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I Introduction

On January 22, 2013, the Philippines unilaterally initiated an arbitration against China under Part XV of and Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). According to the Philippines’ Notification and Statement of Claims, the goal was to seek a peaceful and durable resolu-

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1 For information released by the Permanent Court of Arbitration, see Permanent Court of Arbitration (PCA), PCA Case Repository: The Republic of Philippines v. The People’s Republic of China <https://pcacases.com/web/view/7> (last visited Sept. 25, 2016).
tion of its disputes with China in the West Philippine Sea (WPS). Under challenge were China’s maritime claims and entitlements as well as enforcement actions and omissions in the eastern part of South China Sea (SCS) enclosed by the U-Shaped Line (USL), deemed as Philippine (but not China’s) Exclusive Economic Zone (EEZ) and continental shelf.

Before a month lapsed China rejected and returned the Philippines’ Notification initiating this arbitration. The case went on. A five-member Tribunal was established under the default rule of Article 3(e) of Annex VII. The Philippines submitted its Memorial and Supplemental Written Submission on schedule fixed by the Tribunal. China did not deliver Counter-Memorial and Comment to the Philippines’ Supplemental Written Submission. However, on December 7, 2014, China released the “Position Paper of the Government of the PRC on the Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines (China’s Position Paper),” arguing that the Tribunal has no jurisdiction over the disputes submitted by the Philippines.

Considering China’s Position Paper as a plea against its jurisdiction, the Tribunal bifurcated the arbitral procedure. The hearing on procedural matters was held in July 2015 when both Parties’ oral arguments concerning admissibility and jurisdiction issues could be made (July Hearing). China was not represented at the hearing. On October 29, 2015, the Permanent Court of Arbitration (PCA), the Registry of this arbitration, released the Award on Jurisdiction and

5 UNCLOS, supra note 2, Annex VII.
Admissibility (the Jurisdictional Award). Not convinced by China’s Position Paper, the Jurisdictional Award allowed the Tribunal to entertain all of Philippine Submissions in the merits phase. For this purpose the second stage of hearing was held on November 24-30, 2015 when both Parties’ oral arguments concerning the remaining issues of jurisdiction and admissibility as well as the merits issues could be heard (November Hearing). After completing the hearing without China’s presence, the Tribunal announced that the final award would be delivered in 2016.

Though refusing to participate in this arbitration, China is treated as the respondent by the Tribunal. China’s Position Paper, far from being the Counter-Memorial, was reviewed by Philippine legal team and scrutinized by the Jurisdictional Award. Consequently, it will be hard for the Tribunal and international community to accept the position that China has nothing to do with this arbitration. The final award on merits is expected to create restraining im-

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8 Jurisdictional Award, paras. 397-413.

9 For transcripts of Merits Hearings on November 24-26 and 30, 2015, see PCA, supra note 1.


11 Jurisdictional Award, para. 11.

12 Id. paras. 140-47, 207-11, 238-40, 326-31, 374-78.

pacts upon China’s future SCS policies and behaviors both in legal and political terms. It is expected that China will come out with its own legal response to the award on the merits in various fora.14

Although Article 11 of Annex VII to UNCLOS prevents the losing Party from unilaterally appealing against the award,15 China may still criticize the very basis for the Tribunal to entertain all of Philippine Submissions in the merits phase, namely, the Jurisdictional Award.16 Are there any manifest and essential errors in law or in fact within the Jurisdictional Award?17 As stated in the Jurisdictional Award, seven out of fifteen Philippine Submissions almost passed the thresholds of admissibility and jurisdiction. In other words, these Submissions were held admissible while the Tribunal’s jurisdiction over the disputes reflect-

14 One of the possible arguments for China to raise is that this arbitration cannot settle the Sino-Philippine maritime disputes in SCS presented by the Philippines to the Tribunal, as the core disputes (territorial and sea boundary delimitation disputes) have not been submitted by the Philippines for a settlement. See Michael Sheng-ti Gau, “The Prospects for the Sino-Philippine Arbitration on the South China Sea (U-Shaped Line) Dispute”, 2013 Chinese (Taiwan) Y.B. Int’l L. & Aff. 195.

15 Article 11 (Finality of Award) reads: “The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.” UNCLOS, supra note 2. Cf. Whomersley, supra note 7, paras. 56-61.

16 Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 259 (1953). As pointed out by Professor Cheng, “There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction …” See also Article 288(1) of UNCLOS (providing that: “A court or tribunal referred to in article 87 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”) UNCLOS, supra note 2.

17 Professor Bin Cheng, as one of the most highly qualified publicists, discusses the nullity and voidability of judicial decisions and provides certain causes for annulling, revising or otherwise setting aside a final judgment. One of them is manifest and essential error in law and in fact. Especially, Professor Cheng says that: “VII. Fresh Evidence. — Error produced through lack of knowledge, at the time of the judgment, of facts which would have exercised a decisive influence upon the decision may be regarded as a particular form of error in fact. The Hague Convention of 1899 and 1907 for the Pacific Settlement of International Disputes …, the Statute of the Permanent Court of Justice …, and the Rules of Procedure of practically every Mixed Arbitral Tribunal set up in pursuance of the Treaties of Peace after the First World War consider after-discovered or newly discovered evidence as a ground for revising a judgment. The aim is to provide a remedy against possible injustice arising from errors of fact which have become demonstrable for the first time after the judgment.” Id. 363-64.
ed by them was affirmed. These Submissions can be further divided into two groups. They concern: (i) the legal status of nine maritime features occupied or controlled by China in WPS, as indicated by Submissions 3, 4, 6, and 7;\(^18\) and (ii) the Sino-Philippine maritime confrontations occurring within 12 nautical miles of Scarborough Shoal as well as the environmental issues occurring near the Second Thomas Shoal, as reflected by Submissions 10, 11, and 13.\(^19\) Here, China may question the reasoning and/or evidence employed by the Jurisdictional Award enabling these seven Submissions to pass the thresholds of admissibility and jurisdiction.\(^20\) Sections II and III of this article will explore the possible Chinese legal challenges against these two parts of the award.

For the remaining eight Philippine Submissions, the Jurisdictional Award rules that it cannot fully settle the issues of admissibility and jurisdiction without considering the merits. As a result, these Submissions were examined during the November Hearing which reviewed the merits as well as the remaining admissibility and jurisdictional issues.\(^21\) These Submissions can also be divided into two groups. The first group concerns the legality of China’s invocation of historic rights as justification for its allegedly excessive maritime claims within the area encircled by the USL, as identified by Philippine Submissions 1-2.\(^22\) The second group of submissions identifies various actions of China deemed as trespass to Philippine EEZ and continental shelf, as reflected by Submissions 5, 8, 9, 12 and 14.\(^23\) Not having passed the entire thresholds of ju-

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18 Jurisdictional Award, paras. 169-72, 400-01, 403-04.
19 Id. Paras. 407-08, 410.
20 The thresholds of admissibility and jurisdiction for Submissions submitted to the Tribunal set up under Annex VII to UNCLOS are, inter alia: (i) lack of dispute; (ii) lack of legal dispute: (iii) lack of dispute concerning the interpretation or application of UNCLOS; (iv) application of Articles 281, 283 and 286 of UNCLOS which can bar the jurisdiction of the Tribunal; (v) disputes reflected by the Submission fall within the scope of the disputes indicated by Article 298 which have excluded the Tribunal’s jurisdiction based on Written Declaration of the Respondent made according to Article 298; (vi) disputes reflected by the Submissions fall within the scope of the disputes under Article 297 which limits the jurisdiction of the Tribunal. For a detailed and comprehensive discussion, see Michael Sheng-ti Gau, “The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, With Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015”, 2015(2) China Oceans L. Rev. 90.
21 Jurisdictional Award, paras. 380-88.
22 Id. paras. 398-99.
23 Id. paras. 402, 405-06, 409, 411.
risdiction, these eight Submissions have already surmounted certain major hurdles of admissibility and jurisdiction. China may want to question relevant parts of the Jurisdictional Award concerning how these Submissions passed these thresholds. Section IV, V, VI and VII of this article will uncover such potential arguments. Finally, a conclusion will be given in Section VIII.

II Legal Status of China-Occupied or Controlled Maritime Features in WPS

A The Rulings of the Jurisdictional Award

As the first group of Philippine Submissions that have passed the admissibility and jurisdiction thresholds, the issues of legal status of maritime features cover nine China-occupied or controlled maritime features located in WPS. Philippine Submissions 3, 4, 6 and 7 claim that Johnson, Cuarteron and Fiery Cross Reefs, as well as Scarborough Shoal are only rocks which generate no entitlement to an EEZ or continental shelf under Article 121(3) of UNCLOS. Gaven, McKennan, Mischief and Subi Reefs, as well as Second Thomas Shoal are low-tide elevations (LTEs) that do not generate entitlements to a territorial sea, EEZ or continental shelf, and are not features that are capable of appropriation by occupation or otherwise.

According to the Jurisdictional Award, these four Submissions reflected Sino-Philippine disputes. Such disputes did not relate to sovereignty or sea boundary delimitation. The disputes over the legal status of Johnson, Cuarteron and Fiery Cross Reefs, as well as Scarborough Shoal concerned the interpretation or application of Article 121 of UNCLOS. As to the disputes over the legal status of Gaven, McKennan, Mischief and Subi Reefs, as well as Second Thomas Shoal, they concerned the interpretation or application of Article 13 of UNCLOS.

Since the Jurisdictional Award held that the Sino-Philippine “disputes” could be reflected by these four Submissions, the Tribunal must have obtained sufficient evidence to prove that: (i) China actually rejected Philippine claims that Johnson, Cuarteron and Fiery Cross Reefs, as well as Scarborough Shoal only qualify as rocks defined by Article 121(3) of UNCLOS, incapable of generating EEZ and continental shelf; (ii) China actually claimed that these four mari-

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24 Submission 15 of the Philippines is “China shall desist from further unlawful claims and activities.” It is too vague to warrant discussion in this article. Id. para. 101.
25 Id.
26 Id. paras. 400-01, 403-04.
time features to be islands under Article 121(1) capable of generating EEZ and continental shelf, while the Philippines actually opposed such position; and (iii) China actually contended that Gaven, McKennan, Mischief, and Subi Reefs, as well as Second Thomas Shoal to be islands or rocks under Article 121, while being capable of appropriation by occupation or otherwise. Meanwhile, the Philippines objected to such claims.27

To be noted, the evidence invoked by the Jurisdictional Award fails to demonstrate such clashing positions. To the contrary, the evidence proves that both China and the Philippines have concurrent positions significant to this arbitration.

B The Real Picture of the Unabridged Evidence Invoked

To prove the existence of disputes reflected by Submissions 3-4 and 6-7, the Jurisdictional Award invoked the Philippine-Sino exchange of two Note Verbales (NV) forwarded to the Secretary General of the United Nations (UN) in 2011.28 It is important to review these two NVs to evaluate the reasoning of the Tribunal. To comprehend such an exchange, China’s 2009 NV delivered to the UN must be examined first. As a matter of fact, the Philippines’ NV of 2011 was meant to respond to China’s 2009 NV, while China’s 2011 NV served to refute Philippine 2011 NV so as to defend its position in 2009 NV. Here, the omission of China’s 2009 NV in the Jurisdictional Award becomes questionable.

