The Jurisdictional Rulings of the South China Sea Arbitration: Possible Errors in Fact and in Law

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I Introduction

On 22 January 2013, the Philippines initiated an arbitration against China\(^1\) under Part XV and Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS).\(^2\) The goal of this arbitration, as stated in the Philippine Notification and Statement of Claims, was to seek a peaceful and durable resolution of its disputes with China in the West Philippine Sea (WPS).\(^3\) Specifically,

[The Tribunal’s] determination of the potential maritime entitlements of the parties will serve to narrow the disputes between them, reduce tensions, and facilitate the diplomatic resolution of those issues that lie outside [the Tribunal’s] jurisdiction; namely, sovereignty over small maritime features and the delimitation of maritime boundaries.\(^4\) (emphasis added)

The targets under challenge were China’s claims, maritime entitlements, land reclamation, enforcement actions and omissions within the WPS, which is the eastern part of the South China Sea (SCS) enclosed by the U-Shaped Line

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(USL) and claimed by the Philippines as its (but not China's) exclusive economic zone (EEZ) and continental shelf (CS).\(^5\) China soon rejected the Philippine Notification initiating this arbitration,\(^6\) but the case continued. A five-member Tribunal was established under the default rule of Article 3(e) of Annex VII.\(^7\) The Philippines submitted its Memorial and Supplemental Written Submission on schedule.\(^8\) Not formally providing any response as requested, China released a Position Paper on 7 December 2014, denying the Tribunal's jurisdiction to entertain the disputes submitted by the Philippines.\(^9\)

Treating China's Position Paper as a plea concerning its jurisdiction, the Tribunal bifurcated the arbitral procedure. The hearing on admissibility and

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\(^8\) For the text of the Memorial and Supplemental Written Submission, see n. 1 above. For comment on the Memorial, see M.S.-t. Gau, "The Sino-Philippine Arbitration on South China Sea disputes: Admissibility and jurisdiction issues," *China Oceans Law Review*, no. 1 (2015): 166–293.

jurisdiction issues was held on July 7–8 and 13, 2015 (July Hearing)\(^{10}\) without China’s participation. On 29 October 2015, the Permanent Court of Arbitration (PCA), the Registry of this arbitration, released the “Award on Jurisdiction and Admissibility” (JA).\(^ {11}\) Not convinced by China’s Position Paper, the JA allowed the Tribunal to entertain all Philippine Submissions in the merits phase.\(^ {12}\) The second stage of hearing was held on November 24–26 and 30, 2015 (November Hearing) to receive oral arguments concerning the remaining issues of jurisdiction and admissibility, as well as the merits.\(^ {13}\) Without China’s presence the November Hearing ended with extra submissions from the Philippines.\(^ {14}\) Finally, the Tribunal delivered the Award on the remaining issues of Jurisdiction and

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\(^{12}\) JA, id., paras. 397–413.

\(^{13}\) See Transcripts on Merits Hearing on 24–26 and 30 November 2015, n. 1 above.

\(^{14}\) For Philippine Final Submissions, see Ninth Press Release by the PCA for this arbitration on 30 November 2015, n. 1 above. Also see Parts III-B, IV-B and VII-B below.
Admissibility as well as the Merits (MA) on 12 July 2016. Among 15 Philippine Submissions as amended, only Submissions 14(a) to (c) and 15 failed to surmount the thresholds of jurisdiction and admissibility. Meanwhile, the Tribunal's rulings on the merits were almost completely in the Philippines' favor with respect to its Submissions 1–13 and 14(d).

Rejecting this arbitration, China was treated as the Respondent. Not being the Counter-Memorial, China's Position Paper was reviewed by the Philippine legal team and scrutinized by the JA and the MA. The Tribunal bifurcated the proceedings because of China's "plea concerning its jurisdiction." The MA may create restraining impacts upon China's future SCS policies and behaviors. Rejecting the MA, China is expected to produce its legal response in due course. Examination of the MA may become a hot topic as long as the SCS confrontations continue.

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15 PCA Case No 2013–19, In the matter of the SCS arbitration before an arbitral tribunal constituted under Annex VII to the 1982 UNCLOS between the Republic of the Philippines and the People's Republic of China, Award, 12 July 2016, n. 1 above [MA].

16 Originally the Philippine Submissions 4 and 6 claimed Mischief, Subi, Gaven, and McKennan Reefs as well as Second Thomas Shoal to be low-tide elevations (LTE). In MA, Gaven (South) and Hughes Reefs were ruled as LTEs, while Gaven (North) and McKennan Reefs were held to be rocks under Article 121(3) of UNCLOS. The Philippine original claim was that among nine China-occupied or controlled maritime features, five should be held as LTEs and four rocks. But under MA, there were six rocks and five LTEs. Id., para. 1203, pp. 471–477. Compare with n. 14 above.

17 JA, n. 11 above, para. 11.


20 See Fourth Press Release by the PCA for this arbitration on 22 April 2015, n. 1 above.


22 Taiwan was treated by the Tribunal as part of China in this arbitration. The Government on Taiwan was called Taiwan Authority of China by MA. See MA, n. 15 above, paras. 89, 139, 142, 197, 357, 364, 371, 401, 428, 432–436, etc. Taiwan rejected the rulings soon after MA was published. See S. Hsu, “Government rejects South China Sea ruling,” Taipei Times (13 July 2016), available online: <http://www.taipeitimes.com/News/front/archives/2016/07/13/2003650915>. Also see M.S.-t. Gau, “The Sino-Philippine Arbitration on the South China Sea Disputes and the Taiwan Factor,” Journal of East Asia and International Law, IX, no. 2 (2016): 479–496.

23 One possible argument 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 M.S.-t. Gau, “The Prospects for the Sino-Philippine Arbitration on
To evaluate the legal effect of the MA, one may scrutinize (i) the JA and (ii) the jurisdictional rulings of the MA, as the very basis for the Tribunal’s entertaining of the merits issues. Are there any manifest and essential errors in law or in fact within these jurisdictional rulings? As decided by the JA, seven out of fifteen Philippine Submissions almost passed the thresholds of admissibility and jurisdiction. They can be divided into two groups: (i) the legal status of nine maritime features occupied or controlled by China in the WPS, as indicated by Submissions 3, 4, 6, and 7; and (ii) the Sino-Philippine maritime confrontations occurring within 12 nautical miles (M) of Scarborough Shoal and the environmental issues occurring near the Second Thomas Shoal, as reflected by Submissions 10, 11, and 13. Parts II and III of this article will review the reasoning and evidence employed by the JA enabling these seven Submissions to pass the thresholds of admissibility and jurisdiction. As the MA entertained the jurisdiction and admissibility issues for the amended part of Submission 11, the Tribunal’s decisions in the MA will also be addressed.

For the remaining eight submissions, the JA ruled that it could not fully resolve the issues of admissibility and jurisdiction without considering the merits. These submissions can be broken 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 USL under Philippine Submissions 1 and 2. The second group of submissions identifies various actions and omissions of China seen as trespass into the Philippine EEZ and CS under Submissions 5, 8, 9, 12, and 14. As these eight submissions surmounted certain major hurdles of admissibility and jurisdiction, Parts IV, V, VI and VII

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24 “For the avoidance of doubt, the Tribunal hereby reaffirms in full, and incorporates by reference, the conclusions and reasoning set out in its Award on Jurisdiction.” See MA, n. 15 above, para. 168.
26 B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953), 259. Also see UNCLOS, n. 2 above, art. 288(1).
29 Id., paras. 407–408 and 410.
30 For different levels of thresholds of admissibility and jurisdiction, see Gau, n. 10 above.
31 See n. 14 above.
32 JA, n. 11 above, paras. 380–388.
33 Id., paras. 398–399.
34 Id., paras. 402, 405–406, 409, and 411.
35 Submission 15 of the Philippines was “China shall desist from further unlawful claims and activities.” The Submission as amended was ruled by the Tribunal as reflecting no
of this article will examine how these Submissions passed these thresholds. As the Tribunal dealt with the remaining issues of admissibility and jurisdiction for these eight submissions in the MA, the decisions there will be also reviewed. Finally, a conclusion is given in Part VIII.

II Legal Status of Nine China-occupied or Controlled Maritime Features in the West Philippine Sea

A The Rulings of the JA
Philippine Submissions 3, 4, 6, and 7 claimed that Johnson, Cuarteron and Fiery Cross Reefs, as well as Scarborough Shoal were only rocks incapable of generating an EEZ or CS under Article 121(3) of UNCLOS. Gaven, McKennan, Mischief, and Subi Reefs, as well as Second Thomas Shoal were claimed as low-tide elevations (LTEs) incapable of (i) generating a territorial sea, EEZ or CS, and (ii) appropriation by occupation or otherwise.

According to the JA, these four submissions reflected Sino-Philippine disputes not relating to sovereignty or sea boundary delimitation. The disputes over legal status of the four so-called “rocks” were concerning the interpretation or application of Article 121. The disputes over legal status of five “LTEs” were concerning the interpretation or application of Article 13.

Since the JA held that Sino-Philippine “disputes” were reflected by these four Submissions, the Tribunal must have obtained evidence to “satisfy disputes. Therefore, it is unnecessary to discuss it here. See n. 14 above. Also see JA, id., para. 101. Also see MA, n. 15 above, paras. 1191–1201.

36 JA, id., para. 101.
37 Id., paras. 400–401 and 403–404.
38 Id., paras. 148–149 of JA defined "dispute" as follows: "148. 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. 149. 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." (emphasis added).
itself that (i) China actually rejected the Philippines’ claiming of Johnson, Cuarteron and Fiery Cross Reefs, as well as Scarborough Shoal as only rocks incapable of generating an EEZ and CS; (ii) China actually claimed that these four maritime features were capable of generating an EEZ and CS under Article 121; and (iii) China actually claimed Gaven, McKennan, Mischief, and Subi Reefs, as well as Second Thomas Shoal as islands or rocks capable of appropriation by occupation or otherwise. Meanwhile, the Philippines objected to such claims. Unable to prove such clashing positions, the evidence invoked by the JA in their original form even demonstrated Sino-Philippine agreements that could be (i) widely detrimental to the Philippine legal positions, and (ii) undermining the foundation beneath the Tribunal’s inference of China’s positions in this arbitration.40

B The Real Picture from the Evidence
To prove the existence of disputes reflected by Submissions 3, 4, 6, and 7, the JA invokes the Philippine-Sino exchange of two Note Verbales (NVs) forwarded to the United Nations (UN) in 2011.41 To comprehend such an exchange, China’s 2009 NVs must be examined jointly. In fact, the Philippine 2011 NV served to refute China’s 2009 NVs, while China’s 2011 NV challenged the Philippine 2011 NV and defended its 2009 NVs. The omission of China’s 2009 NVs in the JA becomes questionable.

1 China’s 2009 NVs
On 7 May 2009, China delivered two identical NVs to the UN to oppose two outer CS submissions presented to the Commission on the Limits of the Continental Shelf (CLCS) by Malaysia and Vietnam.45 Dated 6–7

39 Annex VII, n. 7 above, art. 9.
40 See JA, n. 11 above, paras. 161–163. Also see MA, n. 15 above, paras. 156, 180, and 201.
41 JA, id., p. 66, footnotes 133–134.
42 See Article 5(a) of Annex I to the Rules of Procedure of the CLCS, available online: <http://www.un.org/depts/los/clcs_new/commission_documents.htm#Rule>. What China did was to inform the CLCS of the land and maritime disputes existing in the areas submitted by Malaysia and Vietnam so that the CLCS was justified to stop considering these two submissions.
May 2009, the Malaysian and Vietnamese submissions claim two geographically confined seabed areas within the SCS as their CS beyond 200 M from their mainland. Figure 9.1 shows these as CLCS areas.46


**Figure 9.1** Vietnam submission of outer CS to the CLCS (see orange zone to the north) and Vietnamese/Malaysian Joint Submission to the CLCS (see orange zone to the south) in 2009 and their relations to the Paracel and the Spratly Islands

*Source: Fisler Damrosch and Oxman, n. 46 Below.*
In its 2009 NVs China stated:

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.\(^47\)

2 Philippine 2011 NV
To challenge China’s foregoing positions that it enjoys (i) sovereignty over the SCS islands and their adjacent waters and (ii) sovereign rights and jurisdiction over the relevant waters, the Philippines forwarded a NV on 5 April 2011 to the UN (no. 000228),\(^48\) 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* [emphasis added].\(^49\)

*On the “Water Adjacent” to the Islands and other Geological Features:*
SECOND, the Philippines, under the Roman notion of *dominium maris* and the international law principle of “*la terre domine la mer*” which states that the land dominates the sea, necessarily exercises sovereignty and jurisdiction over the waters around or adjacent to each relevant *geological feature in the KIG* [emphasis added] as provided for under UNCLOS.\(^50\)

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\(^{49}\) In its 2009 NVs, China claimed territorial sovereignty over the SCS islands, covering the Nansha Islands (Spratly Islands), Xisha Islands (Paracel Islands), Zhongsha Islands (Macclesfield Bank), and Dongsha Islands Group (Pratas Islands). The 2011 Philippine NV rejected part of China’s claims in Nansha Islands by claiming territorial sovereignty over KIG as part of Nansha Islands. The Sino-Philippine territorial disputes over all geological features in KIG were crystallized. See notes 47–48.

