The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility

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Abstract

In the *South China Sea Arbitration* between the Republic of the Philippines and the People's Republic of China the Arbitral Tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea on 29 October 2015 issued its Award on Jurisdiction and Admissibility. The Tribunal rejected China's objection that the disputes presented by the Philippines concerned, in essence, the extent of China's territorial sovereignty in the South China Sea and were thus outside the Tribunal's jurisdiction. The Tribunal found, inter alia, that the Philippines' submissions reflected disputes between the parties concerning the interpretation or application of the Convention, that there was no other State indispensable to the proceedings, and that the Philippines had met the requirement under Article 283 of the Convention that the parties exchange views regarding the settlement of their disputes. This paper examines the Tribunal's findings with regard to each and every of the Philippines' 15 final submissions and demonstrates that some of its findings on the Tribunal's jurisdiction and the admissibility of the Philippines' claims are seriously flawed and based on procedural irregularities.

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I. Introduction

1. On 29 October 2015, the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") in the *Arbitration between the Republic of the Philippines and the People's Republic of China* (the "*South China Sea Arbitration*" or, in short, "*SCS Arbitration*") issued its Award on Jurisdiction and Admissibility.[1] The arbitration concerns disputes between the parties over maritime entitlements in the South China Sea, the status of certain maritime features in the South China Sea and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by the People's Republic of China ("China" or "PRC") in the South China Sea that were alleged by the Philippines to violate the Convention.[2]

2. The Philippines requested the Tribunal to rule on 15 specific final submissions set out in its Memorial of 30 March 2014 and confirmed at the close of the oral hearing on jurisdiction and admissibility on 13 July 2015.[3] The submissions can be grouped into three inter-related issues. First, the Philippines seeks declarations that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the Convention only and that any Chinese claims reflected by the so-called "nine-dash line" are inconsistent with the Convention and therefore invalid (Submissions No.1 and 2). Second, the Philippines seeks

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1 The Tribunal was composed of Judge Thomas A. Mensah (Presiding Arbitrator), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, and Judge Rüdiger Wolfrum. The Award and all other case documents referred to are available on two websites provided by the Permanent Court of Arbitration ("PCA") (archive.pca-cpa.org/showpage65f2.html?pag_id=1529 and www.pcacases.com/web/view/7).

2 On the disputes between the Philippines and China and the early procedural history of the arbitration, see Bing Bing Jia and Stefan Talmon, in: the same (eds.), The South China Sea Arbitration: A Chinese Perspective (2014), 1-13.

3 See the Arbitration between the Republic of the Philippines and the People's Republic of China, UNCLOS Annex VII Arbitral Tribunal, Award on Jurisdiction and Admissibility, 29 October 2015 (hereinafter "SCS Arbitration, Award"), paras.7, 101, 102.

determinations that, under the Convention, Scarborough Shoal (Huangyan Dao) and eight maritime features in the Spratly Islands Group (Nansha Qundao), which are claimed by both China and the Philippines, are either "rocks" or "low-tide elevations" and, as such, are capable of generating only an entitlement to a 12 nautical mile ("nm") territorial sea or no maritime entitlement at all. In particular, the Philippines seeks declarations that none of these features can generate an entitlement to an exclusive economic zone ("EEZ") or continental shelf (Submissions No.3-8). Third, the Philippines requests the Tribunal to rule that China violated the Convention by interfering with the exercise of the Philippines' sovereign rights and jurisdiction, by interfering with the Philippines' freedom of navigation and by conducting construction and fishing activities that harm the marine environment (Submissions No.9-15).[4]

3. China made it clear from the outset that it would neither accept nor participate in the arbitral proceedings because the disputes presented by the Philippines were outside the jurisdiction of the Tribunal. A Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration that it issued on 7 December 2014 put forward three main objections to the Tribunal's jurisdiction.[5] First, the subject-matter of the arbitration is, in essence, "the extent of China's territorial sovereignty in the South China Sea" and, in particular, its "sovereignty over the Nansha Islands as a whole".[6] The jurisdiction of the Tribunal is, however, limited to "disputes concerning the interpretation or application of this Convention",[7] and territorial sovereignty disputes are not governed by the Convention. Second, even assuming, arguendo, that the subject-matter of the arbitration concerns the interpretation or application of the Convention, the subject-matter in question forms an integral part of the maritime delimitation disputes between the two countries. China validly excluded disputes concerning maritime delimitation from the Tribunal's jurisdiction by a declaration in August 2006 under Article 298 of the Convention.[8] Third, the recourse to arbitration is excluded because China and the Philippines have agreed to settle their disputes in the South China Sea

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4 Cf. SCS Arbitration, Award, paras.4-6.

5 People's Republic of China, Ministry of Foreign Affairs ("PRC, MFA"), Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Philippines, 7 December 2014 (hereinafter "China, Position Paper") (www.fmprc.gov.cn/mfa_eng/zxxx_ 662805/t1217147.shtml).

6 See China, Position Paper, paras.10, 19, 22, 86.

7 See UNCLOS, Article 288(1).

8 See China, Position Paper, paras.57-59, 64-69, 86.

exclusively by negotiations.[9]

4. The Tribunal treated this Position Paper and certain communications from China as "a plea concerning jurisdiction" and decided to bifurcate the proceedings to address the questions of its jurisdiction and the admissibility of the Philippines' claims as preliminary questions before ruling on the merits.[10] The Tribunal's unanimous Award of 29 October 2015 thus concerns only whether the Tribunal has jurisdiction to consider the Philippines' claims and whether such claims are admissible. In its Award, the Tribunal decided *proprio motu* "possible issues of jurisdiction and admissibility even if they [were] not addressed in China's Position Paper."[11]

5. The Tribunal decided that it has jurisdiction with respect to the Philippines' Submissions No.3, 4, 6, 7 and 11; that it has jurisdiction with respect to Submissions No.10 and 13 on condition that claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal; that its jurisdiction with respect to Submissions No.1, 2, 5, 8, 9, 12 and 14 will need to be considered with the merits; and that the Philippines needs to clarify and narrow the scope of Submission No.15. With regard to the seven submissions where the question of jurisdiction is to be considered in conjunction with the merits, the Tribunal held that there may be valid objections to the Tribunal's jurisdiction under Articles 297 and 298 of the Convention.[12]

6. The Award on Jurisdiction and Admissibility is based on five major findings. First, the Tribunal rejected China's objection that the disputes are actually about territorial sovereignty in the South China Sea and therefore beyond the Tribunal's jurisdiction. Second, the Tribunal rejected the argument set out in China's Position Paper that the parties' disputes actually concern maritime boundary delimitation and are therefore excluded from the Tribunal's jurisdiction by virtue of China's Declaration under Article 298 of the Convention. On the contrary, the Tribunal expressly ruled that each of the Philippines' Submissions No.1-14 reflects a dispute between the parties concerning the interpretation or application of the Convention. Third, the Tribunal rejected China's position that the parties had agreed to resolve disputes relating to the South China Sea exclusively through negotiations. Fourth, the Tribunal held that there was no other State indispensable to the proceedings. Fifth, the Tribunal ruled that the Philippines met the requirement under Article 283 of the Convention that the parties exchange views regarding

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9 See ibid., paras.30-56, 86.

10 See SCS Arbitration, Award, paras.15, 68.

11 See SCS Arbitration, Hearing on Jurisdiction and Admissibility (hereinafter "SCS Arbitration, Hearing"), Day 1, 7 July 2015, 19-21 (President Mensah).

12 See SCA Arbitration, Award, paras.271, 369, 370.

the settlement of their disputes.

7. This paper examines the Tribunal's Award on its jurisdiction and the admissibility of the Philippines' claims and demonstrates that some of its findings are seriously flawed and based on procedural irregularities.

II. Jurisdiction of the Tribunal

8. The practice of international courts and tribunals shows that jurisdictional requirements are to be examined for each and every submission of the applicant.[13] This was confirmed by the Tribunal which examined objections to jurisdiction "with respect to any Submission".[14] At the request of the Tribunal, at the oral hearings the Philippines "reviewed its Submissions and argued that an identifiable dispute between the Parties, relating to the interpretation and application of the Convention, exists with respect to each of them."[15] In this section it will be scrutinized whether the preconditions for the Tribunal's compulsory jurisdiction were in fact satisfied.

1. Dispute concerning the interpretation or application of the Convention

9. The compulsory jurisdiction of Part XV courts and tribunals is not unlimited. The Annex VII Tribunal in the *Southern Bluefin Tuna Arbitration* rightly observed that "UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions".[16] The compulsory jurisdiction of the Tribunal is limited to disputes concerning the interpretation or application of the Convention.[17] The Tribunal itself pointed out that the existence of a dispute is "a threshold requirement for the exercise of the Tribunal's jurisdiction" and such dispute must concern the interpretation or application of the Convention.[18] In addition, the dispute must exist at the time the proceedings were instituted.[19]

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[13] Cf. e.g. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 17 March 2016, para.67.

[14] SCS Arbitration, Award, para.129. See also ibid., paras.21 and 131.

[15] SCS Arbitration, Award, para.140. See also ibid., para.147.

[16] Southern Bluefin Tuna (New Zealand v. Japan, Australia v. Japan) (Jurisdiction and Admissibility, Award of 4 August 2000) 23 Reports of International Arbitral Awards 45, para.62.

[17] See SCS Arbitration, Award, paras.106, 110, 130.

[18] SCS Arbitration, Award, para.148. See also ibid., para.131.

[19] See SCS Arbitration, Award, para.149. See also Questions relating to the

10. The Tribunal thus needed to determine (1) whether the record showed a dispute between the Philippines and China with regard to each submission by the Philippines, (2) whether such dispute concerned the interpretation or application of UNCLOS, and (3) whether the dispute existed on 22 January 2013, the date of the Philippines' Notification and Statement of Claim.

11. This approach was questioned by the Philippines which argued that "UNCLOS itself does not appear to set such a high bar: it does not use the words 'legal disputes'."[20] This view, however, was not accepted by the Tribunal. By letter dated 23 June 2015 the Tribunal asked the Philippines to "address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims" irrespective of whether such objection had at any point been raised by China. The Tribunal also provided the Philippines with an Annex of 38 issues set out in eight different categories, listed A to H, which it thought the Philippines may wish to address at the July hearing.[21] In the Tribunal expressly invited the Philippines "to address whether there 'exists a legal dispute between the Philippines and China' *with respect to each of the Philippines' submissions* as set out on page 271 and 272 of the Memorial".[22] On 10 July 2015, the Tribunal put six questions to the Philippines. In question 1 the Tribunal again invited the Philippines "to direct the Arbitral Tribunal to the sources relied upon for ascertaining China's position *with respect to each of the Philippines' specific submissions* in the context of establishing the existence of a legal dispute."[23] It is thus to be examined whether, in fact, a dispute concerning the interpretation or application of the Convention existed on 22 January 2013 with respect to each of the Philippines' 15 submissions.

Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, 422, 444, para.54, and 445, para.55; ibid., Provisional Measures, Order of 28 May 2009, ICJ Reports 2009, 139, 148, para.46; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (hereinafter "CERD"), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 85, para.30. See further M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, 87, 88, para.6 (diss. op. Treves).

[20] SCS Arbitration, Hearing, Day 3, 13 July 2015, 21: 13-15.

[21] SCS Arbitration, Hearing, Day 2, 8 July 2015, 131: 4-11 and 20-21.

[22] SCS Arbitration, Hearing, Day 2, 8 July 2015, 133: 8-12 (italics added).

[23] SCS Arbitration, Hearing, Day 3, 13 July 2015, 4: 3-7 (italics added).

a. Existence of a dispute

(1) Requirements for the existence of a dispute

12. The Tribunal referred to the relevant jurisprudence of the International Court of Justice ("ICJ") and the Permanent Court of International Justice ("PCIJ") for the necessary criteria to apply to determine the existence of a dispute.[24] This jurisprudence has also been endorsed by the International Tribunal for the Law of the Sea ("ITLOS").[25] From this jurisprudence two key requirements for the existence of a dispute emerge.

13. First, a dispute is, as the PCIJ put it in the *Mavrommatis Palestine Concessions* case, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[26] For a "conflict of legal views" to exist it is not sufficient that certain incidents occurred between the parties. Such incidents must rather have led the parties "to adopt clearly-defined legal positions as against each other."[27] In the *South West Africa* cases, the ICJ refined the PCIJ's definition of a "dispute" by holding that it was not "adequate to show that the interests of the two parties [...] are in conflict. It must be shown that the claim of one party is positively opposed by the other."[28] According to this definition, it does not matter which party advances a claim and which one opposes it.[29] What matters is that "the two sides hold clearly opposite views".[30] Positive opposition generally requires a rejection or denial by the other party.[31]

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[24] See SCS Arbitration, Award, para.149. See also ibid., para.159.

[25] See e.g. Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280, 293, para.44.

[26] Mavrommatis Palestine Concessions, 1924 PCIJ, Series A, No.2, 6, 11.

[27] Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, ICJ Reports 1960, 6, 34.

[28] South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, ICJ Reports 1962, 319, 328. See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, 6, 40, para.90; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 84, para.30.

[29] See Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 17 March 2016, para.50.

[30] Cf. Interpretation of Peace Treaties, Advisory Opinion, ICJ Reports 1950, 65, 74.

[31] Cf. Alleged Violations of Sovereign Rights and Maritime Spaces in the

In the *ARA Libertad* case Judges Wolfrum and Cot stated that: "To establish that there is a legal dispute between the Parties it [...] is for the Applicant [...] to invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the views on the interpretation of these provisions are positively opposed by the Respondent."[32] The test of "whether there exists a dispute is thus one of opposability and not one of unfettered freedom by the Court."[33]

14. Second, whether a dispute exists "is a matter for objective determination."[34] The ICJ held in the *South West Africa* cases that it was "not sufficient for one party to a contentious case to assert that a dispute exists with the other party". A mere assertion was "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."[35] The Tribunal's determination must turn on an examination of the facts. As the ICJ pointed out in the *CERD* case, the "matter is one of substance, not of form."[36]

15. While the Notification and Statement of claim and the final submissions are a first point of reference for the consideration by the Tribunal of the nature and existence of a dispute, they are not the only point of reference. The Tribunal is also to base its determination on diplomatic exchanges, public statements and other pertinent evidence as well as the conduct of the parties both prior to and subsequent to the commencement of the proceedings.[37] For

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Caribbean Sea (Nicaragua v. Colombia), Judgment of 17 March 2016, para.12 (diss. op. Caron).

32 "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, 332, 372, para.35 (joint sep. op. Wolfrum and Cot).

33 Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports 2007, 878, 885, para.19 (diss. op. Vice-President Al-Khasawneh).

34 Interpretation of Peace Treaties, Advisory Opinion, ICJ Reports 1950, 65, 74. See also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, 422, 442, para.46.

35 South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, ICJ Reports 1962, 319, 328.

36 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 84, para.30. See also Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, 17 March 2016, paras.50, 72.

37 See Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, 449, para.31; Nuclear Tests (Australia v.

the Tribunal to find that there exists a legal dispute between the Philippines and China with regard to each of the Philippines' 15 submissions, the Tribunal must thus objectively determine that a clearly defined legal claim with regard to a particular provision of the Convention by one of the parties is positively opposed by the other.

(2) Burden and standard of proof

16. The applicant bears the burden of proving the existence of a dispute between the parties at the time of the institution of proceedings.[38] It is for the Tribunal to objectively establish the existence of a dispute by examining the position of the parties, as expressed, inter alia, in the diplomatic history of the case. When determining the existence of a dispute the ICJ limits itself to "official documents and statements."[39] As in international law and practice it is the executive that represents the State in its international relations and speaks for it at the international level, the ICJ gives primary attention to documents and statements made or endorsed by the executives of the parties.[40] For example, in the *CERD* case the ICJ scrutinized in detail over 50 specific statements and documents cited by the applicant in support of its claim that a dispute existed between the parties.[41] The ICJ thus applies a rather exacting standard when determining the existence of a dispute.

17. The Tribunal, on the other hand, applied a rather loose standard. The Tribunal devoted only 14 out of 413 paragraphs of its Award to the question of whether a dispute existed between the parties with respect to the Philippines' 15 submissions.[42] Rather than scrutinizing the documents referred to by the Philippines in detail, the Tribunal simply stated:

France), Judgment, ICJ Reports 1974, 253, 263, paras.30-31.

38 Cf. M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, 57, 73, para.57 (sep. op. Ndiaye). See also Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 17 March 2016, para.21 (diss. op. Caron).

39 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 86, para.33.

40 Ibid., 87, para.37.

41 Cf. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 17 March 2016, para.25 (diss. op. Caron).

42 See SCS Arbitration, Award, paras.164-178.

> Submissions No.8 through 14 concern a series of disputes regarding Chinese activities in the South China Sea. The incidents giving rise to these Submissions are well documented in the record of the Parties' diplomatic correspondence and the Tribunal concludes that disputes implicating provisions of the Convention exist concerning the Parties' respective petroleum and survey activities, fishing (including both Chinese fishing activities and China's alleged interference with Philippine fisheries), Chinese installations on Mischief Reef, the actions of Chinese law enforcement vessels, and the Philippines' military presence on Second Thomas Shoal.[43]

18. The Tribunal also did not fully engage with the Chinese documents. For example, China's Note Verbale addressed to the United Nations Secretary-General stating that the "Nansha Islands *is* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf" is correctly quoted in paragraph 166 of the Award.[44] China purposefully chose the verb "is" instead of "are" in this statement because it views the Nansha Islands as a unit. However, three paragraphs down in the Award the statement is, without much ado, rephrased by the Tribunal to read that "China's Nansha Islands *[are]* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[45] A statement made with regard to the Nansha Islands as a whole, i.e. as an archipelago or geographical unit, was thus made a statement referring to individual features forming part of the Nansha Islands. The use of the plural was necessary in order to construe the existence of a dispute concerning the status and maritime entitlements of the nine individual maritime features in the Nansha Islands which the Philippines had made the subject of the its claims.[46]

19. Only official documents and statements issued up to the institution of proceedings may be considered by the Tribunal when determining the existence of a dispute.[47] It is thus questionable that the Tribunal took note of documents and statements issued after 22 January 2013 which were relied upon in evidence by the Philippines in order to show the existence of a dispute between the

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[43] SCS Arbitration, Award, para.173 (footnotes omitted).

[44] Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, 14 April 2011; correctly quoted in SCS Arbitration, Award, para.166 (italics added).

[45] See SCS Arbitration, Award, para.169 (italics added).

[46] On the misrepresentation of the Chinese position, see below section II.1.a.(4)(c)(ii).

[47] Cf. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 85, para.30.

parties.[48] The same holds true for "academic literature by individuals closely associated with Chinese authorities" but not officially endorsed by the Chinese Government which does not qualify as "official documents and statements".[49]

(3) Inference of a dispute

20. The Tribunal reiterated that the existence of a dispute generally requires that the claim of one party is positively opposed by the other.[50] The Tribunal, however, was unable to establish a positive opposition by China with regard to the Philippines' claims concerning the status of the nine individual maritime features in the Spratly Islands because China had "generally refrained from expressing a view on the status of particular maritime features".[51] The ICJ has held that

> the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.[52]

21. Referring to the ICJ's jurisprudence on the establishment of a dispute by inference, the Tribunal concluded that

> where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the Tribunal is entitled to examine the conduct of the Parties—or, indeed, the fact of silence in a situation in which a response would be expected—and draw appropriate inferences.[53]

22. It is instructive to take a closer look at the circumstances in which the

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48 See e.g. SCS Arbitration, Award, para.147 nn.80, 83, 85 and 91, relying on documents dated 8 February 2014; 7, 10 and 11 March 2014; and 6 July 2015. During the oral hearings the Philippines relied on non-official statements which were neither made nor endorsed by the Executive; see ibid., Hearing, Day 1, 7 July 2015, 35: 15-21.

