Line in the South China Sea Revisited," *Ocean Development and International Law* 43 (2012): 18.

5 See 1st–2nd claims under para. 31 and 1st–3rd reliefs under para. 41 of the Notification, n. 2 above.

6 See 3rd–5th claims under para. 31 and 4th–7th reliefs under para. 41 of the Notification, id.

7 See 6th–7th claims under para. 31 and 8th–9th reliefs under para. 41 of the Notification, id.

8 See 8th–9th claims under para. 31 and 10th–11th reliefs under para. 41 of the Notification, id.

9 See 10th claim under para. 31 and 12th–13th reliefs under para. 41 of the Notification, id.

10 See the statement made on February 19, 2013 by the spokesman of the Foreign Ministry of China (English translation): "China's position on the South China Sea issue is clear and



entertain the case. The Philippines argued otherwise and applied the default rules under Annex VII to proceed in establishing the arbitral tribunal. On June 25, 2013, the fifth arbitrator was appointed and the arbitral tribunal was established for this case (the Tribunal). As there is a dispute concerning whether the Tribunal has jurisdiction over the disputes, the Tribunal is obligated under Article 288(4) of UNCLOS to decide such an issue as a preliminary matter.

As revealed by its official statements, China will neither appear in this litigation nor present written or oral arguments in the court room as the respondent. Such default of appearance makes certain procedural rules applicable. According to Article 9 of Annex VII, the Tribunal, before making its Award, is obligated to satisfy itself not only that it has jurisdiction over the *dispute*, but also that the *claims* brought by the Philippines are well-founded in fact and law. Therefore, it is necessary for the Tribunal to look into *all* the claims brought forward by the Philippines and *all* the disputes alleged by the claims in the procedural phase. The possible arguments China could make should be explored during this process.

To assist the Tribunal in making informed and balanced decisions, this article addresses the four categories of questions for the Tribunal to answer during the procedural phase of this litigation:

- (i) whether the Tribunal should be considered the chosen procedure under Articles 287 and 298 of UNCLOS;
- (ii) whether the inherent conditions for the Annex VII Tribunal to be applicable under Articles 286 and 288 are fulfilled;
- (iii) whether the Philippines' claims are well-founded in fact and law under Article 9 of Annex VII to UNCLOS; and
- (iv) whether jurisdictional requirements of the disputes presented by the Philippines are all fulfilled under Article 9 of Annex VII.

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consistent. China's sovereignty over the Nansha Islands and their adjacent waters is based on sufficient historical and jurisprudential evidence. Meanwhile, bearing in mind the larger interests of China-Philippines relations and regional peace and stability, China has always been committed to solving disputes through bilateral negotiations and has made unremitting efforts to safeguard stability in the South China Sea and promote regional cooperation. It is also the consensus reached by ASEAN (Association of Southeast Asian Nations) countries and China in the Declaration on the Conduct of Parties in the South China Sea (DOC) to resolve disputes through negotiations between directly concerned sovereign states. The Philippines' note and its attached notice not only violate the consensus, but also contain serious errors in fact and law as well as false accusations against China, which we firmly oppose." Available online: <<http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1015317.shtml>>.

To answer these questions, this article discusses the rules and then applies them to the Chinese and Philippine situations. Information will be provided to point out the following factual and legal problems concerning:

- (i) the disputes formulated by the Philippines not being real and contentious;
- (ii) the disputes brought by the Philippines not being identical with the unsettled Sino-Philippine SCS disputes;
- (iii) the disputes presented by the Philippines not concerning the interpretation or application of UNCLOS; and
- (iv) the disputes as correctly re-characterized being excluded by the 2006 Chinese Declaration and Point 8 of the Philippines' Understanding in accordance with Article 298.

Finally, based on these examinations and analyses, a conclusion will be drawn and a suggestion will be made to the Tribunal.

### **The Rules on the Choice and Jurisdiction of the Tribunal and Default of Appearance**

#### *Articles 287 and 298: The "Choice" of Annex VII Tribunal*

To begin with, it is always necessary for the tribunal constituted according to Annex VII of UNCLOS (Annex VII Tribunal) to decide whether it is the *choice* of the disputing parties for settling the dispute presented. Article 287 UNCLOS provides the following multi-stage test.<sup>11</sup>

First, if each of the disputing parties has already chosen an Annex VII Tribunal to settle disputes concerning the interpretation or application of UNCLOS through written declarations made according to Article 287(1),<sup>12</sup> then the arbitral tribunal becomes the chosen forum to settle the dispute presented. Otherwise, the Stage Two Test applies.

At Stage Two, the tribunal will see if any other mechanism under Section 2 of Part XV (Section 2 Procedure) has been selected by all parties. If this is not the case, then Article 287(5)<sup>13</sup> applies and the dispute may only be submitted

11 J.G. Merrills, *International Dispute Settlement*, 4th ed. (Cambridge: Cambridge University Press, 2005), p. 193.

12 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 *United Nations Treaty Series* 397.

13 *Id.*

to an Annex VII Tribunal, unless the parties otherwise agree. Under this situation, if the parties cannot agree on a procedure, it enters Stage Three.

At Stage Three, Article 287(3) applies, which provides that “[a] State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.” If none of the disputing parties has made a written declaration choosing one of the Section 2 Procedures to settle their disputes, then both or all disputing parties are deemed to have accepted an Annex VII Tribunal. Should one party (the claimant) initiate an Annex VII Tribunal to settle the dispute, while the other party (the respondent) either has made no declaration under Article 287(1), or the declaration made does not cover the dispute, the Annex VII Tribunal will be considered as the chosen forum by the operation of Article 287(3).

Even if considered as the chosen forum, the Annex VII Tribunal still needs to check if the optional exception under Article 298 is inapplicable. The question is whether *none* of the disputing parties has made a written declaration to exclude an Annex VII Tribunal concerning any of the categories of disputes under Article 298(1),<sup>14</sup> which covers the disputes the tribunal is requested to settle. If the answer is affirmative, then the tribunal has jurisdiction over the dispute submitted to it. If the claimant has made such a declaration, then Article 298(3)<sup>15</sup> bars the claimant from resorting to an Annex VII Tribunal against the respondent withholding the consent.

The foregoing multi-stage tests have been applied by the Annex VII Tribunals that decided, *inter alia*, the case concerning maritime boundary delimitation between Barbados and the Republic of Trinidad and Tobago on April 11, 2006 (the Barbados Arbitration)<sup>16</sup> and the case concerning land reclamation by Singapore in and around the Straits of Johor brought by Malaysia against Singapore.<sup>17</sup>

Before applying these tests, let us examine the situations of the claimant and respondent. Point 8 of the Understanding, made and confirmed by the

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14 Id.

15 Id.

16 Award of the Arbitral Tribunal in the Matter of Arbitration between Barbados and the Republic of Trinidad and Tobago, April 11, 2006 (Permanent Court of Arbitration), paras. 191–192, available online: <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1152](http://www.pca-cpa.org/showpage.asp?pag_id=1152)>.

17 Award on Agreed Terms for the Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), September 1, 2005 (Permanent Court of Arbitration), paras. 2–3, available online: <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1154](http://www.pca-cpa.org/showpage.asp?pag_id=1154)>.

Philippines upon signature (dated December 10, 1982) and ratification (dated May 8, 1984) of UNCLOS, reads:

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.<sup>18</sup>

Such an Understanding expresses three points. First, the Philippines accepts all the Section 2 Procedures, including an Annex VII Tribunal. Secondly, the Philippines waives its right granted by Article 298 to exclude any of the Section 2 Procedures concerning those disputes identified by Article 298. Thirdly, when a dispute indicated by Article 298 to which the Philippines is a party is to be settled by Section 2 Procedures, the Philippines does not confer jurisdiction upon any of the Section 2 Procedures to decide any issue the judgment of which may adversely affect Philippine sovereignty.

China's situation is slightly different. The People's Republic of China (PRC) government ratified UNCLOS for the State of China on June 7, 1996, with the following declaration:

...2. The People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability.<sup>19</sup>

Two points can be made. First, China will use negotiation as a means for settling maritime boundary delimitation disputes with, *inter alia*, the Philippines. Second, China so far did not invoke the optional exceptions under Article 298. Such invocation was later provided by the Chinese Declaration of August 25, 2006, called "Declaration under article 298":

18 See Point 4 of the Understanding made on December 10, 1982, by the Philippines upon signature of UNCLOS. The Understanding was confirmed upon ratification of UNCLOS by the Philippines on May 8, 1984. "4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto." Available online: <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Philippines](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Philippines)>.

19 Available online: <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China)>, upon ratification.

The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.<sup>20</sup>

Clearly, the PRC has from then on excluded, *inter alia*, an Annex VII Tribunal as a means to settle all the disputes under Article 298(1) with other UNCLOS states parties, including the Philippines.

Now, we apply the test to see if the Tribunal should be considered as the chosen means to settle the disputes brought by the Philippines.

For the Stage One Test: Is an Annex VII Tribunal the common choice? The answer is no, as China has made no declaration to choose any Section 2 Procedure according to Article 287(1).

For the Stage Two Test: Is there any other common choice for dispute settlement? The answer is also negative for the same reason.

With respect to the Stage Three Test: Has neither China nor the Philippines made any choice? The answer is negative. The Philippines has chosen an Annex VII Tribunal because it submitted the Notification on January 22, 2013. For China, it has not made any declaration according to Article 287(1). Under Article 287(3), China could be deemed to have accepted and chosen an Annex VII Tribunal, provided China is a party to the "disputes" presented to the Tribunal by the Philippines through the Notification.

As this article will explore, serious legal problems exist concerning: (i) the hypothetical nature of the disputes constituted by the Philippines' claims, and (ii) the identity between the real Sino-Philippine disputes and the disputes brought to the Tribunal. Consequently, China may not pass the Stage Three Test, leaving an Annex VII Tribunal far from the Chinese choice.

Assuming an Annex VII Tribunal is the Chinese choice for the disputes submitted, the Stage Four Test asks: Has any party excluded the Annex VII Tribunal as the means to settle the dispute in question according to Article 298(1)? The answer is probably affirmative for both China and the Philippines. This issue will also be addressed later in this article.

From the view of the Philippines, an Annex VII Tribunal, precisely the one being constituted already, is the "chosen" forum to settle the disputes brought by the Philippines by the operation of Article 287(3). The reason is given by paragraphs 36–40 of the Notification. China thinks otherwise. Therefore, whether the Tribunal is the chosen forum to settle the disputes presented by the Philippines constitutes one of the preliminary matters to be addressed.

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<sup>20</sup> Id.

***Article 288: Inherent Conditions for the Tribunal to be Applicable***

Assuming an Annex VII Tribunal is the chosen forum, the Tribunal must have jurisdiction over the disputes presented under Article 288(1) of UNCLOS. It reads “[a] tribunal referred to in article 287 shall have jurisdiction over any dispute *concerning the interpretation or application of this Convention* which is submitted to it *in accordance with this Part*.”<sup>21</sup> [Emphasis added]

Two pre-conditions must be fulfilled before the Tribunal becomes bound to address the jurisdictional problems. First, the dispute must concern the interpretation or application of UNCLOS. Secondly, such a dispute must have been submitted to the Tribunal in accordance with Part XV.

At first glance, these conditions are all met. The Philippines is asking the Arbitral Tribunal to apply UNCLOS to decide the entire dispute, and in particular, to evaluate the legality of (i) the U-shaped line claimed by the PRC, (ii) the legal status given by the PRC to eight self-occupied SCS maritime features, (iii) the maritime areas surrounding these maritime features claimed by the PRC, and (iv) the range of maritime zones claimed by the Philippines measured from its archipelagic baselines. All the disputes presented concern the interpretation or application of UNCLOS. Besides, as the Philippines specifically states at the beginning of the Notification,

...the Government of the Philippines has the honor to submit the attached Notification *under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)* and the Statement of Claim on which the Notification is based, in order to initiate arbitral proceedings to clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea.<sup>22</sup>

Emphasis added

Therefore, the Philippines will probably argue that it has submitted the disputes to the Tribunal *in accordance with UNCLOS*, and thereby meeting the second condition under Article 288(1). However, certain situations may prevent the fulfillment of these two conditions.

First, certain disputes presented by the Philippines may not concern the interpretation or application of UNCLOS as required by Article 288(1).

Secondly, the way the Philippines submitted the disputes to the Tribunal may not conform with Part XV, because (i) as this article will explain, *there is lack of dispute*, as the “disputes” submitted by the Philippines may be either

<sup>21</sup> See UNCLOS, n. 12 above.

<sup>22</sup> Para 1 of the covering letter for the Notification, n. 2 above.

non-contentious or hypothetical, making one of the inherent requirements for all the provisions of Part XV unfulfilled; (ii) the Sino-Philippine SCS disputes that failed to be settled through the means indicated by Section 1 of Part XV (Section 1 Means) *may not be the same as* the disputes presented by the Philippines to the Annex VII Tribunal, thus violating Article 286 first,<sup>23</sup> and consequently breaching Article 288(1).

Assuming these pre-conditions were fulfilled and Article 288(1) became applicable, the Tribunal would be obligated to satisfy itself that it has jurisdiction over the case. In this respect, China claimed that the 2006 Declaration has the effect of depriving the Tribunal of jurisdiction over this case.<sup>24</sup> The Philippines argued in its Notification that “the Philippines’ claims do not fall within China’s Declaration of 25 August 2006...”<sup>25</sup> Article 288(4) of UNCLOS, as the way out, provides that “in the event of a dispute as to whether a [...] tribunal has jurisdiction, the matter shall be settled by decision of that [...] tribunal.”<sup>26</sup>

#### *Article 9 of Annex VII: Default of Appearance*

As default of appearance on the part of China will occur, Article 9 of Annex VII applies, which provides:

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. *Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.*<sup>27</sup>

Emphasis added

23 Article 286 (Application of procedures under this section), n. 12 above, reads: “Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”

24 See remarks made by the spokesperson of the Chinese Ministry of Foreign Affairs on April 26, 2013, available online: <<http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml>>.