\(^{50}\) In its 2009 NVs, China also claimed sovereignty over the adjacent waters of SCS islands. However, for the adjacent waters of those KIG geological features, the Philippines claimed to own sovereignty. Here, other territorial sovereignty disputes were crystallized.
At any rate, the extent of the waters that are “adjacent” to the relevant geological features [emphasis added] 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 [emphasis added] 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” … outside of the aforementioned relevant geological features in the KIG and their “adjacent waters” would have no basis under international law, specifically UNCLOS.51 With respect to these areas,52 sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state—the Philippines—to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M EEZ, or CS [emphasis added] in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.53

over “adjacent waters” or territorial waters of those KIG geological features. Using the word "each", the Philippines used individual KIG geological features to claim territorial waters or adjacent waters. See notes 47–48.

The Philippines argued that “relevant waters” indicated by China’s 2009 NV must have denoted the entire region within USL and thus, beyond what was allowed by UNCLOS. A potential dispute over the legal source of China’s maritime claims over such relevant waters arose. Should China invoke customary law to justify its SCS maritime claims beyond the areas allowed by UNCLOS, such a dispute over “source” would be real. If China’s relevant waters are based on UNCLOS provisions, no dispute over source can exist. The key issue was the size and shape of China’s relevant waters. Id. For a detailed discussion, see Gau, n. 8 above, pp. 175–181.

Emphasis added. Critically, the term “these areas” meant (i) the “adjacent waters” surrounding the KIG relevant geological features over which China and the Philippines competed for territorial sovereignty, and (ii) the “relevant waters” outside of the relevant geological features in the KIG and outside of the adjacent waters thereof over which China and the Philippines competed for sovereign rights and jurisdiction.

Noting the headings of First and Second Points, the Philippines claimed some of the “relevant geological features in KIG” as “islands.” Outside of their “adjacent waters” (i.e., territorial waters) over which the Philippines claimed sovereignty, they also generated the EEZ and CS for the Philippines. Whatever extended beyond these bodies of waters that China wished to claim sovereign rights and jurisdiction in the name of “relevant waters,” had no basis under UNCLOS. From Philippine perspectives, since China has no sovereignty over the KIG geological features, all maritime entitlements generated thereby cannot pertain to China.
China’s 2011 NV

Refuting that the Philippines owns (i) territorial sovereignty over all KIG geological features and (ii) maritime entitlements generated thereby, China delivered its NV on 14 April 2011 to the UN with serial no. CML/8/2011, with three major points:

[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.

[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 the 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)


55 Clearly, China rejected Philippine (i) territorial claims over KIG geological features and (ii) any maritime entitlements generated under UNCLOS. China’s “abundant historical and legal evidence” was most probably meant to justify its territorial claims for all consequent positions so as to prevail over these Philippine claims. This phrase may not mean that China invoked an extra-UNCLOS rule governing historic rights to justify its maritime claims in SCS, unless it really claimed maritime areas beyond what UNCLOS permitted. The key issue was still the size and shape of China’s “relevant waters” in its 2009 and 2011 NVs that were most probably indicated by orange color zones in Figure 9.1, n. 46 above.

56 In the First Point of China’s 2011 NV, China mentioned “abundant historical and legal evidence.” In the Second Point, China seemed to demonstrate that, with Philippine
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, EEZ and Continental Shelf.57

C Evidence Misused

Submissions 3, 4, 6, and 7 Could Not Reflect Disputes

The JA invoked the 2011 Philippine-Sino exchange of NVs while omitting China's 2009 NV to prove that Philippine Submissions 3, 4, 6, and 7 reflected the disputes concerning the legal status of nine maritime features. In fact, the Philippine 2011 NV focused on relevant KIG geological features (without names) that may generate a territorial sea, an EEZ and/or CS.58 Inconsistent with the formulation of Submissions 3, 4, 6, and 7, the Philippine 2011 NV identified no KIG geological features incapable of generating a territorial sea, an EEZ and/or CS. Using the Nansha Islands as a unit to claim maritime entitlements under UNCLOS, China's 2011 NV did not specify any maritime feature capable or incapable of generating a territorial sea, an EEZ and CS, either. How can it be possible for any Sino-Philippine disputes concerning the legal status of those nine particular features to have been crystallized this way?

57 It meant that China was actually invoking UNCLOS to justify its maritime entitlements in the Nansha Islands. Since KIG is part of the Nansha Islands, China must also have relied on UNCLOS to claim its maritime entitlements in KIG. As the Philippines also adhered to UNCLOS, there could not be Sino-Philippine disputes over the "source" of maritime entitlements in KIG. See n. 54 above. Also see JA, n. 11 above, paras. 398–399.

58 See the second and third points of Philippine 2011 NV, notes 50–53 above, and corresponding text.
way? No wonder the JA provided no evidence to prove that Submissions 3, 4, 6, and 7 reflected Sino-Philippine disputes over legal status of those nine maritime features.

Had China abandoned its way of claiming maritime entitlements and followed the Philippine model by using individual features to claim an EEZ and CS, China would have chosen some larger features widely recognized as proper islands as factual bases. China would not possibly rely on those inferior features identified by Submissions 3, 4, 6, and 7 for this purpose. According to international law a dispute could only be crystalized when there was a Sino-Philippine disagreement on a point of law or fact, a conflict of legal views or of interests in the present case. For these four Submissions, the Tribunal was able to rely on the 2011 Philippine-Sino exchange of NVs to conclude that Sino-Philippine disputes existed based on (i) a claim that China did not hold and (ii) a position that did not even exist in the Philippine 2011 NV. No wonder the JA lacked confidence in its own conclusion. It is hard to understand why the Tribunal refrained from declaring these Submissions inadmissible due to lack of disputes.

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59 See MA, n. 15 above, para. 97. Critically, see The Philippines’ Written Responses on Itu Aba (25 April 2016), n. 1 above, para. 111. Also see Final Transcript Day 2—Merits Hearing, n. 1 above, pp. 103–104.

60 Evidence provided by JA was a NV from the Philippines to the Chinese Ambassador to the Philippines dated 4 April 2011 concerning Reed Bank. See JA, n. 11 above, p. 67, footnote 135. Reed Bank was irrelevant to Philippine Submissions 3, 4, 6, and 7, as it was not mentioned in these four submissions. It further proves that JA found no evidence. It is interesting to note that Judge Wolfrum once laid down a high standard of proof. See Whomersley, n. 1 above, para. 63.

61 R.C. Beckman and C.H. Schofield, “Defining EEZ claims from islands: A potential South China Sea change,” The International Journal of Marine and Coastal Law 29, no. 2 (2014): 193–243, at 210–211. According to this paper, there are 12 maritime features in the Spratly Islands that qualify as “islands.” They are (i) Itu Aba occupied by Taiwan; (ii) Thitu Island, West York Island, Northeast Cay, Nanshan Island, Loaita Island occupied by the Philippines; and (iii) Spratly Island, Southwest Cay, Sin Cowe Island, Sandy Cay, Nanyit Island, and Amboyna Cay occupied by Vietnam. However, Schofield reconsidered his views on this matter. Irrespective of Schofield’s later view, Beckman remained of the opinion that there exist islands in the Nansha Islands. See Final Transcript Day 3—Merits Hearing (Schofield), p. 6, n. 1 above.

62 See how the Tribunal defined “disputes,” n. 38 above.

63 JA, n. 11 above, para. 170.

64 Id., para. 171.

Moreover, as Scarborough Shoal was neither located in the Nansha Islands nor identified by the 2011 Philippine-Sino exchange of NVs, such evidence seemed unhelpful in proving the existence of dispute to be reflected by Submission 3. Yet, the JA invoked such evidence to conclude that Submission 3 reflected a dispute. It reinforces the suspicion that the Tribunal lacked sufficient evidence to handle Philippine Submissions 3, 4, 6, and 7.

The Existence of Islands in KIG and the Nansha Islands is Widely Recognized

Having considered all four Sino-Philippine exchanges of NVs between 2009 and 2011, one cannot fail to notice the existence of Sino-Philippine agreement on certain vital matters. For example, some of the “relevant geological features in KIG” are considered by the Philippines as capable of generating an EEZ and CS. This was impliedly echoed by China’s 2011 NV, which used the Nansha Islands as a single unit to claim an EEZ and CS. This Chinese position was doubtlessly premised on the existence of “islands” inside the Nansha Islands.

In this arbitration the Philippines switched to an opposite position that none of the maritime features in the Nansha Islands qualified as an island. The MA endorsed this point that, without prejudice to Sino-Philippine territorial disputes over KIG features, China may not claim an EEZ or CS in the WPS, either using the Nansha Islands as a single unit, or using those larger high-tide features within the Nansha Islands individually. Such merits ruling deviated from the Sino-Philippine agreement demonstrated by their 2011 NVs, which was heavily used by the JA as evidence in the context of Philippine Submissions 1–4, 6 and 7. The fact that “islands” exist in KIG or in the Nansha Islands can be further attested by the contemporaneous state practice of the Philippines, Vietnam, and Malaysia.

First, in the July Hearing, the Philippine counsel, Professor Philippe Sands provided a Philippine Supreme Court Ruling to the Tribunal that could confirm such a position. On 8 July 2015 Professor Sands stated:

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66 See Point Three of Philippine 2011 NV, notes 51–53 above and corresponding text.
67 See the Third Point of China’s 2011 NV, notes 54 and 57 above and corresponding text.
68 See First-round submissions by Mr. Reichler, Final Transcript Day 1—Jurisdiction Hearing (on 7 July 2015), n. 1 above, pp. 44–45.
69 MA, n. 15 above, paras. 571–576.
70 Id., para. 1203(B)(7)(a. and b).
71 JA, n. 11 above, paras. 165–166, and 169.
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’ 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 ...’

It seems hard to imagine that Philippine top legislative and judicial bodies would deny the existence of islands in KIG while holding KIG to be a regime of islands.

Second, on 4 August 2009, the executive branch of the Philippine government forwarded a NV to the UN to protest a Vietnamese unilateral submission of outer limits of the CS beyond 200 M in the SCS dated 6 May 2009. This Philippine NV said that “[the] Submission for Extended CS by ... Vietnam lays claim on areas that are disputed because they overlap with those of the Philippines.” As shown by Figure 9.1, the Vietnamese unilateral submission provided a triangle-shaped area in orange far beyond the limits of 200 M from the archipelagic baselines of the Philippines facing the WPS. This triangle area is less than 200 M but beyond 12 M from KIG maritime features. Most probably, the Philippines said this because some KIG maritime features are considered as “islands,” unless the Philippines used its archipelagic baselines to claim an extended CS that might overlap with the Vietnamese triangle area. Seven years have passed without seeing the Philippine submission to the CLCS concerning its extended CS in the SCS. This means that in 2009 the Philippines admitted the existence of certain islands in KIG. As of 21 March 2017 this protesting Philippine NV remains on the CLCS website. Clearly, the Philippines continues to believe that islands exist in KIG even after the MA was granted.

Third, as of 21 March 2017 the Government of Vietnam has believed that “islands” exist in the Nansha Islands or Spratly Islands. This is proved by Vietnam’s NV on 8 May 2009 opposing three of China’s NVs dated 13 April and 7 May 2009. As stated in Vietnam’s NV, “[the] Hoang Sa (Paracels) and Truong

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72 See Response to Tribunal questions by Professor Sands, Final Transcript Day 1—Jurisdiction Hearing (on 8 July 2015), n. 1 above, pp. 4–5.