49 See SCS Arbitration, Award, para.119. See also ibid., Day 1, 7 July 2015, 41-42.

50 See SCS Arbitration, Award, para.159.

51 SCS Arbitration, Award, para.160.

52 Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998, 275, 315, para.89.

53 SCS Arbitration, Award, para.163.

ICJ inferred the existence of a dispute from the failure of a State to respond to a claim. For example, after the occupation of the United States Embassy in Tehran by militants on 4 November 1979 and the detention of its personnel as hostages, the United States claimed that Iran violated its obligations under several articles of the Vienna Conventions on Diplomatic and Consular Relations with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. The United States made its views known to the Iranian Government which, however, refused to enter into any discussions on the subject. It was in that situation that the Court concluded that "there existed a dispute arising out of the interpretation or application of the Vienna Conventions".[54]

23. Another case in which the ICJ inferred the existence of a dispute concerned the violation by the United States of America of the Headquarters Agreement with the United Nations. In 1987 the United States adopted the Anti-Terrorism Act which required the closure of the office of the observer mission of the Palestine Liberation Organization to the United Nations in New York. The United Nations protested the legislation as a violation of the Headquarters Agreement between the United States and the United Nations. The United States never expressly contradicted the view expounded by the United Nations that the legislation violated the Headquarters Agreement. In that situation, the ICJ found that the mere fact that a party "does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty."[55]

24. In a third case, the ICJ inferred from the fact that Nigeria challenged only certain portions of the boundary between Cameroon and Nigeria that it did not challenge the whole of the boundary between the two States. As Cameroon considered the course of the entire boundary to having been called into question, the Court found "the existence of a dispute concerning the whole of the boundary."[56]

25. The case before the Tribunal is different. Contrary to the Tribunal's finding,[57] China had expressed a detailed legal position on the matter before the

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[54] United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, 3, 24-25, paras.46-47.

[55] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, 12, 28, para.38.

[56] Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998, 275, 315, para.89.

[57] See SCS Arbitration, Award, para.160.

Tribunal, namely that "China has indisputable sovereignty over the islands in the South China Sea [the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands]", that "China's Nansha Islands *is* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf" and that "[s]ince 1930s, the Chinese Government has given publicity several times the geographical scope of China's Nansha Islands and the names of its components."[58] China's actions and statements are consistent with its understanding that the Nansha Islands are to be treated as a legal and geographical unit and that therefore the status of individual maritime features is not an issue and, in particular, that no maritime zones are to be measured from individual maritime features. There was thus no reason to second-guess a Chinese position on individual maritime features on the basis of speculative inferences from a misquoted statement.[59]

(4) Existence of a dispute with regard to individual submissions

26. Disputes between the Philippines and China concerning the South China Sea undoubtedly exist. However, this is not sufficient. For the Tribunal to exercise jurisdiction there must be a dispute with regard to each and every one of the Philippines' 15 submissions, i.e. the legal claims advanced in these submissions by the Philippines with regard to particular provisions of the Convention must be positively opposed by China.[60]

(a) Status and maritime entitlements of Scarborough Shoal

27. The Tribunal found that the Philippines' Submission No.3 "reflects a dispute concerning the status of Scarborough Shoal as an 'island' or 'rock' within the meaning of Article 121 of the Convention' and 'the source of maritime entitlements".[61]

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58 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, 14 April 2011; quoted in SCS Arbitration, Award, para.166 (italics added). See also China, Position Paper, paras.4, 21 and, in particular, para.20: "The Nansha Islands comprises many maritime features. China has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof".

59 See SCS Arbitration, Award, paras.169-170.

60 Cf. Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (hereinafter "Chagos MPA Arbitration"), UNCLOS Annex VII Tribunal, Award, 18 March 2015, para.332. See also above section II.1.a(1)

61 See SCS Arbitration, Award, paras.400, 169.

28. The Philippines had claimed that Scarborough Shoal was a rock, or a gathering of rocks that does not generate an entitlement to an EEZ and continental shelf.[62] The Philippines did not provide any evidence that there was a dispute between the parties on "the status of Scarborough Shoal" as a "rock" under Article 121 of the Convention. In particular, it did not produce any Chinese statement claiming that Scarborough Shoal was something other than a rock.[63] An internal Philippine document records China as saying that Scarborough Shoal "is not a sand bank but rather an island".[64] But, this statement does not show that China considers Scarborough Shoal not to be a rock. Rocks are a subcategory of islands, as the Philippines have pointed out themselves.[65] China contrasts the term "island" with the term "sand bank" and not with the term "rock". This seems to denote a distinction between islands (including rocks) and low-tide elevations. In any case, China does not focus on the status of Scarborough Shoal as such but considers Scarborough Shoal (Huangyan Dao) as part of the Zhongsha Islands (Macclesfield Bank), one of the island groups in the South China Sea over which it claims territorial sovereignty.[66]

29. The Philippines also asserted that "China has claimed that Scarborough Shoal generates an exclusive economic zone".[67] But, there is no evidence for this assertion. In default proceedings, however, a Tribunal must verify all the applicant's assertions.[68] The Philippines did not produce any statement or document by China claiming that Scarborough Shoal as such generates an EEZ. The only documents referred to by the Philippines in support of its assertion are Philippine documents "indicating that Scarborough Shoal does not generate an EEZ";[69] there is no documentary record of China stating the

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62 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 44: 4, 12-19; ibid., Day 2, 8 July 2015, 137: 4.

63 See SCS Arbitration, Award, para.147 n.81; and ibid., Hearing, Day 1, 7 July 2015, 44-45; and Day 2, 8 July 2015, 29: 4-7.

64 See SCS Arbitration, Award, para.147. See also ibid., Hearing, Day 2, 8 July 2015, 136: 24, and 137: 1.

65 See SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, 72: 11.

66 See China, Position Paper, paras.4, 6.

67 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 14: 1-3; and 69: 7-8.

68 See Liberian Eastern Timber Corporation (LETCI) v. The Government of the Republic of Liberia, Decision on Jurisdiction of 31 March 1986, 26 ILM (1987), 647-679, 656. See also Christoph Schreuer et al. (eds.), The ICSID Convention – A Commentary (2nd ed., 2009), Article 45, 725, MN 67.

69 See SCS Arbitration, Hearing, Day 2, 8 July 2015, 29 n.34; ibid., Day 2, 8 July 2015, 137 nn.141, 142.

contrary. The statement released by the Chinese Foreign Ministry on 22 May 1997 regarding Scarborough Shoal (Huangyan Dao), which was cited by the Philippines in support of its assertion, reads as follows:

> The issue of Huangyandao is an issue of territorial sovereignty; the development and exploitation of the EEZ is a question of maritime jurisdiction, the nature of the two issues are different and hence the laws and regulations governing them are also different, and they should not be discussed together. The attempt of the Philippine side to use maritime jurisdictional rights to violate the territorial sovereignty of China is untenable.[70]

The statement makes clear that for China the question of Scarborough Shoal is one of territorial sovereignty. The reference to the EEZ and the question of maritime jurisdictional rights referred to the Philippines' claim that Scarborough Shoal is situated within its EEZ and not to any Chinese claim to an EEZ generated by Scarborough Shoal.[71]

30. The Philippines' assertion that China has claimed that Scarborough Shoal is an island in terms of Article 121 which generates an entitlement to an EEZ and continental shelf is also not consistent with its claims in Submissions No.1 and 2. In these Submissions the Philippines claims that China has claimed maritime entitlements in the South China Sea based on "historic rights" contrary to "its entitlements under Articles 3, 57, 76 and 121 of the Convention".[72] The Philippines tries to have it both ways. On the one hand – in its first two Submissions – the Philippines argues that there is a dispute between the parties over maritime entitlements because China has claimed maritime entitlements based on historic rights going beyond those allowed by the Convention.[73] The Philippines opposes this claim and argues that States can only have entitlements established under the Convention. In other words, the dispute is a disagreement concerning the source or legal basis of maritime

70 For the text of the statement, see China, Position Paper, para.49.

71 See China, Position Paper, para.49 ("This passage makes clear the thrust of the statement: the Philippines shall not negate China's sovereignty over Huangyan Dao on the pretext that it is situated within the EEZ of the Philippines. This shows that the exchange of views in question was centred on the issue of sovereignty").

72 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 34: 1-4; 37: 2-7; 50: 8-13, 19-22; 49: 22-26; ibid., Day 2, 8 July 2015, 136: 10-12; ibid., Day 3, 13 July 2015, 6: 1-4; 13: 10-13..

73 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 12-15.

entitlements: historic rights v. UNCLOS.[74] On the other hand – in its third Submission – the Philippines argues that there is a dispute between the parties over the maritime entitlements generated by maritime features on the basis of UNCLOS. In other words, the dispute is a disagreement over the scope of maritime entitlements under UNCLOS. While China may claim maritime entitlements both on the basis of UNCLOS and historic rights,[75] the two claims, as formulated by the Philippines, are mutually exclusive. Either China claims maritime entitlements around Scarborough Shoal on the basis of historic rights going beyond those under the Convention, in which case its status as an island or rock under UNCLOS is irrelevant, or China bases its claim to maritime entitlements in the area on the status of Scarborough Shoal as an island in accordance with UNCLOS, in which case there is no need for a claim based on historic rights outside the Convention. The Tribunal accepted the Philippines' assertions without addressing or resolving these contradictions.

(b) Status and maritime entitlements of maritime features in the Spratly Islands

31. In its Submissions No.4 and 6 the Philippines requested the Tribunal to adjudge and declare, inter alia, that Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, EEZ or continental shelf. In Submission No.7 the Philippines asked the Tribunal to rule that Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an EEZ or continental shelf.[76] The Tribunal found that there was a dispute concerning the "status" of these eight maritime features as low-tide elevations within the meaning of Article 13, or as islands or rocks within the meaning of Article 121, and "the source of maritime entitlements in the South China Sea".[77] The Tribunal reached its finding although it noted that "China has also generally refrained from expressing a view on the status of particular maritime features" within the Spratly Islands,[78] and that "the Parties appear to have only rarely exchanged views concerning the status of specific

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74 See SCS Arbitration, Award, para.164. The Tribunal on several occasions noted China's "historic rights" claim; see also ibid., paras.147, 160, 168.

75 Cf. Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, 26 June 1998, Article 14. The text of the Law can be found in Jia and Talmon, above n.2, Annex I, Doc. A.28.

76 See SCS Arbitration, Award, para.101.

77 SCS Arbitration, Award, para.169. See also ibid., paras.170, 173, 401, 403, 404.

78 SCS Arbitration, Award, para.160.

individual features".[79]

(i) No opposing claims by China

32. The Philippines asserted that "each and every one of the submissions is indeed the subject of a legal dispute" between the parties.[80] A legal dispute concerning the status of the maritime features in question, however, requires that the Philippines put forward a legal position on the status of these features which was opposed by China, or vice versa. These positions must have been taken before the proceedings were instituted on 22 January 2013. For example, the only evidence adduced by the Philippines for its claim that "Second Thomas Shoal is 'part of the sea-bed', i.e., a low-tide elevation", is dated 9 May 2013.[81] Considering that historically the disputes between the parties in the South China Sea concerned questions of sovereignty and maritime delimitation it is thus at least questionable whether the Philippines asserted its position on the status of all the individual maritime features forming the subject of the submissions prior to institution of proceedings against China.

33. The Philippines did not identify a single document or statement by China that contradicts its position on the status of the individual maritime features in question. On the contrary, the Philippines claimed that China's characterization of all these features is the same as that of the Philippines. During the oral hearings, the Philippines stated:

> China's own nautical charts call a low-tide elevation every feature that the Philippines calls a low-tide elevation, and they call a submerged feature those areas that the Philippines regards as submerged. [...].[82]
>
> [The] official Chinese charts [...] indicate the status, the character, the nature of these various features – that is, whether they are below water, whether they are low-tide elevations or whether they are above water at high tide – and the Philippines considers that all of the characterisations of these features in the Chinese charts – whether as submerged low-tide elevations or above water at high tide – are accurate.[83]

Against the background of these statements, it is difficult to understand how the Tribunal could find that there is "a dispute concerning the status of the maritime features" in question. It is not the function of any judicial organ to

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79 SCS Arbitration, Award, para.169.

80 SCS Arbitration, Award, para.147.

81 See SCS Arbitration, Hearing, Day 2, 8 July 2015, 29 n.34.

82 SCS Arbitration, Hearing, Day 3, 13 July 2015, 70: 2-6.

83 SCS Arbitration, Hearing, Day 3, 13 July 2015, 76: 21-26, and 77: 1-3.

accede to a unilateral request for the determination of the status of a maritime feature which cannot be deemed to be in dispute.

34. The Philippines also did not produce any evidence that China has based its claim to maritime entitlements in the South China Sea on any particular status of the maritime features in question under UNCLOS.[84] China has based its claim to maritime entitlements not on individual features but on territorial sovereignty over the Spratly Islands as a geographical unit.[85] It is thus not surprising that the Philippines could not show a dispute over the status of these features.[86] The Philippines' assertion that China based its claim to maritime entitlements on the status of these features as islands in terms of Article 121 is also not consistent with its claims in Submissions No 1 and 2 that China has claimed maritime entitlements in the South China Sea "beyond those permitted by UNCLOS" based on "historic rights".[87]

(ii) Misrepresentation of China's position

35. Having noted the agreement between China's official nautical charts and its own position on the status of the maritime features in question, the Philippines argued that this "does not negate the existence of a legal dispute between the Philippines and China because, of course, China has adopted policy positions which are in direct contradiction with its own charts."[88] The Philippines referred the Tribunal to the position set out in the Note Verbale CML/8/2011 from the Permanent Mission of the People's Republic of China to the UN Secretary-General.[89] This Note Verbale is presented as evidence for the

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84 It is of interest to note that the Philippines did not repeat in its Memorial the claim made in its Amended Statement of Claim that "China has unlawfully claimed maritime entitlements beyond 12 M from these features", i.e. from Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef. See SCS Arbitration, Award, paras.99 and 101.

85 See also Natalie Klein, The Limitations of UNCLOS Part XV Dispute Settlement in Resolving South China Sea Disputes, 9 March 2015 (ssrn.com/abstract=2730411, 19), who points out that the "nine-dash line does not appear to have been drawn as a result of maritime zones being generated by the disputed maritime features".

86 See also Sultan M. Hali, Judicial flaws in [the] South China Sea dispute, 15 April 2016 (www.pakistantoday.com.pk/2016/04/15/comment/judicial-flaws-in-south-china-sea-dispute/).

87 See SCS Arbitration, Award, para.147. See also above nn.71-73 and text thereto.

88 SCS Arbitration, Hearing, Day 3, 13 July 2015, 70: 7-10. See also ibid., 77: 10-14.

89 Note Verbale from the Permanent Mission of the People's Republic of China

existence of a legal dispute concerning the status and maritime entitlements of the eight maritime features listed in Submissions No.4, 6 and 7.[90] Addressing the question of the existence of a dispute with regard to the fourth Submission, the Philippines stated:

> China has asserted that these reefs [Mischief Reef, Second Thomas Shoal and Subi Reef] are part of 'China's Nansha Islands', the Spratlys, and that they '*are* fully entitled to Territorial Sea, Exclusive Economic Zone ... and Continental Shelf'. No says the Philippines, Mischief Reef [...] generates no maritime entitlements; Second Thomas Shoal is a low-tide elevation that is 'part of the seabed'; and Subi Reef is not entitled to anything more than a '12[-mile] territorial sea', if that.[91]

36. In support of its assertions that China "has claimed that every feature in the Nansha Islands is an island",[92] and that China has claimed "200-mile entitlements, purportedly under UNCLOS, for all of the Spratly features", the Philippines also refers the Tribunal to the statement that:

> China's Nansha Islands *are* fully entitled to Territorial Sea, Exclusive Economic Zone and Continental Shelf.[93]

37. The discrepancy between China's official nautical charts and its alleged "policy position" and, consequently, the dispute between the parties over the status of the maritime features in question is based on a misrepresentation of the Chinese position. China's Note Verbale CML/8/2011 reads in the original, as follows:

> 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

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to the Secretary-General of the United Nations, No. CML/8/2011, 14 April 2011 (www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).

90 See SCS Arbitration, Award, para.147 nn.83, 87, 89.

91 SCS Arbitration, Hearing, Day 2, 8 July 2015, 137: 16-19, and 138: 1-6. See also ibid., 29 n.33: "China's Nansha [Spratly] Islands are fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf".

92 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 68: 24-25.

93 SCS Arbitration, Hearing, Day 3, 13 July 2015, 11: 3-10. See also ibid., 14: 12-14.

> Convention on the Law of the Sea, [...] China's Nansha Islands *is* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[94]

The original statement shows that China was not at all concerned with the status or maritime entitlements of individual features in the Spratly Islands but with the Spratly Islands as an island group. This position was confirmed in China's Position Paper of 7 December 2014 to which the Tribunal made frequent reference. In its Position Paper China explained:

> The Nansha Islands comprises many maritime features. China has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof. [...] It is plain that, in order to determine China's *maritime entitlements based on the Nansha Islands* under the Convention, all maritime features comprising the Nansha Islands must be taken into account.[95]

This position was reiterated by the spokesman of the Chinese Ministry of Foreign Affairs who declared that "China takes the Nansha Islands as a whole when claiming maritime rights and interests."[96]

38. While China's claim to maritime entitlements relates to the Nansha Islands as a whole, i.e as a geographical unit ("the Nansha Islands *is* fully entitled"), the Philippines' claim relates to individual maritime features within the Nansha Islands. By misquoting the Chinese Note Verbale – using the verb *"are"* instead of *"is"* in a direct quote – the Philippines misleadingly gave the impression of China claiming that "they", i.e. the individual features, "*are* fully entitled" to maritime entitlements while China in fact claims that the Nansha Islands as a unit "*is* fully entitled" to maritime entitlements.

39. One may wonder why the Philippines which on other occasions took great pains to present the Tribunal with the exact wording of statements and documents and even apologized for a "typographical error" when using the term "provision" in the singular, rather than the plural, in the text of a treaty

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94 Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011, 14 April 2011, 2.

95 China, Position Paper, para.21 (italics added).

96 PRC, MFA, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on March 24, 2016 (www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1350552.shtml).

provided to the Tribunal,[97] treated one of the most important statements by China in its argument for establishing the existence of a dispute in such a cavalier fashion.

