

RULE OF LAW IN THE SOUTH CHINA SEA:

IMPLICATIONS OF THE *PHILIPPINES V CHINA* DECISION ON JURISDICTION AND ADMISSIBILITY

Robert Beckman and Christine Sim
Centre for International Law
National University of Singapore

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Introduction

1. This paper examines the recent developments of the *Philippines v. China case* and the significance of the Award of the Arbitral Tribunal on jurisdiction and admissibility¹.
2. On 22 January 2013, the Philippines initiated compulsory arbitration against China under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)² with respect to its dispute with China over maritime rights and jurisdiction in the South China Sea. China is following a policy of non-appearance and non-participation in the case. On 29 October 2015, a five-member Arbitral Tribunal rendered an Award on Jurisdiction and Admissibility, finding that it has jurisdiction over 7 of the 15 disputes submitted by the Philippines. It will now decide on the jurisdiction of the other 8 disputes, and the merits of all the disputes over which it has jurisdiction.
3. The importance of the decisions of the Arbitral Tribunal on jurisdiction and admissibility will be analyzed in this paper: Section I introduces the dispute settlement regime in UNCLOS; Section II describes the key procedural steps taken in the case; Section III describes the subject matter of Philippines' claims, and summarizes China's objections and the Philippines' arguments; Section IV explains the Tribunal's decisions and its implications for dispute settlement under UNCLOS; Section V discusses key issues on the merits which the Tribunal is presently deciding and analyzes the impact of the Tribunal's potential decisions on States; Section VI concludes with a discussion of the enforceability of the Tribunal's Award.

I. UNCLOS and its Dispute Settlement Regime

4. UNCLOS was intended to promote the peaceful uses of the oceans by establishing a universal legal order. It is now almost universally accepted, with 167 parties including the European Union.³ All the States surrounding the South China Sea are parties,⁴ and in relation to each other, have been legally bound by its provisions since 5 November 1996.⁵
5. The compulsory procedures for the settlement of disputes in Part XV are an integral part of UNCLOS, and a State must accept them if it becomes a party. States accept this dispute resolution procedure in *advance* when they became a party to UNCLOS.

¹ *Arbitration between the Republic of the Philippines and the People's Republic of China* (Permanent Court of Arbitration Case No. 2013-19), Award on Jurisdiction and Admissibility (29 October 2015) (*Award on Jurisdiction and Admissibility*).

² United Nations Convention on the Law of the Sea, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCLOS).

³ United Nations Treaties Collection, Status of Treaties [available at <http://treaties.un.org/pages/ParticipationStatus.aspx>].

⁴ The dates of ratification of the five claimant states are as follows: Brunei Darussalam, 5 November 1996; China, 7 June 1996; Malaysia, 14 October 1996; the Philippines, 8 May 1984; and Vietnam, 25 July 25 1994.

⁵ The date on which the Convention entered into force for Brunei Darussalam, the last State bordering the South China Sea to become a party.

6. If any dispute arises between two State Parties on the interpretation or application of any provision of the Convention, and the dispute cannot be resolved by negotiation after an exchange of views between the parties, either party may unilaterally refer the dispute to an international court or arbitral tribunal.⁶ No additional consent from the other State is required.
7. Every State consents to the compulsory procedures entailing binding decisions in section 2 of Part XV when it becomes a party to UNCLOS. The system of compulsory third party dispute settlement in UNCLOS is not unique. There are more than 90 conventions to which the UN Secretary-General is the depository which provide that a party to that convention has the right to unilaterally institute proceedings against another party before an international court or arbitral tribunal if a dispute arises concerning the provisions of that convention.⁷
8. To interpret the system of dispute resolution as requiring an additional consent *for a particular dispute* after that dispute has arisen would defeat the purpose of compulsory dispute resolution under UNCLOS, as the State against whom the case has been instituted would be unlikely to agree to submit the dispute to a tribunal or court in cases where they have committed acts that are potentially in breach of their obligations under UNCLOS.
9. UNCLOS contains some exceptions and exclusions to the system of compulsory procedures. Article 298 permits States to formally declare that they do not accept the system of compulsory procedures entailing binding decisions for particular categories of disputes, including disputes on military activities and disputes on the provisions on the delimitation of maritime boundaries. In addition, Article 297 excludes certain disputes relating to fisheries and marine scientific research.
10. If one State invokes the dispute settlement procedures against another State, and the latter State believes that the court or tribunal does not have jurisdiction because the dispute is not about the interpretation or application of a provision in UNCLOS, or the dispute is excluded from the compulsory procedures by articles 297 or 298, that State can formally challenge the jurisdiction of the court or tribunal. However, as agreed by State Parties in Article 288(4) UNCLOS, it is the *court or arbitral tribunal that finally decides* whether or not it has jurisdiction, not the State that is challenging jurisdiction. It is a generally recognised principle of international law known as *competence de la competence*, that the court or tribunal has the competence to determine whether it has jurisdiction.
11. In *Philippines v China*, the Tribunal's Award on Jurisdiction and Admissibility emphasized that both the Philippines and China are parties to the Convention: "The Philippines ratified it on 8 May 1984 and China on 7 June 1996. Accordingly, they are both bound by the dispute

⁶ Article 286, UNCLOS.

⁷ See United Nations Treaty Collection, [available at https://treaties.un.org/Pages/DB.aspx?path=DB/titles/page1_en.xml&menu=MTDSG].

settlement procedures provided for in Part XV of the Convention in respect of any dispute between them concerning the interpretation or application of the Convention”.⁸

12. The Tribunal reflected that, “The dispute settlement provisions set out in Part XV of the Convention were heavily negotiated and reflect a compromise.”⁹ Therefore, the Tribunal emphasized that besides the “very specific exceptions spelled out in the Convention”, State parties were “*not free to pick and choose the portions of the Convention they wish to accept or reject*”¹⁰.