73 Dated on 4 August 2009, with the serial no. 000818, the file of this Philippine NV is available online: <http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/clcs_37_2009_los_phl.pdf>.
Sa (Spratlys) archipelagos are parts of Viet Nam’s territory.” The identical position was repeated in its NV on 18 August 2009 forwarded to the UN challenging two Philippines NVs (serial no. 000818 and 000819) of 4 August 2009. Given the definition of “archipelagos,” it seems hard for Vietnam to deny the existence of “islands” in the Spratly Islands while claiming Truong Sa as an archipelago.

Fourth, on 23 June 2016 Malaysia sent a NV to the Tribunal, recalling its sovereignty claims over a number of SCS features. Malaysia “may also have overlapping maritime entitlements (including an extended CS) in the areas of some of the features that the Arbitral Tribunal has been asked to classify.” Clearly, Malaysia must have considered that fully entitled islands exist in the Spratly Islands. Indeed, the 2009 Malaysia-Vietnam Joint Submission to the CLCS was not based on Malaysia-claimed islands in the Spratly Islands (see Figure 9.1). However, it is one thing for a State to consider some maritime features it claims qualify as islands as a matter of fact and law and another thing for that State to choose to use (or not to use) those islands to justify its EEZ and CS entitlements.

Therefore, the Tribunal’s decision in the MA that no maritime feature in the Nansha Islands qualified as a fully entitled island seems unconvincing as

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76 See UNCLOS, n. 2 above, art. 46(b).
77 MA, n. 15 above, paras. 634–635. Also see Tzanakopoulos, n. 11 above, pp. 12–13.
78 MA, id., para. 638.
79 The 2009 Malaysia-Vietnam Joint Submission to the CLCS is the best example. Had Malaysia opted to use some of the fully entitled islands in the Spratly Islands it claimed to generate its extended CS before the CLCS, Vietnam would have protested by sending a NV to the UN to complain of Malaysia’s invasion into (i) Vietnam’s territories in the Spratlys and (ii) Vietnam’s EEZ and CS generated thereby. Had Vietnam chosen to use some fully entitled islands in the Spratlys it claimed to generate its EEZ, CS, and extended CS (before the CLCS), there would have been little share left for Malaysia to claim an EEZ and CS, not to mention an extended CS in the SCS. To cooperate in sending a Joint Submission to the CLCS, both Vietnam and Malaysia had to stop claiming an EEZ and CS by using the fully entitled islands they claimed in the Spratlys.
80 MA, n. 15 above, para. 1203(B)(7)(a–c).
Submissions 3, 4, 6, and 7 could hardly reflect any disputes. With such manifest and essential error in fact, the legal effects of the MA become questionable.\footnote{Cheng, n. 27 above.}

D \textit{No Dispute Concerning Legal Status of Scarborough Shoal}

The Philippine Submission 3 claimed that “Scarborough Shoal generates no entitlement to an EEZ or CS.” However, the evidence offered by the Philippines seemed incapable of proving China’s claim that Scarborough Shoal may generate an EEZ and CS. In Chinese Scarborough Shoal is called a three-word term, Huang (黃 means \textit{Yellow}) Yan (巖 means \textit{Rock or Stone}) Dao (島 means \textit{Island}), literally meaning “Yellow Rock Island” or “Yellow Stone Island.” Saying that China claims this feature to be an “island” is equally reasonable as saying that China claims this feature to be a “rock” or a “stone.” It seems also fair to say that the Chinese consider this “island” to be a barren rock made of a stone.

The key to finding out whether the Philippines Submission 3 reflected a Sino-Philippine dispute is to examine if China actually claimed this feature to be capable of generating an EEZ and CS. The Philippines Submissions 10, 11, and 13 only complained about China’s various actions and omissions in the territorial water surrounding Scarborough Shoal. Meanwhile, the JA offered the true nature of Sino-Philippine dispute for this feature, as they disputed about its physical nature, be it a “sand bank,” a “rock,” or an “island.” The JA provided no information to demonstrate China’s claim that Scarborough Shoal might generate an EEZ and CS,\footnote{JA, n. 11 above, p. 54, particularly footnote 81. Also see para. 171.} reflecting no dispute became the problem of the Philippine Submission 3.

E \textit{The “Disputes” over Legal Status of Maritime Features Relate to Sovereignty}

According to the JA, the Philippine Submissions 3, 4, 6, and 7 did not relate to sovereignty. The criteria are provided as follows: The Tribunal might consider that the Philippine 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{Id., para. 153, p. 59. Compare with Whomersley, n. 11 above, paras. 20–22.}

The logic behind the formulation of Philippine Submissions 3, 4, 6, and 7 is simple. To find out how many maritime entitlements China may claim in the WPS, the Tribunal was asked to examine the legal status of China-occupied or
controlled maritime features. China is denied the status of “coastal State” for foreign-occupied features in the Nansha Islands, because the maritime entitlements those features generate do not accrue to China under these four Submissions. Such a formulation of Submissions is in effect downgrading China's legal status from a coastal State to a non-coastal State. Several KIG maritime features are occupied and claimed by the Philippines. For these features, treating China as a non-coastal State was tantamount to advancing the Philippine position in their sovereignty disputes concerning these maritime features. Obviously, the formulation of Philippine Submissions 3, 4, 6, and 7 related to sovereignty.

In the July Hearing, the Tribunal asked the Philippine lawyer to provide information about all maritime features in the Nansha Islands. The Philippines seemed uncooperative. Obviously, the Philippines was reluctant to accept the Tribunal treating China also as the coastal State for all maritime features of the Nansha Islands occupied by non-Chinese. This attitude confirmed that the Philippine formulation of Submissions 3, 4, 6, and 7 was aimed at denying China's legal status as a coastal State, so as to advance the Philippine position in its territorial disputes with China.

Furthermore, Submission 4 claimed that Mischief Reef, Second Thomas Shoal, and Subi Reef are LTEs incapable of appropriation by occupation or otherwise. The object was to gain a verdict to declare Chinese occupation thereof illegal, as the Philippines denied that these three features were located in China's EEZ or CS. The MA held these three features were LTEs incapable of appropriation, while being within the Philippine EEZ and CS. As to the matter of the MA's enforcement, China is expected to evacuate from these LTEs. Should China yield, it would be seen as abandoning its time-honored

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84 Professor Sands, as Philippine counsel, seemed unwilling to provide such critical information to the Tribunal. See First-round submissions by Professor Sands, in Final Transcript Day 1—Jurisdiction Hearing (on 7 July 2015), n. 1 above, pp. 86–88.
85 It should be noted that during the November Hearing the Philippine 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 Final Transcript Day 1—Merits Hearing (Loewenstein), n.1 above, pp. 92–93, and 98. Final Transcript Day 2—Merits Hearing (Loewenstein), n. 1 above, pp. 1–2. For a different reasoning for the same conclusion, see Tzanakopoulos, n. 11 above, p. 8; Klein, n. 9 above, pp. 17–21; Whomersley, n. 11 above, paras. 32–33.
86 See Philippine Final Submission 4, n. 14 above.
87 MA, n. 15 above, para. 1203(B)(4).
88 Id., para. 1203(B)(7).
territorial claims over these features.89 The Philippines would be justified in
taking over these features deemed part of the Philippine CS. Given the on-
going Sino-Philippine territorial disputes in the Nansha Islands, losing forti-
fied LTEs that can be used to defend the nearby rocks can hardly be denied as
“relating to sovereignty.”

F Disputes over the Legal Status of Maritime Features Conclude and
Concern Sea Boundary Delimitation

1 Sea Boundary Delimitation Will Be Accomplished by Settling
Disputes Reflected by Submissions 3, 4, 6, and 7

Philippine Submissions 3, 4, 6, and 7 were closely linked to Submissions 5, 8, 9,
12, and 14. It was argued by the Philippines that, since China had no EEZ and
cs in the WPS, a Sino-Philippine overlapping EEZ and CS did not exist in the
WPS.90 Philippine Submissions 8, 9, 12, and 14 would project a picture of “Chi-
ina’s trespass into [the] Philippine EEZ and CS.” This is because China would
only have a few circles of territorial waters surrounding those “rocks” in the
WPS, and nothing else. Since the outer limits of China’s maritime jurisdiction
in the WPS would be determined, the Philippines could just ignore China’s
request for sea boundary delimitation negotiations under Article 74 and 83 of
UNCLOS. The Sino-Philippine sea boundary delimitation project in the WPS
in effect was completed91 by the MA.92

89 China’s territorial claims over SCS maritime features were made much earlier than those
of the Philippines in the WPS. In 1935 the Review Committee for the Land and Water
Maps published “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 islands groups. 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 the Nansha Islands (Spratly Islands).
Both the 1935 and 1947 name lists identified Subi Reef and Second Thomas Shoal as fea-
tures claimed by China, while Mischief Reef was mentioned in the 1947 list. Gau, n. 8

90 JA, n. 11 above, para. 375.
91 This was the message of the concluding remarks by Philippine Minister Del Rosario sent
Compare with the corresponding text of n. 4.

92 See Gau, n. 10 above, pp. 78–83, and 191–198. See also Gau, n. 5 above, pp. 124–125.
Article 298(1)(a)(i) Covers the “Disputes” Reflected by Submissions 3, 4, 6, and 7

Had the Tribunal ruled that China was entitled to claim an EEZ and CS in the WPS because some maritime features in the WPS were held to be fully entitled islands, then the Sino-Philippine sea boundary delimitation dispute would have existed in the WPS for the purpose of Articles 74 and 83. Whether or how these two articles would have been activated and applied would depend on the Tribunal’s decision on Philippine Submissions 3, 4, 6, and 7.\(^93\) Obviously, such a decision would have affected and concerned the allocation of Sino-Philippine maritime areas in the WPS resulting from their boundary delimitation negotiations applying Articles 74 and 83.\(^94\)

The JA ruled that these four Submissions reflected Sino-Philippine “disputes.” Such disputes would have affected, concerned, or facilitated\(^95\) their sea boundary delimitation negotiation to which Articles 74(1) and 83(1) would have applied.\(^96\) Capable of affecting and concerning the application of Articles 74(1) and 83(1), such disputes should have been caught by Article 298(1)(a)(i)\(^97\) and excluded from the Tribunal’s jurisdiction according to China’s 2006 Declaration.\(^98\)

\[\text{Tribunal’s \textit{Effortless} Treatment of the Second Word “concerning” under Article 298(1)(a)(i)}\]

Were the issues of legal status of maritime features under Submissions 3, 4, 6, and 7 covered by the first sentence of Article 298(1)(a)(i), i.e., sea boundary delimitation?

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\(^93\) The most favorable decision for China would be that those nine features were all ruled as “islands” under Article 121. The worst decision for China would be that those nine features were held to produce no territorial waters for China because none of them was held as a rock or an island. Each ruling produces a different size of maritime area that China may claim under UNCLOS.

\(^94\) Gau, n. 8 above, pp. 234–244.

\(^95\) As said by the Philippines at the beginning of the July Hearing, the goal of this arbitration was to facilitate the future sea boundary delimitation negotiation. See n. 4 above.

\(^96\) MA cited China’s EEZ declaration on 7 June 1996 and China’s Law on the EEZ and the CS on 26 June 1998. In these two documents, China declared that it “shall determine the delimitation of its EEZ and CS in respect of the overlapping claims by agreement with the states with opposite or adjacent coasts, in accordance with the equitable principle and on the basis of international law.” MA, n. 15 above, paras. 177–178. Also see Klein, n. 9 above, p. 22.

\(^97\) UNCLOS, n. 2 above, art. 298(1)(a)(i). Also see Klein, n. 9 above, p. 22; Whomersley, n. 11 above, paras. 17 and 34.