40. Surprisingly, the Tribunal adopted the Philippines' misrepresentation of China's position. In support of its conclusion that a dispute existed between the parties concerning the status of, and the maritime entitlements generated by the maritime features in question, the Tribunal quoted China as having stated:

> Within the Spratlys, China has also generally refrained from expressing a view on the status of particular maritime features and has rather chosen to argue generally that 'China's Nansha Islands *[are]* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.'[98]
>
> China has set out its view on the status of features in the Spratly Islands as a group, stating that 'China's Nansha Islands *[are]* fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.'[99]

41. China did not set out its view on the "status of features in the Spratly Islands" but on the "status of the Spratly Islands as a group". Views on the status of an island group are not the same as, and not necessarily identical with, views on the status of individual maritime features forming part of the group.

42. Neither the Philippines nor the Tribunal addressed the question of the status and maritime entitlements of the Spratly Islands as an island group. Claims to territorial sovereignty over, and maritime entitlements generated by island groups, however, are nothing unusual. For example, in the case concerning *Territorial and Maritime Delimitation between Nicaragua and Colombia*, Colombia put forward a claim to sovereignty over the archipelago of San Andrés as a whole, including all of its features.[100] One can only speculate why the Tribunal did not engage with China's position of territorial sovereignty over the Spratly Islands as a whole. There may be at least two possible explanations for this silence. First, any acknowledgement of the true Chinese position would

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[97] See SCS Arbitration, Hearing, Day 3, 13 July 2015, 39: 10-25 (apologies for a "typographical error" in the text of Article 16 of the Treaty of Amity and Cooperation which had been provided to the Tribunal).

[98] SCS Arbitration, Award, para.160.

[99] SCS Arbitration, Award, para.169.

[100] See Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment, ICJ Reports 2012, 624, 646, para.42; 648, para.49. See also Chagos MPA Arbitration, Hearing on Bifurcation, 11 January 2013, Final Transcript, 93: 24-25, and 94: 1-5 (James Crawford for Mauritius).

have meant that there is no dispute with regard to the status and maritime entitlements of the individual maritime features in question. In fact, the true Chinese position is easily compatible with China's official nautical charts which – according to the Philippines – accurately indicate the status, the character, the nature of these various features. Second, the status and maritime entitlement of island groups (other than those being part of or constituting an archipelagic State) are not governed by the Convention and are thus not subject to the compulsory jurisdiction of the Tribunal.[101]

(d) Traditional fishing rights at Scarborough Shoal

43. The Tribunal held that the Philippines' Submission No.10 reflected "a dispute concerning China's actions that allegedly interfere with the traditional fishing activities of Philippine nationals at Scarborough Shoal."[102]

44. The Philippines claimed that China violated the Philippines' "traditional fishing rights" in the territorial sea of Scarborough Shoal,[103] but it did not produce any evidence that it ever raised the question of Philippine traditional fishing rights in a Chinese territorial sea around Scarborough Shoal or that such a claim was positively opposed by China.[104] A dispute over this question is more than unlikely because both parties claim territorial sovereignty over Scarborough Shoal. In a document entitled "Philippine position on Bajo de Masinloc (Scarborough Shoal) and the waters within its vicinity", issued on 18 April 2012, the Philippines' Department of Foreign Affairs stated:

> Bajo de Masinloc is an integral part of the Philippine territory. [...] The Philippines exercises full sovereignty and jurisdiction over the rocks of Bajo de Masinloc [...]. The basis of Philippine sovereignty and jurisdiction over the rock features of Bajo de Masinloc is distinct from that of its sovereign rights over the larger body of water and continental shelf. [...] Because the Philippines has sovereignty over the rocks of Bajo de Masinloc, it follows that it has also sovereignty over their 12-NM territorial waters.[105]

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101 Cf. Sophia Kopela, Dependent Archipelagos in the Law of the Sea (2013), 259.

102 SCS Arbitration, Award, para.407.

103 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 8: 23-25; 23: 8-12; 59: 24; 99: 8-10; ibid., Day 2, 8 July 2015, 86: 22; and 142: 2-3; ibid., Day 3, 13 July 2015, 15: 18.

104 Cf. SCS Arbitration, Hearing, Day 3, 13 July 2015, 15: 17-22, and 16: 1-9.

105 Republic of the Philippines, Department of Foreign Affairs, Philippine position on Bajo de Masinloc (Scarborough Shoal) and the waters within its

45. Rather than presenting any claim to traditional fishing rights by Philippine fishermen, the document addressed the question: "What about China claiming Bajo de Masinloc as *traditional fishing waters* of Chinese fishermen?" The Philippines rejected any idea of traditional fishing rights by Chinese fishermen in the waters around Scarborough Shoal on the basis that those rights are "in fact mentioned only in Article 51 of UNCLOS, which calls for archipelagic states to respect such rights, if such exist, in its archipelagic waters."[106]

46. The Philippines changed its position only for the arbitral proceedings. The claim to traditional fishing rights is "premised" on Chinese sovereignty over Scarborough Shoal. This premise was only accepted by the Philippines for the purpose of the proceedings.[107] In fact, the Philippines construed a hypothetical dispute specifically for the proceedings.[108] Against this background it is difficult to understand how the Tribunal could find that a claim to traditional fishing rights by the Philippines was positively opposed by China and that there existed a dispute over this question at the time of the institution of proceedings.

b. Nature of the dispute

(1) Dispute concerning territorial sovereignty

47. For a Part XV court or tribunal to have jurisdiction there must not only exist a "dispute" but the dispute must concern "the interpretation or application of [the] Convention".[109] Disputes that are not governed by the Convention are thus outside the jurisdiction *ratione materiae* of these courts and tribunals. Disputes concerning sovereignty over land territory belong to this category.[110] The Tribunal itself stated that "the Convention is not concerned with territorial disputes".[111] This explains why the Philippines emphasized that

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vicinity, 18 April 2012 (www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/).

[106] Ibid.

[107] See SCS Arbitration, Hearing, Day 2, 8 July 2015, 117: 17-19: "Submissions 10 and 11 assume that Scarborough Shoal is – quod non, and only for the purpose of these proceedings – under Chinese sovereignty". See further ibid., Day 1, 7 July 2015, 98: 12-14; ibid., Day 2, 8 July 2015, 40: 1-6. See also ibid., Award, paras.143, 153.

[108] See below section III.2.a.

[109] UNCLOS, Article 288(1).

[110] See Chagos MPA Arbitration, Award, paras.215-221.

[111] SCS Arbitration, Award, para.8. See also ibid., Hearing, Day 1, 7 July 2015, 8:

it was "not asking the Tribunal to rule on the territorial sovereignty aspect of its disputes with China",[112] and the Tribunal determined with regard to each Submission that this "is not a dispute concerning sovereignty".[113]

(a) Territorial sovereignty dispute as the "real dispute"

48. No doubt many an hour was spent by the Philippines on the careful formulation of the dispute. As Alan Boyle, one of the counsel for the Philippines, pointed out: "everything turns in practice not on what each case involves but on how the issues are formulated".[114] As the formulation of the dispute may have significant jurisdictional implications, it is for the Tribunal itself to "determine the *real dispute* that has been submitted to it".[115] Drawing on the jurisprudence of the ICJ in the *Nuclear Tests* cases[116] and the *Fisheries Jurisdiction* case,[117] the Tribunal stated:

> Here again, an objective approach is called for, and the Tribunal is required to 'isolate the real issue in the case and to identify the object of the claim.' In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so. [...] it is for the Court itself 'to determine on an objective basis the dispute dividing the parties, by examining the position of both parties.' Such a determination will be based not only on the 'Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence.'[118]

4-6: "issues that lie outside your jurisdiction; namely, sovereignty over small maritime features".

112 SCS Arbitration, Hearing, Day 1, 7 July 2015, 12: 23-25. See also ibid., 17: 4-7; 31: 17-19; 61: 16-18 and 62: 1-2.

113 See SCS Arbitration, Award, paras.398-411.

114 Alan E. Boyle, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction, 46 International and Comparative Law Quarterly (1997) 37, 44. See also Chagos MPA Arbitration, Hearing on Bifurcation, 11 January 2013, Final Transcript, 91: 18-19 (James Crawford for Mauritius).

115 Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, 449, para.31 (italics added).

116 See Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, 457, 466-467, paras.30, 31; Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974, 253, 262-263, paras.29, 30.

117 See Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, 448-449, paras.30-32.

118 SCS Arbitration, Award, para.150 (footnotes omitted).

49. In the *Nuclear Tests* cases the ICJ had paid particular attention to ascertaining "the true subject of the dispute, the object and purpose of the claim" as the respondent State, France, did not participate in the proceedings.[119] France did not appoint an agent, did not submit written pleadings and did not attend the hearing on jurisdiction. Accordingly, it was necessary for the ICJ to ensure that it accurately identified the subject matter of the dispute, given that it had only heard from one of the parties.

50. In the *Chagos Marine Protected Area Arbitration* between Mauritius and the United Kingdom ("*Chagos MPA Arbitration*" or "*Chagos*"), the Annex VII Tribunal had to determine whether it was seized with an unsettled territorial sovereignty dispute or a dispute concerning the interpretation or application of the Convention. The *Chagos* Tribunal also relied on the jurisprudence of the ICJ.[120] It found that in order to determine the true object of the dispute it "must evaluate where the relative weight of the dispute lies." It asked whether the dispute was "primarily a matter of interpretation or application" of a term of the Convention, with "the issue of sovereignty forming one aspect of a larger question", or whether the dispute primarily concerned the issue of sovereignty, with the interpretation or application of a term of the Convention merely representing a manifestation of that dispute.[121] In carrying out this task, the *Chagos* Tribunal did not consider that its role was limited to parsing the precise wording chosen by the applicant in formulating its submission. On the contrary, it considered itself entitled, and indeed obliged, to consider the context of the submission and the manner in which it had been presented in order to establish the dispute actually separating the Parties.[122] As part of the context the *Chagos* Tribunal examined what the dispute was historically. It also considered the consequences that flow from the finding requested by the applicant.[123]

51. The Tribunal in the *SCS Arbitration* determined that sovereignty was not "the appropriate characterization of the claims the Philippines has submitted in these proceedings."[124] The Philippines' Submissions could not be understood

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119 Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, 457, 467, para.31; Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974, 253, 263, para.30.

120 See Chagos MPA Arbitration, Award, para.208. See also ibid., Dissenting and Concurring Opinion by Judge James Kateka and Judge Rüdiger Wolfrum, paras.4, 6.

121 See Chagos MPA Arbitration, Award, para.211.

122 See Chagos MPA Arbitration, Award, para.229.

123 Cf. Chagos MPA Arbitration, Award, para.211.

124 SCS Arbitration, Award, para.152.

to relate to sovereignty because (a) the resolution of the Philippines' claims did not require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; and (b) the actual objective of the Philippines' claims was not to advance its position in the Parties' dispute over sovereignty.[125]

52. The Tribunal's finding on the true nature of the dispute is based on a misunderstanding of the disputes in the South China Sea. The Tribunal noted that "there exists a dispute between the Parties concerning land sovereignty over *certain maritime features* in the South China Sea."[126] Misled and misguided by the misrepresentation of China's position by the Philippines that "the Nansha Islands *are* (rather than *is*) fully entitled" to maritime zones, the Tribunal focused on the status and entitlements of individual maritime features in the Spratly Islands, rather than on the Spratly Islands as a whole.[127] The history of the disputes in the South China Sea shows, however, that the real dispute is about territorial sovereignty over the various island groups in the South China Sea. China, as well as the Philippines and Viet Nam, has not claimed sovereignty over individual maritime features but has consistently claimed sovereignty over groups of islands or archipelagos as geographical units. It is only for the proceedings that the Philippines has changed its position and has artificially re-characterized the long-standing sovereignty disputes as disputes over the status and maritime entitlements of individual maritime features.

53. China stated in its Position Paper of 7 December 2014 that it "has indisputable sovereignty over the South China Sea Islands (the Dongsha [Pratas] Islands, the Xisha [Paracel] Islands, the Zhongsha Islands [Macclesfield Bank] and the Nansha [Spratly] Islands) and the adjacent waters."[128] When China uses the term "Islands" in the context of its claim to "indisputable sovereignty over the South China Sea Islands and their adjacent waters", it does not mean individual islands but the island groups of "the Dongsha, Xisha, Zhongsha and Nansha Islands".[129]

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125 SCS Arbitration, Award, para.153.

126 SCS Arbitration, Award, para.152 (italics added).

127 Cf. SCS Arbitration, Award, para.3: "The South China Sea includes hundreds of geographical features [...]. Some of these are the subject of long-standing territorial disputes amongst the coastal States" (italics added).

128 China, Position Paper, para.4. See also UN Doc. A/35/93 – S/13788, 12 February 1980, 8.

129 Judge Wolfrum asked counsel for the Philippines during the oral hearings what was meant by the term 'Islands' in the context of China's claim to sovereignty over the South China Sea Islands (SCS Arbitration, Hearing, Day 3, 13 July 2015, 23: 1-5). It seems that he received no answer, at least not during the oral proceedings.

54. China claims "sovereignty over the Nansha Islands as a whole",[130] including the waters enclosed by the Nansha Islands.[131] In cases where China has claimed sovereignty over individual features in the Nansha Islands it has always done so in their capacity as part of the Nansha Islands only. For example, it was said that "Mischief Shoal has always been part of China, *as part of the Nansha islands*",[132] or that "China has indisputable sovereignty over the Nansha Islands *including* the Ren'ai Reef [Second Thomas Shoal]."[133]

55. This is hardly a new position. As early as 15 August 1951, Chinese Foreign Minister Chou En-lai solemnly pointed out in his Statement on the U.S.-British Draft Peace Treaty with Japan and the San Francisco Conference that "just like the *entire* Nansha Islands, Chungsha Islands and Tungsha Islands, Hsisha Islands and Nanwei Island have always been China's territory".[134] That the Nansha Islands are an "island group" was made clear during Sino-Vietnamese negotiations in 1979. The Head of the Chinese delegation and Vice Minister for Foreign Affairs said on 26 April 1979:

> 'The Xisha and Nansha Islands have always been an inalienable part of China's territory. The Vietnamese side shall revert to its previous position of recognizing this fact and respect China's sovereignty over these two *island groups* and withdraw all its personnel from those islands in the Nansha group which it has occupied.'[135]

56. This position was reaffirmed in a document issued by the Ministry of

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[130] China, Position Paper, para.19; also quoted in SCS Arbitration, Award, para 154. See also PRC, MFA, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on March 24, 2016: "China takes the Nansha Islands as a whole when claiming maritime rights and interests" (www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1350552.shtml).

[131] Cf. SCS Arbitration, Hearing, Day 3, 13 July 2015, 9: 2-4.

[132] See SCS Arbitration, Hearing, Day 3, 13 July 2015, 18: 18-19 (italics added).

[133] See PRC, MFA, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on June 24, 2013 (www.fmprc.gov.cn/eng/xwfw/s2510/2511/t1053084.shtml). See also ibid., Foreign Ministry Spokesperson Hong Lei's Regular Press Conference, 22 May 2013 (www.fmprc.gov.cn/eng/xwfw/ s2510/ 2511/t1043177.shtml).

[134] See Statement of Ministry of Foreign Affairs of the People's Republic of China, dated 20 January 1974, UN Doc. S/11201, 21 January 1974, 2 (italics added).

[135] UN Doc. A/34/219 - S/13294, 3 May 1979, 10-11 (italics added). See also UN Doc. A/34/235 - S/13318, 14 May 1979, 10: "China's sovereignty over these two island groups".

Foreign Affairs of the People's Republic of China on 30 January 1980 entitled "China's indisputable sovereignty over the Xisha [Paracel] and Nansha [Spratly] Islands". The document stated that the "Xisha and Nansha Islands are two large island groups in the South China Sea" which "have been China's territory since ancient times" and that the "Chinese are indisputable owners of these island groups."[136] China treats the Nansha Islands as an archipelago which consists of "numerous islands, reefs, sand cays and banks".[137] Both in the context of the Third United Nations Conference on the Law of the Sea and in the forum of the United Nations generally, China has stated on numerous occasions that "the Xisha Islands and the Nansha Islands are inalienable parts of China's sacred territory",[138] or that "the Xisha and Nansha Islands have been a part of Chinese territory since ancient times."[139] When China ratified the United Nations Convention on the Law of the Sea on 7 June 1996, it issued a statement, which reads in part:

> The People's Republic of China reaffirms its sovereignty over all its *archipelagos* and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992.[140]

The archipelagos listed in Article 2 of the Law on the Territorial Sea and the Contiguous Zone include the "Nansha Islands".[141] These archipelagos generate their own maritime entitlements independent of individual maritime features forming part of these archipelagos.[142]

57. China's legal position is in no way exceptional. Viet Nam has taken exactly the same position as China with regard to the South China Sea islands. Since the late 1970s, when it started to lay claim to the islands in the South

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136 UN Doc. A/35/93 - S/13788, 12 February 1980, 1, 2, and 6, respectively.

137 Ibid., 3.

138 Third United Nations Conference on the Law of the Sea, Official Records, vol. XVII, 240.

139 See e.g. UN Docs. A/53/PV.69, 24 November 1998, 36; A/52/PV.57, 26 November 1997, 21; A/49/PV.78, 6 December 1994, 16; A/37/682 - S/15505, 30 November 1982, 2; S/11201, 21 January 1974, 2.

140 See SCS Arbitration, Award, para.106 n.15.

141 See Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, 25 February 1992, reproduced in People's Republic of China, State Oceanic Administration, Department of Policy, Legislation and Planning, Collection of the Sea Laws and Regulations of the People's Republic of China (4th edn., 2012), 301.

142 See ibid., Articles 2, 4.

China Sea, it has claimed that the "Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagoes are part of Viet Nam's territory" and that "Viet Nam has indisputable sovereignty over these archipelagoes."[143] Upon ratification of UNCLOS on 25 July 1994 Viet Nam made the following declaration:

> The National Assembly reiterates Viet Nam's sovereignty over the Hoang Sa and Truong Sa archipelagoes [...]. The National Assembly [differentiates] between the settlement of the dispute[s] over the Hoang Sa and Truong Sa archipelagoes and the defence of the continental shelf and maritime zones falling under Viet Nam's sovereignty, rights and jurisdiction, based on the principles and standards specified in the 1982 United Nations Convention on the Law of the Sea.[144]

58. Like China, Viet Nam does not claim sovereignty over individual maritime features but over the island groups as a whole, "including parts of islands, interconnecting water and other natural features closely related".[145] For example, in February 2007 it protested military exercises in the Spratly Islands stating that all "activities in Hoang Sa [Paracels] and Truong Sa [Spratlys] archipelagos undertaken without consent of Vietnam are in violation of Vietnam's sovereignty over these areas."[146] Viet Nam, like China, claims maritime entitlements around the archipelagos and not around individual maritime features within these archipelagos.[147]

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[143] On 28 September 1979 the Vietnamese Foreign Ministry issued a White Book, entitled "Viet Nam's Sovereignty Over the Hoang Sa and Truong Sa Archipelagoes"; see UN Doc. A/35/93 – S/13788, 12 February 1980, 1. See also Notes Verbales from the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations to the UN Secretary General, No.86/HC-2009, 8 May 2009; No.240 HC-2009, 18 August 2009; and No.77/HC-2011, 3 May 2011.

[144] See United Nations, Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin No.28 (1995), 5.

[145] See Articles 1 and 19 of The Law of the Sea of Viet Nam, adopted on 21 June 2012 (entry into force on 1 January 2013) (vietnamnews.vn/ politics-laws/228456/the-law-of-the-sea-of-viet-nam.html).