27 The Jurisdictional Award defines “dispute” as following: “The concept of a dispute is well-established in international law and the inclusion of the term within Article 288 constitutes a threshold requirement for the exercise of the Tribunal’s jurisdiction. Simply put, the Tribunal is not empowered to act except in respect of one or more actual disputes between the Parties. Moreover, such disputes must concern the interpretation and application of the Convention. In determining whether these criteria are met, the Tribunal recalls that, under international law, a ‘dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ Whether such a disagreement exists ‘is a matter for objective determination.’ A mere assertion by one party that a dispute exists is ‘not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence.’ It is not adequate to show that ‘the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.’ Moreover, the dispute must have existed at the time the proceedings were commenced. In the present case, that would be 22 January 2013, the date of the Philippines’ Notification and Statement of Claim.” Id. paras. 148-49.

28 Id. at 66, nn. 133-34.
China’s 2009 NV

On May 7, 2009, China delivered two identical NVs to the UN to oppose two outer continental shelf submissions presented to the Commission on the Limits of the Continental Shelf (CLCS) by Malaysia and Vietnam dated May 6–7, 2009, claiming two specified and geographically confined sea-bed areas within SCS as their continental shelf beyond 200 miles from the mainland of Vietnam and Malaysia. It was stated by China in its 2009 NVs 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 (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.

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29 Article 5(a) of Annex I (entitled “Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes”) to the Rules of Procedure of the CLCS provides: “In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.” China’s two NVs of 2009 informed the CLCS of the land and maritime disputes existing in the areas submitted by the Malaysian and Vietnamese submissions so that the CLCS was justified to stop considering these two submissions.

30 For general information concerning (i) submissions of outer continental shelf by Contracting Parties of UNCLOS according to Article 76; (ii) comments and objections raised by other States intending to block relevant submissions; and (iii) the recommendations given by CLCS for respective submissions, see Commission on the Limits of the Continental Shelf (CLCS) <http://www.un.org/depts/los/clcs_new/clcs_home.htm> (last visited Sept. 25, 2016).


Philippine 2011 NV
To challenge the foregoing China’s positions in its 2009 NV that China enjoys (i) sovereignty over SCS islands and their adjacent waters, and (ii) sovereign rights and jurisdiction over relevant waters, the Philippines forwarded a NV on April 5, 2011 to the UN with serial no. 000228,34 with three major points 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.35

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 geo-

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35 In its 2009 NVs to protest against Malaysian and Vietnamese outer continental shelf submissions covering two SCS areas, China claimed territorial sovereignty over the SCS islands, covering Nansha Islands (Spratly Islands Group), Xisha Islands (Paracel Islands Group), Zhongsha Islands (Macclesfield Bank), and Dongsha Islands Group (Pratas Islands). The Philippines in its 2011 NV rejected part of China’s territorial claims in Nansha Islands Group by claiming territorial sovereignty over KIG as part of Nansha Islands. The territorial disputes over geological features in KIG between China and the Philippines ensued. Supra notes 33-34. It is to be noted that the Jurisdictional Award in a different context quoted the 2011 Philippine NV but deleted its first paragraph. Also, the Jurisdictional Award quoted the 2011 China’s NV but erased major part of the second paragraph. What these two missing paragraphs demonstrate is Sino-Philippine territorial disputes due to Philippine invasion of China’s SCS territories in 1970s. See Jurisdictional Award, paras. 165-66.
logical feature in the KIG as provided for under the United Nations Convention on the Law of the Sea (UNCLOS). At any rate, the extent of the waters that are “adjacent” to the relevant geological features are definite and determinable under UNCLOS, specifically under Article 121 (Regime of Islands) of the said Convention.

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

THIRD, since the adjacent waters of the relevant geological features are definite and subject to legal and technical measurement, the claim as well by the People’s Republic of China on the “relevant waters as well as the seabed and subsoil thereof” (as reflected in the so-called 9-dash line map attached to Noted Verbales CML/17/1009 dated 7 May 2009 and CML/18/2009 dated 7 May 2009) outside of the aforementioned relevant geological features in the KIG and their “adjacent waters” would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or

36 In China’s 2009 NVs, China also claimed sovereignty over the adjacent waters of SCS islands. However, for the adjacent waters of those geological features in KIG, the Philippines claimed to own sovereignty. Hence, another territorial sovereignty disputes emerged between China and the Philippines over “adjacent waters” or territorial waters of those geological features in KIG. It should be noted that the Philippines in its 2011 NV used individual geological features in KIG to claim territorial waters or adjacent waters. See Permanent Mission of the PRC to the UN, supra note 33; Permanent Mission of the Republic of the Philippines to the UN, supra note 34.

37 During this arbitration, the Philippines has assumed the meaning of “relevant waters” indicated by China’s 2009 and 2011 NV as denoting the entire maritime areas within the USL drawn on the map attached to China’s 2009 NV, therefore going beyond what is allowed by UNCLOS. A potential dispute over the legal source of China’s maritime claims in SCS embodied by “relevant waters” could arise. Should China invoke historic rights under customary law to justify its maritime claims in SCS beyond the allowance of UNCLOS, such a dispute over “source” would be real. Should China’s “relevant waters” be based upon UNCLOS provisions, no dispute over “source” could exist. Therefore, the key issue is the size and shape of China’s “relevant waters”, if it is within or beyond what is permitted by UNCLOS. See Section IV-B and Figure 1 of this paper.

38 Considering the context, the term “these areas” should mean: (i) the “adjacent waters” surrounding the relevant geological features in the KIG over which China and the Philippines have competed for territorial sovereignty, together with (ii) the “relevant waters” (outside of the relevant geological features in the KIG and the “adjacent waters” thereof) over which China and the Philippines have competed for sovereign rights and jurisdiction. See Permanent Mission of the Republic of the Philippines to the UN, supra note 34.
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 in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.”

3 China’s 2011 NV
To reject the above positions that ‘the Philippines owns territorial sovereignty over the relevant geological features in KIG and the territorial sea, EEZ and continental shelf generated thereby’, China delivered its NV on April 14, 2011 to the UN with serial no. CML/8/2011, with three major points as follows:

[First] “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.”

3 To be submitted, the Philippines believes that some of the “relevant geological features in KIG” qualify as islands under Article 121 of UNCLOS. People may wonder if the Philippines is using its archipelagic baselines to claim EEZ and CS, i.e. WPS. However, Professor Sands in his oral statement delivered at the July Hearing provided a Philippine Supreme Court Ruling to confirm this author’s opinion. It was said by Professor Sands on 8 July 2015 that The Philippines Supreme Court has affirmed the constitutionality of RA 9522 in its 2011 judgment in the case of Magallona v Ermita. The Supreme Court ruled in that case that the Philippine Congress’s decision to classify the Kalayaan Island Group as a regime of islands under the Republic of the Philippines consistent with Article 121 of UNCLOS: “…manifests the Philippine State’s responsible observance of its pacta sunt servanda obligation under UNCLOS …” See PCA, Transcript of the Hearing on Jurisdiction and Admissibility, July 8, 2015, at 4-5 (bold emphasis added), available at <http://www.pccases.com/web/sendAttach/1400> (response to Tribunal questions by Professor Sands) (last visited Sept. 25, 2016).


41 This means that China rejected Philippine claims over (i) the geological features in KIG and (ii) the maritime entitlements under UNCLOS generated by the geological features in KIG. Most probably China’s “abundant historical and legal evidence” here was used to support China’s positions so as to prevail over Philippine various claims. This term does not necessarily mean that China invoked customary rules governing historic rights to justify its maritime claims in SCS, unless China really claimed maritime areas beyond the allow-
[Second] “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.”

[Third] “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.”

42 In the First Point of China’s 2011 NV, China mentioned about “abundant historical and legal evidence”. Here in the Second Point, China probably intended to demonstrate why its historical and legal evidence or claims were better than those of the Philippines. PCA, supra note 39 (bold emphasis added).

43 It means that China actually invoked UNCLOS as a legal basis to claim maritime entitlements in Nansha Islands. Since KIG is part of Nansha Islands, China must have relied on UNCLOS to claim its maritime entitlements in KIG. This position was shared by the Philippines. Therefore there could not be Sino-Philippine disputes over the “source” of maritime entitlements in KIG. PCA, supra note 39 (bold emphasis added). See also Jurisdictional Award, paras. 398-99.
C  **Evidence Misused**

As previously mentioned, the Jurisdictional Award invoked the 2011 Philippine-Sino exchange of NVs while omitting China’s 2009 NV for the purpose of proving that Philippine Submissions 3-4 and 6-7 reflect the disputes concerning the legal status of nine maritime features. However, based on the third point of China’s 2011 NV, it is the Nansha Islands (Spratly Islands Group) as a single unit that was used as the basis to generate maritime entitlements to territorial sea, EEZ and continental shelf for China.44 Meanwhile, the Philippines’ 2011 NV clearly focused on relevant geological features (without giving names) in KIG that generate maritime entitlements of territorial sea, EEZ and/or continental shelf according to UNCLOS.45 The Philippines’ 2011 NV identified no geological features in KIG incapable of generating territorial sea, EEZ and/or continental shelf, let alone those nine features indicated in its Submissions 3-4 and 6-7.

Meanwhile, China did not employ such methodology to claim maritime entitlements, as China used Nansha Islands as a unit to make maritime claims. China’s 2011 NV did not specify any maritime feature capable or incapable of generating territorial sea, EEZ and continental shelf. Those nine features identified by Philippine Submissions 3-4 and 6-7 were never mentioned in the evidence used by the Jurisdictional Award. How could both Parties have any dispute concerning their legal status as LTES, rocks, or islands?

This explains why the Jurisdictional Award failed to provide any positive and specific evidence to prove that Submissions 3-4 and 6-7 reflected Sino-Philippine dispute over the legal status of those nine particular maritime features.46

Had China abandoned its way of claiming maritime entitlements and followed Philippine model by using individual maritime features within Nansha Islands to claim EEZ and continental shelf, China would have chosen those bigger features widely recognized as proper islands as factual bases. Why would China rely on those smaller features identified by Philippine Submissions 3-4 and 6-7? In the eyes of international law, a dispute could only be crystalized when there emerged a disagreement on a point of law or fact, a conflict of legal

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44 See *supra* note 40.
45 See Permanent Mission of the Republic of the Philippines to the UN, *supra* note 34.
46 Another piece of evidence provided by the Jurisdictional Award is a NV from the Philippines to Chinese Ambassador to the Philippines dated April 4, 2011 concerning Reed Bank. See Jurisdictional Award, at 67, n. 135. However, Reed Bank is irrelevant to Philippine Submissions 3-4 and 6-7, as Reed Bank is not even mentioned by these four Submissions. It further proves that the Tribunal found no evidence. It is interesting to note that Judge Wolfrum once laid down a high standard of proof. See Whomersley, *supra* note 7, para. 63.
views or of interests between China and the Philippines in the present case.\textsuperscript{47} However, for Philippine Submissions 3-4 and 6-7, the Tribunal relied on the 2011 Philippine-Sino exchange of NVs to confirm the existence of Sino-Philippine disputes,\textsuperscript{48} based on: (i) for China’s part, an unreal position that China did not claim; and (ii) for Philippine part, a position that did not even exist in Philippine 2011 NV. Perhaps due to such insufficiency of evidence, the Jurisdictional Award lacked confidence in its own conclusion.\textsuperscript{49}

The Tribunal is expected to give its ruling on the merits of Philippine Submissions 3-4 and 6-7. However, such ruling may not facilitate the settlement of Sino-Philippines sea boundary delimitation in WPS, as such ruling can hardly resolve the problem to be encountered when boundary delimitation negotiation starts. This is because Philippine Submissions 3-4 and 6-7 fail to represent what China may actually claim in the boundary delimitation negotiation with the Philippines. No matter what happens by the end of this arbitration concerning these four Submissions, people will not know the totality of maritime entitlements China may claim in WPS according to UNCLOS. There are quite a few proper islands in Nansha Islands (Spratly Islands Group).\textsuperscript{50} Apart from Itu

\textsuperscript{47} See \textit{supra} note 27.