\(^98\) See n. 147 below.
delimitation? The Tribunal’s answer was “no.” Whether such an answer is correct depends on the Tribunal’s interpretation of the second word “concerning” in the first sentence of Article 298(1)(a)(i). In fact, the Tribunal did not bother to interpret this term, simply deeming it interchangeable with the word “over.”\(^9\)

Given the importance of the term “concerning” in the SCS Arbitration,\(^1\) the Tribunal should have explained why it agreed with the Philippines’ narrow reading of the term in giving rulings on Submissions 3, 4, 6, and 7, at variance with the judgement by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Louisa Case*.\(^2\) Perplexingly, the Tribunal, in other parts of the MA, came close to the *Louisa* ruling by signaling that the term “concerning” had a broader meaning than “over”!\(^3\)

4 Philippine Memorial Echoes the *Louisa* Ruling

The biggest echo to the broader interpretation of the word “concerning” came from the recently released Memorial of the Philippines. Although the Philippines contended that the disputes of legal status of maritime features occupied by China did not concern maritime delimitation,\(^4\) all the judicial decisions invoked by the Memorial in Chapters 5 and 7 thereof were judgments on maritime boundary delimitations. They are (1) *Qatar v. Bahrain*;\(^5\) (2) *Nicaragua v. *

\(^9\) JA, n. 11 above, paras. 155 and 157. Also see MA, n. 15 above, paras. 153, 155, and 204. Compare with Whomersley, n. 11 above, paras. 23–31.

\(^1\) As Philippine counsel and advocate, Professor Oxman spent some time arguing that a narrow reading of the term “concerning” in Article 298(1)(a)(i) of UNCLOS was correct. See Final Transcript Day 2—Jurisdiction Hearing, n. 1 above, pp. 49–52. Also see notes 220–226 below and the corresponding text.

\(^2\) See paragraph 83 of the ITLOS Judgement of the *M/V Louisa Case*: “83. The question to be answered is whether the wording of the declaration of Saint Vincent and the Grenadines refers only to the provisions of the Convention which explicitly contain the term ‘arrest’ or ‘detention.’ It is appropriate to underline that the declaration of Saint Vincent and the Grenadines refers to disputes ‘concerning the arrest or detention’ of vessels. In the view of the Tribunal, the use of the term ‘concerning’ in the declaration indicates that the declaration does not extend only to articles which expressly contain the word ‘arrest’ or ‘detention’ but to any provision of the Convention having a bearing on the arrest or detention of vessels....” (emphasis added) *M/V “Louisa” Case (Saint Vincent and The Grenadines v. Kingdom of Spain)*, Judgment of ITLOS on 28 May 2013, available online: <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/judgment/C18_Judgment_28_05_13-orig.pdf>. Compare with Whomersley, n. 11 above, paras. 23–31. See also Tzanakopoulos, n. 11 above, pp. 10–11.

\(^3\) MA, n. 15 above, para. 1158.

\(^4\) Philippine Memorial, n. 8 above, para. 5.113, p. 149.

\(^5\) Id., footnotes 423, 498, and 500; paras. 5.14 and 5.85–5.86, pp. 117 and 139–140.
Colombia;\(^{105}\) (3) Libya v. Malta;\(^{106}\) (4) Eritrea v. Yemen;\(^{107}\) (5) Canada v. United States;\(^{108}\) (6) Romania v. Ukraine;\(^{109}\) and (7) Bangladesh v. Myanmar.\(^{110}\) In those judicial decisions, the issues concerning the legal status of maritime features (and their legal capability to generate maritime entitlements) constituted both preliminary and integral issues for the Court or Tribunal to address before coming to the delimitation issues proper.

After examining closely, \textit{inter alia}, 

\textit{Tunisia v. Libya},\(^{111}\)  

\textit{Canada v. United States},\(^{112}\)  

\textit{Libya v. Malta},\(^{113}\)  

\textit{Eritrea v. Yemen},\(^{114}\)  

\textit{Qatar v. Bahrain},\(^{115}\) and \textit{Romania v. Ukraine},\(^{116}\) it becomes clear that the issues of legal status of maritime features strongly affect the result of the settlement of maritime boundary disputes. This observation was even admitted by the Philippines itself,\(^ {117}\) and confirmed by

\begin{footnotesize}
\begin{enumerate}
\item Id., footnotes 444–445, 497, 500, 540–544, and 974–976; paras. 5.23, 5.27, 5.85, 5.86, 5.107, 5.110–5.113, and 7.122, pp. 121, 139–140, 147–149, and 258.
\item Id., footnotes 459 and 552; paras. 5.44 and 5.120, pp. 127–128 and 152.
\item Id., footnote 460; para. 5.45, p. 128.
\item Id., footnote 489; para. 5.79, p. 138.
\item Id., footnote 538; paras. 5.107–5.108, p. 147.
\item Id., footnotes 971–973; para. 7.121, pp. 257–258.
\item \textit{Case concerning the Continental Shelf (Tunisia v. Libya)}, Judgment, ICJ Reports 1982, paras. 128–129, pp. 88–89 [\textit{Tunisia v. Libya}]. In this case, the Kerkennah Islands, surrounded by islets and low-tide elevations, and constituting by their size and position a circumstance relevant for the delimitation, and to which the Court must attribute some effect.
\item The ICJ in \textit{Libya v. Malta} invoked the Judgment of North Sea CS cases to say that when drawing a median line, the Court needs to ignore “the presence of islets, rocks and minor coastal projections.” In this connection, “the islet of Filfla,” “the uninhabited islet of Filfla,” or “the uninhabited rock of Filfla” were repeatedly mentioned in the Judgment and was ignored as a basepoint at the first step of the delimitation when drawing the median line. See \textit{Continental Shelf (Libya v. Malta)} Judgment, I.C.J. Reports 1985, paras. 15, 62, 64, 72–73, and 79(C), p. 13 at pp. 20, 47–48, 52, and 57.
\item See Award (given on 17 December 1999) of the Arbitral Tribunal in the 2nd Stage of the Proceedings (Maritime Delimitation) pursuant to an agreement to arbitrate dated 3 October 1996 between Eritrea and Yemen, paras. 147–148, available online: <http://www.pca-cpa.org/showpage.asp?pag_id=1160>.
\item \textit{Maritime Delimitation and Territorial Questions between Qatar and Bahrain}, Merits, Judgment, ICJ Reports 2001, paras. 184–187 and 195.
\item Philippine Memorial, n. 8 above, p. 118, footnote 425.
\end{enumerate}
\end{footnotesize}
leading law of the sea experts, e.g., Clive Schofield\textsuperscript{118} and Yann-Huei Song.\textsuperscript{119} No wonder such disputes were requested to be handled first, and that such a request was followed by the International Court of Justice (ICJ) in, e.g., Nicaragua v. Honduras.\textsuperscript{120} In the judgment of Nicaragua v. Colombia, the ICJ put the sub-section of “Entitlements generated by Maritime Features” under Section V entitled “Maritime Boundary.”\textsuperscript{121} It confirms that the issue concerning legal status of maritime features constitutes an integral part of and concerns maritime boundary delimitation, as also noted in Guyana v. Suriname\textsuperscript{122} and Greece v. Turkey.\textsuperscript{123}

G The MA Violates the Non Ultra Petita Principle

The disputes reflected by Philippine Submissions 3, 4, 6, and 7 concerning the legal status of maritime features are over individual features, instead of a group of features as a unit. China did not participate in the proceedings, including the formulation and addition of counter-submissions. Although the Tribunal held that disputes were reflected by Submissions 3, 4, 6, and 7, it was unjustified for such disputes to concern the legal capability of the Nansha Islands as a single unit to generate maritime entitlements.

However, the MA devoted six paragraphs to the issues of application of Article 121 to the Spratly Islands as a whole.\textsuperscript{124} The Tribunal concluded by saying that none of Articles 7, 46, and 47 of UNCLOS were applicable to China’s Spratly Islands so as to justify the drawing of straight baselines encircling the


\textsuperscript{119} Y.-H. Song, “Okinotorishima: A ‘rock’ or an ‘island’? Recent maritime boundary controversy between Japan and Taiwan/China,” in Hong and Van Dyke, n. 118 above, 145–176, p. 168.

\textsuperscript{120} Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, paras. 114 and 135; pp. 35 and 39.


\textsuperscript{123} Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment, ICJ Reports 1978, para. 83, p. 35 [Aegean Sea CS Case].

\textsuperscript{124} MA, n. 15 above, paras. 571–576.
Spratly Islands.\textsuperscript{125} Such a decision violated \textit{non ultra petita} principle,\textsuperscript{126} as no submission concerning the legality of such a way of drawing baselines had ever been presented to the Tribunal by either party. As China has yet to draw such straight baselines for the Spratly Islands, such a dispute could hardly be crystallized by 22 January 2013 for the Tribunal, as a judicial body, to settle this issue by its own standard.\textsuperscript{127} Perhaps the Tribunal should have abandoned such ideas of (i) moving a basically hypothetical, moot, and inadmissible issue into the merits phase and (ii) giving a restraining order to stop China’s drawing of such baselines perhaps in the future.

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

A \textbf{The Rulings of the JA}

With respect to maritime confrontations and environmental issues occurring in Scarborough Shoal and Second Thomas Shoal, Submission 10 claimed that “China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal.” Submission 11 argued that “China has violated its obligations under UNCLOS to protect and preserve marine environment at Scarborough Shoal and Second Thomas Shoal.”\textsuperscript{128} And Submission 13 complained 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.”\textsuperscript{129} The JA decided that each of these submissions reflected disputes, but did not relate to sovereignty. Moreover, Article 297(1)(c) granted jurisdiction to the Tribunal to entertain the merits of Submission 11.\textsuperscript{130} Possible criticisms of these decisions are stated below.

\begin{itemize}
\item \textsuperscript{125} Id., para. 575.
\item \textsuperscript{126} ICJ: \textit{Asylum Case} (Interpretation) (1950), ICJ Reports, 1950, p. 395, at p. 402. 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, ICJ: \textit{Corfu Channel Case} (Compensation) (1949), ICJ Reports, 1949, p. 244, at p. 249.
\item \textsuperscript{127} Check the definition of “disputes” used by the Tribunal, n. 38 above.
\item \textsuperscript{128} At the end of November Hearing, the Philippine final submission offered an amended Submission 11. See n. 14 above.
\item \textsuperscript{129} JA, n. 11 above, para. 101.
\item \textsuperscript{130} Id., paras. 407–408 and 410.
\end{itemize}
Submission 10 Reflected No Dispute

Could Philippine Submission 10 reflect any Sino-Philippine “dispute”? This submission sought the Tribunal’s confirmation of Philippine traditional fishing rights in the territorial waters surrounding Scarborough Shoal. However, the Philippines has claimed that there is “sovereignty.” Constantly rejecting China’s competing territorial claim there, the Philippines should not be allowed to abruptly switch its position by recognizing China’s sovereignty over such waters as a premise for its hypothetical traditional fishing right.

Assuming that China’s sovereignty over Scarborough Shoal really was treated as a premise by the Philippines in Submission 10, China should not be seen automatically accepting or denying the Philippine claim of traditional fishing rights. No evidence can prove that the Philippines had already put forth such a claim to China, not until this arbitration. No opportunity was given to China to encounter such a claim until 2013. During this arbitration China said nothing on this matter. The JA provided no evidence concerning China’s opposition in this regard.

After this arbitration, the Philippines holds fast to its unaffected territorial sovereignty claim over Scarborough Shoal. Why should the Philippines bother to bend by recognizing China’s competing sovereignty claim there so as to assert such an inferior claim of traditional fishing rights?

Submissions 10, 11, and 13 Relate to the Sovereignty Dispute over Scarborough Shoal

Assuming Submissions 10, 11 and 13 did reflect Sino-Philippine “disputes,” such disputes would relate to sovereignty issues over Scarborough Shoal according to the Tribunal’s own standard. The unspoken goal of these three

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131 Both para. 147 and footnotes 94–95 of the JA can neither prove (i) that China was objecting the Philippine claim of traditional fishing rights nor (ii) that the Philippines was invoking traditional fishing rights during maritime confrontations with China in the territorial water of Scarborough Shoal. Id., para. 147, footnotes 94–95.

132 Final Transcript Day 2: Merits Hearing (Martin), n. 1 above, pp. 166–167, 171, and 172.

133 Para. 173 of the JA said that Submission 10, _inter alia_, reflected disputes. The relevant footnote under that para. is footnote 139, which refers to para. 3.40 and footnote 211 of the Memorial. Para. 3.40 and footnote 211 only refer to Chinese fishing in waters claimed by the Philippines in, _inter alia_, Scarborough Shoal. This defeats the Philippine arguments because (i) the Philippines claims the water surrounding Scarborough Shoal; and (ii) no evidence concerns the Philippine traditional fishing rights in that water. JA, n. 11 above, para. 173. Philippine Memorial, n. 8 above, pp. 52–53.

134 JA, n. 11 above, para. 153.

135 See n. 83 above, and corresponding text.
Submissions was to negate China’s sovereignty claims in those waters and to advance the Philippine competitive claim.