[146] See Vietnam possesses sufficient historical evidence and legal foundation to assert its sovereignty over Hoang Sa and Truong Sa archipelagos, The Spokesman of Ministry of Foreign Affairs Le Dzung Answers Question on 14 February 2007 (www.mofa.gov.vn/en/tt_baochi/pbnfn/ns070214165133/view).

[147] See Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977, para.5 (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/V

59. Prior to instituting proceedings in the present case the Philippines also claimed sovereignty over a group of islands in the South China Sea, the so-called "Kalayaan Island Group" ("KIG") which partly overlaps with the Spratly Islands (Nansha Islands; Truong Sa Archipelago).

60. On 11 June 1978 Philippine President Ferdinand Marcos issued Presidential Decree 1596, which noted that "by reason of their proximity the cluster of islands and islets in the South China Sea situated within the Kalayaan Island Group [the scope of which was specified by geographic coordinates] are vital to the security and economic survival of the Philippines". He, therefore, declared that the area within the KIG "including the sea-bed, sub-soil, continental margin and air space shall belong and be subject to the sovereignty of the Philippines".[148] The KIG as established by the Presidential Decree consists of a total of 95 islands, cays, shoals and reefs and covers an approximate area of 64,976 square miles of water and a total land area of 290 square kilometres.[149]

61. When signing UNCLOS on 10 December 1982, the Philippines made the following understanding which was confirmed upon ratification on 8 May 1984:

> 4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;
>
> 5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines.[150]

62. The Philippines' claim to sovereignty over the KIG is not limited to

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NM_ 1977_Statement.pdf); and Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam (www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf).

148 Presidential Decree No.1596 declaring certain area part of the Philippine territory and providing for their government and administration, s.1978, (www.gov.ph/1978/06/11/presidential-decree-no-1596-s-1978/).

149 Municipal Government of Kalayaan, Municipal Background (www.kalayaanpalawan.gov.ph/about_the_municipality/municipal_background.html).

150 See United Nations, Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin No.4 (February 1985), 20-21; and No.5 (July 1985), 18.

islands in terms of Article 121(1). This becomes clear from a Note Verbale from the Philippines to the Secretary-General of the United Nations, dated 5 April 2011, which reads in part:

> <u>On the Islands and other Geological Features</u>
> 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.[151]

Despite quoting extensively from this Note Verbale in its Award, the Tribunal omitted this passage and simply noted that the Philippines is "claiming sovereignty over the 'Kalayaan Island Group (KIG)'" without further examining this claim.[152]

63. On 10 May 2009, the Philippine Congress enacted Republic Act No.9522 ("RA 9522") which redefined the archipelagic baselines of the Philippines.[153] As the Act did not extend the new archipelagic baselines of the Philippines to the KIG and Scarborough Shoal, it was challenged before the Philippine Supreme Court as being "inconsistent with the Philippines' Claim to Sovereignty over these Areas".[154] The Philippine Supreme Court held in *Magallona v. Ermita* that the

> argument that the KIG now lies outside Philippine territory because the baselines that RA 9522 draws do not enclose the KIG is negated by RA 9522 itself. Section 2 of the law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the KIG and the Scarborough Shoal:
>
> SEC. 2. The baselines in the following areas *over which the Philippines likewise exercises sovereignty and jurisdiction* shall be determined

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[151] Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No.000228 (5 Apr. 2011) (www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf).

[152] See SCS Arbitration, Award, para.165.

[153] Republic Act ("RA") 9522 entitled "An Act to Amend Certain Provisions of [RA] 3046, as Amended by [RA] 5446 to Define the Archipelagic Baselines of the Philippines and for Other Purposes" (www.gov.ph/2009/03/10/republic-act-no-9522/).

[154] Magallona v. Ermita, G.R. No 187167, 16 July 2011; reproduced as Magallona and ors v. Ermita and ors, Petition for certiorari and prohibition, G.R. No.187167, reported in Oxford Reports on International Law in Domestic Courts ("ILDC") 2758 (PH 2011), 16 July 2011, Philippines, Supreme Court.

> as 'Regime of Islands' under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS):
> a) The Kalayaan Island Group as constituted under Presidential Decree No.1596 and
> b) Bajo de Masinloc, also known as Scarborough Shoal. (Emphasis supplied).[155]

This finding was in line with an explanatory note of the Philippine Senate which stated that the bill which was to become RA 9522 "reiterates our sovereignty over the Kalayaan Group of Islands declared as part of the Philippine territory under Presidential Decree No.1596."[156]

64. The Supreme Court held that RA 9522 did not affect the Philippines' claim to sovereignty over the KIG. The Court stated:

> UNCLOS III has nothing to do with the acquisition (or loss) of territory. [...]
> UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory. Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription, not by executing multilateral treaties on the regulations of sea-use rights or enacting statutes to comply with the treaty's terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law.[157]

65. In support of the finding that the "Philippines maintains its assertion of ownership over territories outside of its baselines" one of the judges even referred to a protest by China filed with the Secretary-General of the United Nations upon the deposit of RA 9522.[158] The Chinese protest reads in part:

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155 ILDC 2758 (PH 2011), paras 25, 26.

156 Magallona v. Ermita, G.R. No.187167, 16 July 2011 (concurring opinion Velasco Jr., J.); ILDC 2758 (PH 2011), para.73.

157 ILDC 2758 (PH 2011), paras.16, 20. In support of its finding the Supreme Court referred to the last paragraph of the Preamble of UNCLOS which states: that matters not regulated by this Convention continue to be governed by the rules and principles of general international law (ibid., n.26). See also ibid. (concurring opinion Velasco Jr., J.); ILDC 2758 (PH 2011), para.64.

158 Magallona v. Ermita, G.R. No.187167, 16 August 2011 (concurring opinion Velasco Jr., J.); ILDC 2758 (PH 2011), para 74.

> The above-mentioned Philippine Act illegally claims Huangyan Island (referred as 'Bajo de Masinloc' in the Act) of China as 'areas over which the Philippines likewise exercises sovereignty and jurisdiction.' The Chinese Government hereby reiterates that Huangyan Island and Nansha Islands have been part of the territory of China since ancient time. The People's Republic of China has indisputable sovereignty over Huangyan Island and Nansha Islands and their surrounding areas. Any claim to territorial sovereignty over Huangyan Island and Nansha Islands by any other State is, therefore, null and void.[159]

66. During the oral proceedings on 8 July 2015 the Philippines provided the Tribunal with copies of RA 9522 and the judgment of the Philippines' Supreme Court in *Magallona v. Ermita.*[160] The Tribunal, however, did not consider the overlapping Philippines' and Chinese claims to sovereignty over the Spratly Islands group and Scarborough Shoal.

67. The status of individual maritime features and the legality of China's actions in the South China Sea depend upon the validity of China's claim to territorial sovereignty over the island groups in the South China as a whole and the maritime entitlements of these island groups. These questions lie at the heart of the disputes between the parties. The "real issue in the case" is not the status of some individual features and their maritime entitlements but China's claim to territorial sovereignty over the Nansha Islands and Zhongsha Islands (including Scarborough Shoal) as a whole and their respective maritime entitlements.[161] Only after the extent of China's territorial sovereignty in the South China Sea has been determined can a decision be taken on whether China's claims to maritime entitlements and its actions are in conformity with the Convention.[162] This is shown by the fact that almost all of the Philippines' claims would fall away if China's territorial sovereignty over the island groups as a whole were confirmed. By ignoring China's claim to sovereignty over the island groups as a whole the Tribunal does not contribute to the resolution of the "real dispute" between the parties but entertains artificial disputes carefully construed by the Philippines to meet the jurisdictional requirements of the Convention.

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159 Ibid., n.32.

160 See SCS Arbitration, Hearing, Day 2, 8 July 2015, 6: 11-13.

161 See also Natalie Klein, Some lessons from Mauritius v. UK for Philippines v. China, ILA Reporter, 16 April 2015: The territorial sovereignty dispute is the real heart of the problem in Philippines v. China (ilareporter.org.au/2015/04/some-lessons-from-mauritius-v-uk-for-philippines-v-china-natalie-klein/).

162 Cf. China, Position Paper, para.10.

68. The history of the disputes between the Philippines, Viet Nam and China over the island groups in the South China Sea shows that the disputes are not 'primarily a matter of interpretation or application' of Articles 13 and 121, with "the issue of sovereignty forming one aspect of a larger question", but that the disputes primarily concern the issue of sovereignty, with the interpretation or application of the provisions of the Convention merely representing a manifestation of that dispute, if at all.

69. The Tribunal found that the Philippines' Submissions could not be understood to relate to sovereignty because "the actual objective of the Philippines' claims was [not] to advance its position in the Parties' dispute over sovereignty."[163] But this is exactly the situation in the present case. The historic record shows that the Philippines' claim to territorial sovereignty over the Kalayaan Island Group partly overlaps with China's claim to territorial sovereignty over the Nansha Islands. Since the 1970s, the Philippines has claimed territorial sovereignty over the KIG as a whole, including several "geographical features" which it now claims "are not features that are capable of appropriation by occupation or otherwise".[164] By claiming, for example, that Mischief Reef and Second Thomas Shoal (which form part of China's Nansha Islands) are not capable of appropriation and are part of the Philippine EEZ and continental shelf, the Philippines tries to undermine China's claim to territorial sovereignty over the Nansha Islands as a whole.[165] If the Tribunal acceded to this claim by the Philippines it would implicitly rule that there cannot be territorial sovereignty over the Nansha Islands as a whole – a question of sovereignty outside its jurisdiction. This is not the sort of consequence that follows from a narrow dispute regarding the interpretation of Articles 13 and 121, as advanced by the Philippines.[166]

(b) Dispute over territorial sovereignty with regard to individual submissions

70. Two of the Philippines' individual submissions, in particular, demonstrate that the "real issue in the case" is territorial sovereignty over the Nansha Islands as a whole. The Tribunal held that "the Philippines' Submissions could be understood to relate to sovereignty if [...] the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty,

163 SCS Arbitration, Award, para.153.

164 See SCS Arbitration, Award, para.101 (Submission No.4).

165 Cf. China, Position Paper, paras.19, 22. Cf. also Sienho Yee, The South China Sea Arbitration: The Clinical Isolation and/or One-sided Tendencies in the Philippines' Oral Argument, 14 Chinese JIL (2015) 423, 426.

166 Cf. e.g. SCS Arbitration, Hearing, Day 1, 7 July 2015, 81: 5-11.

either expressly or *implicitly*".[167] According to the Tribunal this was not the case. The Tribunal stated that it "does not see that any of the Philippines' Submissions require an implicit determination of sovereignty."[168] It also held that "the Philippines' focus only on the maritime features occupied by China" carries no implications for the question of "China's sovereignty over the Nansha Islands as a whole."[169] But, the Tribunal is not able to rule on the Philippines' Submissions No.4 and 5 without implicitly deciding questions of territorial sovereignty.

(i) Capability of appropriation of the low-tide elevations of Mischief Reef, Second Thomas Shoal and Subi Reef

71. In Submission No.4 the Philippines requested the Tribunal to adjudge and declare that

> Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise.[170]

The Philippines argued that in deciding the matter the Tribunal does not have to "express any view at all as to the extent of China's sovereignty over land territory".[171] The status under the Convention of a particular maritime feature as a low-tide elevation, rock or island was plainly a law of the sea matter which could be resolved by interpreting and applying Article 13 and 121 of the Convention.[172]

72. The Tribunal accepted the Philippines' argument and ruled that

> Submission No.4 reflects a dispute concerning the status of Mischief Reef, Second Thomas Shoal, and Subi Reef as 'low-tide elevations' within the meaning of Article 13 of the Convention [...]. *This is not a dispute concerning sovereignty over the features*, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a

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[167] SCS Arbitration, Award, para.153 (italics added).
[168] Ibid.
[169] SCS Arbitration, Award, para.154.
[170] SCS Arbitration, Award, para.101 (Submission No.4).
[171] See SCS Arbitration, Hearing, Day 1, 7 July 2015, 61: 17-18, 62: 1-2, 5-8, 76: 20-22, 84: 3-6; ibid., Award, para.141.
[172] See SCS Arbitration, Hearing, Day 1, 7 July 2015, 80: 22-23, and 81: 1-11.

> claim of territorial sovereignty.[173]

73. The Tribunal addressed only the first part of Submission No.4, namely whether Mischief Reef, Second Thomas Shoal and Subi Reef "are low-tide elevations". It did not deal with the second part of the Submission concerning the question of whether these maritime features *"are not features that are capable of appropriation by occupation or otherwise"*. The question of whether or not a low-tide elevation can be appropriated, i.e. whether it can be subject to the sovereignty of a State, is clearly a question of territorial sovereignty which calls for the application of rules of general international law, not the application or interpretation of Article 13 or any other provision of the Convention.[174]

74. The Philippines tried to circumvent the question of sovereignty over low-tide elevations by asserting:

> As regards low-tide elevations, they form part of the seabed and subsoil [...]. To determine whether a particular feature is a low-tide elevation does not require you to determine which state, if any, has sovereignty or sovereign rights over it.[175]

75. The Tribunal may not positively have to determine which State has sovereignty over a particular low-tide elevation, but by ruling that Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations which are not 'capable of appropriation' the Tribunal would negatively decide by implication that China's claims to territorial sovereignty over these features are invalid in international law. The Tribunal thus would necessarily prejudge the question of territorial sovereignty over these three features.

76. The ICJ ruled in *Qatar v. Bahrain* that the question of appropriation of low-tide elevations is not governed by "international treaty law", including the Convention.[176] The Court stated that it was not "aware of a uniform and wide State practice which might have given rise to a customary rule which unequivocally permits or *excludes* the appropriation of low-tide elevations."[177] It concluded that "in *the absence of other rules and legal principles*, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated

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173 SCS Arbitration, Award, para.401 (italics added). See also ibid., para.169.

174 Cf. also Yee (above n.165), 427; China, Position Paper, paras.23, 25.

175 SCS Arbitration, Hearing, Day 1, 7 July 2015, 77: 2-3, 10-13. See also ibid., 83: 25-26.

176 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001, 40, 101, para.205.

177 Ibid., 102, para.205 (italics added).

with islands or other land territory."[178] The jurisprudence of international courts on this question is, however, not uniform.[179] The ICJ's ruling on low-tide elevations has been criticized as "legislative activity" in the literature,[180] and one of the judges in his separate opinion in *Qatar v. Bahrain* stated that "the question of whether sovereignty over an islet or low-tide elevation may be appropriated by a State […] remain open matters."[181]

77. In Question 18 of its Request for Further Written Argument, the Tribunal asked the Philippines "to address whether, as a matter of international law, low-tide elevations constitute territory and are subject to appropriation".[182] The Philippines, referring to the jurisprudence of the ICJ, replied that it was "crystal clear from the consistent body of case law on this matter" that low-tide elevations did not constitute land territory and were not subject to appropriation.

78. But, the ICJ's ruling on the matter is less than crystal clear. The ICJ did not find any support in State practice that gave rise to a customary rule which unequivocally "exclude[d]" the appropriation of low-tide elevations thus leaving open the possibility that there is such a rule. It also left open the possibility that there may be "other rules and legal principles" which allowed for the acquisition of low-tide elevations in special circumstances. For example, the ICJ did not address the questions of sovereignty over low-tide elevations forming part of an archipelago, historic title of sovereignty over low-tide elevations or rules of regional customary international law providing for sovereignty over low-tide elevations.[183] That State practice on this question is less than clear is also shown by the Philippines' own behaviour outside the courtroom. The Philippines considers Mischief Reef, Second Thomas Shoal and Subi Reef to be "low-tide elevations".[184] However, this has not prevented the Philippines from claiming these features belong and are subject to the sovereignty of the Philippines. All three features are part of the Kalayaan Island

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178 Ibid., 102, para.206 (italics added).

179 Eritrea v. Yemen (First Stage – Territorial Sovereignty and Scope of the Dispute) 22 Reports of International Arbitral Awards (1998), 209, 330, para.527.

180 Robert Kolb, Case Law on Equitable Maritime Delimitation: Digest and Commentaries (2003), 544.

181 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001, 119, 124, para.7 (sep. op. Oda).

182 Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure, 16 December 2014, Question 18.

183 Cf. China, Position Paper, para.25.

184 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 19:4-5. See also, ibid., Day 2, 8 July 2015, 5: 25 - 6: 1.

Group which the Philippines considers as its sovereign territory.[185] It is revealing that on 30 May 2014, that is while the case was pending before the Tribunal, the Philippines Department of Foreign Affairs spokesman, Assistant Secretary Raul Hernandez, stated "Ayungin shoal [Second Thomas Shoal] is an integral part of the Philippine national territory".[186] Judge Wolfrum astutely observed that the Philippines did not take nationally the same approach with regard to sovereignty over low-tide elevations such as Mischief Reef as they were presenting to the Tribunal.[187] This fact, however, is not reflected in the Tribunal's Award.

79. Irrespective of whether or not State practice has given rise to a rule of customary international law governing the appropriation, *vel non*, of low-tide elevations, the question is one of general international law and not a matter for the interpretation or application of the Convention. It lies, consequently, outside the jurisdiction of the Tribunal. This may explain why both the Philippines in its oral pleadings and the Tribunal did not address the 'capable of appropriation' part of the Submission but focussed solely on the status part.[188]

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[185] With regard to Mischief Reef, see SCS Arbitration, Hearing, Day 2, 8 July 2015, 5: 13-14. Panganiban Reef (Mischief Reef) is included as feature no.12, Ayungin Shoal (Second Thomas Shoal) is included as feature no.65, and Zamora Reef (Subi Reef) is included as feature no.9 in the list of 81 "features in the Kalayaan Island Group (within the limits of Presidential Decree No.1596)" which was attached as Annex D to the Memorandum of the Philippine Solicitor General to the Philippines Supreme Court, dated 15 December 2014, in the cases of Rene A.V. Saguisag, et al. v. Executive Secretary Paquito N. Ochoa, Jr., et al./Bagong Alyansang Makabayan (Bayan), et al. v. Department of National Defense Secretary Voltaire Gazmin, et al., G.R. No.212426 & G.R. No.212444, 61 (sc.judiciary.gov.ph/microsite/EDCA/osg-memo.pdf). It is of interest to note that the Philippines Maritime and Ocean Affairs Office ("OAA") in a Memorandum for the Assistant Secretary, OAA, dated 9 December 2014, "recommends to exercise caution in referring to the geographical features as 'island territories' since the Philippine position is that none of the features in the South China Sea is an 'island' in the true meaning of Article 121 of UNCLOS" (ibid., 60).

[186] PH tells China: Don't tell us what to do within our territory, Philippines Daily Inquirer, 30 May 2014, available on LexisNexis Academic.

[187] See SCS Arbitration, Hearing, Day 1, 7 July 2015, 84:16-22 (Judge Wolfrum). The question of whether the Philippines nationally asserted sovereignty over low-tide elevations in the Kalayaan Island Group such as Mischief Reef was not addressed by counsel for the Philippines in its reply to Judge Wolfrum's question; see ibid., Day 2, 8 July 2015, 3-6.