\textsuperscript{48} Para. 170 of the Jurisdictional Award provides that: “170. The Tribunal considers that, viewed objectively, a dispute exists between the Parties concerning the maritime entitlements generated in the South China Sea. Such a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature. Rather, the Tribunal must “distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute.” International law does not require a State to expound its legal arguments before a dispute can arise.” Jurisdictional Award, para. 170.

\textsuperscript{49} Para 171 of the Jurisdictional Award provides that: “The Tribunal is conscious that it may emerge, in the course of the Tribunal’s examination or in light of further communications from China, that the Parties are not, in fact, in dispute on the status of, or entitlements generated by, a particular maritime feature. In this respect, the Tribunal considers the situation akin to that faced by the International Court of Justice in \textit{Land and Maritime Boundary (Cameroon v. Nigeria)}: even if “the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties.” The Tribunal is entitled to deal with this dispute.” Id. para. 171.

\textsuperscript{50} Robert C. Beckman & Clive H. Schofield, “Defining EEZ Claims from Islands: A Potential South China Sea Change”, 29 \textit{Int’l J. Marine & Coastal L.} 193, 210-11 (2014). This article argued that there are 12 maritime features in Spratly Islands Group that qualify as islands under Article 121 of UNCLOS. They are: (i) Itu Aba occupied by Taiwan; (ii) Thitu Island, West York Island, Northeast Cay, Nanshan Island, Loaïta Island occupied by the Philippines; and (iii) Spratly Island, Southwest Cay, Sin Cove Island, Sandy Cay, Nam rotation of Schofield’s simultaneously conflicting opinions, Beckman is still of the
Aba (Taiping Island) which is occupied by the Republic of China Government on Taiwan, other proper islands within Nansha Islands are occupied by Vietnam and the Philippines. The outcome for China to invoke (i) these foreign-occupied proper islands individually or collectively, or (ii) Nansha Islands as a single unit, to claim EEZ and continental shelf in WPS will be far from any final award of this Tribunal that may only decide what was submitted.\textsuperscript{51} Therefore, Philippine Submissions 3-4 and 6-7 suffer from mootness, incapable of settling real Sino-Philippine disputes. The Tribunal should have declared these Submissions inadmissible due to lack of disputes.\textsuperscript{52}

Having considered all four Sino-Philippine exchange of NVs between 2009 and 2011, one cannot fail to notice that the two Parties somehow shared certain significant positions or agreements. For example, some of the “relevant geological features in KIG” were considered by the Philippines as capable of generating EEZ and continental shelf.\textsuperscript{53} This was echoed by China’s 2011 NV,\textsuperscript{54} using Nansha Islands Group as a single unit to claim EEZ and continental shelf. This

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\textsuperscript{51} This is the \textit{non ultra petita} principle. Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colom./Peru), 1950 I.C.J. 395, 402 (Nov. 27). The Court said: “One must bear in mind the principle that it is the duty of the Court ... to abstain from deciding points not included in [the final] submissions [of the parties].” See also Corfu Channel (Assessment of the Amount Compensation) (U.K. v. Alb.), 1949 I.C.J. 244, at 249 (Dec. 15).

\textsuperscript{52} John Collier & Vaughan Lowe, \textit{The Settlement of Disputes in International Law: Institutions and Procedures} 10, 13, 156-157 (1999). After the heading “Justiciability” the two eminent scholars state: “It was mentioned above that not all disputes are suitable for judicial settlement. To be suitable, the dispute must be justiciable. A dispute is said to be justiciable if, first, a specific disagreement exists, and secondly, that disagreement is of a kind which can be resolved by the application of rules of law by judicial (including arbitral) processes. ... Thus far we have been concerned with the task of establishing that a dispute has come into existence. In the case of most (but not all) tribunals a further aspect of this precondition of justiciability is that the dispute remains in existence up to the point that the judgment or award is given. To put it another way, most tribunals will refuse to give rulings on disputes that are hypothetical or have become moot.” In Barbados v. Trinidad and Tobago, both Parties emphasized the need for the existence of a dispute according to Art. 283, while the Tribunal accepted such interpretation. See Barbados v. Trinidad and Tobago, \textit{PCA Case No. 2004-02, Award} (Apr. 11, 2006), paras. 74, 80, 196-200, \textit{available at <https://pcacases.com/web/sendAttach/1116>} (last visited Sept. 26, 2016).

\textsuperscript{53} See Permanent Mission of the Republic of the Philippines to the UN, \textit{supra} notes 34-38.

\textsuperscript{54} See Permanent Mission of the PRC to the UN, \textit{supra} note 40.
position is premised on China’s perception that “islands” exist in Nansha Islands Group.

However, in this arbitration the Philippines held a totally different legal position that none of the maritime features in Nansha Islands qualifies as an island under Article 121.55 It follows that, even if territorial sovereignty over these features belongs to China, China still may not claim EEZ or continental shelf in WPS, either by using Nansha Islands as a single unit, or by using those bigger maritime features within Nansha Islands individually or collectively. Such Philippine position is in conflict with its 2011 NV, which was deemed important and heavily used by the Jurisdictional Award as evidence in the context of Philippine Submissions 1-4 and 6-7.56 Given this situation, it is bizarre for the Tribunal to have missed the above-mentioned consensus crystallized by the Sino-Philippine exchange of NVs. Such manifest and essential error in fact may undermine the legal effects of the final award of this arbitration.57

D No Dispute Concerning the Legal Status of Scarborough Shoal

Philippine Submission 3 claims that “Scarborough Shoal generates no entitlement to an EEZ or continental shelf.” The real subject of this Submission is whether or not this feature may generate EEZ and continental shelf. However, none of the evidence offered by the Philippines shows China’s claim that Scarborough Shoal may generate EEZ and continental shelf. Scarborough Shoal is called/translated in Chinese as a three-word-term: Huang (黃 means Yellow in color) Yan (岩 means Rock or Stone) Dao (島 means Island), literally meaning “Yellow Rock Island” or “Yellow Stone Island.” If we focus on the third word, we would say that China considers this feature to be an “island.” But if we look at the second word, we may also get an impression that China regards this feature to be a “rock” or “stone.” If we take the second word as the description of

\[55\] See PCA, Transcript of the Hearing on Jurisdiction and Admissibility, July 7, 2015, at 44-45, available at <http://www.pcacases.com/web/sendAttach/1399> (first-round submissions by Mr. Reichler) (last visited Sept. 25, 2016). “Mr. President, the dispute between the parties over their respective maritime entitlements is just as apparent in the southern half of the South China Sea. Here, there are two different disputes over entitlements. The Philippines claims a 200-mile EEZ and continental shelf from Palawan. China claims a 200-mile entitlement for the Spratly Islands, over all of which it claims sovereignty. As you can see, almost all of the Philippines’ entitlement in this part of the sea is overlapped by China’s 200-mile claim in regard to the Spratlys. The Philippines disputes China’s claim to a 200-mile entitlement for the Spratly features because, in our view, none of them is entitled to an EEZ or continental shelf under the Convention.”

\[56\] Jurisdictional Award, paras 165, 169.

\[57\] Cheng, supra note 17.
this feature which illustrates its nature, then it is clear that even Chinese people consider this “island” to be a barren rock made of a stone. Therefore, it is wrong to jump into a conclusion that China claims this feature to be an island \textit{in the sense of UNCLOS} capable of generating EEZ and continental shelf, just because the third word of this feature in Chinese means “island.”

The key to find out whether Philippine Submission 3 can reflect a Sino-Philippine dispute is to examine whether China has claimed this feature to be \textit{capable of generating EEZ and continental shelf}. Philippine Submissions 10, 11 and 13 actually complain about China’s various actions and omissions in the territorial water surrounding Scarborough Shoal. If China did claim Scarborough Shoal as being capable of generating EEZ and continental shelf, why would the Philippines refrain from presenting any Submissions identifying maritime confrontations occurring in the water beyond 12 miles of this feature? The reason is simple: China did not make such maritime claim beyond the territorial waters of this feature. From the Jurisdictional Award we come to know the true nature of the Sino-Philippine dispute in this context: they were disputing about the \textit{physical nature} of this feature, whether it was a “sand bank,” a “rock,” or an “island.” The Jurisdictional Award provided no information to demonstrate China’s claim that Scarborough Shoal may generate EEZ and continental shelf. Therefore, the lack of dispute becomes the problem of Philippine Submission 3, which should have been ruled inadmissible by the Jurisdictional Award.

E The “Disputes” over Legal Status of Maritime Features Relate to Sovereignty

According to the Jurisdictional Award, Philippine Submissions 3-4 and 6-7 do not relate to sovereignty. The criteria was provided by Paragraph 153 of the Jurisdictional Award as follows:

The Tribunal might consider that the Philippines’ Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines’ claims was to advance its position in the Parties’ dispute over sovereignty.\footnote{Jurisdictional Award, at 54 (particularly n. 81). See also Jurisdictional Award, para. 171.}

\footnote{Id. at 59. \textit{Cf.} Whomersley, \textit{supra} note 7, paras. 20-22.}
The logic behind the formulation of Philippine Submissions 3-4 and 6-7 is simple. To find out how many maritime entitlements China may claim in WPS, the Tribunal only has to examine the legal status of China-occupied or controlled maritime features. Those China-claimed but foreign-occupied maritime features do not count in this regard. From Philippine perspectives and for the purpose of this arbitration, China is denied the status of “coastal State” with respect to those foreign-occupied maritime features in Nansha Islands, as the maritime entitlements those foreign-occupied maritime features may generate under UNCLOS do not accrue to China from the perspectives of these four Submissions. Such line of arguments is in effect downgrading the legal status of China from a coastal State to a non-coastal State. In fact, several maritime features in KIG are occupied by the Philippines but claimed by China. For these features, downgrading China’s legal status to non-coastal State is tantamount to advancing Philippine position in the Parties’ dispute over sovereignty concerning these maritime features. Therefore, it seems fair to say that the formulation of Philippine Submissions 3-4 and 6-7 relate to sovereignty.