25 Para. 40 of the Notification, n. 2 above.

26 See UNCLOS, n. 12 above.

27 See UNCLOS, Annex VII. Arbitration, n. 12 above, available online: <[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/annex7.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/annex7.htm)>.

The drafting history shows that the final decision in choosing the word “claim” (instead of “award”) in the last sentence of Article 9 brings the sentence back to the language of Article 53 of the Statute of the International Court of Justice (ICJ).<sup>28</sup> Therefore, the commentary to Article 53<sup>29</sup> can be the guidance when interpreting and comprehending the last sentence of Article 9 of Annex VII.

In the event of default of appearance, the “default” award of the Tribunal will not automatically be in favor of the appearing party. The Tribunal will not necessarily find that it has jurisdiction, that the case is admissible or that the underlying claim is well-founded. Rather, the Tribunal may only decide in favor of that party if such an award is justified both in procedure and in substance.<sup>30</sup>

Given the opposing position of China in the present case, the Tribunal must not decide such preliminary matters lightly due to China’s absence and the lack of its legal arguments submitted formally. If applying the analogous ICJ judgments in two Icelandic Fisheries cases, the Tribunal, in examining its own jurisdiction, should consider those objections of China which might, in its view, be raised against its jurisdiction.<sup>31</sup>

In the present case, China as a party has raised and could further provide *informal* jurisdictional objections, though neither in the form of preliminary objections nor in the way requested by Part XV, Annex VII or the Tribunal. If following the ruling of *Aegean Sea*,<sup>32</sup> the Tribunal should nevertheless consider such “informal objections” to be relevant.<sup>33</sup>

The last sentence of Article 9 of Annex VII imposes an obligation upon the Tribunal to investigate whether or not it has jurisdiction. One question arises:

28 S. Rosenne and L.B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Dordrecht: Martinus Nijhoff Publishers, 1989), pp. 433–434 and 389–390.

29 The most authoritative guide is by A. Zimmermann, K. Oellers-Frahm, C. Tomuschat and C.J. Tams, eds., *The Statute of the International Court of Justice: A Commentary*, 1st ed. (Oxford: Oxford University Press, 2006), pp. 1141–1170. To be noted, the Commentary to Article 53 was written by Von Mangoldt and Zimmermann.

30 *Id.*, pp. 1159–1160.

31 *Fisheries Jurisdiction Case (UK v. Iceland)* (Jurisdiction) [1973] *ICJ Rep* 3, 7–8 (para. 12), available online: <<http://www.icj-cij.org/docket/files/55/5749.pdf>>; *Fisheries Jurisdiction Case (FRG v. Iceland)* (Jurisdiction) [1973] *ICJ Rep* 49, 54 (para. 13), available online: <<http://www.icj-cij.org/docket/files/56/10713.pdf>>.

32 *Aegean Sea Continental Shelf Case (Greece v. Turkey)* [1978] *ICJ Rep* 3, 20 (para. 46), available online: <<http://www.icj-cij.org/docket/files/62/6245.pdf>>. In this case, Turkey, as the non-appearing party, had in informal written observations invoked a reservation with regard to the General Act for the Pacific Settlement of Disputes and the ICJ took note of it. See Zimmermann et al., n. 29 above, p. 1160.

33 Zimmermann et al., *id.*



To what extent is the Tribunal obliged to search for possible jurisdictional problems and to discuss every conceivable objection to the Tribunal's jurisdiction that a creative party like China might raise? As this is also a question for the ICJ when applying Article 53 of its Statute, the commentary to the ICJ Statute again provides insightful guidance.<sup>34</sup>

In short, the ICJ's obligation under Article 53(2) is much higher than that for establishing *prima facie* jurisdiction, as required by Article 41 of the ICJ Statute governing provisional measures.<sup>35</sup> It is because Article 53(2) allows for a judgment on jurisdiction and eventually also on the merits of the case, which is final.<sup>36</sup> Applying this differentiation to the UNCLOS regime, the level of investigatory obligation incumbent upon the Tribunal under Article 9 of Annex VII (governing award-making process) would be thus higher than that under Article 290 of UNCLOS (governing provisional measures and *expressly* provide *prima facie* test).<sup>37</sup>

Now, what does it mean by claims being well-founded in fact and law? The ICJ in *Nicaragua* discussed Article 53(2) of the ICJ Statute by saying

The use of the term "satisfy itself" in the English text of the Statute... implies that the Court *must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence*. For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law, so that the absence of one party has less impact... As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties. Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive question of fact, must necessarily limit the extent to which the court is informed of the facts.<sup>38</sup>

Emphasis added

34 *Id.*, p. 1161.

35 However, the *prima facie* test is not part of the wording of Article 41 of the ICJ Statute.

36 Zimmermann, n. 29 above, p. 1161.

37 See Article 290(1), n. 12 above, which provides the *prima facie* test, whereas Article 9 of Annex VII does not.

38 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits) [1986] *ICJ Rep* 14, 24, 25 (paras. 29–30), available online: <<http://www.icj-cij.org/docket/files/70/6503.pdf>>.

Additionally, given the principle of *juria novit curia*, issues on the burden of proof do not arise as to whether the claim is well-founded in law.<sup>39</sup> The ICJ held that “[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”<sup>40</sup>

On the other hand, the ICJ does not examine the factual basis of the claim to the same degree of certainty. Besides, the ICJ has so far been reluctant to define a clear general rule as to what standard is to be applied in order to determine whether the claim is well-founded in fact. The ICJ has further held that while “Article 53...obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice.” On the other hand, it is “especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.”<sup>41</sup>

The above-mentioned test and jurisprudence of the ICJ in applying Article 53(2) of its Statute are both applicable to the present case for the Tribunal to apply Article 9 of Annex VII to UNCLOS.

In the following sections, relevant factual information and legal opinions are offered as to how the Tribunal should fulfill the above-mentioned assignments in examining each of the disputes to ascertain if it has jurisdiction. More fundamentally, whether the Philippines’ claims are all well-founded in fact and in law will be studied first, as part of the questions the Tribunal must answer.

In the judgment of *The Mavrommatis Palestine Concessions*, the Permanent Court of International Justice has defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>42</sup> Seen as an elaboration of such a definition, J.G. Merrills said that, “a dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal,

39 Zimmermann, n. 29 above, p. 1162.

40 *Fisheries Jurisdiction Case (UK v. Iceland)* (Merits) [1974] ICJ Rep 3, 9 (para. 17), available online: <<http://www.icj-cij.org/docket/files/55/5977.pdf>>; *Fisheries Jurisdiction Case (FRG v. Iceland)* (Merits) [1974] ICJ Rep 175, 181 (para. 18), available online: <<http://www.icj-cij.org/docket/files/56/6001.pdf>>.

41 Zimmermann, n. 29 above, pp. 1162–1163.

42 *The Mavrommatis Palestine Concessions* [August 30, 1924] PCIJ Series A, No. 2, 11, available online: <[http://www.icj-cij.org/pcij/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf)>.

counter-claim or denial by another.”<sup>43</sup> A.V. Lowe and J. Collier also describe the dispute as “a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on.”<sup>44</sup>

Clearly, a dispute is built upon a combination of a claim and counter-claim. In the present case, the examination of the dispute, or even the *existence* of it, should follow the analysis of the claims actually made by the disputing parties, not the other way around.

### Are the Philippines’ Claims Well-Founded in Fact and Law?

#### *The First Group of Claims Concerning China’s U-Shaped Line and SCS Maritime Area*

The first group of claims challenge the legality under UNCLOS of China’s maritime claims in the SCS allegedly *based on, within, and encompassed by* the U-shaped line. The first claim contends and the first relief requests the Tribunal to declare that:

China’s rights in regard to maritime areas in the SCS, like the rights of the Philippines, are those that are established by UNCLOS, and *consist of* its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an EEZ under Part V, and to a Continental Shelf under Part VI.<sup>45</sup>

Emphasis added

Based on such a position, the second claim contends and the second relief requests the Tribunal to declare that “China’s maritime claims in the SCS based on its so-called ‘nine dash line’ are contrary to UNCLOS and invalid.” Importantly, the wording “based on” as used by the Philippines in this claim is interchangeable with “within”<sup>46</sup> or “encompassed by.”<sup>47</sup> The third relief then “requires China to bring its domestic legislation into conformity with its obligations under UNCLOS.”<sup>48</sup>

43 Merrills, n. 11 above, p. 1.

44 J. Collier and A.V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, 1st ed. (Oxford: Oxford University Press, 1999), p. 1.

45 See n. 5 above.

46 Paras. 2 and 11 of the Notification, n. 2 above.

47 Paras. 3 and 12 of the Notification, *id.*

48 Underlying such a line of claims is the principle of state responsibility for an internationally wrongful act, as codified by the International Law Commission (ILC). The Philippines’

Being by nature counter-claims against Chinese positions, these Philippines' claims may be less than well-founded in fact and law. This is because the object challenged is far from what China actually asserts, for the following reasons.

First, by virtue of its 2011 official statement, China's SCS maritime claims are not based on, within, or encompassed by the U-shaped line, as challenged by the Philippines.

Apart from the 2009 Chinese Note Verbale,<sup>49</sup> invoked but misunderstood<sup>50</sup> by the Philippines in the Notification, China later sent a Note Verbale (CML/8/2011) on April 14, 2011 as a response to the Philippine Note Verbale (No. 000228) on April 5, 2011.<sup>51</sup> The 2011 Chinese Note Verbale asserts that:

China has indisputable *sovereignty* over the islands in the South China Sea and the *adjacent waters*, and enjoys *sovereign rights and jurisdiction* over the *relevant waters* as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.... Since 1930s, the Chinese Government has given publicity several times the geographical

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second claim and second relief point out the internationally wrongful act of China, while its third relief demonstrates what China needs to do in terms of reparation. The text on the Responsibility of States for Internationally Wrongful Acts was adopted by the ILC at its fifty-third session in 2001, and submitted to the United Nations General Assembly as a part of the ILC's report, available online: <[http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)>.

49 Mission of the People's Republic of China to the United Nations, Notes Verbales, CML/17/2009 and CML/18/2009, May 7, 2009. These Notes Verbales were issued to oppose the Malaysia-Vietnam Joint Submission and Vietnam Individual Submission for Outer CS beyond 200 miles in the SCS region. Available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)> and <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm\\_c.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm_c.pdf)>.

50 The last three sentences of para. 11 of the Notification read "China first officially depicted the 'nine dash line' in a letter of 7 May 2009 to the United Nations Secretary General. It is reproduced below. According to China, it is sovereign over all of the waters, all of the seabed, and all of the maritime features within this 'nine dash line.'" See n. 2 above. The Chinese 2009 Note Verbale did not say that China is sovereign over all of the waters, all of the seabed, and all of the maritime features within the U-shaped line. Moreover, the 2009 Chinese Note Verbale is not the first official statement of China in terms of claiming territorial sovereignty in the SCS.

51 Philippine Mission to the United Nations, Note Verbale, No. 000228, 11-00494, April 5, 2011, available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf)>.

scope of China's Nansha Islands<sup>52</sup> and the names of its components [sic]. China's Nansha Islands is [sic] therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law of the EEZ and the Continental Shelf of the People's Republic of China (1998), *China's Nansha Islands is [sic] fully entitled to Territorial Sea, EEZ and Continental Shelf*.<sup>53</sup>

Emphasis added

Somehow this 2011 Chinese Note Verbale is not mentioned by the Philippines in its Notification. As clarified by this 2011 statement, what China claims in the SCS in terms of maritime areas are the zones under UNCLOS, namely, the territorial sea, the EEZ and the continental shelf. There seems to be no dispute between these Chinese positions and the Philippines' first claim and first relief sought.

Despite having no dispute concerning UNCLOS as the legal basis for China to generate maritime zonal claims in the SCS, a sharp Sino-Philippine disagreement exists concerning the total *size* of maritime areas China may claim sovereignty, sovereign rights, and jurisdiction over in the SCS. This constitutes the essence of the complaints raised by the first group of the Philippines' claims. The anxieties of the Philippines (and other contenders) are based on a perception that the body of SCS waters China claims may be as large as that enclosed by the U-shaped line. However, such Sino-Philippine maritime disputes probably result from, *inter alia*, a Sino-Philippine disagreement concerning the territorial status of *all* maritime features in the Philippines' Kalayaan Islands Group (KIG) and Scarborough Shoal.<sup>54</sup>

To illustrate Sino-Philippine territorial disputes, eight dots on the map in Figure 1 represent the maritime features in the KIG (part of the Spratly Islands) occupied and claimed by the Philippines.<sup>55</sup> These maritime features are also

52 Here, the Nansha Islands are the Spratly Islands, as touched upon by the Philippines' claims in the present case.

53 Mission of the People's Republic of China to the United Nations, Note Verbale, CML/8/2011, April 14, 2011, available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf)>.

54 N.T.A. Hu, "South China Sea: Troubled Waters or a Sea of Opportunity?," *Ocean Development & International Law* 41, no. 3 (2010): 203, 206.