[188] Cf. SCS Arbitration, Hearing, Day 2, 8 July 2015, 137: 9-19, and 138: 1-8; ibid.,

(ii) Mischief Reef and Second Thomas Shoal as part of the Philippines' EEZ and continental shelf

80. Similar problems arise with regard to Submission No.5 in which the Philippines requested the Tribunal to adjudge and declare that "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines".[189] For the Tribunal the Submission reflected

> a dispute concerning the sources of maritime entitlements in the South China Sea and whether a situation of overlapping entitlements to an exclusive economic zone or to a continental shelf exists in the area of Mischief Reef and Second Thomas Shoal. This [...] is not a dispute concerning sovereignty over the feature [sic], notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty.[190]

The Tribunal indicted that it could "declare that these features form part of the exclusive economic zone and continental shelf of the Philippines" if no overlapping EEZ or continental shelf entitlements existed.[191]

81. Any ruling that these features form part of the EEZ and continental shelf of the Philippines logically excludes territorial sovereignty over these features in particular and the Nansha Islands as a whole in general. Although the Tribunal would not positively determine which State has sovereignty over Mischief Reef and Second Thomas Shoal, its ruling would prejudice and prejudge China's (or any other State's) claim to sovereignty over these features and the Nansha Islands as a whole.[192] By ruling that these features are part of the EEZ and continental shelf of the Philippines it would indirectly rule on a question of territorial sovereignty which is outside its jurisdiction. The Philippines' argument that it is the location of the feature and thus the law of the sea that determines whether it is subject to a claim of national sovereignty is inconsistent with the sequence of its own Submissions.[193] The Philippines first

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Award, para.401.

189 SCS Arbitration, Award, para.101 (Submission No.5).

190 SCS Arbitration, Award, para.402.

191 Ibid.

192 Cf. also Antonios Tzanakopoulos, Resolving Disputes over the South China Sea under the Compulsory Dispute Settlement System of the UN Convention on the Law of the Sea, 8 (ssrn.com/ abstract=2772659).

193 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 82: 21-24. See also ibid., 83: 5-8.

asks the Tribunal to declare that low-tide elevations 'are not features that are capable of appropriation' and then asks it to rule that these low-tide elevations are part of the EEZ and continental shelf of the Philippines. It is the question of sovereignty that determines the location and not the other way round. If sovereignty over low-tide elevations, either on their own or as part of an archipelago, can be acquired, they automatically will not be part of the EEZ or continental shelf of another State.

(2) Other disputes not governed by the Convention

(a) Conditions of Philippine personnel stationed at Second Thomas Shoal

82. There are also other Submissions of the Philippines which are outside the Tribunal's jurisdiction because their subject-matter is not governed by the Convention and thus do not reflect a dispute concerning the interpretation or application of the Convention. For example, in Submission No.14 the Philippines asked the Tribunal to adjudge and declare, inter alia, that

> Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
> [...]
> (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.[194]

83. The Tribunal held that Submission No.14 "reflects a dispute concerning China's activities in and around Second Thomas Shoal and China's interaction with the Philippine military forces stationed on the Shoal."[195] It stated that the dispute concerning "the Philippines' military presence on Second Thomas Shoal" implicated provisions of the Convention,[196] but did not identify any of these provisions.

84. Neither "the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal" nor "the health and well-being" of that personnel are questions dealt with in the Convention. In its Amended Statement of Claim, the Philippines had stated that the exclusion of Philippine vessels from Second

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194 SCS Arbitration, Award, para.101 (Submission No.14).
195 SCS Arbitration, Award, para.411.
196 SCS Arbitration, Award, para.173.

Thomas Shoal violated "the sovereign rights of the Philippines".[197] The Convention, however, does not provide for sovereign rights of States to rotate and resupply military personnel at sea, nor does it protect the health and well-being of military personnel at sea. The Philippines speaks generally of the aggravation and extension of "the dispute" without specifying which of the various disputes forming part of its 15 Submissions has been aggravated or extended.[198] In addition, not everything that can aggravate or extend a dispute is itself a dispute concerning the interpretation or application of the Convention. In particular, a duty not to aggravate or extend a dispute cannot be derived from Article 300 of the Convention as the obligation regarding good faith concerns only "obligations assumed under this Convention".

85. While the principle "that the parties to a case must [...] not allow any step of any kind to be taken which might aggravate or extend the dispute" may be universally accepted by international tribunals,[199] this does not mean that all steps of all kinds are automatically subject to the jurisdiction of Annex VII arbitral tribunals. Economic sanctions contrary to existing trade agreements or the use of force may aggravate a law of the sea dispute but that does not mean that they thereby become law of the sea disputes subject to the compulsory jurisdiction of Annex VII arbitral tribunals. A link must exist between the dispute and the Convention. This limitation is vital. Without it States could use the UNCLOS dispute settlement system as a vehicle for forcing unrelated disputes with other States before these tribunals.[200]

(b) Historic fishing rights in the territorial sea

86. In Submission No.10 the Philippines requested the Tribunal to adjudge and declare that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal."[201] The Philippines clarified that China's alleged

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[197] SCS Arbitration, Award, para.99 (bullet point 4).

[198] The dispute concerning China's interaction with the Philippine military forces stationed on the Second Thomas Shoal arose only after the institution of proceedings, see below section III.1.a.

[199] See SCS Arbitration, Hearing, Day 2, 8 July 2015, 91: 4-10; referring to Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Interim Measures of Protection, Order of 5 December 1939, PCIJ Series A/B, No.79, 194, 199.

[200] Cf. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2001, 183, 185, para.7 (sep. op. Koroma).

[201] SCS Arbitration, Award, para.101 (Submission No.10).

interference with the Philippines' "traditional fishing rights" took place in "the territorial sea around the Scarborough Shoal".[202] The Tribunal concluded that "Submission No.10 reflects a dispute concerning China's actions that allegedly interfere with the traditional fishing activities of Philippine nationals at Scarborough Shoal."[203]

87. The Tribunal noted "that traditional fishing rights may exist even within the territorial waters of another State".[204] While this is correct, the question is whether "traditional fishing rights" in the territorial sea are governed by the Convention. The Convention mentions traditional fishing rights only in Article 51(1) requiring archipelagic States to recognize and respect traditional fishing rights in "archipelagic waters".[205] The Philippines rejected traditional fishing rights of Chinese fishermen in the waters around Scarborough Shoal with the argument that "'Traditional fishing rights' is in fact mentioned only in Article 51 of UNCLOS, which calls for archipelagic states to respect such rights, if such exist, in its archipelagic waters."[206] Traditional or historic fishing rights in the territorial sea thus must have their source outside the Convention – in customary international law. The Philippines argued before the Tribunal that States may not invoke "alleged 'historic rights' under general international law that derogate from the entitlements, rights or obligations that the Convention expressly establishes." Referring to the question of whether a coastal State had an obligation to grant access to fishing vessels of other States that had traditionally fished in an area, the Philippines stated: "The result, in Article 62, paragraph 3, was only a modest coastal state duty to take such traditional fishing practices into account, among other factors, in granting access to its EEZ. There is no suggestion whatever of any preservation or reservation of 'historic fishing rights'".[207] Against this background it is difficult to understand how the Philippines could claim traditional fishing rights in the territorial sea around Scarborough Shoal.

88. In the "Annex of Issues the Philippines May Wish to Address at

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[202] SCS Arbitration, Hearing, Day 1, 7 July 2015, 99: 8-10. See also ibid., Day 1, 7 July 2015, 8: 23-25; 23: 8-12; 59: 24; ibid., Day 2, 8 July 2015, 86: 22; and 142: 2-3; ibid., Day 3, 13 July 2015, 15: 18.

[203] SCS Arbitration, Award, para.407.

[204] Ibid.

[205] Traditional or habitual fishing is also mentioned in UNCLOS, Articles 47(6) and 62(3).

[206] Republic of the Philippines, Department of Foreign Affairs, Philippine position on Bajo de Masinloc (Scarborough Shoal) and the waters within its vicinity, 18 April 2012 (www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/).

[207] SCS Arbitration, Hearing, Day 1, 7 July 2015, 54: 10-22.

November Hearing", the Tribunal asked the Philippines about "the source, *within the Convention*, of any legal duty not to interfere with traditional fishing rights."[208] In its answer the Philippines referred the Tribunal to Article 2(3) of the Convention which provides that the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."[209] According to the Philippines the reference to "other rules of international law" encompasses a general rule of international law which obliges a State to "respect long and uninterrupted fishing by the nationals of another state in its territorial sea".[210]

89. The question of whether an obligation to respect fishing rights in the territorial sea falls within the term "other rules of international law" in Article 2(3) was decided by the Annex VII tribunal in the *Chagos MPA Arbitration*. The *Chagos* Tribunal held that the phrase 'other rules of international law' refers only to 'the general rules of international law' such as abuse of rights and the law of State responsibility. It does not refer to "particular rights in the territorial sea by virtue of bilateral agreements or local custom".[211] The textual *renvoi* to sources of law outside the Convention in Article 2(3) thus does not lead to any substantive expansion of jurisdiction. As a consequence, the Tribunal found that disputes concerning fishing rights in the territorial sea (irrespective of whether they are based on treaties, unilateral undertakings or historic rights) are not subject to the compulsory jurisdiction of Part XV courts and tribunals.[212] Following the *Chagos* Tribunal, the Tribunal in the *SCS Arbitration* thus would have had to dismiss Submission No.10 for lack of jurisdiction. Two judges in their dissenting opinion in the *Chagos MPA Arbitration*, however, held that the reference to other rules of international law may also include particular obligations, such as the obligation to respect fishing rights in the territorial sea.[213]

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[208] SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, 164: 2-6 (italics added). Reference is made to the Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

[209] SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, 164: 7-11.

[210] See SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, 165: 13-17. See also ibid., Hearing, Day 2, 8 July 2015, 142: 3-4.

[211] Chagos MPA Arbitration, Award, para.516.

[212] Chagos MPA Arbitration, Award, para.517.

[213] Chagos MPA Arbitration, Dissenting and Concurring Opinion by Judge James Kateka and Judge Rüdiger Wolfrum, para.94.

90. But, even if after the Award in the *Chagos MPA Arbitration* the question of whether or not the term 'other rules of international law' in Article 2(3) encompasses the obligation to respect fishing rights in the territorial sea were still considered to be open, it would have been for the Tribunal to decide this question at the jurisdictional stage. The abstract legal question of whether the term "other rules of international law" in Article 2(3) refers only to the "general rules of international law" or also encompasses obligations arising from specific rules of international law possesses an exclusively preliminary character which must be decided as a preliminary question.[214] The Tribunal's finding that it has jurisdiction to consider the Philippines' Submission No.10 is thus flawed both on procedural grounds and, following the ruling of the Annex VII Tribunal in the *Chagos MPA Arbitration*, substantively.

2. Indispensable third party

91. It is a well-established principle of international law that an international court or tribunal can exercise jurisdiction over a State only with its consent.[215] The doctrine of the absent or indispensable third party precludes a court or tribunal from adjudicating the merits of a case that would compromise the legal position of third States not party to the proceedings. But, the mere fact that a State not party to the proceedings might be affected by a decision is not enough. The decisive factor is that the State's "legal interests would not only be affected by a decision, but would form the very subject matter of the decision".[216] The Tribunal examined *proprio motu* whether the absence of an indispensable third party such as Viet Nam "would bar jurisdiction".[217]

92. The Philippines' position on the question was contradictory. During the

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214 See SCS Arbitration, Rules of Procedure, 27 August 2013, Article 20(3).

215 Cf. Monetary Gold Removed from Rome in 1943 (Italy v. United Kingdom and United States of America), Preliminary Question, Judgment, ICJ Reports 1954, 19, 32.

216 Ibid., 32. This test has been repeated by the ICJ in subsequent decisions such as Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392 at 431, para 88; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports 1990, 92, 116, para.56, and 122, para.73; Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 258-62, paras.48-55; East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, 90, 102-5, para.28-35; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, 168, 236-238, paras.197-204.

17th Philippines-China Foreign Ministry Consultations in January 2012 the Philippines had rejected bilateral negotiations with China on the ground that "there are other competing claims" in the South China Sea by Viet Nam and other nations.[218] However, during the oral hearing in July 2015 it declared the question of whether any third parties are indispensable to the proceedings "to be a non-issue".[219]

93. Viet Nam's position was equally inconsistent. In April 2014, Viet Nam sent a Note Verbale to the Tribunal requesting to be furnished with any documents relevant to the proceedings because its 'legal interests and rights may be affected' by the arbitration.[220] It also reserved the right to intervene in the proceedings,[221] but ultimately did not do so. In December 2014 Viet Nam sent another Note Verbale asking the Tribunal "to protect its rights and interest of a legal nature in the South China Sea". At the same time, however, Viet Nam declared that it had "no doubt that the Tribunal has jurisdiction in these proceedings".[222] This statement may have been influenced by Viet Nam's understanding that "matters of territorial sovereignty […] had deliberately been excluded from the Philippines' claim."[223] In this context it is of interest to note the Tribunal's report that Viet Nam was 'supporting the Tribunal's competence to interpret and apply *Articles 60, 80, [94], 194(5), 206, 293(1), and 300* of the Convention and other relevant instruments.'[224] The Philippines, however, had argued that the case concerned "the interpretation and application of various provisions of the Convention, but in particular Articles 13 and 121, as well as Articles 56, 57, 76 and 77."[225] There was thus no express statement of support of the Tribunal's competence to interpret and apply the provisions most relevant to the Philippines' case. This can hardly have been an oversight.

94. The Philippines put much emphasis on Viet Nam's statement that it "has no doubt that the Tribunal has jurisdiction in these proceedings",[226] and the Tribunal seized on the fact that "China has not argued in its Position Paper

217 See SCS Arbitration, Award, paras.179-188, 123.

218 See SCS Arbitration, Award, para.339.

219 SCS Arbitration, Hearing, Day 2, 8 July 2015, 125: 13.

220 See SCS Arbitration, Award, para.47.

221 See SCS Arbitration, Award, para.57.

222 See SCS Arbitration, Award, paras.54, 183.

223 See SCS Arbitration, Award, para.184.

224 See SCS Arbitration, Award, para.54 (italics added). With regard to Viet Nam's support for The Tribunal's competence to interpret and apply Article 94, see ibid., para.184.

225 SCS Arbitration, Hearing, Day 1, 7 July 2015, 79: 3-6.

226 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 40: 4-6; ibid., Day 2, 8 July 2015, 121: 21-22, and 122: 1.

or elsewhere that Viet Nam's absence as a party in the present arbitration is a factor that would bar jurisdiction".[227] The obligation set out in Annex VII, Article 9 that the Tribunal must "satisfy itself [...] that it has jurisdiction over the dispute" is an objective obligation, not dependent upon the views – legal or political – of either the applicant or any third State.

95. The Tribunal found that "Viet Nam is not an indispensable third party and that its absence as a party does not preclude the Tribunal from proceeding with the arbitration."[228] But this finding is, again, based on the Tribunal focusing on individual maritime features in the Spratly Islands, rather than on the Spratly Islands as an island group.[229] Viet Nam, however, like China, does not claim sovereignty over individual maritime features but over the "Truong Sa (Spratlys) archipelago" as a whole, including all islands, parts of islands, interconnecting water and other natural features closely related.[230] Any decision that "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines" logically excludes that they are part of the Truong Sa (Spratlys) archipelago which Viet Nam claims as its sovereign territory. A maritime feature can either be "part of" the EEZ and continental shelf of a State or it can be under the territorial sovereignty of another State – it cannot be both. Viet Nam's alleged right of sovereignty over the Truong Sa (Spratlys) archipelago, in general, and Mischief Reef and Second Thomas Shoal, in particular,[231] is not only affected by a decision in the present case, but forms the very subject-matter of the decision. Similarly, any determination that Mischief Reef, Second Thomas Shoal and Subi Reef "are not features that are capable of appropriation by occupation or otherwise" prejudges and prejudices Viet Nam's claim to sovereignty over these features.[232] For these reasons, the Tribunal should have declined jurisdiction with regard to Submissions No.4 and 5.

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[227] SCS Arbitration, Award, para.179. See also ibid., para.188.

[228] SCS Arbitration, Award, para.187.

[229] See SCS Arbitration, Award, para.182: "the Tribunal has already mentioned Viet Nam's sovereignty claims to the features identified in the Philippines' Submissions No.4 to 7".

[230] For Viet Nam's position, see above section II.1.b(1)(a).

[231] For Viet Nam's claim to sovereignty over Mischief Reef and Second Thomas Shoal as part of the Truong Sa archipelago, see the entry on the "Spratly Islands", dated 28 February 2012, on the Vietnamese Border Guard's Website: Bien phong Viet Nam: Quan dao Truong Sa [Vietnam's Border: Spratly Islands] (www.bienphongvietnam.gov.vn/nghien-cuu-trao-doi/tu-lieu/395-abcd.html).

[232] See also Tzanakopoulos (above n.193), 12-13.

3. Obligation to exchange views

96. Article 283(1) of the Convention provides that when "a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiations or other peaceful means." The exchange of views is thus a "jurisdictional precondition" for access to the compulsory dispute resolution procedures in section 2 of Part XV.[233] Article 283(1) is a provision peculiar to the Convention and distinct from, and in addition to any requirement, if any, that parties engage in negotiations prior to resorting to compulsory dispute settlement.[234] It thus deviates from the procedural law under general international law and establishes an additional jurisdictional hurdle.[235]

a. Purpose and content of the obligation

97. It has been pointed out that the obligation to exchange views is "not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done."[236] The main purpose underlying Article 283(1) is to ensure that States are not taken entirely by surprise by the institution of proceedings and to allow States to rectify any possible wrongdoing or violation of the Convention prior to the initiation of binding dispute settlement procedures.[237]

98. The obligation to exchange views is triggered "when a dispute arises", i.e. a dispute must have arisen with sufficient clarity prior to the exchange of

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233 Chagos MPA Arbitration, Award, para.160. See also SCS Arbitration, Award, paras.189, 192; and M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Verbatim Record, 8 October 2012, ITLOS/PV.12/C18/6/ Rev.1, 18: 46-48 (Spain).

234 Chagos MPA Arbitration, Award, 378.

235 M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, 77, 85, para.28 (diss. op. Wolfrum), 87, 89-90, para.9 (diss. op. Treves).

236 Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, 36, 39, para.11 (sep. op. Rao).

237 Cf. Chagos MPA Arbitration, Award, paras.381, 382. See also "Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, 230, 254, para.3 (decl. Anderson).

views so that the parties were aware of the issues in respect of which they disagreed.[238] Article 283(1) lays down a procedural and not a substantive requirement. The Parties must "exchange views regarding the means for resolving their dispute"; they need not "engage in negotiations or other forms of peaceful dispute resolution" with regard to the substance of their dispute.[239] An exchange of views is not "mere protests or disputations", nor is it reduced to "the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims."[240] Article 283 obliges States to indicate a view on the most appropriate means of settlement of their dispute.

99. The exchange of views must relate to the specific dispute or disputes forming part of the proceedings. The Philippines had argued that

> (1) it is not necessary to exchange views on the substance of each and every submission *per se*; (2) as long as there has been an exchange of views on the general subject matter of the dispute, broadly construed, Article 283 is satisfied, both with respect to the main dispute as well as any incidental issues that are subsumed within it; and (3) relatedly, there is no need for an exchange of views to touch upon specific articles of the Convention.[241]

In support of its general propositions the Philippines referred to the arbitral awards in *Guyana v. Suriname* and the *Chagos MPA Arbitration*.[242]

100. In *Guyana v. Suriname*, the Tribunal held that the decades-old "dispute has as its principal concern the determination of the course of the maritime

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238 See Chagos MPA Arbitration, Award, para.382.