Submission 10 concerned whether the Philippine traditional fishing rights were interfered with by China. For China, the adjacent water of Scarborough Shoal has always been its territorial water, where Philippine fishing vessels only enjoy innocent passage,\footnote{UNCLOS, n. 2 above, arts. 17–19.} with no right to fish. For the Philippines, that water is its territorial water where Chinese law enforcement vessels only enjoy innocent passage, with no right to enforce Chinese law upon Philippine fishing vessels. The real dispute crystallized is: who enjoyed innocent passage in the adjacent waters of Scarborough Shoal? This raises two questions: (i) Whose territorial water was it? and (ii) Who owned Scarborough Shoal? These questions manifest an ongoing Sino-Philippine territorial dispute over the land and the water.

Submission 11 originally concerned, partly, China’s obstruction of Philippine government vessels intending to enforce Philippine law upon Chinese fishing boats in the same water. For China, Philippine government vessels had no right to do that in Chinese territorial water. When the Philippine government vessels came close to Chinese fishing vessels, the primary job for Chinese law enforcement vessels was to prevent their Philippine counterparts from enforcing their laws so as to display China’s and deny Philippine sovereignty there. Asking Chinese government vessels to arrest their own fishing boats before their Philippine counterparts because the fishing boats might have “violated” Philippine environmental laws was out of the question.\footnote{Gau, n. 8 above, pp. 263–265.}

Submission 13 concerned near-collision incidents that illustrated an ongoing territorial dispute between the two parties. Prior to April 2012, Scarborough Shoal was under Philippine control. After that time China gained an upper hand. China has suspected the Philippines of planning to take it back by force. It would be hard for China’s government vessels to allow its hostile competitor to freely navigate there. Few States in China’s shoes would comply with collision avoidance rules at the risk of loosening its line of defense. Doubtlessly, Submission 13 reflected the Sino-Philippine territorial dispute.\footnote{Id., pp. 281–286.}

The JA ruled that Philippine Submission 13 reflected a dispute concerning the interpretation or application of Articles 21, 24, and 94 of UNLCOS.\footnote{JA, n. 11 above, para. 410.} However, before applying Article 21 to Chinese government vessels a ruling must be made to hold China a foreign State in the adjacent waters of Scarborough
Shoal, while granting the title of coastal State to the Philippines. Applying Article 24 to Chinese government vessels follows a decision rendering China as the coastal State there, leaving the Philippines as the foreign State. To apply Article 94 (applicable to the high seas) to China's government vessels would require fulfillment of either of the two conditions. The first condition, which is inapplicable here, is that Scarborough Shoal is not even a rock while its adjacent waters are considered high seas. Alternatively, Scarborough Shoal must be considered as an island or a rock under Article 121, whose sovereignty does not belong to China. A Tribunal's preliminary decision still has to be made to deny China's territorial claim over Scarborough Shoal.

To conclude, the “disputes” as reflected by Submissions 10, 11, and 13 (concerning territorial waters of Scarborough Shoal) all related to sovereignty. The JA, which confirmed the Tribunal's jurisdiction over these disputes, probably constituted a decision *ultra vires*.

3 Disputes Concerning Military Activities

The actions by Chinese law enforcement vessels in territorial waters of Scarborough Shoal as indicated in Submission 11 and 13 must be understood against the backdrop of the ongoing territorial dispute. It is fair to consider the disputes reflected by such actions as falling 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, the Philippines contended that the existence of military activities could not be established unless the Chinese government said so. The JA ruled out the possibility for military activities to be involved in disputes reflected by Submissions 11 (before amendment) and 13. Since the Tribunal has no jurisdiction over the dispute concerning military activities

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140 UNCLOS, n. 2 above, art. 21(4).
141 Id., art. 24(1).
142 This would not be applicable in the present case, as both parties considered Scarborough to possess at least territorial water.
143 UNCLOS, n. 2 above, art. 94.
144 UNCLOS, Id., art. 298(1). Compare with Klein, n. 9 above, p. 23.
145 See First-round submissions by Professor Oxman, in Final Transcript Day 2—Jurisdiction Hearing (on 8 July 2015), n. 1 above, pp. 81–93.
146 While para. 377 of JA 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. See para. 396 of JA, n. 11 above, p. 140. Compare with Whomersley, n. 11 above, para. 21.
due to China’s 2006 Declaration, the final award would lack binding force upon those activities once confirmed by China as military ones. Following Philippine logic, China may just verbally characterize as military activity its sending of government vessels to engage in maritime confrontations indicated in Submissions 11 and 13. No violation of the award will then occur. Neglecting the facts on the ground, the Tribunal might end up aggravating the confrontation instead of facilitating its resolution.

Article 297(1)(c) Is Inapplicable to Affirming the Tribunal’s Jurisdiction

As stated by the JA, Philippine Submission 11 reflected a dispute concerning the protection and preservation of the marine environment at Second Thomas Shoal and the application of Articles 192 and 194 of UNCLOS. At that time, the Tribunal had yet to determine the legal status of Second Thomas Shoal. It might be ruled as a LTE later. Paragraph 408(b) of the JA then provides:

To the extent that the alleged harmful activities took place in the EEZ 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 marine environment” in the EEZ. (emphasis added)

However, paragraphs 176, 282, and 285 of the JA denied the Philippine allegation of China’s violation of “specified international rules and standards

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147 On 25 August 2006, China made a written declaration under Article 298 of UNCLOS, which reads: “The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.” Available online: <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China>.

148 This is according to the res judicata principle codified by Article 296 of UNCLOS, n. 2 above.


150 UNCLOS, n. 2 above, art. 297(1)(c).

151 JA, n. 11 above, para. 408.

152 Id., para. 408(b). This ruling was not accepted by MA. See MA, n. 15 above, para. 930.

153 JA, n. 11 above, para. 176, p. 69.

154 Id., para. 282, p. 104.

155 Id. para. 285, p. 105.
for the protection and preservation of [the] marine environment” in the EEZ, as the Philippines refrained from contending that China violated the Convention on Biological Diversity. Consequently, the condition for the application of Article 297(1)(c) would not be met, leaving this provision inapplicable. How could the Tribunal's jurisdiction to entertain Submission 11 with respect to Second Thomas Shoal be affirmed when this feature is held as a LTE?

**B MA's Jurisdictional Rulings for Submission 11 as Amended**

At the end of the November Hearing, the Philippines announced its Final Submissions. Submission 11 was extended to read: “China has violated its obligations under the Convention to protect and preserve [the] marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.”\(^{156}\) (emphasis added) The Tribunal subsequently granted the Philippines leave to this amendment to encompass the marine environment at six added features, in light of the evidence relating to the large-scale island-building activities at those features that had not been available at the time of the Memorial.\(^{157}\)

1 **Can New and Different Disputes Be Included?**

The first legal problem with the Tribunal’s ruling to accept the Philippine amendment is a fundamental one. The amended part of Submission 11 was basically different from the original complaints of Submission 11, which were neither about island-building activities nor about those six features. Moreover, paragraphs 174–177 of the JA\(^{158}\) failed to mention Articles 197, 123, and 206, which were later invoked by the MA to be the rules violated by such amended activities.\(^{159}\) It is not fair to say that the amended part of Submission 11 is related to, or incidental to, the original Submission simply because Articles 192 and 194 are involved.\(^{160}\) Article 286 requires a determination between (i) the dispute concerning the interpretation or application of UNCLOS that fails to be settled according to Section 1 of Part XV, and (ii) the dispute submitted to the tribunal under Section 2 of Part XV.\(^{161}\) Facing an amended but new submission about different activities occurring in different places, violating different

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156 See n. 14 above.
157 MA, n. 15 above, para. 933.
158 JA, n. 11 above, paras. 174–177.
159 MA, n. 15 above, paras. 984–993.
160 Id., para. 983.
161 UNCLOS, n. 2 above, art. 286.
provisions of UNCLOS and beyond critical time limits, the Tribunal should have provided more explanation to justify its acceptance of the amended Submission 11.

2 Military Activities Exclusion Clause Inapplicable?
The second jurisdictional problem with the MA is the Tribunal’s treatment of the military activities exclusion clause in its application to the amended part of Submission 11. The Tribunal obviously failed to face the whole picture of territorial disputes in the Spratly Islands where the People’s Republic of China and the prior Republic of China governments, the Philippines, Vietnam, Malaysia claim all or part of maritime features, while each of these claimants fails to occupy most of the features they claim. As no claimant refuses to abandon its territorial claims over foreign-occupied features, every claimant is facing the constant threat posed by other competitors to take over by force what it occupies so far.

To avoid losing more territory and to prepare for recovering lost territory, militarization of the occupied features becomes necessary, which requires island-building. It would be senseless for an island-builder to confess before completing the project. It would be equally unwise for the Tribunal to only rely on what the island-builder said when deciding if the military activities clause under Article 298(1)(b) was applicable. The MA finally held that the military activities exclusion clause was inapplicable to the amended part of

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162 See the definition of dispute given by the Tribunal itself, n. 38 above, especially the time factor.
163 The explanation was brief in para. 933 of the MA, which said that those activities had not been available at the time of the Memorial. Footnotes 1086–1087 of the MA cited old evidence and an inapplicable rule (Convention on Biological Diversity) from the Philippine Memorial. MA, n. 15 above, para. 933. Also, n. 8 above, pp. 200–201. Compare with Part III-A-4.
164 Id., paras. 936–938.
166 MA, n. 15 above, para. 620.
168 MA, n. 15 above, paras. 936–937.
Submission 11. Still, the Tribunal could be practical in its MA with respect to Philippine Submission 14 (a) to (c), where the Tribunal considered what China did on the ground.

IV China's Maritime Claims on Historic Rights within the U-Shaped Line

A The JA's Rulings Concerning the Existence of a Dispute

Philippine Submission 1 claimed that “China's maritime entitlements in the SCS, like those of the Philippines, may not extend beyond those permitted by UNCLOS.” Submission 2 contended that “China's claims to sovereign rights and jurisdiction, and to 'historic rights,' with respect to 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.” These Submissions were intended to reflect a dispute concerning the legality of China’s “invocation of historic rights” to support its maritime claims in the entire area within the USL. The JA ruled that these two Submissions reflected disputes concerning the interpretation or application of UNCLOS, and were not related to sovereignty and sea boundary delimitation. The following criticisms might be raised to challenge the JA as the foundations of the MA.

1 Geographic Limitation of the Tribunal's Jurisdiction

The Philippines was the only applicant in this arbitration. It did not bring the case on behalf of Vietnam, Malaysia, and Indonesia as other SCS littoral and claimant States. Submissions 1 and 2, which mentioned the entire area within USL where China allegedly claims excessive maritime jurisdiction, were excessive in nature. As the SCS area within the USL is larger than the WPS that is

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169 Id., para. 938. The jurisdictional rulings in MA over Submission 12 only look at what China said too. See paras. 1026–1028.

170 Id., paras. 1158 and 1161. Also see Whomersley, n. 11 above, para. 21.

171 JA, n. 11 above, para. 101.

172 Id., paras. 398–399.

173 For Malaysia's concerns, see MA, n. 15 above, paras. 105 and 637. Also, the Tribunal considered Vietnam to be a third party in this case but not indispensable. See MA, id., para. 157. Tzanakopoulos considers the fact that many other littoral States in SCS are not parties to this arbitration makes this arbitration unfit to settle the SCS disputes, see Tzanakopoulos, n. 11 above, p. 13.
200 M from the Philippine archipelagic baselines (see Figure 9.1), what this Tribunal may address regarding Submission 1 and 2 should be limited to China's maritime claims, entitlements, and enforcement actions and omissions within the WPS. Thus, the legally binding force of the Tribunal's award should be limited to China's claims and actions within the WPS, too.

As discussed above, China, the Philippines, Vietnam, and Malaysia all believe that islands exist in the Spratly Islands. The issue of whether China has claimed historic rights in the southern part of the WPS, covered by the EEZ and CS generated by (i) proper islands in the Spratly Islands or (ii) the Spratly Islands Group as a whole, is moot. The Tribunal should look at the northern part of the WPS to decide whether China claimed historic rights to justify its maritime jurisdiction (see Figure 9.2).