55 R. Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," *American Journal of International Law* 107 (2013): 142, 144; see also D. Heinzig, *Disputed Islands in the South China Sea* (Wiesbaden: Harrassowitz Verlag,

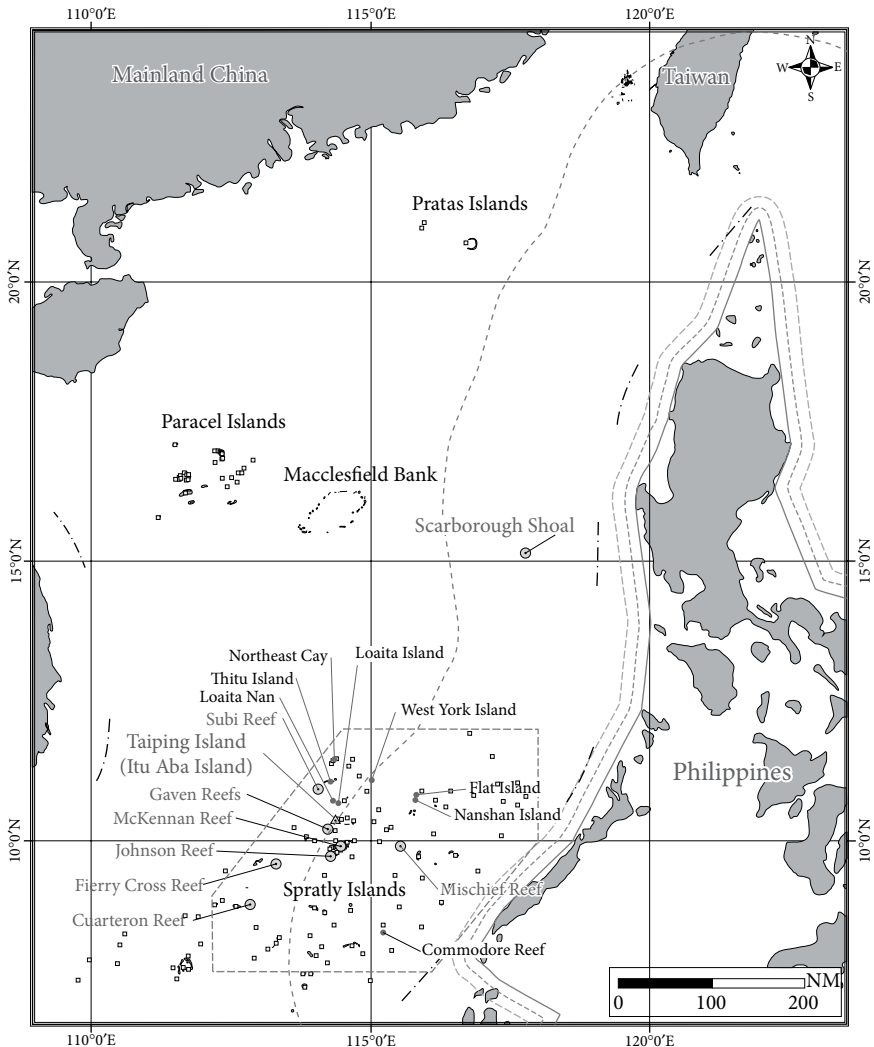


FIGURE 1 *Maritime features occupied by China and the Philippines in the Spratly Islands.*  
SOURCE: PREPARED FOR THE AUTHOR BY MR. JUI-HSIEN HUANG.

claimed by China as part of its Nansha Islands.<sup>56</sup> On the map there are another seven reefs occupied by China within the Spratly Islands that are identified by

1976), p. 36; K.Y. Zou, n. 4 above, p. 19; J.L. Batongbacal, "The Maritime Territories and Jurisdiction of the Philippines and the United Nations Convention on the Law of the Sea," *Philippine Law Journal* 76 (2001): 123, 140–141.

56 Y.H. Song, "The South China Sea Workshop Process and Taiwan's Participation," *Ocean Development & International Law* 41, no. 3 (2010): 253, 254.

the Philippines in its second and third claims (while Scarborough Shoal as the eighth identified maritime feature is not located in the Spratly Islands). These seven reefs are also claimed by the Philippines as part of its KIG.

Table 1 shows the names (in Chinese, English, and Filipino) and coordinates of the eight maritime features currently occupied and claimed by the Philippines,<sup>57</sup> but contested by China. These territorial disputes are again not mentioned by the Philippines in its Notification. Hence, the disputed territories are hardly limited to the eight maritime features occupied by China and identified by the Philippines in this litigation. Due to the overall territorial disputes, the Chinese maritime claims generated by the SCS maritime features are denied by the Philippines (and some other states). Consequently, the

TABLE 1 *Names and coordinates of the islands occupied by the Philippines in the Spratly Islands.*

Chinese name	English name	Philippine name	Coordinates
Beizi Dao 北子島	Northeast Cay	Parola	11°27' N, 114°22' E
Zhongye Qunjiao 中業島	Thitu Island	Pagasa	11°01'–11°06' N, 114°11'–114°24' E
Nanyue Dao 南鑰島	Loaita Island	Dugao Kota	10°40' N, 114°25' E
Feixin Dao 費信島	Flat Island	Patag Flat	10°49' N, 115°50' E
Mahuan Dao 馬歡島	Nanshan Island	Lawak	10°44' N, 115°48' E
Xiyue Dao 西月島	West York Island	Likas	11°05' N, 115°02' E
Siling Jiao 司令礁	Commodore Reef	Rizal Reef	8°22'–8°24' N, 115°11'–115°17' E
Shuanghuang Shazhou 雙黃沙洲	Double Egg Yolk Shoal	Panata	10°42'–10°43' N, 114°19'–114°20' E

SOURCE: THE NAMES OF THE SOUTH CHINA SEA ISLANDS ARE THOSE ADOPTED BY THE PRC NATIONAL COMMITTEE ON GEOGRAPHICAL NAMES AND PUBLISHED IN THE *PEOPLE'S DAILY*, 25 APRIL 1983. THE LIST OF ALL NAMES OF SOUTH CHINA SEA ISLANDS MAY BE FOUND ONLINE: <[HTTP://WWW.UNANHAI.COM/NHZDDM.HTM](http://www.unanhai.com/nhzddm.htm)>. DOUBLE EGG YOLK SHOAL IS ALSO KNOWN AS LOAITA NAN.

57 L.B. Bautista, "The Legal Status of the Philippine Treaty Limits and Territorial Waters Claim in International Law: National and International Legal Perspectives," Ph.D. thesis, Australian National Centre for Ocean Resources & Security, Faculty of Law, University of Wollongong, 2010, available online: <<http://ro.uow.edu.au/theses/3081/>>.

maritime dispute over “the size” occurs. However, the territorial disputes have been excluded by the 2006 Chinese Declaration from the purview of an Annex VII Tribunal. The Tribunal becomes powerless to settle the entire territorial disputes *inseparable* from the disputes on maritime zonal claims the Tribunal is now called upon to settle. Hence, the first group of Philippines’ claims should not be considered as well-founded in law because the core legal basis is missing and can neither be provided by the Tribunal nor by the Philippines.

China relied on historical evidence in its 2011 Note Verbale. Such evidence aims at supporting its territorial claim over four groups of SCS islands. China uses terms like “adjacent waters” and “relevant waters” in its 2009 Note Verbale. These terms need to be understood in the context of the rights attached thereto. China said it has indisputable sovereignty over the SCS islands and the adjacent waters. There is reason to treat such adjacent waters as the Chinese territorial sea based on the Chinese 2011 Note Verbale. In that statement China said it is fully entitled to claim a territorial sea in the SCS according to UNCLOS and its domestic legislation implementing UNCLOS. Likewise, when China claims that it has relevant waters over which it enjoys “sovereign rights and jurisdiction,” it uses the terms given by UNCLOS for the EEZ and the continental shelf. Most critically, China invokes UNCLOS *before* citing two pieces of domestic legislation in its 2011 Note Verbale. Hence, it is fair to consider that China implies the EEZ and the continental shelf in its 2009 Note Verbale.<sup>58</sup> All are surrounding “China’s” four groups of islands and maritime features located in the SCS.

Secondly, looking at its 2009 Note Verbale, China did attach a map with the U-shaped line. But China did not say that its SCS maritime claims of adjacent waters and relevant waters are based on, within, or encompassed by the U-shaped line. It was said by the 2009 Chinese Note Verbale that,

China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (*see attached map*). The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>59</sup>

Emphasis added

The second page of the 2009 Chinese Note Verbale contains the map reproduced in Figure 2.

<sup>58</sup> Also see Z.G. Gao and B.B. Jia, “The Nine-Dash Line in the South China Sea: History, Status, and Implications,” *American Journal of International Law* 107 (2013): 98, 109.

<sup>59</sup> See Note Verbale, n. 49 above.



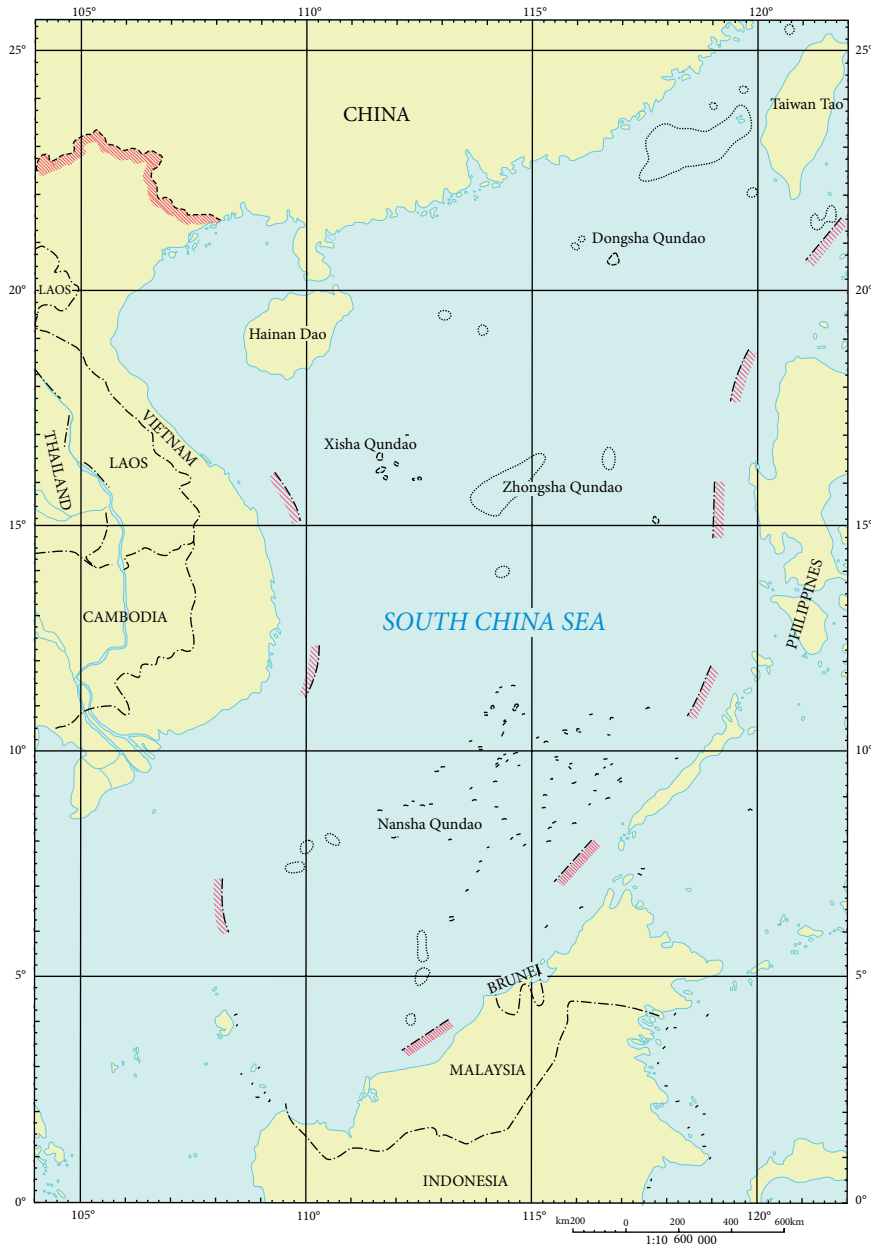


FIGURE 2 *Map provided by China in its 2009 Note Verbale.*  
SOURCE: CHINESE (PRC) GOVERNMENT RELEASED IN 2009 IN ITS NOTE VERBALE DELIVERED TO THE UNITED NATIONS.

What China said here is that it has sovereignty over the four groups of islands<sup>60</sup> enclosed by the U-shaped line shown in Figure 2. The 2009 Chinese Note Verbale did not claim the entire SCS waters as *based on, within, or encompassed by* the U-shaped line. What was said is “see attached map,” which indicated four groups of islands on the map over which China claims territorial sovereignty as well as maritime areas *attached to* these maritime features.

Three important messages can be seen from closely examining the first sentence: “China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (*see attached map*).”

- (1) The location of the full-stop (period) of the first sentence is critical. It is not placed in the middle of the sentence, namely, right after the words “adjacent waters.”
- (2) The word “China” does not reappear between the words “and” and “enjoys.”
- (3) The word “and” lies between “waters” and “enjoys.”

Most critically, U-shaped line as a special term was not even mentioned by the 2009 and 2011 Chinese Notes Verbales. All of these factors undermine the Philippines’ point that China uses the U-shaped line to enclose the water it claims.

Thirdly, the U-shaped line upon its genesis was not meant to be a line enclosing water over which China made maritime zonal claims. It was a line indicating the maritime features over which China claims territorial sovereignty. The original 1948 map showing the U-shaped line published by the Republic of China (ROC) government is entitled “Location Map for the SCS Islands (南海諸島位置圖),” and is shown in Figure 3.<sup>61</sup>

Notably, the last two dashes on the northeastern side indicated in the map separate the Island of Taiwan from the Philippines. Why was Taiwan, which has never been part of SCS islands, enclosed by these two dashes? What does the time of production of the map imply?

60 They are Dongsha, Xisha, Zhongsha and Nansha Qundao. Qundao means archipelago in Chinese.

61 This well-known map was produced by the Ministry of the Interior of the ROC government in December 1946. See the tiny Chinese words at the right hand side of the map. It was kept in the archives of the Presidential Office in Taiwan, serial no. 50082355. This map was published in 1948. See Gao and Jia, n. 58 above, p. 109.