II. Procedural History

13. China’s policy in this case is non-appearance and non-participation. However, there is no “right” under UNCLOS not to participate in a case instituted against it. Rather, UNCLOS provides that the parties to a dispute have an obligation to facilitate the work of the arbitral tribunal.¹¹
14. Part XV of UNCLOS provides that States can elect in advance to indicate whether they prefer to have their disputes heard before the International Court of Justice, the International Tribunal for the Law of the Sea, or an Arbitral Tribunal. When the parties to a dispute have not chosen the same forum, or have not indicated a choice, UNCLOS provides that a dispute will be heard by an Arbitral Tribunal established under Annex VII of the Convention. Since neither the Philippines nor China had indicated a choice, the dispute was referred to an Arbitral Tribunal.
15. Article 3 of Annex VII provides for the constitution of the arbitral tribunal, unless the parties otherwise agree. The tribunal is to consist of five members. The party instituting the proceedings appoints one arbitrator when it institutes the proceedings. The Philippines did this and gave notice it was appointing Rüdiger Wolfrum, a judge on the International Tribunal of the Law of the Sea (ITLOS). The other party then has thirty days to appoint its arbitrator. The remaining three arbitrators are then to be appointed by agreement between the parties, and one of these three will be the President of the Tribunal.
16. On 19 February 2013, China presented the Philippines with a diplomatic note in which it described “the Position of China on the South China Sea issues”, and rejected the Philippines’ Notification and Statement of Claim.¹²
17. Article 3 of Annex VII provides that if the other party fails to appoint its arbitrator or if the two parties cannot agree on the remaining three arbitrators, the party initiating the case may request that the appointments be made by the President of ITLOS from the List of Arbitrators

⁸ Award on Jurisdiction and Admissibility, para 106.

⁹ Award on Jurisdiction and Admissibility, para 107.

¹⁰ Award on Jurisdiction and Admissibility, para 107.

¹¹ Article 6, Annex VII, UNCLOS.

¹² Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 19, 2013, [available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1015317.html].

nominated by States Parties in accordance with Article 2 of Annex VII. In accordance with the procedures in Article 3 of Annex VII, the ITLOS President appointed Stanislaw Pawlak of Poland (current judge of ITLOS) as China's arbitrator. The ITLOS President then appointed the remaining three arbitrators: Jean-Pierre Cot of France (current Judge of ITLOS), Professor Alfred Soons of the Netherlands, and Thomas Mensah of Ghana (former President of ITLOS).

18. In order to prevent a State Party from unilaterally frustrating the peaceful dispute resolution procedures of UNCLOS, Article 9 of Annex VII in UNCLOS provides that 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 make an award. The Philippines made such a request, and the case has proceeded without the participation or appearance of China.
19. Article 5 of Annex VII provides that “[u]nless the Parties to the dispute otherwise agree, the Arbitral Tribunal shall determine its own procedure, assuring to each Party a full opportunity to be heard and to present its case”. In August 2013, the Tribunal, after having sought the views of the parties, issued Rules of Procedure for the arbitration.
20. On 27 August 2013, the Arbitral Tribunal issued Procedural Order No. 1.¹³ It directed the Philippines to fully address all issues in its Memorial, including matters relating to the jurisdiction of the Arbitral Tribunal, the admissibility of the Philippines' claim, as well as the merits of the dispute.
21. On 3 June 2014, the Arbitral Tribunal issued Procedural Order No. 2.¹⁴ It fixed 15 December 2014 as the date for China to submit its Counter-Memorial responding to the Philippines' Memorial.
22. On 7 December 2014, just a few days before the 15 December 2014 deadline by which China was requested by the Tribunal to submit its Counter-Memorial, the Ministry of Foreign Affairs of China officially released a *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*¹⁵ (China's Position Paper). The statement articulated the position of the Chinese Government that the Arbitral Tribunal had no jurisdiction.
23. On 16 December 2014, the Arbitral Tribunal requested the Philippines to make a Supplemental Written Submission by 15 March 2015 addressing specific issues relating to both the jurisdiction of the Tribunal and the merits of the case. The Tribunal submitted 26 questions to the Philippines requesting additional argument relating to issues concerning both the Tribunal's jurisdiction and the merits of the Philippines' claims, including the

¹³ Procedural Order No. 1 (27 August 2013).

¹⁴ Permanent Court of Arbitration, Arbitration between the Republic of the Philippines and the People's Republic of China, Press Release (3 June 2014) [available at <https://pcacases.com/web/sendAttach/230>].

¹⁵ Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014), [available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml].

Philippines' principal claim challenging the lawfulness of China's so-called "nine-dash line". The Philippines submitted its Supplemental Written Submission on 15 March 2015 as ordered. It included detailed information about 49 islands, reefs and other features in the South China Sea.¹⁶

24. On 22 April 2015, the Arbitral Tribunal stated that after seeking the views of the Parties, it decided to treat China's communications (including the Position Paper of 7 December 2014) as constituting objections to the Arbitral Tribunal's jurisdiction. Therefore, the Tribunal decided to bifurcate the case and hold a separate hearing on jurisdiction and admissibility.¹⁷ The Tribunal's decision to hold a separate hearing on jurisdiction could be interpreted as an attempt to give China another opportunity to formally present its views on jurisdiction to the Tribunal. However, China did not participate.

III. Submissions on Jurisdiction

A. The 15 Disputes Submitted to Arbitration

25. The Philippines' 15 Submissions included disputes concerning the status and entitlement of geographic features occupied by China, the lawfulness of petroleum and survey activities, fishing (including both Chinese fishing activities and China's alleged interference with Philippine fisheries), Chinese installations on Mischief Reef, the actions of Chinese law enforcement vessels and the Philippines' military presence on Second Thomas Shoal.¹⁸

B. China's Objections to Jurisdiction in its Position Paper of 7 December 2014

26. First, China argued that the subject matter of the arbitration is territorial sovereignty over maritime features in the South China Sea and not a dispute on the interpretation or application of the provisions of UNCLOS. It pointed out that the issue of which state has sovereignty over territory is governed by general international law, not by any provisions in UNCLOS.¹⁹
27. Second, China argued that maritime delimitation forms an integral and inseparable part of the disputes raised by the Philippines, and that disputes on maritime delimitation are excluded from the jurisdiction of the Tribunal because of China's declaration under Article 298.²⁰ China also objected to the fact that the Philippines selectively submitted only the maritime features occupied by China to arbitration.²¹

¹⁶ Statement on the Philippines' Supplemental Submission to the Arbitral Tribunal, 17 March 2015 [available at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/5667-statement-on-the-philippines-supplemental-submission-to-the-arbitral-tribunal>].

¹⁷ Award on Jurisdiction and Admissibility, para 284.

¹⁸ Award on Jurisdiction and Admissibility, para 173.

¹⁹ China's Position Paper, para 3.