In the July Hearing, the Tribunal requested Philippine lawyer to provide information about all the maritime features in Nansha Islands. But the Philippine side did not cooperate. Perhaps, their lawyer did not even know the situations of those maritime features under Philippine occupation. Or, the

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Professor Sands, as Philippine counsel, apparently was unwilling to provide such critical information to the Tribunal. See PCA, supra note 55, at 86-88 (first-round submissions by Professor Sands). Professor Sands stated that: “What China says is that we have ‘deliberately excluded’ the largest ‘island’ occupied by China, Itu Aba, and that we have been mischievous in doing this. To be very realistic, the basis upon which the Philippines selected nine maritime features is explained fully in the Memorial. There are more than 750 features in the Spratly Islands, and possibly this Tribunal may want to engage in the exercise – which would last a very lengthy period of time, having regard to a similar experience in the case of Slovenia and Croatia on a huge number of different matters – but we felt it would simply be unmanageable and unreasonable for the Philippines to request the Tribunal to determine the nature of so many features, and we said so. So we have asked the Tribunal to rule only on those features that are occupied or controlled by China, on the basis that this would assist in the resolution of differences as to the entitlements generated by all the other features. Once we’ve got your award, we can apply your award to all the other features. So we have not ‘deliberately excluded’ anything for any malign purpose; we have simply tried to be pragmatic in relation to what is doable in a reasonable period of time. And that was motivated, for right or for wrong, to assist the Tribunal.” It is noteworthy that the Tribunal in the Jurisdictional Award again emphasized the importance of knowing and considering the maritime zones generated by any features in the SCS claimed by China, whether or not such feature is presently occupied by China. See Jurisdictional Award, para. 154.
Philippine legal team had such knowledge but refused to share it with the Tribunal. This is either unbelievable or unprecedented in international judicial history. Such behavior in the court room vividly portrayed Philippine position in this arbitration that it does not accept the Tribunal’s possible characterization of China as also the coastal State as far as all the maritime features of Nansha Islands unoccupied by China are concerned. This attitude of the Philippines further proves that the formulation of Submissions 3-4 and 6-7 aims at denying China’s legal status as a coastal State, so as to advance Philippine position in its territorial dispute with China.\textsuperscript{61}

F Disputes over Legal Status of Maritime Features Concern, If not Complete, Sea Boundary Delimitation

Philippine Submissions 3-4 and 6-7 are closely linked to Submissions 5, 8-9, 12 and 14. The merits decisions of the Tribunal over Submissions 3-4 and 6-7 would be in effect a declaration of the maritime entitlements China may have in WPS. Based on Philippine arguments the possible outcome is that “China has no EEZ and continental shelf in WPS.” Such an award serves as the premise for the formulation of Philippine Submissions 5, 8-9, 12 and 14. It is a Philippine position that, since China has no EEZ and continental shelf in WPS, the Sino-Philippine dispute about overlapping claims to EEZ and continental shelf in WPS is a non-issue.\textsuperscript{62} Under such a circumstance, Gaven, McKennan, Mischief and Subi Reefs, as well as Second Thomas Shoal identified by Submissions 4 and 6 as LTEs can hardly be located in China’s (non-existent) EEZ and continental shelf. There will be no justification left for China to occupy these maritime features. It goes without saying that Chinese soldiers stationed on these LTEs must withdraw. Moreover, since China does not have sovereign rights and jurisdiction in WPS under the EEZ and continental shelf regimes of UNCLOS, Philippine Submissions 8-9, 12 and 14 can project the picture of “China’s trespass to Philippine EEZ and continental shelf.” Following the Philippines’ logic, after the Tribunal decides the merits issues on Submissions 3-4 and 6-7 and

\textsuperscript{61} It is important to note that in the November Hearing the Philippines’ legal team put forward a theory of “the undetermined legal status of Spratly and Paracel Islands Group,” challenging China’s territorial sovereignty over these two groups of islands. See PCA, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Nov. 24, 2015, at 92-93, 98, \textit{available at} <http://www.pcacases.com/web/sendAttach/1547>; PCA, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Nov. 25, 2015, at 1-2, \textit{available at} <http://www.pcacases.com/web/sendAttach/1548> (last visited Sept. 26, 2016). For different reasoning reaching the same conclusion, see Tzanakopoulos, \textit{supra} note 7, at 8; Klein, \textit{supra} note 6, at 17-21; Whomersley, \textit{supra} note 7, paras. 32-33.

\textsuperscript{62} See Jurisdictional Award, para. 375.
declares that nine China-occupied or controlled maritime features only generate four circles of territorial waters in WPS, there will be no need for China and the Philippines to engage in any sea boundary delimitation negotiation for WPS. With the final award of this arbitration in hand, the Philippines can just say no to China when requested for such a negotiation, as such delimitation project has been completed by the SCS Arbitration indirectly. Therefore, the merits decisions on Philippine Submissions 3-4 and 6-7 will be tantamount to the Sino-Philippine sea boundary delimitation in WPS, which go beyond the jurisdiction of the Tribunal.

Should the Tribunal rule that China may claim EEZ and continental shelf in WPS because some of those China-occupied or controlled maritime features are held to be islands under Article 121, then Sino-Philippine sea boundary delimitation dispute would exist in WPS for the purpose of Articles 74 and 83 of UNCLOS. Under such circumstances, the decision on Philippine Submissions 3-4 and 6-7 would necessarily affect and concern the allocation of maritime areas between China and the Philippines after completing boundary delimitation negotiations. As stated in the Jurisdictional Award, the Tribunal considered these four Submissions as reflecting Sino-Philippine ‘disputes’. Such ‘disputes’ would affect and concern the subsequent Sino-Philippine sea boundary delimitation negotiation for settling their overlapping EEZ and continental shelf claims, which must apply the rules of Articles 74 and 83. Therefore, the dispute as reflected by Submissions 3-4 and 6-7 would also affect and concern the process of application of Articles 74(1) and 83(1) between China and the Philippines. Undoubtedly, the disputes reflected by Philippine Submissions 3-4 and 6-7 fall within the scope of disputes indicated by Article 298(1)(a)(i), and


64 The most favorable decision for China will be that the Tribunal rules all those nine features qualify as “islands” under Article 121. The worst decision for China will be that the Tribunal rules those nine features incapable of generating any territorial water for China because none of them qualifies even as a rock. Different rulings will produce different sizes of maritime area China may claim under UNCLOS.


66 Article 298 of UNCLOS, entitled “Optional exceptions to applicability of section 2” reads: “1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the
consequently, have already been excluded from the Tribunal’s jurisdiction due to China’s 2006 Declaration.67 Lacking jurisdiction, the Tribunal’s decision to move Philippine Submissions 3-4 and 6-7 to the merits phase constituted an award ultra vires.68

III  Maritime Confrontations and Environmental Issues in Scarborough Shoal and Second Thomas Shoal

A  The Rulings of the Jurisdictional Award

With respect to maritime confrontations and environmental issues occurring in Scarborough Shoal and Second Thomas Shoal, three Philippine Submissions passed the thresholds of admissibility and jurisdiction. Submission 10 claims that “China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal.” Submission 11 argues that “China has violated its obligations under UNCLOS to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal.” And Submission 13 complains that “China has breached its obligation under UNCLOS by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.”69

Holding that these three Submissions passed the thresholds of admissibility and jurisdiction, the Jurisdictional Award considered each of the Submissions...
reflecting Sino-Philippine dispute while not relating to sovereignty disputes between the two Parties. Moreover, Article 297(1)(c) of UNCLOS grants jurisdiction to the Tribunal to entertain the merits of Submission 11.70 Possible legal challenges are stated below.

B Submission 10 Concerning Philippine Traditional Fishing Rights Cannot Reflect Any Dispute

Philippine Submission 10 concerns Philippine traditional fishing rights existing in the territorial water of Scarborough Shoal infringed by China. As a matter of fact, such a Submission can hardly reflect any Sino-Philippine “dispute.”71 In order to create a dispute, one party’s real assertion must have been actually denied by another party. This Submission sought for the Tribunal’s confirmation of Philippine traditional fishing rights in the territorial waters surrounding Scarborough Shoal. However, such Philippine claim cannot be real. What has been actually claimed by the Philippines over the territorial waters surrounding Scarborough Shoal is ‘sovereignty’, as the Philippines claims territorial sovereignty over the land of Scarborough Shoal. In this context, the Philippines has been rejecting China’s competing territorial claim over Scarborough Shoal and its territorial waters. How can it be true that the Philippines switched its position by recognizing China’s sovereignty claim over such territorial water so as to build up Philippine traditional fishing right72 there? Such impossible change of fundamental position turns Submission 10 into an unreal and moot claim incapable of reflecting any dispute on the ground.

Assuming Submission 10 is real, that China’s sovereignty over Scarborough Shoal is treated as the premise by the Philippines, China would have welcome Philippine final recognition of its territorial claim. It does not necessarily mean that China will automatically accept or deny Philippine claim of traditional fishing rights. In fact, none of the evidence provided by the Philippines in this arbitration can prove that the Philippines had put forward such a claim of traditional fishing right against China before this arbitration. Clearly, the

70 Id. paras. 407-08, 410.
71 Jurisdictional Award, para.147 (stating that Submission No. 10 relates to a dispute “premised on [the] fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal”). The Philippines refers to Chinese statements directing Philippines fishing vessels to stay away from Scarborough Shoal, and footnotes 94-95 can neither prove that China was objecting to Philippine claim of traditional fishing rights or that the Philippines was invoking traditional fishing rights during the maritime confrontations with China in the territorial water of Scarborough Shoal. Id.
72 PCA, Nov. 25, 2015 Hearing, supra note 1, at 166-67, 171-72.
Philippines' bringing of Submission 10 to the Tribunal is only a temporary litigation strategy only existing in the court room. No opportunity has ever been given to China to encounter such kind of claim until this arbitration, while during the process of this arbitration China has chosen not to participate and has refrained from expressing its opinions on, *inter alia*, such new claim of the Philippines. This is why the Jurisdictional Award failed to provide any evidence to demonstrate China's opposition to such new claim of the Philippines. How can it be possible for a Sino-Philippine dispute concerning Philippine traditional fishing right *to exist* in such vacuum of China's position?\(^7\)

No matter what happens to Submission 10 at the end of this arbitration, the Philippines will not abandon its territorial sovereignty claim over Scarborough Shoal and its territorial water, due to the Tribunal's lack of mandate to settle territorial disputes.\(^7\) The final award shall be without prejudice to the positions of both Parties concerning their territorial disputes over, *inter alia*, Scarborough Shoal. Doubtlessly, the Philippines will insist on its sovereignty over the territorial water surrounding Scarborough Shoal to justify Filipino fishing activities in that water. Why should the Philippines bother to compromise by recognizing China's competing sovereignty claim in that water so as to assert such an inferior claim of traditional fishing rights? It further proves the mootness of Philippine Submission 10, which is incapable of reflecting any dispute in reality.

\(^7\) It is interesting to refer to the logic of the US Government in its *Limits of the Seas* serial report No. 143 concerning China's maritime claims in SCS. To be noted, even the Philippine lawyer invoked this report during the Merits Hearing. "No State has recognized the validity of a historic claim by China to the area within the dashed line. Any alleged tacit acquiescence by States can be refuted by the lack of meaningful notoriety of any historic claim by China, discussed above. A claimant State therefore cannot rely on nonpublic or materially ambiguous claims as the foundation for acquiescence, but must instead establish its claims openly and publicly, and with sufficient clarity, so that other States may have actual knowledge of the nature and scope of those claims. In the case of the dashed line, upon the first official communication of a dashed-line map to the international community in 2009, several immediately affected countries formally and publicly protested. The practice of the United States is also notable with respect to the lack of acquiescence. Although the U.S. Government is active in protesting historic claims around the world that it deems excessive, the United States has not protested the dashed line on these grounds because it does not believe that such a claim has been made by China. Rather, the United States has requested that the Government of China clarify its claims." See US Dept't of State Bureau of Oceans & Int'l Envtl. & Sci. Affairs, China: Maritime Claims in the South China Sea, at 22 (Limits in the Seas, No. 143, Dec. 5, 2014) <http://www.state.gov/documents/organization/234936.pdf>.

\(^7\) Jurisdictional Award, para. 153.
C  \textit{Philippine Submissions 10, 11 and 13 Relate to Sovereignty Dispute over Scarborough Shoal}

Assuming Submissions 10-11 and 13 can reflect Sino-Philippine ‘disputes’, such disputes would relate to sovereignty issues between the two Parties over Scarborough Shoal according to the principle indicated by the Jurisdictional Award.\textsuperscript{75} In fact, those actions by China identified by these Submissions all aimed at displaying, defending and advancing China’s sovereignty claim over Scarborough Shoal and its territorial water, as well as denying Philippine competing claim. To this end, in that water China’s law enforcement vessels: (i) interfered with harvesting activities of Philippine fishing vessels; (ii) obstructed Philippine law enforcement vessels from enforcing its domestic laws upon China’s boats fishing there; (iii) chased and blocked Philippine law enforcement vessels and interfered with latter’s navigation. Meanwhile, the unspoken purpose for the Philippines to present these three Submissions was to negate China’s sovereignty claims in that water and to advance Philippine competing claim.