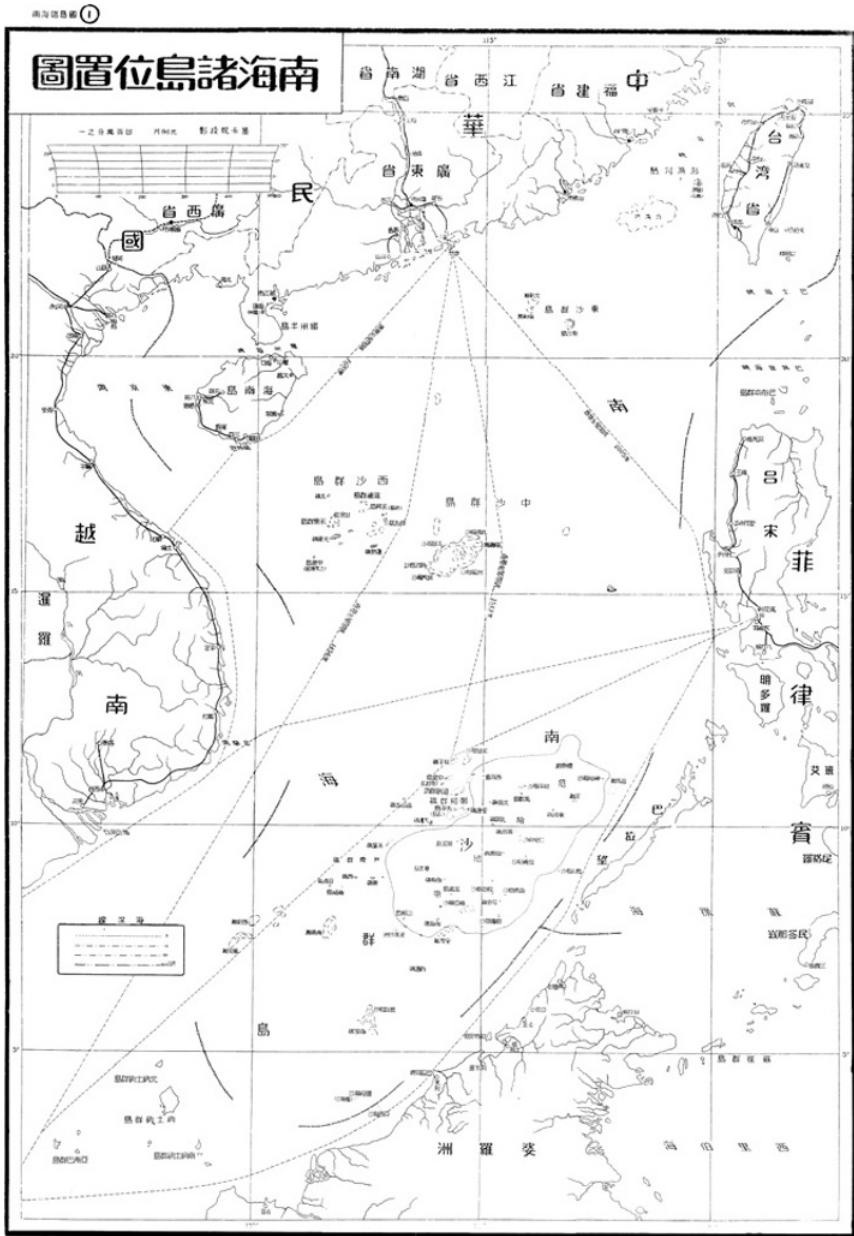


FIGURE 3 *The 1948 location map for the South China Sea Islands.*  
SOURCE: DRAWN BY THE DIVISION OF TERRITORY AND BOUNDARY, MINISTRY OF THE INTERIOR, DECEMBER 1946 (THE 35TH YEAR OF THE REPUBLIC OF CHINA). CHINESE (ROC) GOVERNMENT (PUBLISHED IN 1948).

The timing of production and publication of this map in December 1946 and 1948, respectively, was important. It was after the Japanese unconditional surrender (on September 2, 1945),<sup>62</sup> but before the San Francisco Peace Conference.<sup>63</sup> China then intended to show publicly that, in the name of reversion, it had already taken back from Japan, *inter alia*, the territory of Taiwan, making it part of China again after a long struggle with Japan. The action taken by China was different from what a military occupant could normally do in terms of military occupation under international law.<sup>64</sup> What the then Chinese government (ROC) did to Taiwan on October 25, 1945<sup>65</sup> was an *annexation*,<sup>66</sup> changing the international legal status of Taiwan from Japanese to Chinese. The reversion by annexation was (i) coupled with acquiescence by the major Allied Nations, like the United States,<sup>67</sup> the United Kingdom,<sup>68</sup> and Japan (that

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- 62 See Surrender by Japan: Terms between the United States of America and the Other Allied Powers and Japan, Department of State Publication 2504, Executive Agreement Series 493 (September 2, 1945), available online: <<http://www.taiwandocuments.org/surrender01.htm>>.
- 63 On September 8, 1951, the Treaty of Peace with Japan was signed at San Francisco. The treaty entered into force on April 28, 1952. See: 136 *United Nations Treaty Series* 1952 (reg. no. 1832), pp. 45–164.
- 64 See Lord McNair and A.D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge: Cambridge University Press, 1966), p. 368; L. Oppenheim, *International Law*, Vol. II, 7th ed., H. Lauterpacht, ed. (London: Longmans Green & Co. 1952), p. 433; E. Castren, *The Present Law of War and Neutrality* (Helsinki: Suomalainen Tiedakkemia, 1954), p. 217; also see *L. v. N. (Bulgarian Occupation of Greece)*, Greece, Court of Appeal of Thrace, Judgment No. 21 of 1947, in 14 *Annual Digest* (1947) 242; see also R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), p. 5.
- 65 See Statement by Chen-I made at the Japanese Surrender Ceremony in Taipei. Reprinted in Hungdah Chiu, ed., *China and the Question of Taiwan: Documents and Analysis* (New York: Praeger, 1973), pp. 212–213. The 25th of October had been since declared by the ROC government to be “Taiwan’s Retrocession Day,” a national holiday. See Government Information Office (the ROC), *The Republic of China Yearbook 1993* (Taipei, 1993), p. 819.
- 66 See R.L. Bindschedler, “Annexation,” in *Encyclopedia of Public International Law*, Vol. 3 (Heidelberg: Max Planck Institute for Comparative Public Law, 1982), p. 19.
- 67 See G.H. Kerr, *Formosa Betrayed* (Northampton: John Dickens & Co Ltd., 1965), pp. 112, 206. See *United States Relations with China*, US Department of State Publication No. 3573 (1949), 565, 936–938 and 759–760. As quoted from Tung-Pi Chen, “Legal Status of Formosa,” *Philippine International Law Journal* 4, nos. 1 and 2 (1965): 99 at p. 132. L.C. Green, “Representation versus Membership: The Chinese Precedent in the United Nations,” *Canadian Yearbook of International Law* 10 (1972): 102 at p. 120.
- 68 See D.P. O’Connell, *International Law*, Vol. 1, 2nd ed. (London: Stevens & Sons, 1970), p. 154. In September 1949, the British government made it clear that “it believed the strategic

had been sovereign over Taiwan since 1895);<sup>69</sup> (ii) supported and forecasted by the Cairo Declaration and Potsdam Declaration;<sup>70</sup> and (iii) thus legalized under international law. This was a matter to handle cautiously for the Chinese government, which needed to declare that it had already re-acquired the territorial sovereignty over, *inter alia*, Taiwan prior to the Peace Conference.

As shown by the archive, in 1947 when the ROC officials were contemplating on *whether* to publish such a map with the U-shaped line and *where* to draw the U-shaped line on the map, their concerns were about how to secure SCS territories just recovered from Japan in 1946,<sup>71</sup> but not maritime areas surrounding those islands, let alone making maritime zonal claims.<sup>72</sup> If compared

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island of Formosa should remain Chinese – even if the Communists took over control there.” See *The New York Times* (September 23, 1949). As quoted from L.C. Green, *id.*

69 Seven years later in its 1952 Peace Treaty with the ROC, Japan agreed to the following provision: “Article X: For the purpose of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendants who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and juridical persons of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).” [Emphasis added]

70 See United States-China-Great Britain-Soviet Union, Unconditional Surrender of Japan, reprinted in *American Journal of International Law Supplement* 39 (1945): 264. M.M. Whiteman, *Digest of International Law*, Vol. 3 (Washington, 1964), pp. 478–479, 484–485.

71 The recovery was also based on the Cairo Declaration and the Potsdam Proclamation. See Gao and Jia, n. 58 above, p. 102. By the time the Chinese Navy arrived on the Spratly Islands and Paracels, Japanese troops had already left the islands. See Heinzig, n. 55 above, pp. 31, 39; Hu, n. 54 above, p. 207; K.H. Wang, “The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea,” *Ocean Development & International Law* 41, no. 3 (2010): 237, 243.

72 On April 14, 1947, a meeting was held in the ROC Ministry of the Interior then located in Nanking. The meeting was attended by the Ministries of National Defense, Foreign Affairs and the Interior, as well as the Naval Commander-in-Chief Office. The topic of the meeting was “On the Confirmation and Publication of the Sphere and Sovereignty of Chinese Xisha and Nansha Archipelagos (西南沙群島範圍及主權之確定與公布案).” It was decided that such confirmation and publication did not involve the Chinese territorial sea in the SCS. Another important decision was that the southern limit of Chinese territorial sovereignty in the SCS is the James Shoal, which had been sanctioned by the Ministry of the Interior and published by the Chinese government and used by all government agencies and schools nationwide for a long time. Based on these decisions, the “Location Map for SCS Islands” was published later in 1948. The minutes of the meeting were

with the 1945 Truman Proclamations<sup>73</sup> and the contemporary maritime zonal declarations by other states,<sup>74</sup> the 1948 Chinese map obviously fell short of an average or proper maritime zonal claim. Later on, when succeeding the ROC as the legitimate representative of the State of China, the PRC government took over the U-shaped line as well as the SCS territorial claims, maintaining such claims ever since.<sup>75</sup>

In fact, China started to make SCS territorial claims much earlier than 1948. The map shown in Figure 4 below was produced and published in 1935 by the Review Committee for the Land and Water Maps (水陸地圖審查委員會), established by the then ROC government.<sup>76</sup> Side by side, a list of names of SCS maritime features claimed by China was also published by the same Committee in both Chinese and English.<sup>77</sup> The U-shaped line was not on the

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forwarded by the Ministry of the Interior on April 17, 1947 to the Ministries of National Defense, Foreign Affairs, Agriculture and Forests, as well as the Naval Commander-in-Chief Office, and the Government of Canton Province. The serial no. of this letter is 0434. A copy of the document is on file with the author. Also see Gao and Jia, n. 58 above, p. 102 (particularly footnote 29 and the corresponding text). Also see Zou, n. 4 above, p. 19.

73 Harry S. Truman, "Proclamation 2667 – Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," September 28, 1945, Online by G. Peters and J.T. Woolley, *The American Presidency Project*, available online: <<http://www.presidency.ucsb.edu/ws/index.php?pid=12332>>. Another proclamation made by President Truman in 1945 was Proclamation No. 2668, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 FR 12304, 3 CFR, 1943–1948 Comp., p. 68. Available online: <<http://www.archives.gov/federal-register/codification/proclamations/02668.html>>.

74 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), pp. 144, 160.

75 In 1952, 1963, 1973, 1976, 1987, and 2003, the PRC government had issued six maps on the SCS, which all contain the same U-shaped line as the 1948 location map for South China Sea Islands published by the ROC government. The 1952 map is available online: <<http://www.unanhai.com/a/nanhaiditu/2012/0708/1952nanhaiditu.html>>. The maps for the subsequent years are also available online: <<http://www.unanhai.com/a/nanhaiditu/2012/0708/1963nanhaiditu.html>>; <<http://www.unanhai.com/a/nanhaiditu/2012/0708/1972nanhaiditu.html>>; <<http://www.unanhai.com/a/nanhaiditu/2012/0708/1976nanhaiditu.html>>; <<http://www.unanhai.com/a/nanhaiditu/2012/0708/1987nanshaditu.html>>; <<http://www.unanhai.com/a/nanhaiditu/2012/0708/2003nanhaiditu.html>>. See also Heinzig, n. 55 above, p. 38.

76 See *Journal of the Review Committee for the Land and Water Maps*, Vol. 2 (April 1935), 68–69. The journal is on file with the author. Also see Gao and Jia, n. 58 above, p. 102.

77 The list is called "Table of Chinese and English Names for Chinese Islands in the South China Sea." This table was approved by the Review Committee on December 21, 1934. Id., pp. 61–65, 98. The journal is on file with the author. Also see Zou, n. 4 above, p. 19.



map. However, the map together with the “list of names” fully demonstrate and specify each of the Chinese SCS territorial claims in the 1930s. The 1935 map was the basis for China to produce in 1946 and publish in 1948 the map in Figure 3.<sup>78</sup> Besides, the 1935 map was implied in the 2011 Chinese Note Verbale, as it said that “since 1930s, the Chinese Government has given publicity several times the geographic scope of China’s Nansha Islands and the names of its components.”

Therefore, the U-shaped line issue should be considered an issue of China’s territorial claims, whose legality can hardly be judged according to UNCLOS. As the Philippines is applying the inapplicable rule (UNCLOS), the second claim becomes not well-founded in law.

The Philippines may argue that, even if U-shaped line was originally meant to be a territorial claim, it has been transformed into a maritime claim. The Philippines may contend that the choice of ambiguous wording (“relevant waters”) in the 2009 and 2011 Chinese Notes Verbales signifies Chinese historic water claims in the SCS.<sup>79</sup>

If such a view were accepted by the Tribunal, the legality of the U-shaped line to be judged according to UNCLOS would then become an issue concerning historical titles under Article 298(1)(a)(i) of UNCLOS. As has been carved out from the jurisdiction of an Annex VII Tribunal by the 2006 Chinese

78 Readers may wonder why the 1948 map has the U-shaped line, while the 1935 map does not. A map of territorial claims over numerous maritime features in the SCS without any encircling line was not good enough, even if accompanied by a list of Chinese and English names of the maritime features. The reason for China to produce this 1935 map was because France claimed to occupy certain SCS islands in 1932–1933, while China did not know whether those islands were Chinese. The names of islands given by France were alien to China. Eventually, it became hard for China to know whether *any* foreign nation claiming to occupy a SCS island with an unknown name had violated Chinese territorial sovereignty. This explains why in 1946 when the map was produced, the U-shaped line was installed. It supports the point that the 1948 map which first contains the U-shaped line was not a map of maritime claims simply because of the presence of the U-shaped line. See also Gao and Jia, n. 58 above, p. 102–103 (especially footnote 26).