²⁰ China's Position Paper, para 3.

²¹ China's Position Paper, para 19.

28. Third, China argued that the Philippines and China agreed in the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea as well as in bilateral instruments to settle their disputes concerning the South China Sea by negotiation, and that these agreements impose a legal obligation on the Philippines not to invoke the UNCLOS dispute settlement provisions.²²
29. Fourth, China argued that general exchanges of views, without the specific purpose of settling the dispute, did not constitute negotiations, and that consequently the Philippines had instituted proceedings under section 2 of Part XV without first satisfying the procedural obligations set out in section 1 of Part XV.²³

C. Philippines' Arguments on Jurisdiction

30. First, the Philippines stated that it recognized that the Tribunal has no jurisdiction over issues of territorial sovereignty because there are no provisions in UNCLOS on how to determine issues of territorial sovereignty.²⁴ It maintained that it was not asking the Tribunal to determine any issues of territorial sovereignty. The Philippines submitted that the Tribunal could however, determine the status and entitlements of geographic features in the Spratly Islands without determining which State had the better claim to sovereignty over those features.²⁵
31. Second, the Philippines' claim recognized that the Tribunal has no jurisdiction over disputes excluded from the compulsory dispute settlement procedures in UNCLOS because of China's Declaration under Article 298. In its Statement of Claim, the Philippines expressly stated that it is conscious of China's Declaration under Article 298 of UNCLOS excluding certain categories of disputes, including disputes on sea boundary delimitation and historic titles, from binding dispute settlement.²⁶
32. The Philippines clarified that it is not asking the Tribunal to delimit any maritime boundaries or interpret Articles 15, 74 or 83 of UNCLOS on the delimitation of maritime boundaries.²⁷ Also, the Philippines maintained that there is no dispute with respect to "historic bays or titles" because China has never claimed it has "historic title" to the South China Sea, but "historic rights".²⁸

²² China's Position Paper, para 3.

²³ China's Position Paper, paras 46-49.

²⁴ Philippines' Notification and Statement of Claim, para 7.

²⁵ Award on Jurisdiction and Admissibility, paras 8, 152.

²⁶ Philippines' Notification and Statement of Claim, paras 7 and 33-40.

²⁷ Award on Jurisdiction and Admissibility, paras 8, 152.

²⁸ Philippines' Memorial, para 4.28; Jurisdictional Hearing Transcript (Day 2), pp 59-62; Award on Jurisdiction and Admissibility, para 376.

33. The Philippines also argued that the provision in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea²⁹ (2002 DOC) does not exclude Philippines' right to invoke UNCLOS procedures, and that it can institute proceedings because the parties have exchanged views but failed to resolve the disputes.

IV. Tribunal's Decision on Jurisdiction and Admissibility

34. The Tribunal held that all 15 Submissions of the Philippines were disputes on the interpretation or application of UNCLOS. On seven of the Philippines' Submissions, the Tribunal decided that it had jurisdiction. On seven other submissions, the Tribunal decided that they were not exclusively preliminary in character, and that it would decide whether it had jurisdiction over these claims when it considered the merits of the case. Whether the Tribunal had jurisdiction over these claims would depend upon the applicability of the exceptions and exclusions in articles 297 and 298 of UNCLOS. On the last submission, the Tribunal directed the Philippines to clarify the content and narrow the scope of its submission, as its pleadings had not clearly specified what claims and activities China had allegedly undertaken.
35. First, the Tribunal recognized that there exists land sovereignty and maritime boundary disputes. However, the Tribunal noted that Philippines has not asked the Tribunal to rule on sovereignty, and none of the disputes required the Tribunal to implicitly rule on sovereignty.³⁰
36. Second, the Tribunal considered that a dispute concerning other maritime rights *can be distinct* from a dispute concerning the delimitation of maritime zones.³¹ The Tribunal emphasized that the following were *not* disputes concerning sovereignty or maritime boundary delimitation:³²
- a dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention;³³
 - a dispute "concerning the status" of the maritime features at issue as a "low-tide elevation", "island", or a "rock";³⁴
 - a dispute concerning "China's actions that allegedly interfere with the traditional fishing activities of Philippine nationals at Scarborough Shoal"³⁵; and

²⁹ Declaration on the Conduct of Parties in the South China Sea, 4 November 2002 (available at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>).

³⁰ Award on Jurisdiction and Admissibility, para 153.

³¹ Award on Jurisdiction and Admissibility, para 156.

³² Award on Jurisdiction and Admissibility, para 400-401, 403-405.

³³ Philippines Submission No. 1.

³⁴ Award on Jurisdiction and Admissibility, para 401.

³⁵ Award on Jurisdiction and Admissibility, para 407.

- a dispute concerning the protection and preservation of the marine environment.³⁶

37. The Tribunal found that it had jurisdiction to decide on the *status* of the features occupied or controlled by China - Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef.³⁷ In particular, a dispute over whether any of these maritime features were “rocks” or “islands” under Article 121(3) of UNCLOS, would be a dispute concerning the interpretation or application of UNCLOS. The Tribunal found that “This is not a dispute concerning sovereignty over the feature, which would remain entirely unaffected by the Tribunal’s determination.”³⁸

38. Third, the Tribunal found that there was no other binding obligation to settle disputes by negotiation to the exclusion of UNCLOS dispute resolution provisions, and the parties had fulfilled their obligations to exchange views on the dispute by raising the issues at bilateral consultations and through *Notes Verbales*.

A. *Existence of a “Dispute” on the Interpretation and Application of UNCLOS*

39. One the most critically important aspects of the Tribunal’s decision is its reasoning on whether disputes existed concerning the interpretation or application of the provisions in UNCLOS, notwithstanding the ambiguity of China’s claims, in particular the nine-dash line. The Philippines argued that there were a series of disputes concerning how provisions in UNCLOS applied to certain maritime features occupied by China. The Philippines also argued that it had a dispute with China concerning whether certain “historic rights” claimed by China were compatible with the provisions of UNCLOS.³⁹

40. The problem the Tribunal faced was that China had not elaborated on certain significant aspects of its claimed rights and entitlements in the South China Sea. For example, it has made reference to “historic rights” but never clarified the nature or scope of its claimed historic rights.⁴⁰ China also has refrained from expressing a view on the status of particular maritime features in the South China Sea. The Tribunal considered prior cases on this issue,⁴¹ and then stated that two principles follow:

“First, where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the Tribunal is entitled to examine the conduct of the Parties—or indeed, the fact of silence in a situation in which a response would be expected—and draw appropriate inferences. Second,

³⁶ Award on Jurisdiction and Admissibility, para 408.