Looking at Submission 10 relating to Philippine traditional fishing rights, what China claimed over Scarborough Shoal was sovereignty. From the Chinese perspectives, the adjacent water of Scarborough Shoal was, therefore, China’s territorial water, where Philippine fishing vessels only enjoyed innocent passage,\textsuperscript{76} with no right to fish. From the Philippines’ viewpoint, that water was rather Philippine territorial water where Chinese law enforcement vessels only enjoyed innocent passage, with no right to enforce Chinese law upon Philippine fishing vessels. Sino-Philippine maritime confrontations ensued. Therefore, the real issue reflected by such clashes was: who enjoyed innocent passage in the adjacent water of Scarborough Shoal? What lies behind such issue are three related questions: (i) Who owned sovereignty over the adjacent water of Scarborough Shoal? (ii) Who was the coastal State in the adjacent water of Scarborough Shoal? And (iii) who owned territorial sovereignty over Scarborough Shoal? These questions manifest a Sino-Philippine territorial dispute over the land and the water.

Submission 11 concerns China’s obstruction against Philippine government vessels intending to enforce Philippine law upon Chinese fishing boats. From China’s point of view, Philippine government vessels had no right to enforce Philippine law in the adjacent water of Scarborough Shoal, which was Chinese (but not Philippine) territorial water. When the Philippine government vessels came close to Chinese fishing vessels, preparing for boarding and investigation,

\textsuperscript{75} Id. para. 153.
\textsuperscript{76}\textit{UNCLOS}, supra note 2, arts. 17-19.
the primary job for Chinese law enforcement vessels was to prevent Philippine counterpart from enforcing Philippine law in Chinese territorial water, so as to display China’s sovereignty there. It would not be an option in such circumstances for Chinese government vessels to arrest Chinese fishing boats in front of Philippine counterpart, just because Chinese fishing boats might have violated Philippine environmental laws in Chinese territorial water.77

Submission 13 concerns the near-collision incidents which also illustrated on-going territorial dispute between the two Parties. Prior to April 2012, Scarborough Shoal was under Philippine control. Since then China recovered that land as well as its adjacent water. The Philippines has not given up its plans to take over by force. Under such circumstances, the presence of Philippine government vessels in the adjacent water of Scarborough Shoal has been seen by China as hostile. With strong mutual distrust, it was hard for China’s government vessels to allow its Philippine counterpart to freely navigate in that area deemed by the Philippines as its territorial water. Putting in China’s shoes, the Philippines would have done the same thing. In fact, for any State with on-going territorial dispute over certain maritime area, it is impossible to accommodate its primary and sacred duty of maintaining territorial integrity to the secondary duty to avoid collision at sea vis-à-vis its territorial disputant. Therefore, the confrontations indicated by Submission 13 still reflected Sino-Philippine territorial sovereignty dispute.78

The Jurisdictional Award said that Philippine Submission 13 reflects a dispute concerning the interpretation or application of Articles 21, 24 and 94 of UNLCS. However, the premise of applying Article 21 to Chinese government vessels is the ruling that China was a foreign State in the adjacent water of Scarborough Shoal, while granting the title of coastal State to the Philippines.79 On the other hand, the pre-condition to applying Article 24 to Chinese government vessels is a decision that takes China as the coastal State, rendering the Philippines the foreign State.80

77 Gau, supra note 65, at 263-65.
78 Id. at 281-86.
79 Article 21 of UNCLOS is entitled “Laws and regulations of the coastal State relating to innocent passage”. Paragraph 4 reads: “4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.” UNCLOS, supra note 2, art. 21.
80 Article 24 of UNCLOS is entitled “Duties of the coastal State”. Paragraph 1 reads: “1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the
As to Article 94 which is meant to apply to the high seas, its application to China's government vessels in the adjacent water of Scarborough Shoal would require either of the two conditions to be met. The first condition is that Scarborough Shoal is not even a rock, and not capable of generating even a territorial water for any State, thus leaving its adjacent water purely high seas. Alternatively, Scarborough Shoal must be considered as an island or a rock under Article 121, whose sovereignty does not belong to China.\textsuperscript{81} Judging by the positions of both Parties in this arbitration, the first condition cannot apply, leaving the second condition applicable to Submission 13. That means, a preliminary decision must be made by the Tribunal to deny China's territorial claim over Scarborough Shoal.

Summing up, the Tribunal needs to first render a decision on the territorial sovereignty dispute over Scarborough Shoal before applying Articles 21, 24 and 94 to the behaviors of China's government vessels. It proves that the disputes as reflected by Submission 13 relate to sovereignty, thus going beyond the jurisdiction of the Tribunal. However, the Tribunal considered itself as having jurisdiction over the dispute reflected by Submission 13. This is another decision ultra vires.

D Disputes Concerning Military Activities for Maintaining Territorial Integrity Are beyond the Tribunal’s Jurisdiction

The actions by Chinese law enforcement vessels in the territorial water of Scarborough Shoal that (i) obstructed Philippine government vessels intending to enforce Philippine law upon Chinese fishing boats (as indicated in Submission 11) and (ii) chased and blocked Philippine government vessels (as identified by Submission 13) must be understood in the backdrop of the coastal State shall not: (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." Id. art. 24(1).

Article 94 of UNCLOS is entitled “Duties of the flag State” which reads: “1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. ... 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: ... (c) the use of signals, the maintenance of communications and the prevention of collisions. 4. Such measures shall include those necessary to ensure: ... (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.” Id. art. 94.
on-going territorial dispute over Scarborough Shoal (see Section III-C of this article). Therefore, the disputes arising from such actions by Chinese government vessels should fall within the scope of “disputes concerning military activities, including military activities by government vessels engaged in non-commercial service” under Article 298(1)(b) of UNCLOS. During the July Hearing, it was contended by the Philippine legal team that the existence of military activities could not be established unless the Chinese Government so recognized. As decided by the Jurisdictional Award, in the second stage of hearing on the merits issues the Tribunal will assess the applicability of “military activities exclusion clause” in Philippine Submissions 12 and 14. Clearly, the Tribunal ruled out the possibility for military activities to be involved in disputes as reflected by Submissions 11 and 13. However, the Sino-Philippine territorial struggle and dispute over Scarborough Shoal has been widely published and known to the world. The decision by the Tribunal to ignore such outstanding facts and to render the military activities exclusion clause under Article 298(1)(b) inapplicable to the maritime confrontations in the adjacent waters of Scarborough Shoal will not facilitate the resolution of the maritime confrontations voiced by these two Submissions. What makes matters worse is that, since the Tribunal has no jurisdiction over the dispute concerning military activities in the present arbitration, the final award will not be binding.

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82 Article 298 of UNCLOS, entitled “Optional exceptions to applicability of section 2” reads: “1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: ... (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, ...” Id. art. 298.

83 Professor Oxman said in the July Hearing that China has to prove the existence of military activities. See PCA, supra note 39, at 81-93 (first-round submissions by Professor Oxman).

84 While para. 377 of the Jurisdictional Award mentioned Philippine legal positions relating to the military activities exclusion clause under Article 298(1)(b), no decisions were given by the Tribunal on such Philippine positions. Paragraph 396 of the Jurisdictional Award laid down the conditions (the nature of the activities concerned) for applying the military activities exclusion clause: “Fourth, the Tribunal's jurisdiction to decide on the merits of some of the Philippines' Submissions may depend upon whether certain Chinese activities are military in nature. If so, the exclusion from jurisdiction in Article 298 for disputes relating to military activities may bar the Tribunal's jurisdiction. The Philippines has requested the Tribunal to address certain Chinese activities at Mischief Reef and Second Thomas Shoal in its Submissions No. 12 and 14. The nature of such activities, however, is a merits determination that the Tribunal cannot make at this point in the proceedings.” Jurisdictional Award, para. 396 (emphasis added). Cf. Whomersley, supra note 7, para. 21.
upon those activities once confirmed by China as military ones. Following Philippine logic, China just needs to openly characterize as military activity its sending of government vessels to engage in maritime confrontations described by these two Submissions. By doing so, no violation of the award will occur. This proves the impracticability of Philippine Submissions 11 and 13. The plan to apply those Philippine-invoked UNCLOS provisions does not address the real and core issue, and hence cannot settle Sino-Philippine maritime confrontations. It further proves that the issues brought by the Philippines in Submissions 11 and 13 should have been ruled inadmissible, due to mootness.

E. Article 297(r)(c) cannot be used to affirm the Tribunal’s jurisdiction over dispute reflected by Submission 11

As the Tribunal has not determined the legal status of Second Thomas Shoal (LTE or rock), either result is possible. If the Tribunal finally rules that Second Thomas Shoal qualifies as a rock or even island under Article 121, the Tribunal will face the situation that China has been claiming territorial sovereignty over, inter alia, Second Thomas Shoal since 1935 at the latest. This result will render the legal arguments (stated in Section III-C of this article) used for

86 See supra note 52.
87 Article 297 of UNCLOS (Limitations on applicability of section 2) reads: “1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases: ... (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.” UNCLOS, supra note 2, art. 297.
88 China’s territorial claims over SCS maritime features have been made much earlier than that of the Philippines in the WPS. In 1935 the Review Committee for the Land and Water Maps published “the Map of Chinese Islands in the SCS (中國南海各島嶼圖)”, together with a list of names of SCS maritime features claimed by China in both Chinese and English languages (中國南海各島嶼華英名對照表), covering 132 maritime features in four different groups of islands. The 1935 map served as the foundation of the 1947 map. In 1947 the Ministry of the Interior of the Republic of China Government published “the Location Map of the SCS Islands (南海諸島位置圖)”, as well as “the Comparison Table of New and Old Names of SCS Islands (南海諸島新舊名稱對照表)”, which covered 167 maritime features in SCS, including 102 features in Nansha Islands (Spratly Islands Group). To be noted, both the 1935 and 1947 name lists identified Second Thomas Shoal and Mischief Reef as the feature claimed by China. Gau, supra note 65, at 210-18.
Scarborough Shoal in Submission 11 applicable *mutatis mutandis*. As a result, the dispute as reflected by Submission 11 concerning maritime confrontations in Second Thomas Shoal would relate to sovereignty and go beyond the Tribunal’s jurisdiction.

Should the Tribunal eventually find that Second Thomas Shoal to be a LTE, this feature would be located in and part of EEZ of China and/or of the Philippines. As mentioned by Paragraph 408(b) of the Jurisdictional Award:

> To the extent that 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 notes that Article 297(1)(c) expressly affirms the Tribunal’s jurisdiction over disputes concerning the alleged violation of “specified international rules and standards for the protection and preservation of the marine environment” in the exclusive economic zone.90

Here the Jurisdictional Award conflicts with itself, as Paragraphs 176,91 28292 and 28593 have already denied Philippine *allegation* of China’s violation of “specified international rules and standards for the protection and preservation of the marine environment” in the EEZ. This is because the Philippines actually denied that China violated the Convention on Biological Diversity during the July Hearing. Consequently, the condition for Article 297(1)(c) to apply was unfulfilled, leaving this provision inapplicable. Accordingly, the ju-

89 See *supra* Section III-C & D of this article

90 See Jurisdictional Award, para. 408(b) (emphasis added).

91 Id. para. 176. “The Tribunal also accepts the Philippines’ assertion that, while it considers China’s actions and failures to be inconsistent with the provisions of the CBD, the Philippines has not presented a claim arising under the CBD as such. The Tribunal is satisfied that Article 293(1) of the Convention, together with Article 31(3) of the Vienna Convention on the Law of Treaties, enables it in principle to consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.”