79 Gao and Jia, n 58 above, p. 108. Also see F. Dupuy and P.-M. Dupuy, “A Legal Analysis of China’s Historic Rights Claim in the South China Sea,” *American Journal of International Law* 107 (2013): 124, 129–130, 135. Also see R. Beckman, n. 55 above, 155–156; Zou, n. 4 above, p. 18–19, 21–22, 28. M. Miyoshi, “China’s ‘U-Shaped Line’ Claim in the South China Sea: Any Validity under International Law?,” *Ocean Development & International Law*, 43, no. 1 (2012): 1, 3–4; E. Franckx and M. Benatar, “Dots and Lines in the South China Sea: Insights from the Law of Map Evidence,” *Asian Journal of International Law*, 2 (2012): 89, 93.



Declaration, this dispute may not be settled by the present Tribunal.<sup>80</sup> It is discussed later in this article.

To conclude, the foregoing legal problems make it doubtful that the first group of the Philippines' claims is legally sound. Besides, the facts on which these claims are based seem unsupported by convincing evidence. Therefore, it is hard to consider these claims as well-founded in fact and law.

### *The Second Group of Claims Concerning Four Low-Tide Elevations*

The second group of Philippine claims tackles the Chinese-occupied Mischief, McKennan, Gaven and Subi Reefs, and the maritime zones surrounding them.

According to the fourth Philippine claim, these four reefs are submerged features not above sea level at high tide that should neither be deemed as islands nor rocks according to Article 121 of UNCLOS. All of them are *not* located on China's continental shelf. The fifth Philippine claim argues that the Mischief and McKennan Reefs are part of the Philippines' continental shelf. The fourth and fifth reliefs request the Tribunal to make a declaration that, having violated Philippine sovereign rights, China's occupation of the Mischief and McKennan Reefs, as well as construction activities taken thereon, are unlawful and should be ended. The sixth and seventh reliefs request the Tribunal to declare that China's same conduct with respect to the Gaven and Subi Reefs, which are not part of its continental shelf, are unlawful and shall be terminated, too.<sup>81</sup>

Being components of a Sino-Philippine contention, these Philippine claims and relief sought are supposed to counter China's following claims:

- (i) the four reefs are located on China's continental shelf, which entitles China to claim and exercise maritime jurisdiction under UNCLOS over the seabed areas surrounding them;
- (ii) the four reefs should be considered as islands or rocks defined by Article 121 of UNCLOS that may generate for China considerable maritime zones of their own, like the territorial sea, the EEZ or continental shelf; and
- (iii) the Mischief and McKennan Reefs are not part of the continental shelf of the Philippines.

<sup>80</sup> Zou, *id.*, p. 29; Miyoshi, *id.*, p. 10.

<sup>81</sup> To be noted, the Philippines is applying rules of state responsibility for an internationally wrongful act here. See n. 48 above.

The Philippines denies all these claims, based on

- (i) the application of the rule in the third Philippines' claim to these four alleged "low-tide elevations";
- (ii) that the other four maritime features identified by the third group of claims are rocks capable of generating a 12-NM territorial sea only, and the territorial sea so generated cannot cover the maritime areas surrounding the four reefs under the second group of claims;
- (iii) even if those four features under the third group of claims were islands, the EEZ and continental shelf generated thereby could not be considered as Chinese, as the Philippines denies Chinese territorial claims over those four "islands"; and
- (iv) apart from those eight maritime features occupied and claimed by China as indicated by the Notification, China's territorial claims over the *remaining* maritime features located in the Spratly Islands are inadmissible or non-existent in this litigation.

The rule invoked by the third Philippine claim reads:

Submerged features in the SCS that are not above sea level at high tide, and are not located in a coastal State's territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State's continental shelf under Part VI of the Convention.

Being the third Philippine claim, such a rule is supposed to challenge China's claim or position that opposes this rule. This can hardly be the case. The following legal problems will probably preclude the second group of the Philippine claims from being well-founded in fact and in law.

First, although the rule is legally sound,<sup>82</sup> the third claim containing the rule is not contesting any claim China has made. No evidence has been provided to prove that the third Philippines' claim, being a counterclaim, is challenging anything real. Consequently, the third Philippine claim should be considered unfounded in fact.

Secondly, it seems that the Philippines has not released the whole truth in the Notification. The Chinese territorial claims over SCS maritime features are not limited to those eight identified by the second and third Group of Philippine claims (see Figure 1 and Table 1).

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<sup>82</sup> Beckman, n. 55 above, pp. 150, 152–153.

For the purpose of this litigation, China claims territorial sovereignty over *all* maritime features in the Spratly Islands (part of which is KIG) and Scarborough Shoal. Quite a few good-sized islands located among the Spratly Islands may lawfully generate the EEZ and continental shelf on which these four maritime features stand.<sup>83</sup>

Being incapable of settling such overall Sino-Philippine territorial disputes and, *a fortiori*, rejecting these Chinese territorial claims, the Tribunal should not hold that China's territorial claims over all the foreign-occupied maritime features in the Spratly Islands are groundless, inadmissible or ignorable. Equally unfair would be to deny that Mischief, McKennan, Gaven and Subi Reefs are located on the continental shelf that China may claim in the SCS.

As the Philippines does not show the Tribunal the whole picture, such Chinese territorial claims may *in fact* be dismissed or ignored by the Tribunal. The Philippine claims challenge the *alleged* Chinese claim that these four reefs may generate maritime zones of their own under UNCLOS, including the EEZ and continental shelf. However, China *need not* rely on them to claim the EEZ or the continental shelf surrounding these four reefs. The Philippines' failure in notifying the Tribunal of the entire Chinese territorial claims in the Spratly Islands may justify the ruling that its fourth claim is not well-founded in fact.

Thirdly, the Philippines fails to indicate Taiwan-occupied Itu Aba (or Taiping) Island in its Notification, as it should. On June 9, 1975, the Philippines and the PRC signed a Joint Communiqué to establish diplomatic relations at the ambassadorial level. It was declared by the Philippines that:

*The Philippine Government recognizes the Government of the People's Republic of China as the sole legal government of China, fully understands and respects the position of the Chinese Government that there is but one China and that Taiwan is an integral part of Chinese territory, and decides to remove all its official representations from Taiwan within one month from the date of signature of this communiqué.*<sup>84</sup>

Emphasis added

Clearly, the Philippines respects the Chinese territorial claim and, *a fortiori*, may not deny that Taiwan forms part of the State of China. Besides, the

83 J.W. McManus, K.T. Shao and S.Y. Lin, "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan," *Ocean Development & International Law*, 41, no. 3 (2010): 270, 271.

84 Joint Communiqué of the Government of the People's Republic of China and the Government of the Republic of the Philippines (Peking, June 9, 1975), available online: <<http://ph.china-embassy.org/eng/zfgx/zzgx/t183265.htm>>.

Philippines respects the “One China Policy” and, therefore, may not recognize the independence of Taiwan,<sup>85</sup> which has actually not been proclaimed by Taiwan.<sup>86</sup> Hence, the islands claimed and occupied by the ROC in Taiwan, including Itu Aba,<sup>87</sup> should be considered as territories of the State of China opposable to the Philippines under international law.

As a proper island, Itu Aba<sup>88</sup> is located at 10°23' N and 114°22' E,<sup>89</sup> less than 200 NM from each of the seven maritime features identified by the Philippines in its second and third group of claims. The map in Figure 5 and Table 2 below show the relative geographical positions and distance between Itu Aba and each of the seven maritime features.

The eight maritime features identified by the Philippines in the present case are claimed by China and the Philippines. This fact did not prevent the Philippines from mentioning these maritime features in the Notification. Why did the Philippines leave out the name of Itu Aba and the rest of islands unoccupied by China in the Spratly Islands? Itu Aba is an island fulfilling every condition under Article 121(1) of UNCLOS.<sup>90</sup> The four reefs identified in the second group of claims are all within 200 NM from Itu Aba. Therefore, the second group of claims that these four reefs are not located on China's continental shelf is (i) unfounded in fact as it omits the vital factor of Itu Aba and other nearby islands claimed by China, and (ii) unfounded in law as such an omission of the Philippines violates the one-China commitment it has given to the PRC since 1975.

Fourth, the fifth Philippine claim said that Mischief and McKennan Reefs are part of the Philippines' continental shelf under Part VI of the Convention. However, no record shows that China has denied that the Philippines, as another contracting party to UNCLOS, may make such a claim from its baseline in accordance with UNCLOS, provided these two reefs are low-tide

85 Even the United States, the biggest ally of and weapon provider for Taiwan, does not give such recognition. See, T.J. Christensen, Deputy Assistant Secretary of State, “A Strong and Moderate Taiwan,” Presentation to the Defense Industry Conference held by the U.S.-Taiwan Business Council on September 11, 2007 in Annapolis, Maryland, available online: <[http://www.us-taiwan.org/reports/2007\\_sept11\\_thomas\\_christensen\\_speech.pdf](http://www.us-taiwan.org/reports/2007_sept11_thomas_christensen_speech.pdf)>.

86 J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2006), pp. 198–221; A.V. Lowe, *International Law* (Oxford: Oxford University Press, 2007), pp. 165.

87 Heinzig, n. 55 above, p. 35.

88 Beckman, n. 55 above, p. 144.

89 See online: <<http://www.globalsecurity.org/military/world/taiwan/taiping.htm>>.

90 R.W. Smith, “Maritime Delimitation in the South China Sea: Potentiality and Challenges,” *Ocean Development & International Law* 41, no. 3 (2010): 214, 222.

elevations. Since the fifth Philippine claim is not challenging any Chinese claim that exists, it is difficult to consider this claim well-founded in fact. In conclusion, the second group of the Philippine claims is not well-founded in fact and law.

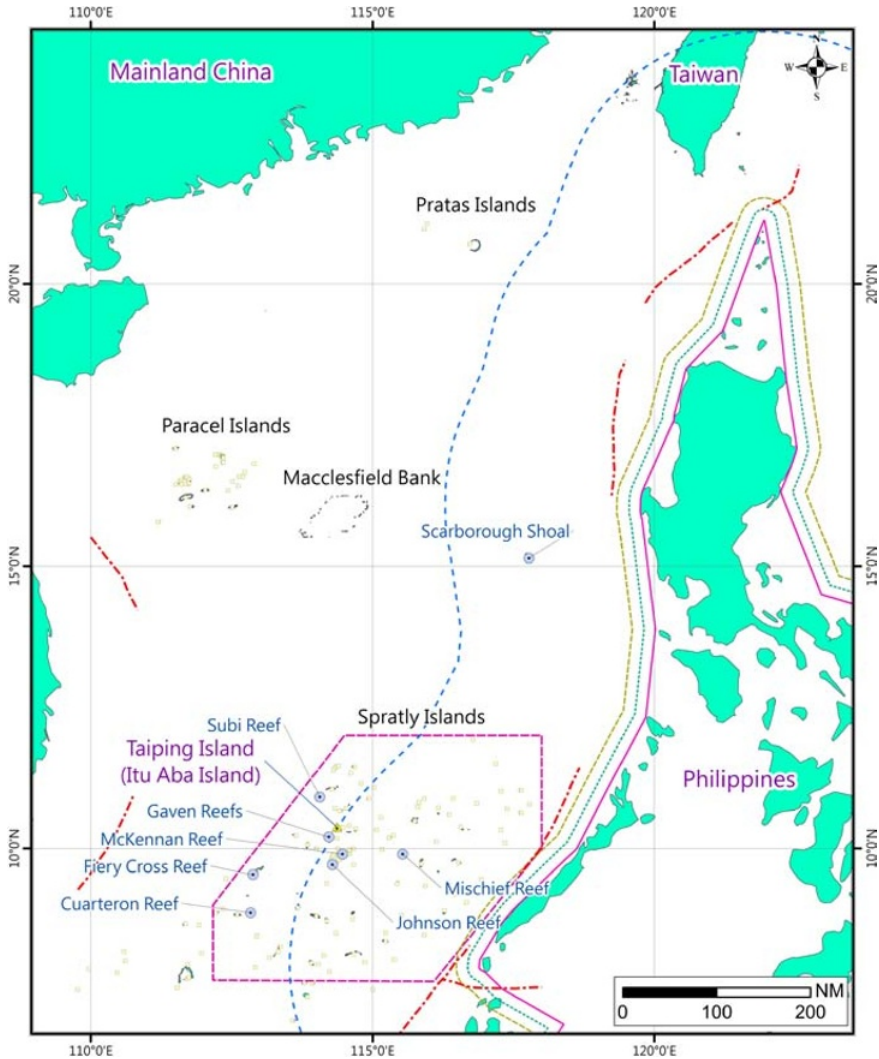


FIGURE 5 Location map of Itu Aba and the eight reefs identified by the Philippines.

SOURCE: PREPARED FOR THE AUTHOR BY MR. JUI-HSIEN HUANG.

TABLE 2 *Distance between Itu Aba and each of the seven reefs in the Spratly Islands.*

Maritime features	Location	Distance from Itu Aba (NM)	Position in Philippine claim
Mischief Reef	9°54' N, 115°32' E	74.7	4th–5th claims
McKenna Reef	9°53' 5" N, 114°28' E	29	
Gaven Reef	10°13' N, 114°13' E	12.9	4th claim
Subi Reef	10°55' N, 114°05' E	36.7	
Johnson Reef	9°42' N, 114°22' E	39.7	6th–7th claims
Cuarteron Reef	8°51' N, 112°50' E	128.2	6th claim
Fiery Cross Reef	9°33' N, 112°54' E	78.8	

### *The Third Group of Claims Concerning the “Rock” Status of Four Reefs*

In the third group of claims, another four reefs are covered, namely, Scarborough Shoal<sup>91</sup> and the Johnson, Cuarteron and Fiery Cross Reefs. All of them are occupied by China, which claims large maritime zones *from* these reefs, as perceived by the Philippines.

Here, the sixth Philippine claim and the eighth relief requests the Tribunal to declare that (i) Scarborough Shoal and the Johnson, Cuarteron and Fiery Cross Reefs shall qualify as rocks under Article 121(3) of UNCLOS, (ii) they are only capable of generating entitlement to a 12-NM territorial sea and nothing else, and (iii) China has unlawfully claimed maritime entitlements beyond 12 NM *from* these four maritime features.