239 See Chagos MPA Arbitration, Award, para.378. See also ibid., para.383, and Dissenting and Concurring Opinion by Judge James Kateka and Judge Rüdiger Wolfrum, para.66. See further "Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation), Merits, Award of 14 August 2015, para.151.

240 Cf. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, 70, 132, para.157. See also China's observation that the exchanges between the parties pertained to "responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce fictions, maintain stability in the region, and promote measures of cooperation" (China, Position Paper, para.47).

241 SCS Arbitration, Hearing, Day 2, 8 July 2015, 33: 23-25, and 35: 1-6; also quoted ibid., Award, para.331.

242 SCS Arbitration, Hearing, Day 2, 8 July 2015, 34: 21-22. See in particular ibid., 33 n.41, and 34 n.43.

boundary between the two Parties".[243] On 3 June 2000, two patrol boats from the Surinamese navy ordered an oil rig and drill ship to leave the disputed maritime area within twelve hours.[244] The Tribunal considered the action by the Surinamese navy incidental to the real dispute between the Parties. The Tribunal, therefore, found that

> *in the particular circumstances*, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can be considered as being subsumed within the *main* dispute.[245]

101. In the *Chagos MPA Arbitration* Mauritius had claimed that the MPA was incompatible with Articles 2(3) and 56(2) of the Convention insofar as it did not take into account Mauritius' fishing rights in the territorial sea and EEZ of the Chagos Archipelago. Mauritius and the United Kingdom had discussed the proposed MPA. In the discussions Mauritius had only expressed general reservations about the MPA without ever referring to UNCLOS or its Articles 2(3) and 56(2). The *Chagos* Tribunal considered

> it to be settled international law that 'it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument,' but that 'the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter'.[246]

102. The two cases do not support the proposition that it is sufficient that "there has been an exchange of views on the general subject matter of the dispute, broadly construed". In both cases, there was a clearly-defined dispute at the heart of the proceedings. While in *Suriname v. Guyana* the dispute was about the determination of the course of the maritime boundary between the two Parties, and in the *Chagos MPA Arbitration* it was the legality of the marine protected area, what would be the "general subject matter of the dispute" in the *South China Sea Arbitration*? The wording of Article 283(1) shows that the exchange of views must relate to a specific dispute. An exchange of views on "the general subject matter of the dispute" would be contrary to legal certainty

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243 Maritime Delimitation (Guyana v. Suriname), Jurisdiction and Merits, Award of 17 September 2007, 47 ILM (2008) 166, 225, para.410.

244 See ibid., 184, para.151.

245 Ibid., 225, para.410 (italics added).

246 Chagos MPA Arbitration, Award, para.379.

and would allow an applicant to frame its Submissions as it likes within the main heading "disputes in the South China Sea" or "disputes concerning Scarborough Shoal". The Tribunal in the *Chagos MPA Arbitration* stated that "Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed."[247] This is not the case if the subject matter of the dispute is formulated in general or abstract terms.

103. In a case like the *South China Sea Arbitration* which involves numerous different disputes, the exchange of views must refer to the subject-matter of each individual dispute. Only if the parties have exchanged views on each and every submission can it be excluded that a State is taken by surprise by the institution of proceedings. The Tribunal seems to have accepted this as it determined for every Submission that it is not "barred from the Tribunal's consideration by any requirement of Section 1 of Part XV", including Article 283(1).[248]

b. Exchange of views with regard to the subject-matter of individual submissions

104. While the Tribunal determined for each Submission that the jurisdictional requirement in Article 283(1) does not pose any bar to the Tribunal's consideration of the Submission,[249] it did not examine whether the exchange of views in fact addressed all the different subject-matters of the disputes presented in the proceedings. The Tribunal noted generally that the "Philippines has held regular bilateral discussions with China, addressing *a wide range of issues of concern to the two governments, including the South China Sea.*"[250]

105. A closer look at these bilateral discussions, as set out by the Tribunal, shows that the subject matters covered by these discussions were limited. The Tribunal noted that at the time of the consultations in 1995 and 1998, the dispute between the Parties "concerned sovereignty over the Spratly Islands and certain activities at Mischief Reef",[251] and that the November 2002 Declaration on the Conduct of Parties in the South China Sea of the Association of Southeast Asian Nations ("ASEAN") related to the parties'

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[247] See Chagos MPA Arbitration, Award, para.382. See also ibid., Rejoinder Submitted by the United Kingdom, 17 March 2014, para.6.10, pointing out that Article 283 required "a shared understanding [of the parties] of what the dispute or disputes are".

[248] See SCS Arbitration, Award, paras.398-411.

[249] See SCS Arbitration, Award, paras.352, 398-411.

[250] SCS Arbitration, Award, para.348 (italics added).

[251] SCS Arbitration, Award, para.336.

"territorial and jurisdictional disputes".[252] It observed that the actions complained of in the Philippines' Submissions No.8 to 14 arose after the consultations and the ASEAN Declaration.[253] For the exchange of views on these Submissions the Tribunal referred to a bilateral consultation on 14 January 2012 which addressed "a range of issues, including the South China Sea." However, the record of this consultation speaks only generally of "the disputes in the West Philippine Sea" or "the current dispute and problem". It mentions "China's 9 dash line", "competing claims", and the resolution of disputes "by clarifying and segregating the disputed land features from the non-disputed waters of the West Philippine Sea" as well as the resolution of "competing claims" and the definition of "the disputed areas from the non-disputed areas".[254] Communications between the parties in April 2012 refer to "the Philippines' sovereignty and sovereign rights under international law including UNCLOS, over the Scarborough Shoal and its EEZ" and "the rights and obligations of the two countries in the Philippines' EEZ under international law, specifically UNCLOS".[255] The Tribunal concluded:

> Taking the exchanges in 2012 together, the Tribunal is convinced that the Parties have unequivocally exchanged views regarding the possible means of settling the disputes between them that the Philippines has presented in these proceedings.[256]

106. There is, however, no record of any exchange of views regarding the settlement, for example, of the dispute in Submission No.10 concerning the interference by China "with traditional fishing activities" of Philippine fishermen within a Chinese territorial sea around Scarborough Shoal. This is not surprising as the "dispute" concerning Philippine traditional fishing rights is purely hypothetical.[257] The record presented by the Philippines shows that the dispute and any exchange of views concerned the question of the Philippines' or China's sovereignty over Scarborough Shoal. This is also confirmed by China's Position Paper which stated with regard to Scarborough Shoal that "the exchange of views in question was centred on the issue of sovereignty."[258] The claim to traditional fishing rights is based on the premise of Chinese sovereignty over Scarborough Shoal; a premise that was accepted by

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252 SCS Arbitration, Award, para.335.
253 SCS Arbitration, Award, para.336.
254 SCS Arbitration, Award, para.337.
255 SCS Arbitration, Award, para.340.
256 SCS Arbitration, Award, para.342.
257 See below section III.2.a.
258 China, Position Paper, para.49.

the Philippines only for the purpose of the proceedings.

107. The Tribunal stated that the parties did not have to "address all of the matters in dispute with the same level of specificity that is now reflected in the Philippines' Submission". While this is generally correct, even the Tribunal required that the subject-matter of the exchange of views must relate to the subject matter of the dispute. But what is the subject-matter: Scarborough Shoal in general, sovereignty over Scarborough Shoal, sovereign rights in a claimed Philippine EEZ around Scarborough Shoal or hypothetical traditional fishing rights in a hypothetical Chinese territorial sea around Scarborough Shoal?

108. Any discussions and consultations that may have taken place between the parties did not and could not accomplish one of the "principal goals" of prior exchanges of views and negotiations, "namely to clarify the parties" respective positions on the issues in dispute',[259] because traditional fishing rights were never an issue prior to the presentation of the Philippines' Memorial in March 2014. Against this background it is difficult to understand how the Tribunal could conclude that "China was aware of the issues in respect of which the Parties disagreed and cannot have been taken by surprise when the Philippines decided to proceed with arbitration."[260] This, of course, applies even more to the Tribunal's finding that "the Philippines has in fact presented a dispute concerning the status of every maritime feature claimed by China within 200 nautical miles of Mischief Reef and Second Thomas Shoal, at least to the extent of whether such features are islands capable of generating an entitlement to an exclusive economic zone and to a continental shelf."[261]

III. Admissibility of the claims presented

109. Annex VII arbitral tribunals must satisfy themselves not only that they have jurisdiction over the dispute, but also that the claims brought before them by the applicant are admissible. As pointed out by the ICJ, "[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[262] The Tribunal bifurcated the proceedings in the *SCS Arbitration* to consider the question of its jurisdiction and the admissibility

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[259] SCS Arbitration, Award, para.349.

[260] SCS Arbitration, Award, para.343.

[261] SCS Arbitration, Award, para.172.

[262] Oil Platforms (Islamic Republic of Iran v. United States of America), Judgement, ICJ Reports 2003, 161, 177, para.29.

of the Philippines' claims as a preliminary matter. In its letter to the Philippines of 23 June 2015, the Arbitral Tribunal requested the Philippines to "address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims".[263] The Tribunal in its "Award on Jurisdiction and Admissibility" did not expressly pronounce on the admissibility of the Philippines' claims but also did not declare any of these claims inadmissible. In this section it will be examined whether any of the Philippines' claims should have been declared inadmissible as a preliminary matter.

1. New claims

a. Formal amendment of the Statement of Claim

110. Article 19 of the Tribunal's Rules of Procedure provides that "[d]uring the course of the arbitral proceedings a Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its written pleadings." On 28 February 2014, more than one year after the submission of its Statement of Claim and only 30 days before its Memorial was due,[264] the Philippines applied for leave to amend its original Statement of Claim. The application added a request to determine the status pursuant to the Convention of one additional feature, Second Thomas Shoal, and asked the Tribunal to declare that China's "exclusion of Philippine vessels from Second Thomas Shoal, violate the sovereign rights of the Philippines".[265] On 11 March 2014, the Tribunal granted the requested leave pursuant to Article 19 of the Rules of Procedure and accepted the Philippines' Amended Statement of Claim.[266] Only the first part of the amendment relating to the status of Second Thomas Shoal is expressly mentioned by the Tribunal in its Award.[267] It is, however, the second part that merits closer scrutiny.

111. Prior to the Philippines' application on 28 February 2014 to add China's "exclusion of Philippine vessels from Second Thomas Shoal" to its Statement of Claim, no incident had ever been reported of a Philippine vessel being excluded from Second Thomas Shoal. In support of its submission that there existed a legal dispute with regard to China's behaviour of "interfering with navigation rights, preventing the rotation and resupply of personnel, and

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[263] See SCS Arbitration, Hearing, Day 2, 8 July 2015, 131: 4-7.

[264] This may be considered a classic example of guerrilla tactics in international arbitration.

[265] See SCS Arbitration, Award, para.99 (bullet point 4).

[266] See SCS Arbitration, Award, para.43.

[267] See SCS Arbitration, Award, para.42.

endangering their health and well-being", the Philippines referred to a Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines, dated 23 April 2013, in which it was stated that the "Chinese side w[ill] not allow the continuous stranding of the vessel" at Second Thomas Shoal.[268] A verbal objection to the permanent stationing of a Philippine naval vessel in the disputed area of Second Thomas Shoal is not the same as excluding Philippine vessels from Second Thomas Shoal or interfering with navigation rights etc. On 19 June 2013, Philippine Armed Forces chief of staff General Emmanuel Bautista stated that the military did not encounter any blockade at Second Thomas Shoal.[269] The first time the Philippines protested the exclusion of a Philippine vessel from Second Thomas Shoal was on 9 March 2014, i.e. nine days after the Philippines had applied to amend its statement of claim.[270] Commenting on the 9 March incident, the Philippines' Department of Foreign Affairs spokesman, Assistant Secretary Raul Hernandez, told a press briefing on 11 March 2014 that this was the first time that China prevented a Philippine supply mission and personnel rotation to Ayungin [Second Thomas Shoal] since it established a presence in the area 15 years ago.[271] The second piece of evidence adduced by the Philippines to show the existence of a dispute concerning the interference with navigation rights at Second Thomas Shoal dates from 10 March 2014, the day after two vessels were prevented for the first time from reaching the Philippine naval vessel at Second Thomas Shoal.

112. Only a few days after the first navigational incident at Second Thomas Shoal, on 29 March 2014 another Philippine vessel with "Reuters and other media invited onboard" provoked a further incident with Chinese coast guard vessels at Second Thomas Shoal watched by a "U.S. navy plane [and] a Philippine military aircraft".[272] On both occasions, the Philippines wrote to the

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268 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 20: 4-10.

269 Marines reinforce disputed shoal, Philippines Daily Inquirer, 20 June 2013, available on LexisNexis Academic.

270 Philippines lodges protest over China ship blockade, BBC News, 11 March 2014 (www.bbc.com/news/ world-asia-26524388).

271 PHL calls China's actions a "clear and urgent threat" to its territorial rights; Protests move to block PHL vessels to Ayungin, 11 March 2014 (ptvnews.ph/bottom-news-life2/11-11-nation-submenu/30072-phl-calls-china-s-actions-a-clear-and-urgent-threat-to-its-territorial-rights-protests-move-to-block-phl-vessels-to-ayungin); Philippines protests Ayungin Shoal incident, 12 March 2014 (globalnation.inquirer.net/ 100173/dfa-issues-protest-on-chinas-expulsion-of-ph-ships-2).

272 See Philippine ship dodges China blockade to reach South China Sea outpost, Reuters, 31 March 2014 (www.reuters.com/article/us-philippines-china-reef-

Tribunal regarding "China's most recent actions in and around Second Thomas (Ayungin) Shoal" and expressed concern "about its ability to resupply its personnel".[273]

113. In its Amended Statement of Claim the Philippines asked the Tribunal to declare that China's "exclusion of Philippine vessels from Second Thomas Shoal, violates the sovereign rights of the Philippines".[274] Within a month this claim was reformulated. In its Memorial the Philippines requested the Tribunal to declare that

> *[s]ince the commencement of this arbitration in January 2013*, China has unlawfully aggravated 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.[275]

114. The Philippines shifted the focus of the claim from a violation of the sovereign rights of the Philippines to the aggravation and extension of the dispute "since the commencement of this arbitration in January 2013". This was necessary because the Philippines could not establish the existence of a dispute concerning the exclusion of its vessels from Second Thomas Shoal. The requirements for the existence of a dispute must be satisfied at the time when the dispute is submitted to the arbitral tribunal by written notification to the other party of the dispute.[276] The "critical date" for the existence of a dispute is thus 22 January 2013. This date is also relevant for any new claim of

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idUSBREA2U02720140331); China-Philippines navy spat captured on camera, BBC News, 30 March 2014 (www.bbc.com/news/world-asia-26806924).

273 See SCS Arbitration, Award, paras.44, 46.

274 See SCS Arbitration, Award, para.99 (bullet point 4).

275 SCS Arbitration, Award, para.101 (Submission No.14) (italics added).

276 Cf. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, ICJ Reports 1962, 319, 344; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, 422, 444, para.54; M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, 4 at 46, para.151; and ibid., Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, 87, 88, para.6 (diss. op. Treves).

the amendment of an existing claim.[277] In order to consider a dispute in all its aspects a court or tribunal may also deal with a submission that is based on "facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application."[278] In the present case, the facts did not arise directly out of a question which was the subject-matter of the Notification and Statement of Claim. There is no mention in these documents of the Philippines' right of navigation in the waters around Second Thomas Shoal,[279] or of "China's interaction with the Philippine military forces stationed on the Shoal".[280] Rather than arising directly out of the Philippines' application, the facts were engineered to fill the amended application with life.

115. The sequence of events, the restatement of the claim and the tailoring of Submission No.14 to suit the requirements of the existence of a dispute raise the question of an "abuse of right" by the Philippines. A claim may be held inadmissible because the filing of the claim constitutes an abuse of right.[281] Article 300 provides that

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

The provision explicitly targets the abuse of the jurisdiction of Part XV courts and tribunals, which have competence to decide disputes in accordance with

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277 Cf. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 266, para.68.

278 See LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001, 466, 484, para.45 (with regard to submissions requesting the ICJ "to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with"). See also Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974, 175, 203, para.72.

279 In its Notification and Statement of Claim the Philippines claimed generally that "China has unlawfully interfered with the exercise by the Philippines of its rights to navigation under the Convention" (see paras.12, 13, 25, 27, 28, 31, 39, 41).

280 See SCS Arbitration, Award, para.411. See also ibid., para.173.

281 Cf. Eric de Brabandere, "Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims 3 Journal of International Dispute Settlement (2012), 609, 620.

the provisions of UNCLOS.[282] The Annexes form an integral part of the Convention and a reference to the Convention includes a reference to the Annexes relating thereto.[283] The basis for the Tribunal's Rules of Procedure can be found in Annex VII, Article 5. Rights under the Rules of Procedure, including the right to amend the pleadings, thus constitute rights recognized in the Convention.

116. The Philippines amended its Statement of Claim requesting the Tribunal to declare that China's "exclusion of Philippine vessels from Second Thomas Shoal" violated the sovereign rights of the Philippines at a time when no vessel had ever been excluded from Second Thomas Shoal. In addition, it modified the amended claim within 30 days from one asking the Tribunal for a declaration that China's activities "violate[d] the sovereign rights of the Philippines" to one asking for a finding that China's actions "aggravated and extended the dispute". Such a course of action amounted to an abuse of a procedural right – an abuse of process – which should have led the Tribunal to rule that Submission No.14 was inadmissible.

b. Introduction of new claims

117. In its (Amended) Statement of Claims of 22 January 2013 the Philippines presented 10 claims,[284] and requested the Tribunal, under the heading "Relief Sought", to issue an Award on 13 different points.[285] The Memorial submitted on 30 March 2014, on the other hand, contains 15 final submissions.[286] The Philippines did not just add two more submissions but dropped eight of the original 13 points of its Relief Sought in whole or in part and replaced them with new submissions. In addition, it rephrased several of its original submissions giving them a different content and meaning.

118. The following eight requests were deleted without replacement, namely the requests to issue an Award that

- Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS;[287]

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282 Ibid., 618 n.56.
283 UNCLOS, Article 318.
284 SCS Arbitration, Notification and Statement of Claim of the Republic of the Philippines, 22 January 2013, para.31.
285 Ibid., para.41. See also SCS Arbitration, Award, para.99.
286 SCS Arbitration, Award, paras.7, 101.
287 SCS Arbitration, Award, para.99 (bullet point 3).