³⁷ Award on Jurisdiction and Admissibility, para 401.

³⁸ Award on Jurisdiction and Admissibility, paras 400, 404.

³⁹ Award on Jurisdiction and Admissibility, para 151.

⁴⁰ Award on Jurisdiction and Admissibility, para 160.

⁴¹ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p 12 at p. 28, para 38; *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p 275 at pp 316-17, para 93.

the existence of a dispute must be evaluated objectively. The Tribunal is not obliged to permit an overly technical evaluation of the Parties' communications or deliberate ambiguity in a Party's expression of its position to frustrate the resolution of a genuine dispute through arbitration."⁴²

41. The Tribunal then concluded that a dispute existed concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention.⁴³
42. After reviewing the *Notes Verbales* submitted by the Philippines and China to the Secretary-General of the United Nations in relation to the submissions to the Commission on the Limits of the Continental Shelf, including the fact that China had attached its nine-dash line map to one of its notes, the Tribunal concluded that a dispute is readily apparent in the text and content of the diplomatic exchange. It further stated that the existence of a dispute over these issues is not diminished by the fact that China has not clarified the meaning of the nine-dash line or elaborated on its claim to historic rights.⁴⁴
43. With respect to the issue whether the dispute on China's claim to historic rights in the South China Sea is a dispute on the interpretation or application of UNCLOS, despite that fact that China's entitlements appear to be based on an understanding of historic rights existing independently of, and allegedly preserved by, the Convention, the Tribunal pointed out that "[t]he Philippines' position is that "UNCLOS supersedes and nullifies any 'historic rights' that may have existed prior to the Convention." It then concluded as follows:

"This is according not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A *dispute concerning the interaction of the Convention with another instrument or body of law*, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention."⁴⁵

B. No Other Binding Dispute Settlement Procedure

44. The Tribunal dealt with the conditions under Articles 281 and 282 of UNCLOS that there was no other binding dispute settlement procedure that parties had agreed to use. Article 281 allows States to "opt out" of Part XV procedures.⁴⁶ If States have agreed on another dispute resolution mechanism, such an agreement may exclude UNCLOS compulsory dispute settlement procedures.

⁴² Award on Jurisdiction and Admissibility, para 163.

⁴³ Award on Jurisdiction and Admissibility, para 164.

⁴⁴ Award on Jurisdiction and Admissibility, para 167.

⁴⁵ Award on Jurisdiction and Admissibility, para 168 [emphasis added].

⁴⁶ Award on Jurisdiction and Admissibility, paras 224.

45. China argued that in the 2002 DOC, bilateral and unilateral statements, the 1976 Treaty of Amity, and the Convention on Biological Diversity, the Philippines had agreed to solve the disputes only by negotiations.
46. According to Article 281, the alternative agreement must fulfill three criteria:
- It is an agreement for the settlement of “a dispute concerning the interpretation or application of the [UNCLOS] Convention”.
 - There is an agreement to submit such disputes to a compulsory procedure “at the request of any party to the dispute”.
 - The agreed compulsory procedure “entails a binding decision”.⁴⁷
47. The Tribunal decided that “the DOC was not intended to be a legally binding agreement with respect to dispute resolution”,⁴⁸ considering several Chinese government statements referring to the DOC as “political” document, and statements by other parties to the DOC and the ASEAN Secretary-General that the DOC “was reduced to a political declaration from the originally envisioned legally binding ‘code of conduct’.”⁴⁹
48. The Tribunal noted the Parties had tried over a decade after the DOC was signed to agree upon a Code of Conduct, and that in recent years before the arbitration, several Chinese officials described the DOC as a “political” document.⁵⁰ Most observers would agree that the DOC is not legally binding treaty. In fact, this is the reason why the ASEAN countries have been calling on China and ASEAN to agree to a legally binding code of conduct (COC).
49. As for the bilateral political statements such as the Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures, the Tribunal found that the language of the statements were suggestive of an aspirational arrangement rather than a legally binding agreement.⁵¹
50. China also argued that by “repeatedly reaffirming negotiations as the means for settling relevant disputes” the statements produced the effect of excluding any means of third-party settlement.” However, the Tribunal emphasized that “repeated insistence by one party on negotiating indefinitely until an eventual resolution cannot dislodge the “backstop of compulsory, binding procedures” provided by Section 2 of Part XV.”⁵²
51. Next, the Tribunal decided that the 1976 ASEAN Treaty of Amity and Cooperation did not provide for binding dispute settlement procedures. The Treaty of Amity includes a range of

⁴⁷ Award on Jurisdiction and Admissibility, paras 213, 318.

⁴⁸ Award on Jurisdiction and Admissibility, para 217.

⁴⁹ Award on Jurisdiction and Admissibility, para 217.

⁵⁰ Award on Jurisdiction and Admissibility, para 218-219.

⁵¹ Award on Jurisdiction and Admissibility, para 243.

⁵² Award on Jurisdiction and Admissibility, para 247.

choices for peaceful means of dispute settlement including a recommendation of the High Council and friendly negotiations. The Philippines also cited State practice that none of the states in *Land Reclamation (Malaysia v. Singapore)*, and *Bay of Bengal Maritime Boundary (Bangladesh v. India)*, took the position that the 1976 Treaty of Amity contained compulsory dispute resolution procedures which excluded UNCLOS jurisdiction under Article 281.⁵³

52. The Tribunal noted that the dispute resolution procedures in the 1976 Treaty of Amity were subject to Article 16, which states that “the foregoing provisions of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute.” The Treaty did not constitute a binding agreement to resolve disputes by other means because that obligation only becomes binding if there is an additional agreement amongst all parties to the dispute.⁵⁴
53. Finally, on the 1992 Convention on Biological Diversity (CBD), the Tribunal acknowledged an overlap in the subject matter of the CBD and Part XII of UNCLOS on Protection and Preservation of the Marine Environment. However, the Tribunal took the view that the CBD and UNCLOS contained parallel regimes. The CBD is aimed at protecting biological diversity beyond that found in the marine environment and goes well beyond the scope of Articles 192 and 194 of UNCLOS.⁵⁵ In addition, the Tribunal found that Article 22(1) of the CBD preserves the right to dispute settlement under UNCLOS.