Disputes on the Source of Law?
Paragraph 164 of the JA read that “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.” (emphasis added) According to the JA, Submissions 1 and 2 asked the Tribunal to consider and determine the “effect” and “legal validity” of “any historic rights claimed by China to maritime entitlements in [the] SCS.” The Tribunal obviously confirmed that China has claimed maritime entitlements in the SCS area within the USL based on historic rights under customary international law. As the Philippines opposed China's choice of source of law to justify such maritime claims, a Sino-Philippine dispute ensued.

The Tribunal's decision was based on four 2009–2011 Sino-Philippine exchanges of NVs (see Part II-B of this article). The examination of these four NVs as they are, reveals a Sino-Philippine agreement that UNCLOS serves as the legal basis for both China and the Philippines to claim maritime entitlements in Nansha Islands, which includes KIG. It is unconvincing to use such

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174 It is interesting to look at the concluding remarks by Philippine Minister Del Rosario at the end of November Hearing, n. 91 above. It shows clearly that the focus of this arbitration was the WPS.
175 Part II-C-2 and Part II-G of this article.
176 JA, n. 11 above, p. 64.
177 Id., paras. 398–399.
178 Id., para. 400.
179 See the Second and Third Points of the Philippine 2011 NV and the Third Point of China's 2011 NV. See notes 48, 50, 54, and 57 and corresponding text.
Figure 9.2  The only possible region in the WPS for China to invoke historic rights to justify its maritime jurisdiction

Source: Drawn by Mr. Jui-Hsien Huang
evidence\textsuperscript{180} to prove that China has invoked customary international law to claim (i) historic rights within the USL, or (ii) “relevant waters” going beyond what is permitted by UNCLOS.

The real disputes crystallized by these four NVs concern the ownership of (i) sovereignty over each relevant geological feature in KIG and their respective territorial seas,\textsuperscript{181} and (ii) sovereign rights and jurisdiction generated by the relevant geological features in KIG under UNCLOS in the EEZ and on the CS.\textsuperscript{182} However, the JA omitted territorial disputes arising from the Philippine invasion of China’s Nansha Islands.\textsuperscript{183}

With this in mind, it is more appropriate to say that the term “abundant historical and legal evidence” found in the First Point of China’s 2011 NV\textsuperscript{184} served to support China’s claims on (i) territorial “sovereignty” over all maritime features in KIG and the rest of the SCS islands as well as their territorial waters, and (ii) “related rights and jurisdiction” pertaining to the EEZ and CS generated by maritime features in the SCS claimed by China.\textsuperscript{185} As China’s maritime claims were further qualified by UNCLOS and two pieces of UNCLOS-compliant domestic legislation,\textsuperscript{186} it seemed unfair for the Tribunal to interpret “abundant historical … evidence” broadly as denoting China’s intention to make excessive maritime claims in the \textit{entire} area within the USL based on historic rights under customary law.\textsuperscript{187}

The Philippines argued that the term “relevant waters” mentioned in China’s 2009 NV\textsuperscript{188} and in the First Point of China’s 2011 NV\textsuperscript{189} meant the entire area enclosed by the USL where China claimed sovereignty\textsuperscript{190} or sovereign rights.

\textsuperscript{180} Some evidence was offered by the MA, n. 15 above, paras. 207–214. For a discussion, see Part IV-B of this article.
\textsuperscript{181} See the First Point of the Philippine 2011 NV and the Second Point of China’s 2011 NV. See notes 48–50, 54, 56 and corresponding text.
\textsuperscript{182} Compare the Second and Third Points of Philippine 2011 NV with the Third Point of China’s 2011 NV. See notes 48, 50–54, 57 and corresponding text.
\textsuperscript{183} The JA cut off the First Point of Philippine 2011 NV and major part of the Second Point of China’s 2011 NV. See JA, n. 11 above, paras. 165–166.
\textsuperscript{184} See n. 55 above.
\textsuperscript{185} See notes 55 and 56 and the accompanying text.
\textsuperscript{186} See the Third Point of China’s 2011 NV, n. 57 above.
\textsuperscript{187} JA, n. 11 above, para. 167.
\textsuperscript{188} See n. 47 above.
\textsuperscript{189} See n. 54 above.
\textsuperscript{190} Philippine Notification, n. 3 above, para. 11, p. 4.
and jurisdiction. The Tribunal agreed with the Philippine interpretation of the term “relevant waters.”

In fact, China’s 2009 NVs protested against two outer CS submissions presented to the CLCS by Malaysia and Vietnam concerning two geographically confined areas in the SCS claimed as their CS beyond 200 M. The object to which “relevant waters” must have referred should be what were submitted to the CLCS. As the entire waters within the USL were not submitted to the CLCS, the relevant waters could not denote the entire areas within the USL. Figure 9.1 puts the areas under those two submissions (see orange areas) into a SCS map with the USL, together with the Paracel Islands and the Spratly Islands that are next to (and almost within) the areas marked by these two submissions. The Philippines and the Tribunal seemed to have broadened the geographically confined relevant waters into the entire area within the USL, while in reality there was no dispute left for the Tribunal to try.

B The MA’s Jurisdictional Rulings Concerning Existence of a Dispute
In its MA the Tribunal was trying to ascertain the nature of China’s maritime claims in the SCS, with three examples provided to prove China’s maritime claims based on historic rights in the entire region within the USL. However, it was problematic for these examples to prove such a theory.

1 The First Example
The first example came from the 2012 notice of open blocks for petroleum exploration adjacent to the western edge of the USL issued by the China National Offshore Oil Corporation (see Figure 9.3). The problem with this example was that maritime areas provided by this open block are far beyond the WPS and fall within 200 M of Vietnam’s coasts. Vietnam was not a party to this arbitration case, while the Philippines was not bringing this arbitration

191 JA, n. 11 above, para. 167.
192 See the opening and third paragraphs of China’s 2009 NVs. See n. 47 above.
193 See page 5 of Executive Summary of the Vietnam/Malaysia Joint Submission dated on May 6, 2009, n. 44 above.
194 See page 5 of Executive Summary of the Vietnam individual Submission dated on May 7, 2009, n. 45 above.
195 See n. 46 above.
197 See n. 38 above.
198 MA, n. 15 above, para. 207.
199 Id., para. 208.
200 Id., Figure 9.3, p. 89.
Figure 9.3 Map enclosed with the China National Offshore Oil Corporation press release notification of part of open blocks in waters under jurisdiction of the PRC available for foreign cooperation in the year 2012 (23 June 2012) (Figure 3 of the MA)
case on behalf of Vietnam. This map of open blocks should have been declared as inadmissible by the Tribunal as it lacked jurisdiction over this issue.201

2 The Second Example

The second example raised by the MA about China’s maritime claims based on historic rights within the USL (independently of UNCLOS) was China’s protest against (i) Philippine Geophysical Survey and Exploration Contract 101 petroleum block ("GSEC101"); (ii) Service Contract 58 (SC58); (iii) Service Contracts 14, 54, 58, 63, and other nearby service contracts; and (iv) Area 3 and Area 4 petroleum blocks.202 These blocks are depicted in Figure 9.4.203 As stated by the MA, the justifications used by China to protest these Philippines oil blocks were that “the area is” (i) “situated in the adjacent waters of the Nansha Islands (Spratlys)”; (ii) “located deep within China’s 9-dash line”; and (iii) “in the waters of which China has historic titles including sovereign rights and jurisdiction.”204 These statements were all made in 2010 and 2011.205

The problem with the second example was that, judging by the statements available to the Tribunal, China did not always invoke historic rights under customary international law to justify its protest. Nor did China always invoke historic rights to justify its maritime jurisdiction or entitlements in the entire region within the USL. When China was seen to have invoked such sources of law, the language was ambiguous.

Even if invoking historic rights in its SCS maritime claims, China’s most recent clarification was known to the Tribunal and quoted by the MA. Paragraph 200 of the MA mentioned the statement by the Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs on 12 May 2016, which clarifies certain points.206

The critical message was that to generate maritime entitlements in the SCS, China relied on both the principle of “land dominates the sea” and the rules of UNCLOS. Equally important was that China did not positively claim maritime jurisdiction or entitlements beyond what was permitted by UNCLOS (i.e., historic rights or historic titles). Nor did China invoke historic rights under customary international law to serve as the basis of its maritime jurisdiction within the SCS. That is why the Director-General said that “without first determining

201 Philippine Memorial, n. 8 above, Figure 4.3.
202 MA, n. 15 above, para. 209.
203 Id., para. 269.
204 Id., para. 209.
205 Id., footnotes 203–205.
206 Id., the corresponding text of n. 194 above.
China's territorial sovereignty over maritime features ... it would not be possible to determine maritime entitlements China may claim in [the SCS] pursuant to the UNCLOS, let alone determine whether China's maritime claims in the SCS have exceeded the extent allowed under the UNCLOS." Besides,
as regards the USL (and its accompanying issues), “the door of negotiation is open.”207

In fact, the use of the USL or dotted line to depict outer limits of China’s maritime claims pending conclusion of a boundary delimitation agreement could hardly be in dispute with Philippine practice. Figure 3.4 in the Philippine Memorial offered a comparable position208 (see Figure 9.5). There are the dotted lines (i) between Taiwan and the Philippines and (ii) between the Philippines and Indonesia/Malaysia. These two dotted lines were called “provisional equidistance lines.” No Philippine-Taiwan, Philippine-Indonesia and Philippine-Malaysian maritime boundaries had been concluded by the time of submission of this Memorial. What such dotted lines represented are definitely not the “settled” maritime boundaries, but the provisional ones unilaterally proposed by the Philippines. Such provisional lines will most probably be removed once maritime boundary lines are drawn by the parties concerned, just like what happened to the USL.209 Such Philippine practice confirmed (i) the impossibility for a Sino-Philippine dispute to exist concerning the legality of dotted lines, be they Chinese or Philippine; and (ii) the legal nature of the USL relating to, affecting or concerning sea boundary delimitations.210

3 The Third Example
Paragraphs 210–211 of the MA provided China’s Declaration of a “Summer Ban on Marine Fishing in the SCS Maritime Space” in May 2012 as another example to prove China’s invocation of historic rights under the extra-UNCLOS legal regime to justify its SCS maritime jurisdiction.211 As discussed above, the jurisdiction of this tribunal was limited to the examination of China’s claims in the WPS, where the southern part of it is covered by the EEZ and CS generated by proper islands existing in the Spratly Islands, are recognized by China, the Philippines, Vietnam, and Malaysia. Therefore, the only possible maritime area where China could be seen invoking historic rights independent of UNCLOS might be the northern part of the WPS (see Figure 9.2).

207 Id., para. 200.
208 Philippine Memorial, n. 8 above, Figure 3.4.
209 The original USL had eleven dashes, later two dashes between China’s Hainan Province and Vietnam were removed in the framework of Sino-Vietnamese negotiations to draw maritime boundaries in the Gulf of Tonkin. See n. 8 above, pp. 193–194.
210 Therefore, the issue of the USL went beyond the Tribunal’s jurisdiction due to China’s 2006 Declaration. Gau, n. 10 above, pp. 182–183.
211 MA, n. 15 above, paras. 210–211.
Figure 9.5  Philippine use of dotted lines as its Northern and Southern provisional maritime borders entitled “Provisional Equidistance Lines” (Figure 3.4 of the Philippine Memorial)
As stated in the MA, “the area north of 12° north latitude could be almost entirely covered by entitlements claimed from the Convention, if China were understood to claim an EEZ from the very small rocks of Scarborough Shoal.” However, the issue of legal status of Scarborough Shoal can hardly surmount the thresholds of admissibility and jurisdiction, due to (i) a lack of a dispute as reflected by Submission 3 and (ii) it concerns the application of Articles 74 and 83. This third example should have been declared inadmissible and irrelevant by this Tribunal, incapable of deciding the legal status of Scarborough Shoal.

C The Dispute over China’s Historic Rights Concerns the Application of Articles 74 or 83

Assuming that disputes exist concerning China’s historic rights claims in the SCS, such “disputes” would still lie outside of the Tribunal’s jurisdiction. Such disputes would be concerning the application of Articles 74(1) and 83(1) of UNCLOS covered by Article 298(1)(a)(i) due to China’s 2006 declaration. The Philippines denied China’s right to claim an EEZ and CS in the WPS. No Sino-Philippine sea boundary delimitation disputes resulting from overlapping EEZ and CS claims would arise. Articles 74(1) and 83(1) would become inapplicable in the WPS. However, as proved by Parts II-C-2 and II-G of this article, China may claim EEZ and CS from the Spratly Islands. It follows that Articles 74(1) and 83(1) apply in the WPS between China and the Philippines.