The seventh claim argues that China has unlawfully prevented Philippine vessels from exploiting the living resources in waters adjacent to Scarborough Shoal and Johnson Reef.

Therefore, in the ninth relief the Philippines requests the Tribunal to require China to refrain from (i) preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef, and (ii) conducting other activities inconsistent with UNCLOS at or in the vicinity of all the four features.

Once again, to examine whether such Philippine claims are well-founded in fact, we need to see what claims China must have made that are challenged. According to the Philippines, China must have claimed that (i) the four

91 Beckman, n. 55 above, p. 145.

maritime features are islands capable of generating maritime zones larger than 12 NM, and (ii) China legally enjoys maritime zones like the EEZ or continental shelf extending *from* these four features. Such “Chinese” positions are neither correct nor a complete picture of the situation.

First, no evidence proves that China claims an EEZ or continental shelf in the SCS extending *from* or generated *by* these four maritime features. Furthermore, it seems unlikely for the Philippines to find such evidence. In terms of the maritime areas where the Spratly Islands are situated, China need not rely on the Johnson, Cuarteron and Fiery Cross Reefs to generate the EEZ or continental shelf, regardless whether these three maritime features are considered as rocks or islands under Article 121 by the Tribunal.

There are several islands fulfilling every condition of Article 121(1) that China can use to claim the EEZ or continental shelf to cover the water and seabed surrounding Johnson, Cuarteron and Fiery Cross Reefs. The island of Itu Aba is a perfect example.<sup>92</sup> However, these factors are not mentioned by the Philippines in its Notification.

Consequently, the third group of the Philippine claims is not well-founded in fact. Besides, the sixth Philippine claim is unfounded in law like the fourth claim just discussed because the omission of Itu Aba by the Philippines is inconsistent with the Philippines’ one-China commitment.

Second, concerning the alleged Chinese activities in preventing Philippine vessels from exploiting the living resources in the waters adjacent to or in the vicinity of the four “rocks,” the Philippines again fails to inform the Tribunal of the real cause. The situations are attributable to a set of compound SCS disputes China has with the Philippines and other states: (i) territorial disputes over all the maritime features in the KIG and Scarborough Shoal for the purpose of the present litigation; and (ii) maritime boundary delimitation disputes for the overlapping maritime zones extending from the disputed maritime features claimed by China and from the Philippines’ archipelagic baselines.

Since the third group of the Philippine claims omits the factual situations facing both China and the Philippines, it seems unreasonable to consider such claims as well-founded in fact. As the overall disputed situations of overlapping maritime areas are not presented to the Tribunal by the Philippines, the Sino-Philippine legal relation as formulated by the Philippines turns into the one between a non-coastal state (China) and a coastal state (the Philippines), instead of a relation between two coastal states. This incorrect

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92 There are more examples, such as Thitu Island (or Zhongye Dao, Pagasa Island), see Smith, n. 90 above, p. 222.

characterization of the legal relations between the two disputing parties makes it hard to consider the third group of Philippine claims well-founded in law.

*The Fourth Group of Claims Concerning the Philippines' Entitlement to Maritime Zones*

In the eighth claim and the tenth relief, the Tribunal is requested to declare that the Philippines is entitled under UNCLOS to a 12-NM territorial sea, a 200-NM EEZ, and a continental shelf measured from its archipelagic baselines. The ninth claim and the eleventh relief requests the Tribunal to declare that China has unlawfully claimed and exploited the living and non-living resources in the Philippine EEZ and continental shelf, and has unlawfully prevented the Philippines from exploiting living and non-living resources therein.

To answer the question as to whether such claims are well-founded in fact or in law, we still need to see which Chinese claims, from the Philippines' perspective, constitute the object contested here. In the eyes of the Philippines, China must have said that (i) the Philippines is *not* entitled under UNCLOS to a 12-NM territorial sea, a 200-NM EEZ, and a continental shelf measured from its archipelagic baselines; and (ii) China has lawfully claimed and exploited the living and non-living resources in the very maritime area not considered as the Philippine EEZ and continental shelf, and lawfully prevented the Philippines from exploiting living and non-living resources therein. However, these so-called Chinese claims are both factually incorrect and based on a mischaracterization of Sino-Philippine legal relations.

First, it will be hard to prove that China has denied Philippines' right to claim a territorial sea, EEZ and continental shelf, as implied by the Philippine claims. No evidence has been presented so far. It is unlikely that such evidence will be found.<sup>93</sup> Hence, it is hard to consider the eighth Philippine claim, as a component to create a Sino-Philippine contention, well-founded in fact.

As mentioned, the real SCS disputes China has with the Philippines are maritime delimitation disputes harboring territorial disputes over all the maritime features in the KIG (part of the Spratly Islands) and Scarborough Shoal. This can better explain the confrontations indicated by the ninth claim and the eleventh relief of the Philippines.

Secondly, the Philippines' explanation for the confrontations is less convincing. As implied by the Philippines, China is not a coastal state in the relevant area as it may not claim an EEZ or continental shelf, except for the territorial seas surrounding the four *disputed* rocks under the third group of Philippine claims. However, the Tribunal is powerless to endorse such a

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93 Beckman, n. 55 above, p. 146.



characterization (that China is not a coastal state), as a preliminary judicial settlement must have been made by the Tribunal on the Sino-Philippine territorial disputes over all the maritime features in the KIG and Scarborough Shoal *in favor of the Philippines*. The Tribunal simply cannot make such a decision in the Philippines' or China's favor, as the power to make such a decision has been removed by, *inter alia*, the 2006 Chinese Declaration.

Therefore, the only option left seems to be for the Tribunal to accept China as a coastal state for the purpose of this litigation. Accordingly, the Tribunal must attribute the confrontations under the fourth group of Philippine claims to China's and Philippines' overlapping maritime claims. Such a decision finds support from China's time-honored SCS territorial claims.

It follows that those activities complained of in the ninth Philippine claim are not due to the false accusation of China denying the Philippines' entitlement to claim those maritime zones. The real reason is that the compound Sino-Philippine maritime delimitation disputes harboring territorial disputes remain *unsettled*.

To conclude, the fourth group of the Philippines' claims counters against some positions that China does not take in reality. Being hard to constitute any dispute, these Philippines' claims do not seem well-founded in fact. Besides, the premise of the fourth group of claims is China being given the legal status as a non-coastal state in the areas concerned. It seems impossible for the Tribunal to accept this assumption. This would render the fourth group of claims not well-founded in law either.

#### *The Fifth Group of Claims Concerning the Philippines' Right to Navigation*

In the fifth group of claims, the tenth claim argues for and the twelfth relief requests the Tribunal to declare that China has unlawfully interfered with the Philippines' exercise of its rights to navigation and other rights under UNCLOS in areas within and beyond the Philippines' EEZ. The thirteenth relief requests the Tribunal to require that China desist from these unlawful activities.

Several legal problems exist that may render these claims unfounded in fact and in law. To begin with, legal errors may exist in the choice of UNCLOS provisions to build up such claims. Judging by the formulation of these claims and reliefs, Articles 58<sup>94</sup> and 78(2)<sup>95</sup> probably serve as the legal bases of such complaints against China. According to these two articles, it is non-coastal states whose rights and high seas freedoms are protected. However, the

94 UNCLOS, n. 12 above.

95 *Id.*

presupposition of the fifth group of claims is that China has violated the Philippines' rights. But is the Philippines a non-coastal state in the region? Does the Philippines recognize China as a coastal state in the SCS whose EEZ and continental shelf were entered by the Philippines' vessels exercising high seas freedoms?

The third group of Philippine claims contends that China is not entitled to claim an EEZ and continental shelf in the Spratly Islands and surrounding Scarborough Shoal, apart from the four circles of territorial sea generated by the four disputed rocks identified thereby. The fourth group of Philippine claims requests the Tribunal to declare that the Philippines is entitled to an EEZ measured from its archipelagic baselines. The Philippines seems to argue that China should be considered as a non-coastal state incapable of claiming an EEZ and continental shelf within the EEZ of the Philippines. Following such a position and applying Articles 58 and 78(2), it would be the rights of China and other "non-coastal states" that are protected in the fifth group of Philippine claims. If this is correct, then the fifth group of Philippine claims becomes meaningless.

Assuming that China has no EEZ and continental shelf as contended by the Philippines in its third and fourth group of claims, China may not qualify as a coastal state whose exercise of EEZ and continental shelf sovereign rights and jurisdiction is limited by Articles 58 and 78(2). If China is absolved of the duties, it becomes impossible for China to violate these two articles.

A legally irreconcilable situation thus arises between the fifth group of Philippine claims and the third and fourth group of its claims. It is unfair to say that the fifth group of Philippine claims is well-founded in law since the legal grounds used by the fifth group of claims would be rendered inapplicable in the context of the Philippine claims as a whole, provided Articles 58 and 78(2) are invoked as the legal grounds.

Alternatively, if China is recognized as a coastal state entitled to claim an EEZ and continental shelf for the purpose of the fifth group of claims, certain critical points remain missing. The Philippines has not identified (i) the *location* where such "Chinese interference" occurred, (ii) the *Chinese actions* considered to have interfered with the Philippines' exercise of high seas freedoms, and (iii) the specific Philippines' *high seas freedoms* interfered with.

Besides, no evidence proves that the pre-conditions for such submission of disputes to the Tribunal have been met, for example, Section 1 Means have been utilized by both states while the dispute remains unsettled. Marine scientific research activities are a possible example. Such activities conducted or authorized by the Philippines focusing on natural resources in the subsoil of submerged banks within 200 NM from islands over which China claims

territorial sovereignty without China's consent would be viewed by China as an infringement of its sovereign right or jurisdiction under UNCLOS.<sup>96</sup> The Chinese interference with such Philippines' high seas freedoms' may be justified under Article 246 of UNCLOS.

The Philippines may probably contend that the location of such interference should not be considered China's but rather the Philippines' continental shelf. Then the impossible issues of unsettled territorial and boundary delimitation disputes incapable of settlement by the Tribunal reoccur. Depending on the *location* eventually indicated, China may probably identify some islands in the Spratly Islands that it has *claimed* and then argue that the 200-NM continental shelf surrounding those islands covers the *location*.

The Philippines may contend that territorial disputes are not submitted to the Tribunal for settlement, so the islands in the Spratly Islands region generating a 200-NM continental shelf for China can neither be considered Chinese nor used by China for the sake of argument. The "location" should therefore be considered by the Tribunal as non-Chinese.

As already argued, such a possible contention is far from justified. Since the Tribunal is powerless to settle territorial and boundary delimitation disputes, it would be unreasonable to deny the "location" as Chinese continental shelf, provided it is within reach of 200 NM from Itu Aba, or other "islands" claimed by China located in the Spratly Islands. Therefore, these Philippine arguments should be considered as not well-founded in law, as the missing legal basis to support the Philippines' claim cannot be given by the Tribunal.

### *Summary of All Five Groups of the Philippine Claims*

Having examined all five groups of Philippines' claims contained in its Notification dated January 22, 2013, it would be unjustified to say that the first to tenth claims are well-founded in fact, and that the second, fourth, sixth, seventh, ninth and tenth claims are well-founded in law. Specifically, the first, third, fifth, and eighth Philippine claims assert something China does not oppose. For the second Philippine claim, it denies something that China does not claim. Besides, the second claim is based on UNCLOS, which is inapplicable to judging the legality of the U-shaped line. The fourth and sixth Philippine claims are premised on an incomplete factual foundation, for omitting Itu Aba, which should be considered as belonging to the State of China as opposed to the Philippines. Consequently, the fourth and sixth claims are not well-founded in law. The seventh and ninth Philippine claims are based on an incorrect

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96 For more on the Reed Bank incident between China and the Philippines and Chinese official positions, see Beckman, n. 55 above, pp. 157–158.

characterization of the factual and legal situations. It qualifies China as a non-coastal state in the maritime areas concerned. The tenth claim is probably not well-founded in law, as Articles 58 and 78(2) of UNCLOS, which may serve as legal bases, are inapplicable to govern China's conduct based on the positions taken by the Philippines in its third and fourth groups of claims.

In order to build up a strong case, the claim made by the claimant must be directed at or counter a claim previously and actually made by the respondent. A dispute cannot be founded on (i) a premise which has no factual basis, (ii) an incorrect characterization of the legal situations between the parties, (iii) an incorrect characterization of the role the respondent plays in the specific legal relations, or (iv) inapplicable rules. All of these defects exist in the Philippines' claims. Therefore, the Tribunal should take no further action on all the Philippines' claims in accordance with Article 9 of Annex VII to UNCLOS.

### Is the Requirement of Jurisdiction over the Disputes Fulfilled?

#### *Identity of the Disputes Submitted and the Real Disputes*

Article 286 of UNCLOS, which is the first article of Section 2 (entitled "Compulsory Procedures Entailing Binding Decisions") of Part XV (entitled "Settlement of Disputes"), dictates that the dispute submitted to the Section 2 Tribunal must be identical to the dispute that has not been settled under Section 1 Means. If the disputes brought by the Philippines to this Tribunal are different from what China and the Philippines have been attempting to settle regarding the SCS according to Articles 279–285 of UNCLOS, the Tribunal shall be inapplicable and, *a fortiori*, without jurisdiction over the disputes presented.

Moreover, Article 288(1)<sup>97</sup> requires an Annex VII Tribunal to have jurisdiction over any *dispute* concerning the interpretation or application of UNCLOS "which is submitted to it according to Part XV." When the disputes *as submitted and formulated* by the claimant are considered either hypothetical/unreal or different from the disputes that the claimant and respondent have been attempting to settle according to Section 1 Means, the disputes cannot be considered as submitted to the Tribunal according to Article 286, as part of Part XV. Therefore, the condition ("which is submitted to it according to Part XV") under Article 288(1) is not met, rendering Article 288(1) inapplicable. The Tribunal will be absolved of the obligation to satisfy itself of the needed jurisdiction to proceed to the merits part.