C. *Exchange of Views*

54. Article 283 of UNCLOS pre-conditions jurisdiction with an “exchange of views regarding [the] settlement [of the dispute] by negotiation or other peaceful means.”
55. China argued that “general exchanges of views, without having the purpose of settling a given dispute, do not constitute negotiations.” On the other hand, the Philippines emphasized that “Article 283 is not a requirement to negotiate as such.”⁵⁶
56. The Tribunal adopted the view in *Chagos Marine Protected Area Case*⁵⁷ and the *Arctic Sunrise Case*⁵⁸ that Article 283 requires “that the Parties exchange views regarding *the means by which a dispute that has arisen between them may be settled* . . . Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute.”⁵⁹
57. The Tribunal held that two rounds of bilateral consultations between the Philippines and China that took place in 1995 and 1998 included the exchange of views on the means of

⁵³ Awards on Jurisdiction and Admissibility, para 262.

⁵⁴ Award on Jurisdiction and Admissibility, para 266.

⁵⁵ Award on Jurisdiction and Admissibility, para 285.

⁵⁶ Award on Jurisdiction and Admissibility, para 328.

⁵⁷ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015.

⁵⁸ *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015.

⁵⁹ Award on Jurisdiction and Admissibility, para 333.

resolving the dispute between the Parties.⁶⁰ Further, the Tribunal found that the DOC itself, along with discussions on the creation of a further Code of Conduct, represented an exchange of views on the means of settling the Parties' dispute.⁶¹

58. In relation to recent activities, the tribunal also found that Parties continued to exchange views on the means to settle the disputes between them until their bilateral consultation on 14 January 2012, which addressed many issues including the South China Sea.⁶² Particular to the disputes at Scarborough Shoal, the Tribunal noted that on 26 April 2012, the Philippines presented China with a *Note Verbale* asking "for the two countries to bring the matter before an appropriate third-party adjudication body under international law, specifically the International Tribunal on the Law of the Sea (ITLOS)" and China replied on 29 April 2012 that "[t]he proposal from the DFA of the Philippines to bring the so-called "Huangyan island issue" to a third-party arbitration body has none[sic] ground".⁶³ This exchange of *Notes Verbales* was sufficient evidence that the Parties had "unequivocally exchanged views regarding the possible *means of settling the disputes* between them that the Philippines has presented in these proceedings".⁶⁴

59. The Tribunal's decision is in accordance with many prior cases, including the *Land Reclamation Case*,⁶⁵ in which ITLOS suggested that once a State has decided negotiations will not succeed, it can invoke the dispute settlement provisions.⁶⁶

D. Disputes on the Protection and Preservation of the Marine Environment

60. The Philippines submitted a dispute concerning the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal, and the application of Articles 192 and 194 of the Convention.⁶⁷ Where the alleged harmful activities took place in the territorial sea surrounding Scarborough Shoal or Second Thomas Shoal, the Tribunal noted that the environmental provisions of the Convention impose obligations on States Parties *including in the territorial sea*.⁶⁸

61. Where the alleged harmful activities took place in the exclusive economic zone of the Philippines, of China, or in an area of overlapping entitlements, the Tribunal noted that Article 297(1)(c) expressly affirms the Tribunal's jurisdiction over disputes concerning the

⁶⁰ Award on Jurisdiction and Admissibility, para 334.

⁶¹ Award on Jurisdiction and Admissibility, para 335.

⁶² Award on Jurisdiction and Admissibility, para 337.

⁶³ Award on Jurisdiction and Admissibility, para 340.

⁶⁴ Award on Jurisdiction and Admissibility, para 342.

⁶⁵ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Case No. 12, Provisional Measures Order (8 October 2003) [available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf].

⁶⁶ *Id.*, para 47.

⁶⁷ Philippines' Submission No. 11.

⁶⁸ Award on Jurisdiction and Admissibility, para 408(a).

alleged violation of “specified international rules and standards for the protection and preservation of the marine environment” in the exclusive economic zone.⁶⁹

62. The Philippines also submitted a dispute concerning China’s activities on Mischief Reef and their effects on the marine environment. The Tribunal similarly held that its jurisdiction was not dependent on a prior determination of the status of any maritime feature, on the existence of an entitlement by China to an exclusive economic zone in the area, or on the prior delimitation of any overlapping entitlements.⁷⁰
63. This finding is significant because the Tribunal affirmed that States are bound by obligations to submit disputes regarding their duty to protect and preserve the marine environment *regardless of which maritime zone they took place in*. Therefore, the Tribunal may make a finding on whether China violated its obligations under UNCLOS to protect and preserve the marine environment by the manner in which it has undertaken massive reclamation and construction activities and converted small geographic features into large artificial islands.

E. Disputes on Fisheries

64. The Philippines’ submitted a dispute concerning China’s actions that allegedly interfered with the traditional fishing activities of Philippine nationals at Scarborough Shoal.⁷¹
65. Article 297 limits the jurisdiction of the tribunal with respect to fisheries resources in the exclusive economic zone. Article 298 excludes disputes concerning “law enforcement activities” related to marine scientific research or fisheries. This could be a bar to the Tribunal’s jurisdiction over the Parties’ disputes relating, among others, to Chinese fisheries enforcement measures, and the operation of Chinese law enforcement vessels.⁷²
66. The Philippines clarified that the activities in question occurred *within* the 12 nautical mile territorial sea that would be generated by Scarborough Shoal irrespective of whether the feature were considered to be a rock or island pursuant to Article 121 of the Convention. The Tribunal noted that traditional fishing rights may exist even within the territorial waters of another State and considered that its jurisdiction to address this dispute was not dependent on a prior determination of sovereignty over Scarborough Shoal.⁷³
67. The Tribunal emphasized that Articles 297 and 298 of the Convention do not apply in the territorial sea and thus imposed no limitation on the Tribunal’s jurisdiction. This finding has implications on a State’s exercise of jurisdiction over fishing rights within the territorial sea of a disputed maritime feature.

⁶⁹ Award on Jurisdiction and Admissibility, para 408(b).

⁷⁰ Award on Jurisdiction and Admissibility, para 409, Submission No. 12.

⁷¹ Philippines’ Submission No. 10.