Can the disputes concerning the existence or legality of China’s historic rights claims in the WPS be “concerning the application of Article 74(1) and 83(1)”? The question was not whether the disputes in question should be considered as EEZ or CS delimitation. The key issue is the interpretation of the term “concerning” as the second word in the first sentence of Article 298(1)
(a)(i). The ordinary meaning given to the term “concern” as a verb is (1) have relation to, (2) affect, and (3) be of importance to. Therefore, the term “concerning” should be interpreted as (1) having relation to or relating to, (2) affecting, and (3) being important to. It follows that any dispute relating to, affecting, or important to the application of Article 74(1) and 83(1) should be considered as concerning the application of these two articles and caught by Article 298(1)(a)(i). Both Articles 74(1) and 83(1) explicitly address delimitation agreements concluded by disputing parties. However, as ITLOS stated in Bangladesh v. Myanmar that these two provisions also apply to judicial and arbitral decisions for delimitation. Therefore, any dispute concerning the application of these two provisions to judicial settlement for boundary delimitation (e.g., this Arbitration) also will be covered by Article 298(1)(a)(i).

In fact the Philippines has already admitted that the existence or legality dispute concerning China’s historic rights claims in the WPS is relating to, affecting, or important to the application of Articles 74(1) and 83(1). Contending that “there is no basis for China’s claim of ‘historic rights’ in the EEZ or CS of the Philippines, or any other State,” the Philippine Memorial invoked international judicial decisions (in Chapter 4, Section II-A-2 entitled The Case Law) as evidence. Paradoxically, those judicial decisions were all aimed at resolving maritime delimitation disputes. They were the Anglo-Norwegian Fisheries Case, the Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), Continental Shelf Delimitation Cases (Tunisia v. Libyan Arab Jamahiriya), Gulf of Maine Case (Canada v. United States), Qatar

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221 That is “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, ...” (emphasis added) See UNCLOS, n. 2 above, art. 298(1)(a)(i).


224 As confirmed by the ICJ in the Aegean Sea CS Case, the meaning of the term “concern” as a verb can be interpreted as “affect.” See Aegean Sea CS Case, n. 123 above, para. 89, p. 37.

225 The term “relating to” was interpreted by the ICJ in Aegean Sea CS Case as “emanating from” and “being an automatic adjunct of.” Id., para. 86, p. 36.


227 Philippine Memorial, n. 8 above, para. 4.55, p. 91.
v. Bahrain, the Eritrea/Yemen arbitration, and the Barbados/Trinidad and Tobago arbitration.228

As proved by these judicial decisions, under the equidistance/relevant circumstances method,229 historic rights may constitute a “relevant circumstance”230 to be considered when certain conditions are met.231 This happens when applying Article 74(1) and 83(1) of UNCLOS to achieve “an equitable solution or result” in settling maritime delimitation disputes.232 Put differently, historic rights constitutes one of the factors to be addressed in the application of the delimitation process, i.e., the equidistance/relevant circumstances method, conceived by Article 74(1) and 83(1), as demonstrated in, for example, Eritrea v. Yemen233 and Tunisia v. Libya.234

Therefore, the “dispute” of the existence or legality of China’s claim of historic rights, if any, in the WPS would be concerning the application of Article 74(1) and 83(1) of UNCLOS and caught by Article 298(1)(a)(i). Being covered by the 2006 China Declaration, such a dispute would fall outside the jurisdiction of the Tribunal. However, the Tribunal in the JA and the MA took a narrow reading of the critical word “concerning,” treating it as interchangeable

228 Id., paras. 4.55–4.69, pp. 91–99.
230 As to what constitutes relevant circumstances, ICJ in Denmark v. Norway quoted the judgments of North Sea Continental Shelf Cases (ICJ Reports 1969, para. 93, p. 50) and Libya/Malta Case (ICJ Reports 1985, para. 48, p. 40). See Denmark v. Norway, id., para. 57, p. 63. Also see CS (Libya v. Malta), above n. 113, para. 65, p. 13, at p. 48, para. 65.
231 The conditions for historic fishing rights to qualify as a relevant circumstance are “catastrophic” and “long usage” tests, originated in the Anglo-Norwegian Fisheries Case of 1951. They were brought forward in the provisions inter alia of Article 7(5) of UNCLOS, and applied to the delimitation for overlapping EEZ and CS as happened in Eritrea v. Yemen. See para. 50 of the 1999 award of Eritrea v. Yemen (Maritime Delimitation), available online: <http://www.pca-cpa.org/showpage.asp?pag_id=1160>. Also see Barbados v. Trinidad and Tobago, n. 65 above, para. 241, where the Annex VII Tribunal confirms the resource-related criteria, i.e. traditional fishing activities, may under certain circumstance be treated as a special circumstance. Also see Denmark v. Norway, n. 229 above, para. 75, p. 71.
232 Philippine Memorial, n. 8 above, footnote 373. Also see Tunisia v. Libya, n. 111 above, para. 50, p. 180; Guyana/Suriname, n. 122 above, paras. 332–333, pp. 107–108.
233 For example, see paragraph 51 of the award of arbitration between Eritrea v. Yemen (Maritime Delimitation), n. 231 above.
with the word “over,” without any reasons. The Tribunal hastily concluded that the dispute concerning China’s historic rights claims in the SCS was not excluded by the “sea boundary delimitation” clause under Article 298(1)(a)(i). With the reasons presented above, the Tribunal’s decision was less than convincing.

V Are Mischief Reef and Second Thomas Shoal Part of the Philippine EEZ and CS?

A An Inherent Problem in Submission 5
Philippine Submission 5 contended that “Mischief Reef and Second Thomas Shoal are part of [the] Philippine EEZ and CS.” Such a Submission could hardly reflect any dispute, as China has never denied the Philippine right to claim an EEZ and CS stretching from its archipelagic baselines facing the WPS to embrace these two features. No wonder the JA failed to identify any concrete evidence to prove the existence of such a dispute. With respect to the locations of these two maritime features, the real dispute was whether Mischief Reef and Second Thomas Shoal are part of China’s EEZ and CS. In short, Philippine Submission 5 was inherently defective, as it was incapable of reflecting any dispute. The JA should have declared this Submission to be inadmissible instead of moving it into the merits phase.

B The JA Transforms the Philippine Submission
With the above problem in mind, Paragraph 172 of the JA fixed Submission 5 by transforming it into a new submission capable of reflecting disputes. Paragraph 172 reads:

In Submission No. 5, however, the Philippines has asked ... for a declaration that Mischief Reef and Second Thomas Shoal as LTEs “are part of the EEZ and CS 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 EEZ and to a CS. Only if no such overlapping

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235 See n. 99 above. Compare with Art. 10 of Annex VII, n. 7 above.
236 JA, n. 11 above, para. 101.
237 Gau, n. 8 above, pp. 244–246.
238 JA, n. 11 above, para. 172.
entitlement exists—and only if China is not entitled to claim rights in the SCS 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. 5.239 (emphasis added)

Clearly, the Tribunal transformed a Submission with a narrowly defined scope240 into a completely different Submission with the most expansive scope from an opposite direction.241 It became easier to explain why Submission 5 being transformed was capable of reflecting disputes.

Three months prior to the JA being released, Professor Philippe Sands, as Philippine counsel and advocate, did not cooperate with the Tribunal during the July Hearing. The Tribunal requested that the Philippines provide information about all maritime features in the Spratly Islands as this was the “characterization” by the Tribunal for, inter alia, Submission 5.242 This uncooperative attitude was tantamount to Philippine rejection of the above characterization by the Tribunal for Submission 5. However, the Tribunal still made its decision that Submission 5, being transformed or “characterized,” reflected the Sino-Philippine dispute.243 Perhaps the Tribunal did not follow the “equality principle” under Article 5 of Annex VII to UNCLOS?244

Later on, the Philippines seemed to have received the message from the Tribunal. During the November Hearing, Professor Clive Schofield, from Wollongong University and technical expert on the Philippine legal team, indicated that he had reconsidered an earlier opinion about the legal status of maritime features in the Spratly Islands. Previously, Professors Schofield and Beckman in an article had stated that they considered that 12 maritime features in the Spratly Islands fulfilled the conditions of “islands” under Article

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239 Id., pp. 67–68.
240 Submission 5 in its original form only required the Tribunal to check the lawfulness of the archipelagic baselines of the Philippines facing the SCS under UNCLOS and to measure the distance between such baselines and those two features.
241 Submission 5 as being transformed required the Tribunal to look at China’s, instead of Philippine, maritime entitlements in the Nansha Islands (Spratly Islands). What should be examined by the Tribunal became the legal status of all maritime features claimed by China in the Nansha Islands in accordance with Article 121.
242 See First-round submissions by Professor Sands, Final Transcript Day 1-Jurisdiction Hearing (on 7 July 2015), n. 1 above, pp. 86–88.
243 JA, n. 11 above, para. 402.
244 UNCLOS, Annex VII, n. 7 above, art. 5 (procedure).
121 of UNCLOS. Schofield told the Tribunal that he considered that none of the maritime features qualified as an island.

The Tribunal finally accepted Schofield's new theory. The fundamental problem remains. No dispute could be reflected by Philippine Submission 5 as it was. The disputes indicated by para. 172 of the JA remain artificial as China does not use individual maritime features to claim EEZ and CS.

C  The JA Violates the Non Ultra Petita Principle

Philippine Submission 5, as it was, could not reflect any dispute between the two parties. The Tribunal transformed such a Submission into something capable of reflecting disputes, thus surmounting a certain admissibility threshold. Based on the general principle of non ultra petita, repeatedly declared by the ICJ, it is the duty of the court to abstain from deciding points not included in the final submissions. The decision by the Tribunal to move something not included in the Philippine Final Submissions, i.e., the transformed Submission 5, into the merits phase probably constituted an action ultra vires.

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

The Philippine 2011 NV and other statements revealed its position that certain geological features in KIG were capable of generating an EEZ and CS, which are also recognized by Malaysia, Vietnam and China. Since KIG forms part of the Nansha Islands claimed by China, the position that “China may alternatively claim [an] EEZ and CS by using those geological features in Nansha Islands” was objectionable to the Philippines and undeniable for the Tribunal. The three largest islands both in KIG and in the Nansha Islands (i.e., Itu Aba, Thitu Island, and West York Island) are all less than 200 M from

245 Beckman and Schofield, n. 61 above.
246 Final Transcript Day 3-Merits Hearing (26 November 2015), n. 1 above, p. 6. Also see MA, n. 15 above, para. 132.
247 MA, id., para. 626.
248 For Philippine final submissions, see n. 14 above.
249 See n. 126 above.
250 See corresponding text of notes 49–53, 72–79. Also, the Beijing Government said that Itu Aba (Taiping Island), which is occupied by Taiwan, is an island, not a rock. See C. Wong, “Taiwan's Spratlys outpost an island, not a rock, says Beijing—Foreign Ministry spokeswoman rebuts Philippine comments over disputed land in South China Sea,” South China Morning Post (3 June 2016), available online: <http://www.scmp.com/news/china/diplomacy-defence/article/1963632/taiwans-spratlys-outpost-island-not-rock-says-beijing>. 
Mischief Reef and Second Thomas Shoal. Therefore, these two features should be deemed located in the overlapping EEZ and CS. To answer the question as to whether Mischief Reef and Second Thomas Shoal are part of the Philippine EEZ and CS, the Tribunal must first draw a sea boundary so as to know on which part of the EEZ and CS these two features fall. Being powerless to settle the sea boundary delimitation dispute, the Tribunal was therefore without jurisdiction to entertain the merits of Submission 5. The Tribunal’s decision to move Submission 5 as transformed into the merits phase was questionable.

VI  Sino-Philippine Maritime Confrontations Only Occurring in the Philippine EEZ

A  The Premise of Philippine Submissions 8 and 9

Philippine Submissions 8 and 9 claimed 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 CS” 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 Submissions was that “China is not entitled to claim [an] EEZ and CS in [the] WPS, which is [the] Philippine EEZ and CS.”