<sup>97</sup> UNCLOS, n. 12 above.

It is time to discuss the real Sino-Philippine SCS disputes, which have been there for four decades.<sup>98</sup> Countless statements and counter-statements have been made. It is useful to observe the most recent and *conclusive* exchange of Sino-Philippine positions at the Commission on the Limits of the Continental Shelf (CLCS) since 2009.<sup>99</sup> The position of the PRC is demonstrated by its Note Verbale delivered to the United Nations on May 7, 2009, and the map attached thereto<sup>100</sup> to challenge the Malaysia/Vietnam Joint Submission<sup>101</sup> and the Vietnam Submission<sup>102</sup> to the CLCS concerning extended continental shelf in certain SCS areas on May 6 and 7, 2009 respectively. The 2011 Note Verbale by the Philippines<sup>103</sup> was delivered to challenge the 2009 Chinese Note Verbale. As a response to the 2011 Philippines' statement, the PRC produced its 2011 Note Verbale.<sup>104</sup>

The language used by the PRC in its two Notes Verbales of 2009 is identical:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters, as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.<sup>105</sup>

The relevant part of the 2011 Philippine Note Verbale is as follows:

*On the Islands and Other Geological Features*

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

98 Gao and Jia, n. 58 above, p. 105. See Heinzig, n. 55 above, p. 36.

99 N.-D. Thang and N.H. Thao, "China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between the Philippines and China," *Ocean Development & International Law* 43, no. 1 (2012): 35, 39–46.

100 Notes Verbales, n. 49 above.

101 The executive summary of this joint submission is available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/mys\\_vnm2009executivesummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf)>.

102 The executive summary of this submission is available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm2009n\\_executivesummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf)>.

103 Dated April 5, 2011, and the Document No. is 000228. Available online: <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf)>.

104 Note Verbale, n. 53 above.

105 Notes Verbales, n. 49 above.

*On the “Water Adjacent” to the Islands and Other Geological Features*

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

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

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

THIRD, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People’s Republic of China on the “*relevant waters as well as the seabed and subsoil thereof*” (as reflected in the so-called 9-dash line map attached to Notes Verbales CML/17/2009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their “adjacent waters” would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.<sup>106</sup>

To respond to the 2011 Note Verbale of the Philippines, the relevant part of the 2011 Chinese Note Verbale reads:

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

<sup>106</sup> Note Verbale, n. 51 above.

The so-called Kalayaan Island Group (KIG) claimed by the Republic of the Philippines is in fact part of China's Nansha Islands. In a series of international treaties which define the limits of the territory of the Republic of the Philippines and the domestic legislation of the Republic of the Philippines prior to 1970s, the Republic of the Philippines had never made any claims to Nansha Islands or any of its components. Since 1970s, the Republic of the Philippines started to invade and occupy some islands and reefs of China's Nansha Islands and made relevant territorial claims, to which China objects strongly. The Republic of the Philippines' occupation of some islands and reefs of China's Nansha Islands as well as other related acts constitutes infringement upon China's territorial sovereignty. Under the legal doctrine of "*ex injuria jus non oritur*", the Republic of the Philippines can in no way invoke such illegal occupation to support its territorial claims. Furthermore, under the legal principle of "*la terre domine la mer*", coastal states' Exclusive Economic Zone (EEZ) and Continental Shelf claims shall not infringe upon the territorial sovereignty of other states.

Since 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the 1982 *United Nations Convention on the Law of the Sea*, as well as the *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (1992) and the *Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China* (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.<sup>107</sup>

Clearly, the real Sino-Philippine SCS disputes are four-fold: (i) territorial disputes over all the maritime features within Philippines' KIG, which is part of China's Nansha Islands; (ii) disputes concerning legal capability of certain reefs or rocks in China's Nansha Islands to establish the territorial sea, the EEZ, and the continental shelf; (iii) disputes concerning the legality under UNCLOS of China's historical waters claims within the U-shaped line; and (iv) disputes concerning maritime boundary delimitation for the overlapping Sino-Philippine maritime claims.<sup>108</sup>

<sup>107</sup> Note Verbale, n. 53 above.

<sup>108</sup> L.F. Damrosch and B. Oxman, "Agora: The South China Sea: Editors' Introduction," *American Journal of International Law* 107 (2013): 95; M.S.T. Gau, "The U-Shaped Line and a Categorization of the Ocean Disputes in the South China Sea," *Ocean Development*

However, what is presented to the Tribunal in the Philippines' claims stated in the Notification is far from the aggregation of these disputes. First, as discussed already, the first, third, fifth, and eighth Philippine claims cannot *create* any dispute. The real Sino-Philippine dispute behind the fifth and eighth Philippines' claim is a maritime boundary delimitation dispute for the overlapping maritime areas identified by the Philippines. This dispute was not presented by the Philippines. The second Philippine claim can hardly create any dispute as to the legality of China's maritime claims in the SCS based on, within, and encompassed by the U-shaped line under UNCLOS. No evidence shows that China has made such a maritime claim. The fourth and sixth Philippine claims are premised on an incomplete factual foundation that excludes the island of Itu Aba and other islands in the Spratly Islands. China would probably argue that those seven maritime features situated in the Spratly Islands are located in China's continental shelf, generated by other *nearby* maritime features qualifying as islands. The Philippines would deny China's sovereignty over these islands. Such territorial disputes are the root cause of the confrontations indicated by these two claims but not presented by the Philippines to the Tribunal. The dispute to be created by the seventh Philippine claim concerns the illegality of China's prevention of Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef. However, the real Sino-Philippine dispute demonstrated by such Philippine complaint concerns maritime boundary delimitation. The basis of this dispute is the Sino-Philippine territorial disputes over all the maritime features in KIG. The territorial dispute and boundary delimitation disputes are inseparable from the dispute to be created by the seventh claim of the Philippines. However, no territorial disputes are presented for settlement. The disputes to be established by the Philippines based on its ninth claim concern (i) the illegality of China's claims and activities in exploiting the living and non-living resources in the Philippines' EEZ and continental shelf, and (ii) the illegality of China's prevention of Philippine people from undertaking the same activities in these areas. The real Sino-Philippine disputes behind this concern territorial claims and maritime delimitation which are again not presented to the Tribunal. The tenth claim of the Philippines seems to be an alternative argument based on the Philippines' recognition of China as a coastal state entitled to claim an EEZ in the region. However, what is between China and the Philippines are not the disputes

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*and International Law* 43 (2012): 57, 62; Beckman, n. 55 above, pp. 143–144, 151–152; Song, n. 56 above, pp. 254–256; Smith, n. 90 above, pp. 214–236, 220.



between a coastal state (in this case, China) and a non-coastal state (in this case, the Philippines).

To conclude, what the present Tribunal is requested to resolve is far from the aggregation of these four kinds of real Sino-Philippine disputes. The failure of presenting Sino-Philippine territorial and maritime boundary delimitation disputes as core disputes to the Tribunal by the Philippines would be inconsistent with Articles 286 and 288(1). The Tribunal is facing disputes that should not have been brought to it, as the disputes presented are either unsupported by the facts, non-contentious, and unreal, or different from the existing Sino-Philippine SCS disputes. As Articles 286 and 288(1) are rendered inapplicable by such defects, the Tribunal should not have been established in the first place. *Being also inapplicable*, the Tribunal as presently constituted should be considered without jurisdiction over the disputes as formulated by the Philippines.

### *The Re-characterization of the Disputes*

Should the Tribunal consider the disputes presented to be identical with the real but unsettled Sino-Philippine SCS disputes, the Tribunal would examine whether the disputes *presented* have already been removed from the scope of its jurisdiction by the 2006 Chinese Declaration or Point 8 of the Philippines' Understanding. Prior to this, the Tribunal still needs to properly characterize the nature or the scope of the disputes presented. As put in paragraph 40 of the Philippines' Notification,

It follows that the Philippines' claims do not fall within China's Declaration of 25 August 2006, because they do not: concern the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitation; involve historic bays or titles within the meaning of the relevant provisions of the Convention; concern military activities or law enforcement activities; or concern matters over which the Security Council is exercising functions assigned to it by the UN Charter.<sup>109</sup>

Clearly, the Philippines said that it does not bring any dispute falling within the category of disputes as indicated by Article 298(1)(a)–(c) and excluded by the 2006 Chinese Declaration. This characterization is still subject to judgment by the Tribunal, which may decide otherwise.

It is worth mentioning the Barbados Arbitration in this connection. The tribunal in that case did not accept the Barbados' argument that the terms of notification it submitted to institute the arbitration excluded the delimitation

<sup>109</sup> Para. 40 of the Notification, n. 2 above.

of the outer continental shelf.<sup>110</sup> In the present case, it is critical to properly characterize the scope of the Sino-Philippine dispute, as formulated by the Philippines alone. But with what test can this job be done? The test is to see the “scope of the legal differences between the parties” as indicated by the record with reasonable clarity, as declared and applied by the 2006 Award of the Barbados Arbitration, in particular, paragraphs 198 and 213 of the Award.<sup>111</sup>

As indicated by the open records of the 2009–2011 Sino-Philippine exchange of Notes Verbales in the United Nations concerning their compound disputes with more than reasonable, if not crystal, clarity, the real Sino-Philippine SCS disputes are four-fold, as discussed above.

As stated previously, the core Sino-Philippine disputes of (i) territorial sovereignty over all the maritime features in the KIG and Scarborough Shoal and (ii) maritime boundary delimitation cannot be separated from the partial, if not hypothetical, disputes as presented by the Philippines. However, should the Tribunal consider it lawful for such core disputes to be cut off from the disputes presented under Article 286 and 288(1), then the Tribunal must find out *what these disputes presented really are* before deciding if these disputes still fall within the 2006 Chinese Declaration or Point 8 of the Philippine Understanding.

Looking at all the ten claims and the thirteen reliefs sought as presented by the Philippines *in its entirety*, the result the Philippines wishes to achieve is clearly the Sino-Philippine maritime boundary delimitation indirectly drawn, which gives the Philippines the entire 200-NM EEZ in the SCS extended from the Philippine archipelagic baselines free from Chinese interference, while China receives no more than four circles of territorial sea surrounding four rocks<sup>112</sup> whose legal status remain disputable. Let us see how the Philippines can do this step-by-step through its claims.

Specifically, the first and second claims, if upheld by the Tribunal, would render the U-shaped line unlawful and void. The U-shaped line would be useless for China in negotiations for maritime boundary delimitation with the Philippines, Malaysia and Vietnam. The result of upholding the Philippines' fourth to seventh claims is that the eight maritime features do not assist in generating maritime zones for China in the SCS. The Philippines accepts that Scarborough Shoal and the Johnson, Cuarteron and Fiery Cross Reefs may legally generate no more than 12 NM of territorial sea, *without* recognizing that

110 See para. 213 of the Award, n. 16 above.

111 *Id.*, paras. 198, 213.

112 Beckman, n. 55 above, p. 152; J. Greenfield, *China's Practice in the Law of the Sea* (Oxford: Oxford University Press, 1992), p. 164.

the four circles of territorial sea belong to China. The Tribunal is unauthorized to determine the territorial disputes. Therefore, it is impossible for China to be granted ownership or sovereignty over these four maritime features as well as their 12-NM territorial sea by the Tribunal. Furthermore, the third to fifth Philippine claims, once upheld, would justify the eviction of Chinese presence from the Mischief, McKennan, Gaven and Subi Reefs. Therefore, the first six claims mean that in the maritime areas surrounding those eight maritime features, China becomes a non-coastal state, if the Tribunal upholds these claims while neglecting the overall territorial disputes.

Following this logic, it is easy to understand the Philippines' goal in making its seventh to tenth claims. As China would be considered a non-coastal state in the relevant maritime areas, all the law enforcement activities by China in preserving its various maritime zonal rights, jurisdiction, or even sovereignty in the areas concerned become totally illegal.

To conclude, it is fair to consider the disputes *presented* by the Philippines to be *de facto* maritime boundary delimitation disputes by nature.

#### *Disputes Concerning the Interpretation or Application of the Convention*

Article 4 (entitled "functions of arbitral tribunal") of Annex VII to UNCLOS provides: "An arbitral tribunal constituted under Article 3 of this Annex shall function *in accordance with this Annex and the other provisions of this Convention*" [emphasis added]. While Annex VII does not regulate the subject matter for settlement by the Tribunal, Part XV of UNCLOS confines the disputes to those concerning the interpretation or application of UNCLOS. Such limitation was required by Articles 279–284, 286–288, and 297 in Sections 1, 2, and 3 of Part XV, respectively.

Therefore, if the disputes submitted to the Tribunal by the Philippines are not deemed by the Tribunal to concern the interpretation or application of UNCLOS, all the above-mentioned provisions of UNCLOS will become inapplicable, so is Annex VII Tribunal.

The alleged dispute in the first group of claims indicated by the Philippine Notification does not seem to concern the interpretation or application of UNCLOS.

It was said by the Philippines in its second claim that China's maritime claims in the SCS based on its so-called U-shaped line are contrary to UNCLOS and invalid. The dispute to be established by such a claim will probably concern the illegality of the U-shaped line under UNCLOS as a line pronounced by China to enclose waters over which China claims maritime jurisdiction. Apart from the above-mentioned defect that such a claim may not be well-founded

in fact and law, the dispute to be laid out by such a claim, if any, may not concern the interpretation or application of UNCLOS, for the following reasons.

First, as discussed already, the U-shaped line from the very beginning has been a demonstration of Chinese territorial claims relating to four groups of maritime features in the SCS, instead of a maritime zonal claim for the body of sea enclosed.<sup>113</sup> The applicable law governing the legality of such claims consists of the rules concerning acquisition of territorial sovereignty. Such a body of rules is neither part of UNCLOS concluded in 1982,<sup>114</sup> nor the four Geneva Conventions signed in 1958. Such rules cannot be found in any standard textbook on public international law of the sea, either. In short, the rules concerning the acquisition of territorial sovereignty are not part of conventional or customary international law of the sea.