⁷² Award on Jurisdiction and Admissibility, para 371.

⁷³ Award on Jurisdiction and Admissibility, para 407.

F. *Status and Entitlements of Maritime Features*

68. The Tribunal ruled that it *has* jurisdiction over the status and entitlements of maritime features, in spite of China’s Article 298 declaration. This is a key decision in the case.
69. The status of the feature and its entitlement to maritime zones is *separate* from any issue of sovereignty. The Tribunal *can* decide whether a disputed feature in the exclusive economic zone of the Philippines is an “island” entitled to an exclusive economic zone and continental shelf of its own, a “rock” under Article 121(3) that is entitled only to a territorial sea, or a low-tide elevation which cannot be claimed as territory and is not entitled to any maritime zones of its own. The status and entitlement of a feature depends upon the *characteristics* of the feature—and has nothing to do with “ownership”.
70. The Tribunal agreed with the arguments of the Philippines’ that the case is neither a territorial sovereignty dispute nor a case on maritime boundary delimitation. It agreed with the Philippines that the issues on the status and entitlement of features in the South China Sea could be addressed without addressing sovereignty issues or delimiting maritime boundaries. Based on this reasoning, the Tribunal decided that it had jurisdiction over four of the Philippines’ Submissions.⁷⁴
71. The Tribunal decided that it had jurisdiction over the submission that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are islands that generate no exclusive economic zone or continental shelf. It reasoned that:
- This is not a dispute concerning sovereignty over the feature, which would remain entirely unaffected by the Tribunal’s determination.
 - Given that *Scarborough Shoal lies over 200 nautical miles from any maritime feature claimed by any State to generate an exclusive economic zone or continental shelf, no delimitation is required* before the Tribunal may determine the status of Scarborough Shoal.⁷⁵
72. The Tribunal decided that it had jurisdiction over the submission that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef & McKennan Reef are low tide elevations that generate no maritime zones of their own.⁷⁶ The Tribunal reasoned that:
- Low-tide elevations do not generate entitlement to a territorial sea, exclusive economic zone, or continental shelf. This is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty.

⁷⁴ Philippines’ Submissions No. 3, 4, 6 and 7.

⁷⁵ Award on Jurisdiction and Admissibility, para 400.

⁷⁶ Philippines’ Submissions No. 4 and 6.

- Nor is this a dispute concerning sea boundary delimitation: the status of a feature as a “low-tide elevation”, “island”, or a “rock” relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap.⁷⁷

G. *Disputes Linked to Delimitation of Maritime Boundaries*

73. Article 298 excludes disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations. China’s strongest argument was that the disputes raised are *inextricably linked* with the delimitation of maritime boundaries, and that disputes on maritime boundaries are excluded by its declaration under Article 298.⁷⁸

74. This was the most difficult issue facing the Tribunal on the issue of jurisdiction. If any of the islands, in particular Itu Aba, are entitled to an exclusive economic zone or continental shelf of their own, the proximity to the disputed zones creates an overlap. The Tribunal would not have jurisdiction to decide on the legality of China’s *activities* in areas of overlapping exclusive economic zone claims without engaging in maritime delimitation, and such disputes would then be excluded by article 298.

75. The Tribunal decided that, “To the extent that a claim by the Philippines is premised on the absence of any overlapping entitlements of China to an exclusive economic zone or continental shelf, the Tribunal considers it necessary to consider the maritime zones generated by any feature in the South China Sea claimed by China whether or not such feature is presently occupied by China.”⁷⁹ Consequently, the Philippines has in fact presented a case concerning the status of every large maritime feature claimed by China within 200 nm of Mischief Reef and Second Thomas Shoal.⁸⁰

76. The Tribunal chose to defer its decision on jurisdiction over Submissions 5, 8, 9, 12 and 14:

- Whether Mischief Reef and Second Thomas Shoal are within the exclusive economic zone or on the continental shelf of the Philippines;
- Whether China has interfered with sovereign rights of Philippines within its exclusive economic zone and continental shelf;
- Whether China has failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
- Whether China’s occupation and construction activities on Mischief Reef are unlawful; and

⁷⁷ Award on Jurisdiction and Admissibility, paras 401, 403.

⁷⁸ Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014), paras 65-69.

⁷⁹ Award on Jurisdiction and Admissibility, para 154.

⁸⁰ Award on Jurisdiction and Admissibility, para 172.

- Whether China's actions in waters surrounding Second Thomas Shoal are lawful.

77. The Tribunal's reasoning was that the disputes were concerned neither sovereignty nor boundary delimitations. *If, however, another maritime feature claimed by China within 200 nautical miles of the place of the disputed acts were to be an "island" capable of generating an entitlement to an exclusive economic zone and continental shelf, the resulting overlap may bar the Tribunal's jurisdiction.*⁸¹

H. Disputes on Historic Rights, Historic Bays and Titles

78. The Tribunal was asked by the Philippines to rule on the legality of China's claim to sovereign rights and jurisdiction or to "historic rights" within the "nine-dash line".⁸² In other words, the Tribunal was asked to rule that claims to maritime zones must be from land territory, including islands, in accordance with UNCLOS—and not from the nine-dash line.

79. However, China's declaration under Article 298 excludes the jurisdiction of the tribunal over disputes concerning historic bays or titles. Therefore, the Tribunal has to first determine whether a dispute on whether China's claim to "historic rights" in the South China Sea is consistent with UNCLOS, is a dispute that is within China's Article 298 declaration excluding disputes on "historic bays or titles".

80. The Tribunal took the view that this jurisdictional issue was linked to the merits, and chose to decide both issues at the merits stage. It reasoned, "The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination."⁸³

I. Disputes on Law Enforcement Activities

81. The Philippines claimed that China has breached obligations by operating its law enforcement vessels in a dangerous manner causing risk of collision with Philippine vessels navigating in vicinity of Scarborough Shoal.⁸⁴

82. Article 298 excludes disputes concerning "law enforcement activities" related to marine scientific research or fisheries. Article 298(b) limits the jurisdiction of the tribunal with respect to law enforcement activities regarding fisheries resources in the exclusive economic zone.

83. This could be a bar to the Tribunal's jurisdiction over disputes relating, among others, to Chinese fisheries enforcement measures, the operation of Chinese law enforcement vessels,

⁸¹ Award on Jurisdiction and Admissibility, para 402.