- Declares that [...] China's occupation of and construction activities on [...] McKennan Reef [. . .] violate the sovereign rights of the Philippines;[288]
- Requires that China end its occupation of and activities on [...] McKennan Reef [...];[289]
- Declares that Gaven Reef and Subi Reef [...] are not located on China's Continental Shelf; and that China's occupation of and construction activities on these features are unlawful;[290]
- Requires China to terminate its occupation of and activities on Gaven Reef and Subi Reef;[291]
- Requires that China refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to [...] Johnson Reef, and from undertaking other activities inconsistent with the Convention in the vicinity of this feature;[292]
- Declares that the Philippines is entitled under UNCLOS to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;[293]
- Declares that China has unlawfully interfered with the exercise by the Philippines of its rights to navigation and other rights under the Convention in areas [...] beyond 200 M of the Philippines' archipelagic baselines.[294]

119. The submissions concerning Gaven Reef and McKennan Reef, for example, had to be dropped because it must have dawned on the Philippines that these maritime features are located within the territorial sea of islands and the Philippines, for tactical reasons and for the purpose of the proceedings only, assumed that China had territorial sovereignty over all islands in the South China Sea. Occupation of and construction activities on maritime features within a State's territorial sea are generally allowed and cannot violate the sovereign rights of other States, so that this part of the Philippines' request could logically no longer be sustained. The declaration that the Philippines was entitled under UNCLOS to the various maritime zones was stating the obvious

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288 SCS Arbitration, Award, para.99 (bullet point 4).
289 SCS Arbitration, Award, para.99 (bullet point 5).
290 SCS Arbitration, Award, para.99 (bullet point 6).
291 SCS Arbitration, Award, para.99 (bullet point 7).
292 SCS Arbitration, Award, para.99 (bullet point 9).
293 SCS Arbitration, Award, para.99 (bullet point 10).
294 SCS Arbitration, Award, para.99 (bullet point 12).

and could hardly have given rise to a dispute between the parties.[295] Why the other submissions were dropped is subject to speculation. In case of Subi Reef, which is situated outside any possible 200nm Philippine continental shelf entitlement, it seems likely that the Philippines wanted to avoid having the Tribunal examine possible continental shelf entitlements of China on the basis of each and every island in the South China Sea which the Philippines, for the purpose of the proceedings, had accepted to be under the Chinese sovereignty. This probably even more so, as the Philippines itself claims to be entitled to regulate the occupation of and construction activities on low-tide elevations in the South China Sea on the basis of their location on the Philippines' continental shelf.[296] The fact that the Philippines dropped eight of the original 13 points of its Relief Sought is at best bad lawyering, but more likely a sign that the Philippines used the arbitration first and foremost for political point-scoring.

120. The following table shows how the Philippines changed the content and meaning of several submissions. The numbers in square brackets at the beginning of each claim refer to the bullet point of the Relief Sought in the Amended Statement of Claim and to the number of the final submission in the Memorial.

Amended Statement of Claim	Memorial
[4] McKennan Reef is a submerged feature that *forms part of the Continental Shelf of the Philippines* under Part VI of the Convention	[6] McKennan Reef (including Hughes Reef) is a low-tide elevation that does not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but its low-water line may be used to determine the baseline from which the breadth of the territorial sea Sin Cowe is measured
[4] China's occupation of and construction activities on Mischief Reef *violate the sovereign*	[12] China's occupation and construction activities on Mischief Reef

[295] See Stefan Talmon, The South China Sea Arbitration: Is There a Case to Answer?, in: Stefan Talmon and Bing Bing Jia (eds.), The South China Sea Arbitration: A Chinese Perspective (2014), 15, 28-29.

[296] See e.g. SCS Arbitration, Hearing, Day 2, 8 July 2015, 48: 4-8.

rights of the Philippines	(a) violate the provision of the Convention concerning artificial islands, installations and structures; (c) constitute unlawful acts of attempted appropriation in violation of the Convention
[4] China's exclusion of Philippine vessels from Second Thomas Shoal violates the sovereign rights of the Philippines [5] China is to end its activities at Second Thomas Shoal	[14] 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' right 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
[6] Gaven Reef is a submerged feature in the South China Sea that is not above sea level at high tide, is not an island under the Convention, and is *not located on China's Continental Shelf*	[6] Gaven Reef is a low-tide elevation that does not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but its low-water line may be used to determine the baseline from which the breadth of the territorial sea Namyit is measured
[6] Subi Reef is a submerged feature in the South China Sea that is not above sea level at high tide, is not an island under the Convention	[4] Subi Reef is a low-tide elevation that does not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and is *not a feature that is capable of appropriation by occupation or otherwise*

[9] China is to refrain from preventing Philippine vessels from exploiting in a sustainable manner the living resources in the waters adjacent to Scarborough Shoal	[10] China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by *interfering with traditional fishing activities* at Scarborough Shoal
[9] China is to refrain from undertaking *other activities inconsistent with the Convention* at or in the vicinity of Scarborough Shoal	[13] China has breached its obligations under the Convention 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

These changes go beyond a mere modification of language not affecting the substance of the submissions contained in the Statement of Claim and, at least in part, constitute new submissions.

121. Besides the restatement and expansion of existing claims, the Philippines introduced in its Memorial several new claims which were not set out or even foreshadowed in its Amended Statement of Claim. In the final submissions as set out in its Memorial, the Philippines, for example, requested the Tribunal to adjudge and declare that

> China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;
>
> China's occupation and construction activities on Mischief Reef […] violate China's duties to protect and preserve the marine environment under the Convention.[297]

There is no mention of the term "environment", let alone an obligation to protect and preserve the environment, anywhere in the Amended Statement of Claim. The only reference to the marine environment that can be found anywhere in the Statement of Claim is an allegation that "Chinese vessels [...] have harvested, inter alia, endangered species such as sea turtles, sharks and giant clams which are protected by both international and Philippine law" in the area of Scarborough Shoal.[298] The statement is limited to Scarborough

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[297] SCS Arbitration, Award, para.101 (Submissions No.11 and 12(b)).

[298] SCS Arbitration, Notification and Statement of Claim of the Republic of the

Shoal and there is no mention in the Statement of Claim of similar activities at either Second Thomas Shoal or Mischief Reef.

122. With regard to Scarborough Shoal, the Philippines requested the Tribunal only in most general terms to issue an Award that "requires that China refrain from [...] undertaking *other activities inconsistent with the Convention* at or in the vicinity" of this feature.[299] Similarly, with regard to Second Thomas Shoal the Philippines asked the Tribunal to require that "China ends *its [...] activities* [...] at Second Thomas Shoal".[300] The same is true for Mischief Reef where the Philippines asked the Tribunal to declare that "China's occupation of and construction activities on Mischief Reef [...] violate the sovereign rights of the Philippines' in its EEZ, and to require that 'China end *its [...] activities* on Mischief Reef'. In the EEZ, a coastal State does not have "sovereign rights" but "jurisdiction" with regard to the protection and preservation of the marine environment.[301] The terminology used thus could not refer to any violation of obligations under the Convention to protect and preserve the marine environment.[302]

123. The Philippines' claim with regard to the violation by China of its obligation to protect and preserve the marine environment was detailed as follows:

> 'China's toleration, encouragement of and failure to prevent environmentally destructive fishing practices at Scarborough Shoal and Second Thomas Shoal violate its duty to protect and preserve the marine environment …' We say that China has flagrantly violated Articles 192 and 194 by using dynamite to destroy coral reefs, cyanide to kill the fish, and by harvesting giant clams, which are an endangered species that live on the reefs. Submission 12(b) makes a similar claim with respect to the harmful environmental effect of construction activities at Mischief Reef. So the marine environment that we are concerned with in these proceedings is thus a particular one: it is the ecosystem of coral reefs and the biodiversity and living resource sustained by that environment.[303]

The Philippines explained that the "environmentally destructive conduct" at

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Philippines, 22 January 2013, para.21.

299 SCS Arbitration, Award, para.99 (bulletin point 9) (italics added).

300 SCS Arbitration, Award, para.99 (bulletin point 5) (italics added).

301 See UNCLOS, Article 56(1)(b)(iii).

302 Coastal States also do not exercise over the continental shelf any sovereign rights for the purpose of protecting or preserving the marine environment; see UNCLOS, Article 77(1).

303 SCS Arbitration, Hearing, Day 2, 8 July 2015, 95: 6-22.

Scarborough Shoal and Second Thomas Shoal was carried out by Chinese-flagged fishing boats and not by Chinese government ships.[304] Thus, the relevant conduct strictly speaking did not concern "activities" by China.

124. The Philippines' claims concerning the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal went well beyond the harvesting of endangered species mentioned in the Statement of Claim. The environmental claims included the protection and preservation of marine ecosystems and biological diversity represented by coral reefs as well as the use of dangerous substance such as dynamite or cyanide to extract fish.[305] These claims were expanded throughout the proceedings. The Philippines, probably encouraged by the broad reading given to the category of environmental disputes by the arbitral tribunal in the *Chagos MPA Arbitration* in its Award of 18 March 2015,[306] announced during the oral hearing on 8 July 2015 that it would claim at the merits stage that China violated its obligations

> (a) to take measures to protect and preserve marine ecosystems, including coral reefs; (b) to ensure sustainable use of the biological resources which those coral reefs represent; (c) to protect and preserve endangered species found in the reefs; (d) to apply a precautionary approach in all these respects; and finally (e) to consult and cooperate with the Philippines and other relevant states in the management of the biological resources, ecosystems and marine environment of all of the reef systems in the South China Sea.[307]

At the merits stage the Philippines asserted the violation by China of all these obligations, with the exception of the precautionary approach, with regard to Scarborough Shoal, Second Thomas Shoal and Mischief Reef.[308]

125. The Tribunal neither noted that the number of final submissions in the Memorial was different from the number of submissions in the Amended Statement of Claim, nor did it make any observation on the different content of the final submissions, apart from stating that 'the claims initially made' in the Statement of Claim were "refined" in the 15 final submissions in the

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304 See SCS Arbitration, Hearing, Day 2, 8 July 2015, 87: 5-9; 21-22.

305 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 16: 11-17, ibid., Day 2, 8 July 2015, 99: 18-19, and 110: 12-14.

306 SCS Arbitration, Hearing, Day 2, 8 July 2015, 104: 20-24, and 105: 1-3.

307 SCS Arbitration, Hearing, Day 2, 8 July 2015, 97: 1-12. See also, ibid., Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 3, 26 November 2015, 22-34.

308 See e.g. SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 3, 26 November 2015, 21: 10-11; 34: 4-12.

Memorial.[309] But, what the Philippines did went far beyond a mere "refinement" of claims initially made. The Philippines itself had identified the subject-matter of the dispute in its Note Verbale transmitting the Notification and Statement of Claim as a "dispute with China over the *maritime jurisdiction* of the Philippines in the West Philippine Sea". The Philippines brought the case "to clearly establish *the sovereign rights and jurisdiction of the Philippines over its maritime entitlements* in the West Philippine Sea."[310] The Tribunal also initially identified the dispute as one "over the maritime jurisdiction of the Philippines in the West Philippine Sea".[311] There was no mention at all of any violation by China of its obligation to protect and preserve the marine environment.

126. An applicant is not entitled to change its claims at will during the course of the proceedings. The Philippines in its Statement of Claim expressly "reserve[d] the right to supplement and/or amend its claims and the relief sought as necessary".[312] However, the fact that an applicant has reserved "the right to supplement or to amend this Application"[313] has not, for example, prevented the ICJ and the PCIJ from examining whether a new claim is admissible.[314]

127. These courts held inadmissible new claims, formulated during the

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309 SCS Arbitration, Award, para.19.

310 Note Verbale No.13-0211 from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China, Manila, dated 22 January 2013. For the Philippines' view of the purpose of the arbitral proceedings, see also the opening statement before the Tribunal of the Philippine Secretary of State, Albert F. del Rosario: SCS Arbitration, Hearing, Day 1, 7 July 2015: 12: 25-26; 13: 1, 11-26; 14: 1-7, 12-17; 15: 3-5, 14-21; 16: 25-26; and 17: 1-2.

311 SCS Arbitration, Rules of Procedure, 27 August 2013, preamble, para.5. This description of the dispute can also be found in all Press Releases of the PCA on the Arbitration between the Republic of the Philippines and the People's Republic of China; see e.g. PCA Press Release, The Arbitral Tribunal Requests Further Written argument form the Philippines, 17 December 2014 (www.pcacases.com/web/sendAttach/1295).

312 SCS Arbitration, Notification and Statement of Claim of the Republic of the Philippines, 22 January 2013, para.43.

313 See e.g. Certain Phosphate Lands in Nauru (Nauru v. Australia), Application of Nauru, 19 May 1989, para.50; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Application of the Republic of Nicaragua, 8 December 1999, para.8.

314 See Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 262-267; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, 694-697.

course of the proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally submitted to it in the Application into another dispute which is different in character.[315] This is not the case if the new claim is implicit in, or arises directly out of the question which forms the subject-matter of the Application. The Application sets out the subject of the dispute. The Memorial may elucidate the terms of the Application but must not go beyond the limits of the claims as set out therein.[316] The ICJ jurisprudence must be seen against the background of Article 40(1) of the ICJ Statute which requires "the subject of the dispute" to be indicated in the initial Application and Article 38(2) of the ICJ's Rules of Court which states that the application shall "specify the precise nature of the claim". The ICJ pointed out that the requirements that the "subject of the dispute" must be indicated and the "precise nature of the claim" specified in the Application are reflective of a general principle and are "essential from the point of view of legal certainty and the good administration of justice".[317] This is confirmed by the fact that similar provisions can be found both in the Statute and Rules of the ITLOS[318] and the PCA Arbitration Rules.[319]

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315 See e.g. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, 3, 16, para.36; Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 267, para.70; Société Commerciale de Belgique, Judgment of 15 July 1939, PCIJ Series A/B No.78, 160, 173.

316 Cf. Administration of the Prince von Pless (Preliminary Objections), Order of 4 February 1933, PCIJ Series A/B, No.52, 11, 14; Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 267, para.69; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, 639, 656, para.39.

317 Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 267, para.69; Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, 448, para.29; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, 695, para.108; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, 639, 656, para.38. The ITLOS made the same statement: See M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, 4, 45, para.148. See also M/V "Virginia G" (Panama/Guinea Bissau), Judgment, ITLOS Reports 2014, 230, 283, paras.137, 138 (diss. op. Ndiaye).

318 ITLOS, Statute, Article 24(1) and Rules, Article 54(2).

319 PCA Arbitration Rules 2012, Article 3(3)(e) and (f), and Article 18(2)(c) and

128. According to Article 1 of Annex VII a dispute may be submitted to an Annex VII tribunal by written notification. This notification "shall be accompanied by a statement of claim and the grounds on which it is based".[320] The requirement that the subject of the dispute must be indicated with the greatest possible precision in the Statement of Claim is not called into question by Article 19 of the Rules of Procedure of the Tribunal in the *SCS Arbitration* which provides that "[d]uring the course of the arbitral proceedings a Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its written pleadings." Even if the provision allows the applicant to amend or supplement its submissions, it may not do so at will but only with leave of the Tribunal. No such leave was applied for by the Philippines, or granted by the Tribunal with regard to the new submissions concerning the protection and preservation of the marine environment.

129. The reasons for not allowing the applicant to change or amend its submissions at will was succinctly set out by Robert Kolb who writes with regard to the ICJ:

> In principle, the subject matter of the case is fixed by the documents initiating it – that is when the claim is first formulated. The originating documentation 'selects the battle-ground' and sets bounds to it: it is to this terrain that the Court and the parties must then address their attention. To allow unilateral changes to the terrain would disrupt the proceedings, leading to delays and opening up the possibility of various kinds of tactical manoeuvring by the parties. This in turn might prejudice the respondent's rights and thus the equality of the parties. That in its own turn undermines the due and proper administration of justice and generally makes the Court's job harder. It is therefore unsurprising that the Court has been very reticent on this point.[321]

130. The ICJ's jurisprudence on the admissibility of new claims is informative. In *Certain Phosphate Lands in Nauru*, the ICJ held that a claim that appeared for the first time in the Memorial was inadmissible.[322] Nauru had claimed in its Application that Australia, by its acts and omissions with regard to phosphate mining in Nauru, had violated several specified rules of international law and asked the Court "to adjudge and declare that Australia has

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(d).

320 See also SCS Arbitration, Rules of Procedure, 27 August 2013, preamble, para 4.

321 Robert Kolb, The International Court of Justice (2013), 183.

322 Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 267, para.70.

incurred an international legal responsibility and is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered".[323] At the end of its Memorial on the merits, Nauru requested the Court to adjudge and declare that Australia was "under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of the breaches of its legal obligations detailed above" and, in addition, that "the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners".[324] The ICJ noted in the first place that "no reference to the disposal of the overseas assets of the British Phosphate Commissioners appears in Nauru's Application, either as an independent claim or in relation to the claim for reparation submitted".[325] The Court also noted that the submission concerning the overseas assets of the British Phosphate Commissioners was presented separately, in the form of a distinct paragraph, and thus, from a formal point of view, was a new claim in relation to the claims presented in the Application.[326] The Court accepted that "links may exist between the claim made in the Memorial and the general context of the Application".[327] But, the ICJ was of the view that for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it was "not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application" or must arise "directly out of the question which is the subject-matter of that Application".[328] These criteria were not satisfied.

131. In the *Diallo* case, the ICJ held that a claim that appeared for the first time in the Reply was inadmissible. Guinea had asked the Court in its Application to "order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea *for the numerous wrongs*

[323] Certain Phosphate Lands in Nauru (Nauru v. Australia), Application of Nauru, 19 May 1989, para.50.

[324] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 244, para.5.

[325] Ibid., 265, para.64.

[326] Ibid., 265, paras.64, 65. Cf. also Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, 695, para.109.

[327] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 266, para.66.

[328] Ibid., 266, para.67. See also Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, 697, para.114.

done to it in the person of its national Ahmadou Sadio Diallo".[329] The Application listed arrest, detention and expulsion measures taken against Mr. Diallo in 1995-1996. In its Reply, Guinea for the first time also included arrest and detention measures taken against Mr. Diallo in 1988-1989. The Court noted that there was nothing in the Application referring to the events in 1988-1989. While the application under the heading "Subject of the Dispute" stated that Mr. Diallo was "unjustly imprisoned [...] despoiled [...] and then expelled", it was clear from the document annexed to the Application that the "imprisonment" in question concerned events in 1995-1996. Nowhere in the Application proper or in the annex to it was there any reference to Mr. Diallo's arrest and detention in 1988-1989.[330] The Court held the new claim to be inadmissible because it was hard to see how allegations concerning arrest and detention measures, taken at a different time and in different circumstances, could be regarded as "implicit" in an Application concerned with events in 1995-1996.[331] The ICJ also saw no possibility of finding that the new claim "arises directly out of the question which is the subject-matter of the Application". The Court stated that it "would be particularly odd to regard the claim concerning the events in 1988-1989 as 'arising directly' out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed".[332]

132. The ITLOS has generally followed the jurisprudence of the ICJ on the question of new claims.[333] In the *M/V "Louisa"* case, Saint Vincent and the Grenadines requested the Tribunal in its Application to adjudge and declare that the "Respondent has violated Articles 73, 87, 226, 245 and 303 of the Convention".[334] Later in the proceedings, Saint Vincent and the Grenadines requested the Tribunal to declare that "the Respondent has violated Articles 73(2) and (4), 87, 226, 227, *300*, and 303 of the Convention".[335] The Tribunal considered that "this reliance on article 300 of the Convention generated a new

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329 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, 639, 647, para.12 (italics added).

330 Ibid., 653, para.28.

331 Ibid., 657, para.43.

332 Ibid., 658-659, para.46.

333 See e.g. Gudmundur Eiriksson, The International Tribunal for the Law of the Sea (2000), 156-157. But see also M/V "Saiga" (No.2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, 24, 38, para.33.