92 Id. para. 282. “The Philippines has further clarified that it does not separately plead a claim for breach of the CBD. It refers to the CBD only insofar as that instrument informs the normative content of Articles 192 and 194. That the CBD can be used in this way to interpret the Convention is clear from Article 31(3) of the Vienna Convention on the Law of Treaties and the applicable law provision in Article 293 of the Convention and has been confirmed in other recent cases.”

93 Id. para. 285. “In this respect the Tribunal agrees with the Philippines that “[a] dispute under UNCLOS does not become a dispute under the CBD merely because there is some overlap between the two Parallel regimes remain parallel regimes.”
risdiction of the Tribunal to entertain Submission 11 with respect to Second Thomas Shoal could hardly be affirmed should this feature be held as a LTE eventually.

IV  China’s Maritime Claims on Historic Rights Within USL

A  The Rulings of the Jurisdictional Award
Philippine Submission 1 claims that “China’s maritime entitlements in the SCS, like those of the Philippines, may not extend beyond those permitted by UNCLOS.” Submission 2 contends that “China’s claims to sovereign rights and jurisdiction, and to ‘historic rights’, with respect to the maritime areas of the SCS encompassed by the so-called ‘nine-dash line’ are contrary to UNCLOS and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under UNCLOS.”94 These two Submissions intend to reflect a Sino-Philippine dispute concerning the legality of China’s invocation of historic rights to support its maritime claims in the entire area within USL under UNCLOS. The Jurisdictional Award ruled that these two Submissions reflected disputes concerning the interpretation or application of UNCLOS, while not relating to sovereignty and sea boundary delimitation.95 In other words, these two Submissions passed certain thresholds of admissibility and jurisdiction. For this part of surmounted thresholds, the following legal questions may be raised by China when challenging the Jurisdictional Award.

B  Submissions 1-2 Cannot Reflect Any Dispute Concerning China’s Maritime Claim on Historic Rights Based on Extra-UNCLOS Rules of Customary Law
Paragraph 164 of the Jurisdictional Award provides that:

In the Tribunal’s view, the Philippines’ Submissions No. 1 and 2 reflect a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China’s claimed “historic rights” with the provisions of the Convention.96

94 Id. para. 101.
95 Id. paras. 398-99.
96 Id. at 64.
Moreover, Paragraphs 398-399 of the Jurisdictional Award mention that Philippine Submissions 1-2 directly requested the Tribunal to consider and determine the “effect” and “legal validity” of “any historic rights claimed by China to maritime entitlements in SCS.” In other words, the Tribunal confirmed that China has claimed maritime entitlements in SCS area within USL based on historic rights under a legal regime outside of UNCLOS. As the Philippines opposed China’s choice of source of law to justify its SCS maritime claims, a Sino-Philippine dispute was crystallized.

Therefore, the key issue is: did China invoke any rule deriving from extra-UNCLOS legal regime (i.e. customary international law) to support its maritime claims or entitlements in the entire water enclosed by USL? Should China instead rely on UNCLOS to claim its maritime entitlements in WPS, there would be no dispute on ‘source’ for the Tribunal to entertain. It should be noted that, the maritime area beyond WPS but within SCS is out of reach of the Tribunal’s jurisdiction.

The foregoing decision of the Tribunal was based on a rough analysis of four Sino-Philippine exchange of NVs between 2009 and 2011 as quoted by Section II-B of this article. Mysteriously, some critical paragraphs of both China’s and Philippine 2011 NVs were cut off by the Jurisdictional Award. Having considered these four NVs as they are, two major agreements between China and the Philippines surface. Apart from the one mentioned in Section II-C of this article, another consensus is that UNCLOS was actually invoked as the legal basis for both China and the Philippines to claim maritime entitlements in Nansha Islands, which includes KIG. It negates the position that China invoked extra-UNCLOS customary international law to claim (i) historic rights within USL or (ii) “relevant water” going beyond what is permitted by UNCLOS.

There are of course some disagreements or disputes crystallized by these four NVs, although unlike what the Philippines contended in the present arbitration. What China and the Philippines were contesting back and forth through these four NVs was for the ownership of (i) territorial sovereignty over each relevant geological feature in KIG and their respective adjacent waters (i.e. territorial seas); and (ii) sovereign rights and jurisdiction generated by the

97 Id. at 141.
98 Id. para. 400.
99 Id. paras. 164-68.
100 See Permanent Mission of the Republic of the Philippines to the UN, supra note 34; Permanent Mission of the PRC to the UN, supra note 40. See also Pemmaraju, supra note 7, para. 51.
101 See Permanent Mission of the Republic of the Philippines to the UN, supra note 34.
relevant geological features in KIG under UNCLOS in the names of EEZ and continental shelf.\textsuperscript{102} Somehow, the Jurisdictional Award cut off the First Point of Philippine 2011 NV\textsuperscript{103} and the major part of the Second Point of China’s 2011 NV.\textsuperscript{104} The territorial disputes over KIG due to Philippine invasion of China’s Nansha Islands, as the major issues revealed by these four NVs, were de-emphasized.

It was most probably in this context of territorial disputes that China in the First Point of its 2011 NV used the term “abundant historical and legal evidence” to support its competing claims on (i) territorial “sovereignty” over all maritime features in KIG and the rest of SCS islands as well as their territorial waters; and (ii) “related rights and jurisdiction” pertaining to the maritime entitlements of EEZ and continental shelf generated by the maritime features in SCS claimed by China.\textsuperscript{105} Being qualified by various regimes of UNCLOS governing the limits of maritime entitlements to territorial sea, EEZ and continental shelf, as well as two UNCLOS-compliant laws of China,\textsuperscript{106} the term “abundant historical ... evidence”\textsuperscript{107} could hardly indicate China’s intentions to make extra-UNCLOS maritime claims in the entire area within USL based on historic rights under customary international law.\textsuperscript{108} To conclude, the term “abundant historical and legal evidence” as stated in the second sentence of the First Point of China’s 2011 NV could hardly prove that China claimed historic rights in SCS within USL.

It is the Philippines’ position that the term “relevant waters” mentioned in China’s 2009 NV\textsuperscript{109} and in the First Points of China’s 2011 NV\textsuperscript{110} meant the entire area enclosed by USL (drawn in the map attached to China’s 2009 NV) where

\begin{flushright}
\textsuperscript{102} Cf. id. \\
\textsuperscript{103} See Jurisdictional Award, para. 165. \\
\textsuperscript{104} Id. para. 166. \\
\textsuperscript{105} See Permanent Mission of the PRC to the UN, supra note 40. \\
\textsuperscript{106} See id. \\
\textsuperscript{107} See id. \\
\textsuperscript{108} Jurisdictional Award, para. 167. \\
\textsuperscript{109} “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.” Permanent Mission of the Republic of the Philippines to the UN, supra note 34. \\
\textsuperscript{110} Permanent Mission of the PRC to the UN, supra note 40. 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
\end{flushright}
China claimed sovereignty, or sovereign rights and jurisdiction. The Tribunal agreed with such Philippine interpretation of the term “relevant water.” The logic of Philippine arguments is that the maritime entitlements China may legally claim in SCS under UNCLOS cannot fill up the area within USL. As argued by the Philippines, China started to claim the entire area by using the term “relevant waters” in its 2009 NV. Since UNCLOS could not assist China to complete its goal, China had to resort to the historic rights regime under customary international law outside of UNCLOS. Such interpretation of the “relevant waters” in the context of the USL Map is appealing but distorting, as it ignores the background and object of China’s 2009 NV.

As mentioned already, China’s 2009 NVs was a protest against two outer continental shelf submissions presented to the CLCS by Malaysia and Vietnam concerning two geographically confined maritime areas in SCS claimed as their continental shelf beyond 200 nautical miles. Therefore, “relevant waters” should mean what were submitted by these two States to CLCS. As these two States never submitted the entire waters within the USL, the

111 See Notification, supra note 3, at 4. “Notwithstanding its adherence to UNCLOS, China claims almost the entirety of the South China Sea, and all of the maritime features, as its own. Specifically, China claims ‘sovereignty’ or ‘sovereign rights’ over some 1.94 million square kilometers, or 70% of the Sea’s waters and underlying seabed within its so-called ‘nine dash line.’ China first officially depicted the ‘nine dash line’ in a letter of 7 May 2009 to the United Nations Secretary General. 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.’”

112 Jurisdictional Award, para. 167. “In the Tribunal’s view, a dispute is readily apparent in the text and context of this exchange: from the map depicting a seemingly expansive claim to maritime entitlements, to the Philippines’ argument that maritime entitlements are to be derived from ‘geological features’ and based solely on the Convention, to China’s invocation of ‘abundant historical and legal evidence’ and rejection of the contents of the Philippines’ Note as ‘totally unacceptable.’ 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.”


114 US Dep’t of State Bureau of Oceans & Int’l Envtl. & Sci. Affairs, supra note 73, at 1, 16.

115 See Permanent Mission of the PRC to the UN, supra note 33.

116 See CLCS, supra note 31, at 5.

117 See CLCS, supra note 32, at 5.
Figure 1
“relevant waters” under China’s protest could not possibly denote the entire areas enclosed by the USL. Figure 1 of this article illustrates the situation as it puts the areas under those two outer continental shelf submissions (see areas in orange color) into a SCS map with the USL, together with the locations of the Paracel Islands and the Spratly Islands Group that are next to (and almost within) the areas marked by these two submissions. It proves that, inter alia, the Philippines and the Tribunal were making mountains out of a molehill by enlarging a confined meaning of “relevant waters” to indicate the entire area within the USL, while there was hardly any dispute concerning the source of maritime entitlements left for the Tribunal to resolve.118

To conclude, as rightly put by Paragraph 159 of the Jurisdictional Award:

The existence of a dispute in international law generally requires that there be “positive opposition” between the parties, in that the claims of one party are affirmatively opposed and rejected by the other. In the ordinary course of events, such positive opposition will normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected.119

With the foregoing in mind, the exchange of NVs between China and the Philippines from 2009 to 2011 was insufficient for a dispute to crystallize concerning China’s invocation of historic right under customary international law to support its maritime claims in the entire waters enclosed by USL. This is because of three reasons.

Firstly, the legal basis for China to justify its maritime claims in WPS was not historic right according to the Third Point of its 2011 NV. It was impossible for the Philippines to affirmatively oppose such non-existent position of China, not to mention for a dispute concerning “historic rights” to crystalize.

Secondly, what China invoked in the Third Point of its 2011 NV to support its maritime entitlements in WPS, or to be more specific, in Nansha Islands, was UNCLOS, which was also relied upon by the Second and Third Points of Philippine 2011 NV, focusing on KIG as part of Nansha Islands. The evidence relied by the Jurisdictional Award failed to prove that China invoked any extra-UNCLOS legal regime to justify its maritime entitlements in SCS. It was impossible for a dispute to arise concerning the “source of maritime entitlements.”