⁸² Philippines' Submissions No. 1 and 2.

⁸³ Award on Jurisdiction and Admissibility, para 400.

⁸⁴ Philippines' Submission No .13.

and the stand-off between the Philippines and China at Second Thomas Shoal, if the incidents took place within an area that China could claim as its exclusive economic zone.⁸⁵ This issue is therefore linked to whether the Tribunal finds that Itu Aba or other large islands may be entitled to an exclusive economic zone or continental shelf.

84. With respect to China's activities in the waters around Scarborough Shoal, the Tribunal found that this dispute related principally to events occurring in the territorial sea surrounding Scarborough Shoal, and it noted that a declaration under Article 298(1)(b) has no application in the territorial sea.⁸⁶ The Tribunal's finding has implications on the jurisdiction of an UNCLOS tribunal over a dispute concerning a State's law enforcement activities within the territorial sea of a disputed island.

J. Disputes on Military Activities

85. The Philippines submitted a dispute concerning China's activities in and around Second Thomas Shoal and China's interaction with the Philippine's military forces stationed on the Shoal.⁸⁷

86. Article 298 excludes disputes concerning "military activities", which could be a bar to the Tribunal's jurisdiction over the Parties' disputes relating to Chinese fisheries enforcement measures, the operation of Chinese law enforcement vessels, and the stand-off between the Philippines and China at Second Thomas Shoal.⁸⁸

87. The Philippines submitted that "[n]one of the activities undertaken by Chinese government vessels about which the Philippines complains in these proceedings are properly considered 'military activities'." Furthermore, China itself has repeatedly asserted that these activities were for civilian purposes.⁸⁹

88. The Tribunal stated that it "considers the specifics of China's activities in and around Second Thomas Shoal, and whether such activities are military in nature, to be a matter best assessed in conjunction with the merits".⁹⁰

V. Major Issues for Consideration by the Tribunal on the Merits of the Dispute

A. Tribunal's Ruling on "Rock" and "Island"

89. The Tribunal's most important decision will be its interpretation of Article 121(3), which is the rule that rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

⁸⁵ Award on Jurisdiction and Admissibility, para 371.

⁸⁶ Award on Jurisdiction and Admissibility, para 410.

⁸⁷ Philippines' Submission No. 14.

⁸⁸ Award on Jurisdiction and Admissibility, para 371.

⁸⁹ Award on Jurisdiction and Admissibility, para 377.

⁹⁰ Award on Jurisdiction and Admissibility, para 411.

90. The Philippines admits that some of the disputed features in the South China Sea that are occupied by China — Scarborough Shoal, Fiery Cross Reef, Johnson South Reef and Cuarteron Reef — meet the definition of an island set out in Article 121(1) of UNCLOS, and are entitled to a territorial sea of 12 nm. However, the Philippines maintains that none of these islands are entitled to an exclusive economic zone and continental shelf because they fall within the exception in Article 121(3) of UNCLOS, that is, they are “rocks which cannot sustain human habitation or economic life of their own”.
91. The Philippines also maintains that three of the reefs occupied by China – Hughes Reef, Mischief Reef and Subi Reef — are not "islands" as defined in UNCLOS, as they are not naturally formed areas of land surrounded by and above water at high tide, but "low-tide elevations" because they are submerged at high tide. Therefore, they are not capable of being subject to a claim of sovereignty. Furthermore, if they are now above water at high tide because of reclamation works, they are "artificial islands", which are not entitled to any maritime zones of their own. Artificial islands, like installations and structures, are entitled only to a 500 m safety zone. Therefore, any State could exercise freedom of overflight over the reefs and freedom of navigation in their surrounding waters.
92. The Tribunal’s decision may clarify some of the provisions in UNCLOS, and become important as a judicial precedent, even if China does not fully comply with it. If the Tribunal provides an authoritative interpretation of the phrase “rocks which cannot sustain human habitation or economic life of their own” in Article 121(3), its reasoning is likely to be carefully examined, especially by the legal advisors in countries that have claimed an exclusive economic zone from tiny uninhabited offshore islands.
93. The Tribunal’s decision on the status and entitlement of islands may apply not only to the islands occupied by China, but also to the larger islands occupied by Taiwan, Vietnam, Malaysia and the Philippines. In response to questions from the Tribunal, the Philippines submitted information on 49 geographic features in its Supplemental Written Submission.⁹¹ However, **it is not clear whether the Tribunal will rule on the status and entitlement of the larger islands** occupied by other States.
94. The issue of rocks and islands under Article 121(3) has focussed attention in particular on Itu Aba, the largest natural island in the Spratly Islands which is occupied by Taiwan but claimed by China, Vietnam and the Philippines. The Philippines admits that Itu Aba is an island, but maintains that it is a rock which cannot sustain human habitation or economic life of its own within Article 121(3) of UNCLOS, and that it therefore is not entitled to an exclusive economic zone or continental shelf, but only a 12 nm territorial sea. Although it is not a State recognized by the United Nations, the Taiwan Government has issued official statements on

⁹¹ Statement on the Philippines’ Supplemental Submission to the Arbitral Tribunal, 17 March 2015, [available at <http://www.dfa.gov.ph/index.php/newsroom/dfa-releases/5667-statement-on-the-philippines-supplemental-submission-to-the-arbitral-tribunal>].

why Itu Aba is an island entitled to an exclusive economic zone and continental shelf.⁹² The Tribunal requested the Philippines to respond to the arguments by the Taiwan Government on the status of Itu Aba and its entitlement to maritime zones.⁹³

B. Legality of the Nine-Dash Line

95. The second important issue the Tribunal may decide is whether China had “historic rights” to resources in the waters enclosed by the nine-dash line, and if so, whether such historic rights continued after China ratified UNCLOS, in areas that UNCLOS provisions recognize as the exclusive economic zone of other States.

96. The key argument in the Philippines’ case is that China has no right to explore and exploit the natural resources within the Philippines’ exclusive economic zone or continental shelf based on China’s “historic rights” in the waters enclosed by the nine-dash line. The Philippines asserts that China can only claim rights in accordance with the *provisions of UNCLOS*. UNCLOS provides that coastal States have sovereign rights to explore and exploit the natural resources only *within* the 200 nm exclusive economic zone. The argument of the Philippines is that China’s claim to historic rights in waters inside the nine-dash line is not compatible with the sovereign rights of the coastal State to the resources within its exclusive economic zone.