As stated by the JA, the disputes reflected by these two Submissions were not concerning sovereignty or maritime boundary delimitation. The premise of the Philippine submissions was that no overlapping entitlements exist because only the Philippines possesses an EEZ in the relevant areas. If another China-claimed maritime feature within 200 M of these areas were to be an “island,” capable of generating an EEZ and CS, 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

251 See “Table of distance between three biggest islands and each of the nine maritime features in the Spratly Islands identified by Philippine submissions 3–7,” in Gau, n. 8 above, pp. 226–227.
252 JA, n. 11 above, para. 402.
253 Id., para. 101.
254 Id., para. 405, p. 144.
255 Id., para. 406, p. 144.
256 Id., paras. 405–406, p. 144.
features in the SCS. 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*  
Based on Parts II-C-2, II-G and V-D of this article, China may rely on (i) the Spratly Islands, or (ii) alternatively, individual islands thereof to claim an EEZ and CS. A Sino-Philippine overlapping EEZ and CS claims ensues without doubt, rendering the exclusion clause of boundary delimitation under Article 298 applicable. Such an overlap situation need not wait until the merits phase to be discovered. The decision of the JA to move Submissions 8 and 9 to the merits was less than convincing.

VII *Maritime Confrontations in Mischief Reef and Second Thomas Shoal*

A *The Rulings of the JA for Philippine Submissions 12 and 14*  
Philippine Submissions 12 and 14 claimed respectively 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 [an] unlawful act of attempted appropriation in violation of the Convention” and that “since 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 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.”

Paragraphs 409 and 411 of the JA mentioned that the disputes reflected by these two Submissions were not concerning 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,”

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257 Id.
258 MA was also less than convincing. See n. 15 above, paras. 690–695 and 733–734.
259 JA, n. 11 above, para. 101.
260 Id., para. 409, p. 146.
261 Id., para. 411, p. 147.
“rocks,” or “LTEs.” If the Tribunal were to find, contrary to the premise of the Philippine Submission, that Mischief Reef was an island or rock and thus constituted 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. Further, 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. Therefore, these two Submissions were moved into the merits phase. However, certain legal questions may undermine the above rulings and, consequently, the MA.

1 Submissions 12 and 14 Concern Sea Boundary Delimitation
As a matter of fact, maritime confrontations in Mischief Reef and Second Thomas Shoal follow an unsettled Sino-Philippine sea boundary delimitation dispute due to overlapping EEZ and CS claims in the WPS. Before the boundary is drawn, each party will continue to insist that (i) these two features lie on its own side of the EEZ and CS, (ii) its sovereign rights and jurisdictions under 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 violates UNCLOS.

As Parts II-C-2, II-G and V-D of this article argue, neither the Philippines nor the Tribunal can deny that China’s maritime entitlements to an EEZ and CS in the Nansha Islands may reach Mischief Reef and Second Thomas Shoal. It follows that China may justify its exploration, exploitation, conservation and management activities in these two features, as complained of by Submissions 12 and 14. The decision of the JA to rule out the factor of sea boundary delimitation in Submissions 12 and 14 was hardly convincing.

2 Maritime Confrontations Clearly Relate to Sovereignty Dispute
The first point of the Philippine 2011 NV was that “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.” However, the Chinese government in 1935 and 1947 published a list of China’s SCS islands in both Chinese and English languages, where Mischief

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262 Id., paras. 409 and 411.
264 See n. 8 above, pp. 278–281 and 286–292.
265 See notes 48–49 and corresponding text.
Reef and Second Thomas Shoal were identified. With this in mind, Philippine Submissions 12 and 14 should be seen as aimed at (i) dispelling Chinese soldiers stationed on Mischief Reef while terminating the construction project by China thereon and (ii) ending China’s interference with the Philippine supply to and rotation of soldiers stationed on Second Thomas Shoal. Moreover, these two Submissions served to (i) undermine, if not end, China’s territorial claims and display of sovereignty over these two features and (ii) advance the Philippine competitive territorial claims and facilitate its exercise of sovereignty thereon. By the Tribunal’s own standard these two Submissions related to sovereignty without doubt.

Should these two features be declared as LTEs, another mission for Chinese soldiers stationed there should be mentioned, namely, to defend nearby islands or rocks, over which China claims sovereignty. To say the least, Philippine Submission 7, inter alia, indicated the existence of geological features in KIG over which territorial sovereignty may be claimed. With this background, Submissions 12 and 14 were aimed at (i) advancing, if not ensuring, Philippine territorial integrity in KIG and (ii) lessening, if not terminating, the military threat against Philippine territories in KIG posed by Chinese soldiers dispatched from these two LTEs. Clearly, these two Submissions related to sovereignty, and should have been declared by the JA as inadmissible.

B Jurisdictional Rulings in the MA

As stated by the JA, the Tribunal reserved to the merits phase the decision on whether China’s activities at Mischief Reef as indicated by Submissions 12 and 14 constituted “military activities” under Article 298(1)(b). For Submission 12, the MA took note of China’s repeated statements that its installations and island construction were intended to fulfil civilian purposes. The MA said that it would not deem activities to be military in nature when China itself had consistently resisted such a classification and affirmed the opposite at the highest level. Therefore, the MA decided that Article 298(1)(b) did not exclude the Tribunal’s jurisdiction to entertain the merits of this Submission.

For Submission 14, the MA should address both the original claims, i.e., paragraphs (a) to (c), concerning China’s activities on Second Thomas Shoal and the amended part, which was paragraph (d) concerning China’s dredging, island-building, and construction activities in Cuarteron, Fiery Cross, Johnson,

266 See n. 89 above.
267 See n. 83 above.
268 JA, n. 11 above, para. 101.
269 MA, n. 15 above, paras. 1026 and 1151.
270 Id., paras. 1027–1028.
Hughes, Gaven (North), Subi, and Mischief Reefs, as amended in the November Hearing.\textsuperscript{271} For the original Submission 14(a) to (c) focusing on Second Thomas Shoal, the Tribunal looked at what China did and ruled that the exclusion clause of military activities applied.\textsuperscript{272} Most importantly, the Tribunal notes that Article 298(1)(b) applies to “disputes concerning military activities” and not to “military activities” as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.\textsuperscript{273}

Obviously, for the second word of the phrase “disputes concerning military activities,” the Tribunal abandoned its narrow “interpretation” as applied to (i) the second word of the first sentence in Article 298(1)(a)(i)\textsuperscript{274} and (ii) its jurisdictional rulings over Submission 11 as amended.\textsuperscript{275} This is critical for the original Submission 14(a) to (c) to be ruled beyond the Tribunal’s jurisdiction, as China did not use military vessels to prevent Philippine rotation and resupply actions on the Second Thomas Shoal. With this wider and more reasonable interpretation of the word concerning, such activities still counted as military ones\textsuperscript{276}.

However, for the dredging, island-building, and construction activities indicated by the amended Submission 14(d), the Tribunal came back to its narrow reading of the word concerning and only looked at what China said and then denied the applicability of the “military activities” exclusion clause.\textsuperscript{277} As stated in Part III-B-2 of this article, such an interpretation of the word concerning by the Tribunal seemed less than convincing as it ignored the entire scope of territorial disputes in the Spratly Islands among several States.

\textbf{VIII Conclusion}

The key to the success of the Philippine arguments for this arbitration was the lack of “islands” in the Spratly (Nansha) Islands. Both the JA and the MA

\begin{footnotes}
\footnote{271}{See n. 14 above.}
\footnote{272}{MA, n. 15, paras. 1153–1162.}
\footnote{273}{Id., para. 1158. (emphasis in original).}
\footnote{274}{See Part II-F-3 of this article.}
\footnote{275}{See Part III-B-2 of this article.}
\footnote{276}{MA, n. 15 above, para. 1161.}
\footnote{277}{Id., para. 1164.}
\end{footnotes}
endorsed such a theory. However, the evidence used by the JA to prove the existence of disputes reflected by Philippine Submissions 3, 4, 6, and 7 rather testified to the lack of disputes. Moreover, the evidence (i.e., 2009–2011 Sino-Philippine exchanges of NVs) demonstrated the Sino-Philippine agreement concerning existence of “islands” in KIG. Vietnam and Malaysia shared this position. Furthermore, the issues of legal status of nine particular maritime features (i) related to sovereignty based on the formulation of these submissions and (ii) were caught by Article 298(1)(a)(i) as they “concerned the application of Articles 74 and 83.” However, the JA narrowly applied the second word (concerning) of the first sentence in Article 298(1)(a)(i) without interpretation, treating it interchangeable with “over.” Such a narrow reading was at odds with the ITLOS Louisa judgement and some ICJ rulings. Finally, the MA enlarged the scope of examination targets by declaring that the Spratly Islands as a whole may not generate an EEZ and CS, as none of the maritime features within the Spratly Islands qualified as an “island.” This ruling (i) deviated from Final Submissions 3, 4, 6, and 7, (ii) violated non ultra petita principle, (iii) contradicted the Philippine expressed goal when initiating this arbitration, (iv) accomplished the Sino-Philippine boundary delimitation project in the WPS without China’s participation, and (v) went far beyond the Tribunal’s jurisdiction.

Philippine Submissions 1 and 2 contended that China had no historic rights to justify its maritime jurisdiction within the USL. This position was endorsed by both the JA and the MA. However, the same evidence (the 2009–2011 Sino-Philippine exchanges of NVs) failed to demonstrate any dispute over the source of law, but revealed Sino-Philippine agreement that UNCLOS was actually used by them to claim maritime entitlements there. The term “relevant waters” from China’s 2009 and 2011 NVs had rather a geographically confined meaning, denoting the two areas submitted by Vietnam and Malaysia in 2009 to the CLCS as their outer CS (see Figure 9.1, orange areas). The Philippines cut off the background of this term while the Tribunal accepted the abridged story without focus.

There was only one applicant in this case. Other SCS littoral States remained third parties. The geographic scope under the Tribunal’s purview was limited to the WPS, not the entire region within the USL. Since the Spratly Islands Group is capable of generating EEZ and CS, the northern part of the WPS becomes the only possible area for China to invoke historic rights (see Figure 9.2). Applying to the northern part of the WPS, China’s 2012 “Summer Fishing Ban” operates within the EEZ generated by Scarborough Shoal, if deemed an island. The MA ruled this feature as only a rock while proving China’s invocation of historic rights in the “northern part.” However, a preliminary issue should not
be overlooked. Suffering from a lack of a dispute concerning the application of Articles 74 and 83, the preliminary issue of the legal status of the Scarborough Shoal under Submission 3 becomes unanswerable for the Tribunal. The foundation for the Tribunal’s merits ruling over China’s historic rights in the SCS was gone.

The issues of maritime confrontations in the territorial waters of Scarborough Shoal, indicated by Submissions 10 and 11 and 13, related to sovereignty by the Tribunal’s own standard. China’s actions complained of by Submissions 11 and 13 should be caught by “military activities, including military activities by government vessels engaged in non-commercial service” under Article 298(1) (b), if considering the ongoing Sino-Philippine territorial struggle over this feature. Furthermore, Philippine “traditional fishing rights” in the Philippine-claimed territorial waters of Scarborough Shoal was self-contradictory and groundless. The Tribunal’s acceptance of the Philippine litigation strategy, i.e., the temporary “traditional fishing right” claim, was questionable and unfair.

The claims of China’s trespass into the Philippine EEZ and CS, identified by Submissions 8 and 9, were based on a theory that China had no EEZ and CS in the WPS. Since the Spratly Islands Group is capable of generating EEZ and CS, the Tribunal may not entertain such “trespass” issues without first engaging in boundary delimitation. It is hard to understand why the Tribunal sent these issues to the merits phase. Submission 5, concerning whether Mischief Reef and Second Thomas Shoal were within the Philippine EEZ and CS, did not reflect the Sino-Philippine dispute as China did not challenge this position. In the name of characterization, the Tribunal fixed and transformed this inherently defective submission into one that reflected a dispute by appearance, violating the non ultra petita principle again.

The environmental issues as indicated by Submissions 11 and 12 and 14(d) resulting from island-building in Cuarteron, Fiery Cross, Gaven, Johnson, Hughes and Subi Reefs as well as Second Thomas Shoal should have all considered falling within the “military activities exclusion clause” under Article 298(1)(b). The Tribunal overlooked the territorial disputes among the SCS littoral States who regard island-building as necessary for defense purposes. Island-builders’ public disclaimers before completing the project should not serve as the only evidence to deny the application of military activities exclusion clause, if such statements could count as evidence at all.

Summing up, the jurisdictional rulings in the JA and the MA most probably harbored manifest and essential errors in fact and in law. The legally binding force of the merits rulings was perhaps jeopardized as a result. Thus China’s non-compliance is understandable, if not justified.