Thirdly and most importantly, the misunderstood term “relevant waters” in China’s 2009 and 2011 NVs has a confined geographic meaning, which denoted

118 See Gau, supra note 20, at 108-15.
119 Jurisdictional Award, at 62.
two outer continental shelf areas submitted by Malaysia and Vietnam. China's 2009 NV was meant to claim those two areas in the forum of CLCS and to block Malaysian and Vietnamese Submissions.\textsuperscript{120} It was self-evident that China's “relevant waters” was not as large as what the Philippines alleged in this arbitration (\textit{i.e.,} entire area within USL). China did not even need to invoke extra-UNCLOS legal regime to justify its maritime claims in the “relevant waters” indicated by orange color zones in Figure 1. It further proves the lack of dispute concerning the “source of maritime entitlements.”

V Mischief Reef and Second Thomas Shoal Are Part of Philippine EEZ and Continental Shelf?

A Inherent Problem with Submission 5

Philippine Submission 5 contends that “Mischief Reef and Second Thomas Shoal are part of the EEZ and continental shelf of the Philippines.”\textsuperscript{121} Such a Submission cannot reflect any dispute, as China has never denied the Philippines its right to claim EEZ and continental shelf stretching from its archipelagic baselines facing SCS to embrace these two features.\textsuperscript{122} It explains why the Jurisdictional Award failed to identify any positive evidence to prove the existence of such a dispute.\textsuperscript{123} With respect to the locations of these two maritime features, what was really disputed is “whether Mischief Reef and Second Thomas Shoal are also part of China’s EEZ and Continental Shelf.” Such an issue was not formally submitted to the Tribunal by the Philippines. In short, Philippine Submission 5 is inherently defective, as it is incapable of reflecting a real dispute. The Jurisdictional Award should have declared this Submission to be inadmissible, instead of moving it into the merits phase.

B The Jurisdictional Award Transformed Philippine Submission

With the above problem in mind, Paragraph 172 of the Jurisdictional Award fixed such problem in Submission 5 by transforming it into a submission apparently capable of reflecting disputes. Paragraph 172 reads:

\begin{itemize}
\item \textsuperscript{120} See Permanent Mission of the PRC to the UN, \textit{supra} note 33. (stating that the Submissions have “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the SCS. In accordance with Article 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf, the Chinese Government seriously requests the Commission not to consider the Submission ...”).
\item \textsuperscript{121} Jurisdictional Award, para. 101.
\item \textsuperscript{122} Gau, \textit{supra} note 65, at 244-46.
\item \textsuperscript{123} Jurisdictional Award, para. 172.
\end{itemize}
In Submission No. 5, however, the Philippines has asked ... for a declaration that Mischief Reef and Second Thomas Shoal as low-tide elevations "are part of the exclusive economic zone and continental shelf of the Philippines." In so doing, the Philippines has in fact presented a dispute concerning the status of every maritime feature claimed by China within 200 nautical miles of Mischief Reef and Second Thomas Shoal, at least to the extent of whether such features are islands capable of generating an entitlement to an exclusive economic zone and to a continental shelf. Only if no such overlapping entitlement exists – and only if China is not entitled to claim rights in the South China Sea beyond those permitted by the Convention (the subject of the Philippines' Submissions No. 1 and 2) – would the Tribunal be able to grant the relief requested in Submission No. 5.124

Clearly, the Jurisdictional Award transformed a Submission with a narrowly defined scope125 into a completely different Submission with a much more expansive scope from an opposite direction.126 It becomes easier to explain why the transformed Submission 5 looks capable of reflecting disputes.

Three months before the Jurisdictional Award was released, Professor Philip Sands, as a member of Philippine legal team, refused to cooperate with the Tribunal during the July Hearing. The Tribunal was actually requesting the Philippines to provide information about all the maritime features in the Spratly Islands Group, as this was the "characterization" by the Tribunal for, inter alia, Submission 5.127 This uncooperative attitude was tantamount to Philippine disapproval of the above "characterization" by the Tribunal for Submission 5. Under such a circumstance, the Tribunal could still make its decision that Submission 5, being transformed or "characterized," could reflect a Sino-Philippine dispute.128 Did the Tribunal act inconsistently with the "equal-

124 Id. at 67-68 (emphasis added).
125 Submission 5 in its original form only requires the Tribunal to check the lawfulness of the archipelagic baselines of the Philippines facing SCS under UNCLOS and to measure the distance between such baselines and those two features.
126 Submission 5 as being transformed requires the Tribunal to look at China's, instead of Philippine, maritime entitlements in Nansha Islands (Spratly Islands Group). What should be examined by the Tribunal are the legal status of all the maritime features claimed by China in Nansha Islands in accordance with Article 121.
127 See supra note 60.
128 Jurisdictional Award, para. 402.
ity principle” under Article 5 of Annex VII to UNCLOS by accepting the unsubstantiated case of the Philippines?129 Later on, the Philippines seemed to have received the message from the Tribunal. During the November Hearing, Professor Clive Schofield at Wollongong University (who once co-authored a paper with Professor Robert Beckman) abruptly changed his opinions about the legal status of maritime features in the Spratly Islands Group. Previously, Schofield and Beckman considered that 12 maritime features in the Spratly Islands Group could fulfil the conditions of “islands” under Article 121 of UNCLOS.130 Now, being part of Philippine legal team, Schofield confessed to the Tribunal that none of the maritime features qualifies as an island.131 Nobody knows how the Tribunal will treat Schofield’s new statement, if the Tribunal is willing to adhere to its duty of being equally fair to both Parties, appearing and non-appearing, under Article 9 of Annex VII to UNCLOS. Will his simultaneously conflicting opinions be both discarded as they have defeated each other? Will his later opinions be trusted? No matter what happens, the fundamental problem remains. No dispute could be reflected by Philippine Submission 5 as it is, which should have been barred from entering the merits phase.

C Jurisdictional Award Violated Non Ultra Petita Principle

Philippine Submission 5, as it is, cannot reflect any dispute between the two Parties. The Tribunal fixed and transformed such a Submission into something apparently capable of reflecting disputes, thus surmounting certain admissibility threshold. Based on the general principle of Non Ultra Petita repeatedly declared by the ICJ, it is the duty of the Court, when having jurisdiction over the disputes presented, to abstain from deciding points not included in the

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129 Article 5 (Procedure) of Annex VII to UNCLOS reads: “Unless 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.” UNCLOS, supra note 2, Annex VII, art. 5.
130 Beckman & Schofield, supra note 50.
131 PCA, supra note 50, at 6 (statement by Professor Schofield). “Concerning the above-high-tide features, we conclude that it is appropriate to consider all of them as ‘rocks’ within the meaning of Article 121(3) of the Convention. A small number of these features do have vegetation on them, and the host government and/or military personnel are stationed on them. But none of them have an indigenous population, and the personnel stationed on them are reliant on supplies from outside. There is no evidence of meaningful economic activity, either now or in the past.”
final submissions. The Tribunal should be looking at is the Philippines’ Submission, which should be considered as inadmissible. The decision by the Tribunal to move something not included in Philippine Submissions (i.e. the transformed Submission 5) into the merits phase constituted an action ultra vires.

D The “Dispute” Reflected by Submission 5 “as Transformed” Concerns Sea Boundary Delimitation

As mentioned already, Philippine 2011 NV revealed its position that certain geological features in KIG are capable of generating EEZ and continental shelf. Since KIG forms part of Nansha Islands claimed by China, the position that “China may claim EEZ and continental shelf by using those geological features in Nansha Islands” would be opposable to the Philippines and undeniable to the Tribunal. To be noted, the top three big islands in Nansha Islands as well as in KIG (i.e. Itu Aba, Thitu Island, and West York Island) are all less than 200 miles from Mischief Reef and Second Thomas Shoal. Therefore, these two features are located in the EEZ and continental shelf that China may claim, as well as in the EEZ and continental shelf of the Philippines. To decide Submission 5 as to whether Mischief Reef and Second Thomas Shoal are part of Philippine EEZ and continental shelf, the Tribunal must first draw a boundary line so as to know on which part of EEZ and continental shelf these two features are located. Being powerless to settle the sea boundary delimitation dispute and draw the line, the Tribunal is without jurisdiction to entertain the merits of Submission 5. Why would reaching such a simple conclusion wait until the merits phase? The decision to move Submission 5 into the merits phase was hardly justified.

132 Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, 1950 I.C.J., at 402 (stating “One must bear in mind the principle that it is the duty of the Court ... to abstain from deciding points not included in [the final] submissions [of the parties]”); Corfu Channel (Assessment of the Amount Compensation), 1949 I.C.J., at 249.
133 See Gau, supra note 65, at 226-27.
134 Jurisdictional Award, para. 402.
VI Sino-Philippine Maritime Confrontations Only Occurred in Philippine EEZ?

A The Premise of Philippine Submissions 8-9 and the Jurisdictional Award

Philippine Submissions 8 and 9 claim respectively that “China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its EEZ and continental shelf,” and that “China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the EEZ of the Philippines.”

The premise of these two Submission is that “China is not entitled to claim EEZ and continental shelf in WPS, which is Philippine EEZ and continental shelf.” Therefore, all Chinese activities of exploration, exploitation, conservation, management and law enforcement with respect to natural resources found in WPS, as identified by Submissions 8-9, were inconsistent with UNCLOS.

Why is China not entitled to claim EEZ and continental shelf there? Three reasons were provided by the Philippines in this arbitration. Firstly, none of the nine China-occupied or controlled maritime features in WPS qualifies as an island under Article 121(1) of UNCLOS. Secondly, even the three biggest maritime features in Nansha Islands (Spratly Islands Group), i.e., Itu Aba, Thitu Island, and West York Island, do not qualify as islands under Article 121. These three features are only “rocks” under Article 121(3) incapable of generating EEZ and continental shelf. Thirdly, none of the maritime features in Nansha Islands qualifies as an island under Article 121.

As said in the Jurisdictional Award, the disputes reflected by these two Submissions are not concerning sovereignty or maritime boundary delimitation. The premise of the Philippines’ submissions is that no overlapping en-

135 Id. para. 101.
136 Paragraph 405 of the Jurisdictional Award provides: “The Philippines' Submission No. 8 reflects a dispute concerning China's actions that allegedly interfere with the Philippines' petroleum exploration, seismic surveys, and fishing in what the Philippines claims as its exclusive economic zone.” Id. at 144.
137 Paragraph 406 of the Jurisdictional Award provides: “The Philippines' Submission No. 9 reflects a dispute concerning Chinese fishing activities in what the Philippines claims as its exclusive economic zone.” Id. at 144.
138 Id. paras. 405-06.
139 Id. para. 101 (Philippine Submissions 3-4 and 6-7).
140 Gau, supra note 65, at 219-22.
141 See PCA, supra note 55, at 44-45. See also Gau, supra note 20, at 149, n. 181.
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titlements exist because only the Philippines possesses an EEZ in the relevant areas. If another China-claimed maritime feature within 200 nautical miles of these areas were to be an “island,” capable of generating EEZ and continental shelf, the resulting overlap and the exclusion of boundary delimitation from the Tribunal’s jurisdiction by Article 298 would prevent the Tribunal from addressing this Submission. Whether this is the case depends upon a merits determination on the status of maritime features in the South China Sea.\textsuperscript{142}

This explains why the Tribunal moved these two Submissions to the merits phase and had them entertained during the November Hearing.