97. If the Tribunal rules that any claims to explore and exploit the natural resources must be in maritime zones claimed in accordance with UNCLOS, the ASEAN States bordering the South China Sea will benefit. Vietnam is likely to be the major beneficiary because there are no disputed islands within its 200 nm exclusive economic zone. Indonesia would likely benefit because it would be clear that China would have no historic rights in the exclusive economic zone claimed by Indonesia from the Natuna Islands.

C. Whether Construction Works can change the Status and Entitlement of Features

98. Although the Tribunal cannot decide if the installation and construction works *on* the reefs occupied by China are legal, it may rule that construction works cannot change their status, or their entitlement to maritime zones. In other words, it may rule that low tide elevations and rocks cannot be changed into islands entitled to an exclusive economic zone and continental shelf.

D. Protection and Preservation of the Marine Environment

99. There might be an overall victory for the marine protection activists and environmentalists. The Tribunal has already decided that it has jurisdiction over violations of obligations to protect and preserve the marine environment, regardless of where the violations took place.

⁹² Ministry of Foreign Affairs of the Republic of China, Press Release No. 023 of 23 January 2016, available at http://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=542A8C89D51D8739

⁹³ Transcript, Hearing on the Merits (Day 4, Monday, 30th November 2015), p 29-40.

On the merits, the Tribunal could rule on whether China's construction activities on the reefs it occupies are in violation of its obligations to protect and preserve the marine environment.

VI. Non-appearance, Non-participation and Non-compliance

A. Consequences of Non-appearance and Non-Participation

100. Interesting legal and policy issues arise in this case because of China's decision not to appear and participate in the case. China's decision not to participate *does not deprive the tribunal of jurisdiction*. China is legally bound by the decision because it had consented in *advance* to the UNCLOS dispute settlement procedures by ratifying UNCLOS.

101. In the *Arctic Sunrise Case* between the Netherlands and the Russian Federation,⁹⁴ the Netherlands instituted a case before ITLOS and sought provisional measures. The Russian Federation decided not to appear. In their Joint Separate Opinion, Judges Wolfrum and Kelly stated that in cases such as UNCLOS, where States have consented to a dispute settlement system in general, "*the non-appearance of a party is contrary to the object and purpose of the dispute settlement system under Part XV of the Convention*". The Judges pointed out that under Article 28 of the Statute of the Tribunal, the non-appearing State *remains* a party to the proceedings and is *bound* by the decisions taken.⁹⁵

102. China's decision to adopt a policy of non-appearance and non-participation may not have been a wise choice. If China believed it had strong legal arguments on why the Tribunal had no jurisdiction, it should have participated in the selection of members of the Tribunal and formally raised jurisdictional objections as a preliminary issue. If China had participated in the jurisdictional phase, it would have been better able to articulate its arguments on why it believes that Tribunal has no jurisdiction. Then, if China lost on jurisdiction, it could consider not participating in the case on the merits.⁹⁶

103. As a result of China's policy of non-appearance and non-participation, the Philippines was allowed to set out its entire case to the Tribunal on both jurisdiction and the merits in its Memorial and Supplemental Written Submission on the merits, in which it responded to questions from the Tribunal. Some would argue that when a tribunal has read and studied the issues raised on the merits, they may be less likely to decide that they lack jurisdiction to hear the case.

⁹⁴ *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, 2013, Order (22 November 2013) [available at <https://www.itlos.org/affaires/role-des-affaires/affaire-no-22/>].

⁹⁵ *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*, ITLOS Case No. 22, 2013, Order (22 November 2013), Joint Separate Opinion of Judge Wolfrum and Judge Kelly [available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_sep_op_Wolfrum-Kelly_rev_Eng.pdf]

⁹⁶ This is what the United States did in its case with Nicaragua before the ICJ. It challenged the jurisdiction of the ICJ, and when it lost at the jurisdictional phase, it decided not to participate in the proceedings on the merits: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice *Other Documents: United States*, 24 International Legal Materials 246 (1985).

104. The decision not to participate also raised practical problems for the conduct of the case in the *Arctic Sunrise Case*. In their Joint Separate Opinion, Judges Wolfrum and Kelly explained the practical problems caused by the non-appearance of one of the parties. They stated that:

“The non-appearing party not only weakens its own position concerning the legal dispute but also hampers the other party in its pursuit of its rights and interests in the legal discourse of the proceedings in question. But, more importantly, it hinders the work of the international court or tribunal in question. The international court or tribunal may in such a situation have to rely on the facts and the legal arguments presented by one side without having the benefit of hearing the other side. This cannot be fully compensated by recourse to facts which are in the public domain.”

B. Recognition and Compliance with the Award

105. The Tribunal’s affirmation of jurisdiction sends a signal to all States Parties to UNCLOS. In particular, it sends a message that if States invoke the dispute settlement procedures in UNCLOS, an arbitral tribunal established under Annex VII will decide the case as it sees the legal issues, notwithstanding how big and powerful the other party in the case may be. In the long run, it sends a message to small States that they can trust the dispute settlement mechanisms in UNCLOS.

106. If the Tribunal makes any rulings limiting China’s rights and jurisdiction to explore and exploit the natural resources in the waters in the South China Sea, these rulings will be legally binding on China. UNCLOS clearly provides that the award of the arbitral tribunal is final and without appeal, and shall be complied with by the parties to the dispute.⁹⁷

107. However, if China decides not to recognize or comply with any adverse ruling, there is no mechanism available to force China to comply. In other words, the award of the Tribunal will be legally binding but unenforceable.

108. If China does not comply with the Award, it would have to pay a political price. China could be seen by many States as a rising power with little respect for international law, or as a rising power which does not follow the rules of international law when it is not in its national interests to do so. This will be a matter of serious concern for many States who have an interest in the oceans being governed by a rules-based order rather than power.

109. In the end, the case raises a fundamentally important question. Will use of the oceans in Asia continue to be governed by the universally accepted rules-based regime set out in UNCLOS, or will exceptions to that regime be necessary to accommodate the interests of powerful states? It is hoped that whatever the outcome of this case, China and other major powers with significant global maritime interests will decide that it is in their long-term national interest to support rather than undermine the universally-accepted rules-based regime in UNCLOS.

⁹⁷ UNCLOS, Article 296.