Secondly, the dispute concerning the legality of the U-shaped line therefore should be characterized as a dispute concerning the interpretation or application of rules of acquisition of territorial sovereignty, instead of a dispute concerning the interpretation or application of rules of the international law of the sea, including UNCLOS.

Thirdly, the above position will not be affected even if (i) UNCLOS is considered to have retroactive effect; or (ii) the presentation of 1948 U-shaped line “territorial” claim is deemed of having a continuing nature or effect.

Lastly, as discussed already, *assuming* 2009 was the first time for China to make its official *maritime zonal claims* in the SCS by its Note Verbale to the UN Secretary General, what was stated in that communication cannot contribute to the constitution of *any* dispute concerning the interpretation or application of UNCLOS. Critically, the 2009 Chinese communication cannot be detached from the context which includes the subsequent clarifying Note Verbale of China dated April 5, 2011. As discussed already, what is indicated by the 2011 Note Verbale does not conflict with the position of the Philippines. China *invokes* UNCLOS when making maritime zonal claims in the SCS region. Therefore, it will be unjustified to say that the 2009 Chinese communication that contains the U-shaped line constitutes an element to build up a Sino-Philippine “maritime dispute” concerning the interpretation or application of UNCLOS.

### *Optional Exceptions to the Applicability of the Present Tribunal*

#### The 2006 Declaration of China

According to China’s “Declaration under article 298” on August 25, 2006, as discussed above, the PRC has excluded an Annex VII Tribunal as a means to

<sup>113</sup> Smith, n. 90 above, p. 224.

<sup>114</sup> Beckman, n. 55 above, p. 142; Smith, *id.*, p. 220.

settle, *inter alia*, (i) disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to maritime boundary delimitation; (ii) disputes involving historic bays or titles; and (iii) disputes necessarily involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory. To be noted, these disputes are covered by paragraph 1(a)(i) of Article 298.

As just concluded, the disputes presented by the Philippines, after careful re-characterization, amount to *de facto* maritime boundary delimitation disputes to secure the integrity of Philippines' EEZ in the SCS. It is submitted that such disputes fall within the scope of excluded disputes indicated above. However, if such a re-characterized nature of the disputes is not accepted by the Tribunal, the disputes presented by the Philippines will not be settled *as a matter of fact*, unless the following legal issues are resolved by the Tribunal:

- (i) whether China's territorial claims over *all* the components (maritime features) of the Spratly Islands can be set aside and ignored in this litigation so that China's EEZ and continental shelf claims in the Spratly Islands can all be denied;
- (ii) whether the Tribunal is empowered to reject all the customary rules of acquisition of territorial sovereignty, and take "effective control" as the only test to deny Chinese territorial claims over all those maritime features unoccupied by China;
- (iii) whether the area of China's maritime jurisdiction in the Spratly Islands can be confined to four circles of territorial sea surrounding Scarborough Shoal and the Johnson, Cuarteron and Fierly Cross Reefs so that China cannot use the maritime features and islands like Itu Aba to claim an EEZ and continental shelf, which overlaps with the EEZ and continental shelf of the Philippines; and
- (iv) whether China's EEZ and continental shelf claims extending from its Spratly Islands, including Itu Aba, can all be denied so that the Philippines can be free from China's interference within the EEZ of the Philippines in the SCS.

Basically, the Sino-Philippine disputes as *presented* to the Tribunal have different layers. The central disputes are the territorial disputes over all the maritime features in KIG and Scarborough Shoal. The maritime boundary delimitation disputes are the middle layer disputes. The outer layer disputes are made by all the claims brought by the Philippines in its Notification. The core and middle layer disputes are the *real* causes of the confrontations indicated by the Philippines in its claims.

In fact, the core and middle layer disputes must first be settled by the Tribunal *in favor of the Philippines*, before the Tribunal can entertain the outer layer disputes presented by the Philippines. However, both the core and middle layer disputes have been excluded by the 2006 Chinese Declaration. As the Tribunal has no jurisdiction to settle these two kinds of preliminary or fundamental disputes, it would be incorrect to say that the Tribunal has jurisdiction to settle the outer layer disputes.

Another issue here concerns the first group of Philippine claims. It was submitted above that the dispute over the legality of the U-shaped line should not be deemed to concern the interpretation or application of UNCLOS. However, should the Tribunal consider the U-shaped line as a maritime claim of China, this dispute should then be regarded to concern historical title. Hence, the Tribunal may not adjudicate such an issue, as it has been excluded by the 2006 Chinese Declaration.

The remaining issue in this section concerns the fifth group of the Philippine claims, namely, the tenth claim and twelfth and thirteenth relief sought of the Philippines. Here, marine scientific research may be considered as the Philippines' high seas freedom that has been interfered with by China.

The Tribunal also lacks jurisdiction to adjudicate such a case, if raised by the Philippines. The 2006 Chinese Declaration has removed the dispute under Article 298(1)(b) of UNCLOS from the scope of jurisdiction of the Annex VII Tribunal. That provision provides the scope of such a dispute as "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a [...] tribunal under article 297, paragraph 2[.]"

Which disputes are excluded from the Tribunal's jurisdiction under Article 297(2)? They are the ones arising out of the exercise by the coastal state of a right or discretion in accordance with Article 246.<sup>115</sup>

Paragraph 2 of Article 246 provides that "[m]arine scientific research in the EEZ and on the Continental Shelf shall be conducted with the consent of the coastal State." Paragraph 3 of this article provides that, in normal circumstances, coastal states shall grant their consent for marine scientific research projects by other states in their EEZ or continental shelf "to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind." Paragraph 5(a)–(c) of this article allows the coastal states to withhold their consent when the project "(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

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115 See UNCLOS, n. 12 above, Art. 297 (2)(a)(i).

(b) involves drilling into the Continental Shelf, the use of explosives or the introduction of harmful substances into the marine environment; (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80.”

Therefore, if the situation indicated by the fifth group of Philippine claims is characterized as marine scientific research for the purpose of the exploration and exploitation of natural resources in China’s continental shelf as defined by Article 246(5)(a)–(c), China will have the right to withhold its consent and exercise jurisdiction by interfering with the team dispatched or authorized by the Philippines. Under the 2006 Chinese Declaration, the disputes arising out of such a refusal or interference by China will be excluded from the jurisdiction of the present Tribunal.

#### Point 8 of the Philippines’ Understanding

It is submitted that Point 8 of the Philippines’ Understanding may also deprive the Tribunal of jurisdiction over the disputes brought by the Philippines without the consent of China, based on Article 298(3) of UNCLOS, which reads:

A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

To make this provision applicable in the present case, the dispute brought by the Philippines against China must be (i) falling within the excepted category of disputes indicated by Point 8 of the Philippines’ Understanding, and (ii) without the consent of China to confer the jurisdiction upon the Tribunal.

What kinds of disputes have been excluded by Point 8 of the Philippines’ Understanding? It is helpful to revisit this paragraph, which reads as follows:

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 *shall not be considered as a derogation of Philippines sovereignty*.<sup>116</sup>

Emphasis added

As the context for the interpretation of the terms “Philippines sovereignty” of Point 8, Point 4 of the same Understanding is worth mentioning, which reads:

<sup>116</sup> Point 4 of the Understanding, n. 18 above.

4. Such signing shall not in any manner impair or prejudice the *sovereignty* of the Republic of the Philippines *over any territory over which it exercises sovereign authority*, such as the Kalayaan Islands, and the waters appurtenant thereto.<sup>117</sup>

Emphasis added

If we look into the disputes as presented by the Philippines, especially the possible *negative* outcome of the litigation, we can see that the situation is clearly excluded by the above Understanding. The reason is very simple; we can just ask the agent of the Philippines the following questions. Does it impair or prejudice Philippine sovereignty over the Kalayaan Islands, and the waters appurtenant thereto, when any of the following awards is given by the Tribunal?

- (i) The award endorses the U-shaped line of China as the basis for China to make maritime claims in the SCS.
- (ii) The award upholds that the Mischief, McKennan, Gaven and Subi Reefs are located on China's continental shelf so as to justify Chinese presence and construction thereon.
- (iii) The award denies that the Mischief and McKennan Reefs are part of the Philippines' continental shelf.
- (iv) The award upholds the legality for China to claim maritime entitlements beyond 12 NM from Scarborough Shoal and the Johnson, Cuarteron and Fiery Cross Reefs;
- (v) The award upholds the legality for China to prevent Philippine vessels from exploiting the living resources in the waters adjacent to Scarborough Shoal and Johnson Reef.
- (vi) The award denies that the Philippines is entitled to a 12-NM territorial sea, a 200-NM EEZ, and a bigger continental shelf under UNCLOS and measured from its archipelagic baselines in the SCS.
- (vii) The award upholds the legality for China to claim rights to and to exploit the living and non-living resources in the Philippines' EEZ and continental shelf in the SCS, as well as the legality for China to prevent the Philippines from exploiting the same resources within its own EEZ and continental shelf in the SCS.
- (viii) The award upholds the legality for China to interfere with the Philippines' exercise of its rights to navigation under the Convention within and beyond the Philippines' EEZ in the SCS.

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<sup>117</sup> Id.



If the answers given are affirmative, then it may be justified to argue that the disputes as brought by the Philippines to the Tribunal have actually been excluded by Point 8 of the Philippines' Understanding. Coupled with the lack of the consent given by China to confer the power to the Tribunal to settle such disputes, Article 298(3) would become applicable in the present case. Consequently, the Tribunal is deprived of jurisdiction over the disputes brought by the Philippines, which is not entitled to make such a submission in the first place.

### *Summary of the Requirements of Jurisdiction over the Disputes Presented*

Based on the above review, it is unjustified to conclude that the Tribunal has jurisdiction over the disputes brought by the Philippines for several reasons. First, there is serious doubt as to whether the disputes presented to the Tribunal are both real and identical with what China and the Philippines have been settling for the SCS. Secondly, assuming there is identity, the disputes articulated in the first group of the Philippine claims do not concern the interpretation or application of UNCLOS. Thirdly, assuming the legal problems identified in the above two points are all solved, the Philippines' characterization of the disputes should be reviewed and dismissed by the Tribunal. It is submitted that the disputes presented are by their nature *de facto* maritime boundary delimitation disputes involving unsettled territorial disputes over all the maritime features in the KIG (part of the Spratly Islands) claimed by China and opposed by the Philippines. No matter whether the re-characterization of the disputes is accepted by the Tribunal or not, the disputes presented by the Philippines should be deemed as falling within the scope of disputes excluded by the 2006 Chinese Declaration as well as Point 8 of the Philippines' Understanding. With no jurisdiction over the disputes, the Tribunal should take no action to entertain the merits part of this litigation in accordance with relevant provisions of Part XV of and Annex VII to UNCLOS.

### **Conclusion**

Since China has declined to participate in the litigation, Article 9 of Annex VII becomes applicable. The Tribunal is accordingly required to satisfy itself, before making its award, not only that it has jurisdiction over the disputes but also that the claims are well-founded in fact and law. Article 10 of Annex VII also obligates the Tribunal to state the reasons on which the award is based.

Even before applying Article 9 of Annex VII, major preliminary problems may preclude the fulfillment of some *inherent* conditions for the disputes to be lawfully brought to the Annex VII Tribunal under Articles 286 and 288(1). First, certain disputes alleged by the Philippines' claims should be considered hypothetical, non-contentious, and unreal. The first, third, fifth, and eighth claims contend something that China does not oppose. The second claim denies something China has not claimed. The tenth claim is based on the Sino-Philippine legal relations (by treating China as a coastal state in the SCS while denying the Philippines this status) irreconcilable with what is portrayed by the first to ninth claims (which treats the Philippines as a coastal state in the SCS while denying China this status).

Secondly, the disputes brought to the Tribunal may not be identical to the disputes that both Parties failed to settle through Section 1 Means. The real unsettled disputes are compound, consisting of territorial issues, maritime boundary delimitation issues, the legality of maritime features to generate maritime zones under UNCLOS, and historical titles. The core components of these disputes are not presented by the Philippines to the Tribunal.

Thirdly, the dispute to be established by the first and second Philippine claims, namely, the legality of the U-shaped line under UNCLOS, as an issue of territorial claim by nature, should not be considered as concerning the interpretation or application of UNCLOS. Fourthly, the disputes were not submitted to the Tribunal in accordance with Article 286. Consequently, the condition of Article 288(1) cannot be fulfilled. This renders the Annex VII Tribunal inapplicable to the present case.

Assuming the above preliminary issues are all resolved, which would render the Tribunal applicable, major conditions under Article 9 of Annex VII for the Tribunal to give its award may not be fulfilled.

It has been submitted that the first to tenth claims may not be well-founded in fact, while the second, fourth, sixth, seventh, ninth and tenth claims are not well-founded in law. Therefore, the Tribunal should not proceed to make the award in accordance with Article 9 of Annex VII. Alternatively, assuming the claims are all well-founded in fact and law, the disputes as brought to the Tribunal, after careful re-characterization, may turn out to be maritime boundary delimitation disputes excluded by, *inter alia*, the 2006 Chinese Declaration. Assuming such a re-characterization is not accepted by the Tribunal, the disputes as presented by the Philippines would have two layers of components. The core layer disputes are territorial disputes, while the middle layer disputes are maritime boundary delimitation disputes. Both components must be all settled *in favor of* the Philippines by the Tribunal before the Tribunal can actually resolve the outer layer disputes presented by the Philippines.

The 2006 Chinese Declaration, which expressly excluded the core and middle layer disputes, should be considered as having also excluded the *inseparable consequence* of these *component* disputes, namely, the disputes presented by the Philippines. Meanwhile, Point 8 of the Philippines' Understanding has implicitly excluded all the disputes brought by the Philippines, unless it is proved impossible for the Philippines to lose in this litigation.

To conclude, many serious factual and legal problems exist which serve to preclude the application of Articles 286 and 288(1) of UNCLOS, rendering the Annex VII Tribunal inapplicable in the present case. Assuming the Tribunal may function legally, it would then be bound by Article 9 of Annex VII to refrain from giving an award for this case. Therefore, the Tribunal should take no further actions in the merits part of the litigation.