B Sea Boundary Delimitation Disputes Clearly Exist

As discussed in Section V-D of this article, Philippine 2011 NV asserted indirectly that certain geological features in KIG qualify as “islands” under Article 121. China has territorial claims over Nansha Islands, which include KIG. Undeniably, China may at least rely on those \textit{islands} in KIG to claim EEZ and continental shelf. Sino-Philippine overlapping EEZ and continental shelf claims ensue without doubt, rendering the exclusion clause of boundary delimitation under Article 298(1)(a)(i) applicable. Such overlapping claims need not wait until the merits phase to be discovered. The decision of the Jurisdictional Award to move Submissions 8-9 to the merits phase was thus unjustified.

VII Maritime Confrontations in Mischief Reef and Second Thomas Shoal

A The Jurisdictional Rulings on Philippine Submissions 12 and 14

Philippine Submissions 12 and 14 claims respectively\textsuperscript{143} that “China’s occupation of and construction activities on Mischief Reef: (a) violate the provisions of UNCLOS concerning artificial islands, installations, and structures; (b) violate China’s duties to protect and preserve the marine environment under the Convention; and (c) constitute unlawful act of attempted appropriation in violation of the Convention”\textsuperscript{144} and that “[s]ince the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things: (a) Interfering with the Philippines’ rights of

\textsuperscript{142} Jurisdictional Award, paras. 405-06.

\textsuperscript{143} Id. para. 101.

\textsuperscript{144} Paragraph 409 of the Jurisdictional Award provides that: “The Philippines’ Submission No. 12 reflects a dispute concerning China’s activities on Mischief Reef and their effects on the marine environment.” Id. p. 146.
navigation in the waters at, and adjacent to, Second Thomas Shoal; (b) Preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and (c) Endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal."\(^{145}\)

Paragraphs 409 and 411 mentioned that the disputes reflected by these two Submissions did not concern sovereignty or maritime boundary delimitation. The Tribunal's jurisdiction to address these questions was dependent on the status of Mischief Reef and Second Thomas Shoal as “islands,” “rocks,” or “LTSs.” If the Tribunal were to find – contrary to the premise of the Philippines' Submission – that Mischief Reef is an “island” or “rock” and thus constitutes land territory, the Tribunal would lack jurisdiction to consider the lawfulness of China's construction activities or the appropriation of the feature. The status of the two features was a matter for the merits. Additionally, Article 298 excludes disputes concerning military activities from the Tribunal’s jurisdiction. The Tribunal considered that the specifics of China’s activities on the two features and whether such activities were military in nature to be a matter best assessed in conjunction with the merits.\(^{146}\) Therefore, these two Submissions were moved into the merits phase. However, certain legal questions may undermine the above rulings.

**B Submissions 12 and 14 Concern Sea Boundary Delimitation**

Previous publications by this author in China Oceans Law Review have provided comments on Philippine legal arguments presented at the end of July 2015.\(^{147}\) The maritime confrontations in Mischief Reef and Second Thomas Shoal follow an unsettled sea boundary delimitation dispute due to the Sino-Philippine overlapping EEZ and continental shelf claims. Before the boundary is drawn, each Party will continue to insist that: (i) these two features lie on its own side of EEZ and continental shelf, (ii) its sovereign rights and jurisdictions granted by UNCLOS justify its exploration, exploitation, conservation and management activities in these two features and surrounding waters, and (iii) the same activities by the other party violate UNCLOS.\(^{148}\)

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145 Paragraph 411 of the Jurisdictional Award said that “The Philippines’ Submission No. 14 reflects a dispute concerning China's activities in and around Second Thomas Shoal and China's interaction with the Philippine military forces stationed on the Shoal.” Id. para. 409.

146 Id. paras. 409, 411.

147 Gau, supra note 20, at 65.

148 Id. at 191-98. Gau, supra note 65, at 247-51.
Furthermore, as Section V-D of this article argues, neither the Philippines nor the Tribunal can deny that China may claim EEZ and continental shelf in WPS or in Nansha Islands which may reach Mischief Reef and Second Thomas Shoal, as the Philippines itself indirectly asserted in its 2011 NV that certain geological features in KIG are capable of generating EEZ and continental shelf. This position did not have to wait until the merits phase to be discovered. It follows that China may justify its exploration, exploitation, conservation and management activities around these two features, as complained of by Submissions 12 and 14, under its EEZ and continental shelf entitlements in Nansha Islands.149 Under such circumstances, the Tribunal needs to first draw Sino-Philippine maritime boundary in WPS so as to know on whose EEZ and continental shelf these two features are located. Only after this can the Tribunal entertain the merits issues of Submissions 12 and 14. Being powerless to draw sea boundary for the two Parties, the Tribunal obviously lacks jurisdiction over the disputes reflected by these two Submissions. It was incorrect for the Jurisdictional Award to declare that the Tribunal needs to consider merits issue before deciding whether it has jurisdiction over these two Submissions.

C Maritime Confrontations Clearly Relate to Sovereignty Dispute

For anyone familiar with Sino-Philippine territorial disputes in WPS, the maritime confrontations occurring in Mischief Reef and Second Thomas Shoal clearly do not concern the interpretation or application of UNCLOS, as such disputes relate to sovereignty. Submissions 12 and 14 should have been ruled as inadmissible by the Jurisdictional Award.

According to the First Point of Philippine 2011 NV: “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.”150 On the other hand, the Chinese Government in 1935 and 1947 published two name lists of China’s Islands in South China Sea in both Chinese and English languages, where Mischief Reef and Second Thomas Shoal were identified as among the territories claimed by China.151 In such a background of Sino-Philippine territorial disputes over, inter alia, these two maritime features, Philippine Submissions 12 and 14 aim at: (i) dispelling Chinese soldiers stationed in Mischief Reef while terminating the construction project by China thereon; and (ii) ending China’s interference with Philippine supply to and rotation for Philippine soldiers stationed in Second Thomas Shoal. Putting

149 Gau, supra note 65, at 278-81, 286-92.
150 Permanent Mission of the Republic of the Philippines to the UN, supra note 34.
151 See supra note 88.
forward these two Submissions in this arbitration can serve to (i) undermine, if not end, China’s territorial claims and display of sovereignty over these two features, and (ii) advance Philippine competing territorial claims and facilitate its exercise of sovereignty thereon.

Should Mischief Reef and Second Thomas Shoal be declared as LTEs (instead of rocks or islands) incapable of appropriation by occupation otherwise, no sovereignty may be claimed thereon. Under such circumstances, another mission for Chinese soldiers stationed there would be, at least, to defend neighboring islands or rocks where China claim sovereignty. As revealed by Philippine Submission 7152 and its 2011 NV, there are geological features in KIG capable of generating territorial sea, EEZ or continental shelf. Territorial sovereignty may doubtlessly be claimed over these features. In fact they are all claimed by China. It is fair to consider Philippine Submissions 12 and 14 as aiming at (i) advancing, if not ensuring, Philippine territorial integrity in KIG and (ii) lessening, if not terminating, military threat against Philippine territories in KIG by Chinese soldiers that may be dispatched from Mischief Reed and Second Thomas Shoal. It proves that these two Submissions still relate to sovereignty, and should have been declared by the Jurisdictional Award as inadmissible.

VIII Conclusions

The Jurisdictional Award of the SCS Arbitration has left quite a few legal questions unanswered. Many admissibility and jurisdictional thresholds remain insurmountable most probably.

First, it is critical to go through the exchange of NVs between China and the Philippines in 2009-2011, word by word, to know the nature of their disputes and agreement as crystalized thereby. These NVs have been invoked by the Jurisdictional Award, with certain critical paragraphs cut off mysteriously.

Second, as evidenced by its 2011 NV, China neither relied on extra-UNCLOS legal regime nor invoked historic rights to justify its SCS maritime claims. Instead, UNCLOS and two UNCLOS-compliant domestic legislations were used as the legal bases to claim China’s maritime entitlements to territorial sea, EEZ and continental shelf in SCS. Importantly, UNCLOS was also invoked by the Philippines to justify its maritime claims in WPS or, to be specific, in KIG. Therefore, no dispute could be crystallized concerning the “source of maritime

152 Jurisdictional Award, para. 101.
entitlements” between the two Parties with respect to Philippine Submissions 1-2.

Third, the critical term “relevant waters” in China’s 2009 and 2011 NVs can hardly denote the entire area enclosed by USL. China’s 2009 NVs were protesting against two Vietnamese and Malaysian submissions of continental shelf beyond 200 miles in SCS. Vietnam and Malaysia never submitted the entire water and seabed within USL to the CLCS, but only two specified areas in the middle of SCS. So China’s “relevant waters” most probably should mean these two geographically confined areas. China had no need to even invoke historic rights deriving from extra-UNCLOS source of international law to justify its maritime entitlements embracing these geographically confined “relevant waters.”

Fourth, China in its 2009 and 2011 NVs did not rely on specific or individual maritime feature it claims in SCS to make maritime claims of EEZ and continental shelf. Instead, China was using Nansha Islands as a single unit to claim territorial sea, EEZ and continental shelf. Meanwhile, Philippine 2011 NV did not identify any geological features in KIG as incapable of generating EEZ or continental shelf. What was said by Philippine 2011 NV was that relevant geological features with no names may generate EEZ and continental shelf, which was shared by China impliedly in its 2011 NV. It seems impossible for any dispute concerning the legal status of those nine particular maritime features under Philippine Submissions 3-4 and 6-7 to be crystallized between the two Parties.

Fifth, the Philippines’ 2011 NV indirectly asserted some geological features in KIG to be capable of generating EEZ and continental shelf for the Philippines. Obviously, the Philippines admitted the existence of “islands” within KIG. Such a position defeated some of its Submissions in this arbitration, as Submissions 1-2, 5, 8-9, 12 and 14 are premised on the position that China has no EEZ and continental shelf in WPS because none of the maritime features in WPS, including Nansha Islands, qualifies as an “island” under Article 121.

Sixth, based on the foregoing, the Sino-Philippine overlapping claims to EEZ and continental shelf in WPS (or specifically, in KIG or Nansha Islands) and the ensuing sea boundary delimitation disputes were too obvious to wait until the merits phase to surface. Therefore, Philippine Submissions 5, 8-9, 12 and 14 all concern sea boundary delimitation beyond the jurisdiction of the Tribunal. It was unjustified for the Jurisdictional Award to decide to move these Submissions into the merits phase.

Seventh, Philippine Submissions 3-4, 6-7 and 10-14 concerning Scarborough Shoal, Mischief Reef, Second Thomas Shoal and various maritime features all relate to Sino-Philippine sovereignty disputes. Such insurmountable threshold should have barred these Submissions from entering into the merits phase.
related issue is the military activities exclusion clause under Article 298(1)(b) of UNCLOS that should have been deemed applicable to the on-going territorial disputes as reflected by Philippines Submissions 11-14 and by the Jurisdictional Award.

Eighth, Paragraph 408(b) of the Jurisdictional Award confirmed the applicability of Article 297(1)(c) to affirm the Tribunal’s jurisdiction in entertaining the environmental issues occurring in Second Thomas Shoal if ruled as a LTE under Submission 11. However, Paragraphs 176, 282 and 285 of the Jurisdictional Award clearly indicated that the condition required by Article 297(1)(c) was not met, rendering this provision inapplicable. Another inherently defective ruling is over Submission 5, which could not reflect any dispute, as China could not possibly oppose Philippine position indicated thereby. However, the Jurisdictional Award repaired and transformed this Submission into something apparently capable of reflecting a Sino-Philippine dispute and moved this different Submission into the merits phase, thus violating the Non Ultra Petita principle. These rulings unreasonably favored the Applicant State, which perhaps justify China’s potential challenge that the Tribunal failed to live up to the “equal treatment standard” laid down by various articles of Annex VII to the UNCLOS.