334 M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Application of Saint Vincent and the Grenadines, 23 November 2010, 2.

335 See M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, 4, 20, para.43 (italics added).

claim in comparison to the claims presented in the Application; it is not included in the original claim."[336] The Tribunal observed that

> it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it [...] while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.[337]

The Tribunal consequently ruled that "article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines."[338]

133. In the Philippines' Notification and Statement of Claim no mention is made of the protection and preservation of the marine environment at Scarborough Shoal, Second Thomas Shoal and Mischief Reef, either as an independent claim or in relation to the claims concerning the Philippines' sovereign rights and jurisdiction over its alleged entitlements in the South China Sea. The submissions concerning the marine environment set out in the Memorial are presented in the form of distinct submissions – Submissions No.11 and 12(b) – and, from a formal point of view, are new claims in relation to the claims presented in the Statement of Claim.

134. The fact that claims are formally new ones, however, is not decisive. The claims in question must not have been included, as a matter of substance, in the original claims as formulated in the Statement of Claim.[339] Submissions which employ general terms such as "activities" do not automatically cover all possible activities of a State but are limited to the activities mentioned in the Statement of Claim. There was, however, no mention either of China's alleged toleration, encouragement of and failure to prevent environmentally destructive fishing practices at Scarborough Shoal and Second Thomas Shoal or its alleged failure to protect and preserve the ecosystems of coral reefs and the biodiversity and living resources sustained by that environment. The claims relating to China's alleged violation of its obligations to protect and preserve the marine environment at the three maritime features were not included in the

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336 Ibid., 44 para.142.

337 Ibid., 44, paras.142, 143.

338 Ibid., 45, para.150. See also ibid., 88, para.112 (sep. op. Ndiaye). For the opposite view, see ibid., 126-129, paras. 9-16 (sep. op. Kateka).

339 Cf. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, 240, 265-266, para.65.

original claim. These environmental claims were neither “implicit” in the Statement of Claim, nor did their “arise directly” out of the dispute over the maritime jurisdiction of the Philippines in the South China Sea which had been identified both by the Philippines and the Tribunal as the subject matter of the dispute set out in the Statement of Claim.[340] As the ICJ pointed out, it would be particularly odd to regard a new claim as “arising directly” out of the issue forming the subject-matter of the Statement of Claim if the claim concerns facts, that were perfectly well known to the applicant on the date the proceedings were instituted.[341]

135. The Philippines’ new environmental claims are not a case of an initial claim simply being developed further by drawing out the implications of an existing claim. These claims are materially different from the claims set out in the Notification and Statement of Claim and have, at least in part, transformed the subject of the dispute. Consequently, the Tribunal should have declared the Philippines’ new submissions concerning the marine environment inadmissible out of concern for the fundamental principles of the due and proper administration of justice and, in particular, the principle of legal certainty.

2. Hypothetical disputes

136. It is not the function of international courts and tribunals to decide purely hypothetical disputes. The ICJ stated in the *Northern Cameroons* case:

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. […]
>
> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at

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340 For examples of submissions implicit in or arising directly out of the question which forms the subject matter of the application, see Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, ICJ Reports 1962, 6, 36; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974, 175, 203, para.72; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, 3, 16, para.36; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, 659, 697, para.114.

341 Cf. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, 639, 658-659, para.46.

> the time of the adjudication *an actual controversy* involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.[342]

The dispute between the parties must be "a real one". A claim concerning a hypothetical question or situation is not a "dispute" and must be declared inadmissible.[343]

137. China argued that "[i]f the sovereignty over a maritime feature is undecided, there cannot be a *concrete and real dispute* for arbitration as to whether or not the maritime claims of a State based on such a feature are compatible with the Convention."[344] It is therefore to be examined whether the adjudication sought by the Philippines is one which its judicial function permits the Tribunal to give.

a. Assumption of Chinese sovereignty over Scarborough Shoal

138. In Submission No.10 the Philippines requested the Tribunal to adjudge and declare that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal."[345] For the purpose of the proceedings, the Philippines tactically "assumed" that Scarborough Shoal is under Chinese sovereignty,[346] in order to claim that China violated the Philippines' "traditional fishing rights" in

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[342] Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1963, 15, 29, 33-34 (italics added). See also ibid., 41, 64, para.59 (sep. op. Koo); 97, 98-99 (sep. op. Fitzmaurice). See further Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia, Preliminary Objections, Judgment, 17 March 2016, para.123.

[343] Cf. M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, 57, 73, para.56 (sep. op. Ndiaye).

[344] China, Position Paper, para.17 (italics added).

[345] SCS Arbitration, Award, para.101 (Submission No.10).

[346] See SCS Arbitration, Hearing, Day 2, 8 July 2015, 117: 17-19: "Submissions 10 and 11 assume that Scarborough Shoal is – quod non, and only for the purpose of these proceedings – under Chinese sovereignty". See also ibid., Day 1, 7 July 2015, 98: 12-14; ibid., Day 2, 8 July 2015, 40: 1-6. See also ibid., Award, paras.143, 153.

the (Chinese) territorial sea of Scarborough Shoal.[347] The Tribunal adopted the Philippines' scenario and approached the claim on "the *premise* [...] that China is correct in its assertion of sovereignty over Scarborough Shoal".[348]

139. The Philippines presented the Tribunal, however, with a purely hypothetical question. Outside the courtroom the Philippines, like China, has claimed since at least the late 1970s sovereignty over Scarborough Shoal.[349] Even while the proceedings were going on, the Philippines continued to claim Scarborough Shoal as "an integral part of the Philippine territory". For example, in a lecture on the "West Philippine Sea issue" on 10 March 2014, Philippine Secretary of Foreign Affairs Albert F del Rosario stated:

> Now we go back to our question, what is the extent of Philippine territory? It is the Philippine archipelago, other lands or islands which we own and govern, such as the Kalayaan Island Group [Spratly Group of Islands] and Bajo de Masinloc [Panatag or Scarborough Shoal], and also include our maritime zones that we just discussed. All these comprise Philippine territory.[350]

This is the same Foreign Secretary who at the same time made arguments concerning "China's interference with its [the Philippines'] fishing rights in the vicinity of Scarborough Shoal."[351]

140. During a debate in the Philippine House of Representatives on 27 August 2014 Representative Acedillo stated: "Based on Republic Act No.9522 or the Baselines Law of 2009, the Philippine territory is composed of the main archipelago and a regime of islands that include the KIG and the Scarborough

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347 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 8: 23-25; 23: 8-12; 59: 24; 99: 8-10; ibid., Day 2, 8 July 2015, 86: 22; and 142: 2-3; ibid., Day 3, 13 July 2015, 15: 18.

348 SCS Arbitration, Award, para.153 (italics added).

349 See Republic of the Philippines, Department of Foreign Affairs, Philippine Position on Bajo de Masinloc (Scarborough Shoal) and the Waters Within its Vicinity, 12 April 2012 (www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/). See also Philippine Supreme Court, Magallona v. Ermita, G.R. No.187167, 16 July 2011, ILDC 2758 (PH 2011), para.28: "the Philippines has consistently claimed sovereignty over [...] the Scarborough Shoal for several decades". See further SCS Arbitration, Hearing, Day 1, 7 July 2015, 44: 1-2; ibid., Day 2, 8 July 2015, 30 n.36.

350 Secretary del Rosario delivers lecture on West Philippine Sea issue, 12 March 2014 (www.gov.ph/ 2014/03/12/secretary-del-rosario-delivers-lecture-on-west-philippine-sea-issue/).

351 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 8: 23-25.

Shoal."[352] In December 2014, the Republic of the Philippines Department of Environment and National Resources, National Mapping and Resources Authority ("NAMIRA"), launched a book entitled "Bajo de Masinloc (Scarborough Shoal): Maps and Documents". At the launch of the book, NAMRIA Administrator Tiangco said: "It is evident then that since time immemorial, Bajo de Masinloc has been regarded as a parcel of the Philippine national territory".[353] The Philippines' Bulletin on the hearings on the merits in the *SCS Arbitration* is also most revealing in this respect. While in the courtroom the Philippines presented "a circa 1784 map" showing Scarborough Shoal as evidence for "the long use of Scarborough Shoal by Filipino fishermen",[354] the Bulletin of the Deputy Presidential Spokesperson on Day 2 of the Hearing on the Merits stated that "A map from 1784 was presented to prove that Bajo de Masinloc has always been part of the Philippines."[355]

141. At the time of the adjudication the "actual controversy" between the parties was not about Philippine traditional fishing rights in the Chinese territorial sea around Scarborough Shoal but about territorial sovereignty over that maritime feature.[356] If it turns out that the Philippines does indeed have sovereignty over Scarborough Shoal, as it claims outside the courtroom, any finding by the Tribunal that the China violated Philippine traditional fishing rights will be without legal basis and will not be in line with reality. In that case, China will have violated the Philippines' sovereignty but not its traditional fishing rights. If the Tribunal rules in the Philippines' favour on Submission No.10, it seems highly unlikely that the Philippines will thereafter argue in its relations with China, or generally, that China interfered with the Philippines' traditional fishing rights in a Chinese territorial sea around Scarborough Shoal.

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352 Congressional Record, 16th Congress, Second Regular Session, House of Representatives, Vol 1, No.10a, 27 August 2014, 8, (www.congress.gov.ph/download/congrec/16th/2nd/16C_2RS-10a-082714.pdf).

353 NAMRIA and UP launch Phl's 1st ever book on Bajo de Masinloc, Republic of the Philippines Department of Environment and National Resources, National Mapping and Resources Authority, Newscoop, vol. XXVI, No.75, 1 December 2014, (www.namria.gov.ph/Downloads/Publications/NewsScoop/2014decNo75.pdf).

354 SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, 175: 5-14.

355 Bulletin No.3 of Deputy Presidential Spokesperson Abigail Valte on Day 2 of the Hearing on the Merits, Released at 9:50pm (Netherlands time), on 25 November 2015 (www.gov.ph/2015/11/26/bulletin-no-3-day-2-of-the-hearing-on-the-merits/).

356 Cf. China, Position Paper, para.49: "The issue of Huangyandao [Scarborough Shoal] is an issue of territorial sovereignty".

Such a claim would implicitly recognize Chinese sovereignty over Scarborough Shoal. This shows that the Tribunal's ruling on Submission No.10 would not have any practical consequences.

142. In Submission No.10 the Philippines is asking for a declaratory award. The purpose of such an award is "to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[357] Any award that is based on a hypothesis which is not accepted by the applicant outside of the proceedings is devoid of purpose as it can never remove uncertainty from the legal relations between the parties. It is also difficult to see how such an award could ever acquire the authority of *res judicata*.[358]

143. The Tribunal is the guardian of its judicial integrity and must discharge the duty to safeguard its judicial function. Any adjudication devoid of purpose is outside the judicial function of the Tribunal. In cases where it is evident – as in the present case – that the judicial function cannot be engaged by a submission and where the Tribunal's judicial function is, in fact, abused in order "to provide a basis for political action",[359] the submission must be declared inadmissible.[360]

b. Assumption of Chinese sovereignty over all islands in the Spratly Islands

144. In Submissions No.5, 8 and 9 the Philippines requested the Tribunal to declare that Mischief Reef and Second Thomas Shoal "are part of the exclusive economic zone and continental shelf of the Philippines", or that certain Chinese activities interfered with the Philippines' sovereign rights in "its exclusive economic zone and continental shelf". If only one maritime feature in the Spratlys under Chinese (or any other State's) sovereignty was found to be an island within the meaning of Article 121 of the Convention, and therefore entitled to an EEZ or continental shelf overlapping those generated by the Philippine archipelago, the Tribunal could not rule on these submissions without first determining the geographical scope of the Philippine EEZ and continental shelf and thus engaging in a delimitation of overlapping entitlements.

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357 Cf. Interpretation of Judgments Nos.7 and 8 concerning the Case of the Factory at Chorzów, PCIJ, Series A, No.13, 4, 20.

358 See UNCLOS, Annex VII, Article 11.

359 Cf. Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1963, 15, 37.

360 Cf, ibid., 38.

145. Article 298(1)(a)(i) of UNCLOS provides that a State Party to the Convention may at any time (prior to a dispute) make a declaration excepting from the compulsory jurisdiction under section of Part XV disputes relating, inter alia, to "sea boundary delimitation". China made use of this opportunity when, on 25 August 2006, it deposited a declaration with the Secretary-General of the United Nations stating that

> 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.[361]

China expressly relied on this declaration both when commenting on the Philippines' institution of arbitration proceedings,[362] and in its Position Paper of December 2014.[363] As sea boundary delimitation is excluded from its jurisdiction the Tribunal could only rule on Submissions No.5, 8 and 9 if it determined that China could not possess any potentially overlapping entitlement in the Spratlys.[364]

146. The question of potentially overlapping Chinese maritime entitlements depends on Chinese sovereignty over the islands in the Spratlys. Sovereignty over the maritime features in the South China Sea is, however, disputed between several States, including China, the Philippines and Viet Nam. In order to determine whether there are any overlapping Chinese maritime entitlements the Tribunal would have had to determine first which islands are under Chinese sovereignty. As questions of territorial sovereignty are outside the Tribunal's jurisdiction,[365] the Tribunal could not have done this and, consequently, could not have ruled on Submissions No.5, 8 and 9. The Philippines tried to avoid the question of territorial sovereignty by "assuming", for the purpose of the proceedings, that China has sovereignty over all the insular features in the Spratly Islands.[366] This again shows that the question at the core of the disputes

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361 United Nations, Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin No.62 (2006), 14.

362 See e.g. PRC, MFA, Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea, 26 April 2013 (www.fmprc.gov.cn/eng/xwfw/s2510/2535/t1035577.shtml).

363 China, Position Paper, paras.58, 70, 74, 77, 79, and 86.

364 See SCS Arbitration, Award, para.157.

365 See above section II. 2.b.(1).

366 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 48: 6-7: "assuming, quod

between Philippines is territorial sovereignty.

147. By entertaining the Philippines' premise of Chinese sovereignty over all maritime features in the Spratly Islands, the Tribunal was faced with

> a dispute concerning the status *of every maritime feature claimed by China within 200 nautical miles of Mischief Reef and Second Thomas Shoal*, at least to the extent of whether such features are islands capable of generating an entitlement to an exclusive economic zone and to a continental shelf. Only if no such overlapping entitlement exists [...] would the Tribunal be able to grant the relief requested in Submission No.5.[367]

The same is true for Submissions No.8 and 9.[368]

148. By "putting the status cart before the sovereignty horse",[369] the Tribunal saddled itself – at the merits stage – with the question of determining the status of *all* insular features within the Spratly Islands, irrespective of whether or not such features are currently occupied by China.[370] As the Philippines pointed out, there are more than 750 features in the Spratly Islands and all are claimed by China.[371] The Philippines considered it to be 'unmanageable' to determine the nature of so many features.[372] Even if, in practice, the task is limited to the main insular features such as Taiping (Itu Aba) Island, Zhongye (Thitu) Island and several other islands this approach has considerably transformed the nature and expanded the subject matter of the disputes between the parties.

149. The approach of expanding the status disputes in order to circumvent

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non, that for purposes of these hearings all of the Spratlys belong to China"; ibid. 98: 9-14: "The Philippines' claims pertaining to China's unlawful conduct are premised on China's maximum permissible entitlement under the Convention, even assuming that it, quod non, has sovereignty over all disputed insular features"; ibid., Day 2, 8 July 2015, 79: 7-17: "If so, the issue of which state has sovereignty over the island is not before the Tribunal; for purposes of these proceedings it is assumed, quod non, that China is that state". See also ibid., Award, paras. 143, 145, 153.

367 SCS Arbitration, Award, para.172 (italics added).

368 See SCS Arbitration, Award, paras.154, 369, 402.

369 The apt expression was coined by Chris Whomersley, former Deputy Legal Adviser for the British Foreign and Commonwealth Office; see Chris Whomersley, Philippines v. China: Putting the Status Cart Before the Sovereignty Horse, 19 January 2016 (chinaus-icas.org/materials/philippines-v-china-putting-status-cart-sovereignty-horse/).

370 See SCS Arbitration, Award, paras.402, 154.

371 See SCS Arbitration, Hearing, Day 1, 7 July 2015, 87: 5-6.

372 Ibid., 87: 11-13.

the real – sovereignty – dispute seems difficult to reconcile with Article 10(1) of the Tribunal's Rules of Procedure which provides that

> The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings so as to *avoid unnecessary delay* and expense and to provide a fair and *efficient process* for resolving the Parties' dispute.[373]

150. Expanding the subject matter of the dispute to several insular features which were neither part of the submissions, nor mentioned in the Notification and Statement of Claim, and joining the determination of their status to the merits is not efficient and causes unnecessary delay. This is even more the case, as any finding by the Tribunal on the status and maritime entitlements of these features based on the assumption of Chinese sovereignty will be removed from reality and thus devoid of purpose. If it turned out that the insular features generating an overlapping maritime entitlement were in fact under the sovereignty of the Philippines or a third State (e.g. Viet Nam), no question of maritime delimitation between China and the Philippines would arise. If the Philippines did enjoy sovereignty over the features, the Tribunal would have wrongly declined jurisdiction; if a third state enjoyed sovereignty, the Tribunal would have declined jurisdiction for the wrong reasons. In the latter case, the Tribunal would have had to decline jurisdiction on the ground that an indispensable third party was not before the Tribunal as any finding that "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines", or any finding that Chinese activities took place in the Philippines' EEZ or continental shelf would necessarily affect the rights and interests of the third State. Against this background, the Tribunal should have declared Submissions No.5, 8 and 9 inadmissible in order to safeguard its judicial function.

IV. Procedural questions

1. Deferment of unclear submissions

151. Submissions have been defined as the 'precise and concise' summary of the claims.[374] The term "submissions" reflects the French procedural notion of

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[373] SCS Arbitration, Rules of Procedure, 27 August 2013, Article 10(1) (italics added).

[374] Jules Basdevant, Quelques mots sur les "conclusions" en procédure internationale, in: Scritti di Diritto Internazionale in onore di Tomaso Perassi, Volume I (1957), 173, 177. See also Omar Aslaoui, Les Conclusions et leurs

conclusions. The *Dictionnaire de la terminologie du droit international* defines the term "conclusions" as a A[t]erm of procedure designating the precise formulation of what a party in litigation before an international tribunal is requesting that tribunal to decideA.[375] Shabtai Rosenne wrote:

> A degree of solemnity attaches to the final submissions, and this emphasizes their importance as the final definition of the precise issue on which the Court's decision is required. They are the ultimate precision of the dispute and the formulation of what each party wants the Court to state in the operative clause of its decision.[376]

The final submissions have been described as "the single most important part of [a party's] presentation before the Court".[377]

152. The Philippines Submission No.15 raises the question of how to deal with an unclear or imprecise submission. In that Submission, the Philippines requested the Tribunal to adjudge and declare that "China shall desist from further unlawful claims and activities."[378] During the oral proceedings the Philippines asserted that the Tribunal's "jurisdiction is clear in regard to *all* of the Philippines' submissions",[379] and that "each and every one of the submissions is indeed the *subject of a legal dispute*".[380] At the close of the Hearing on Jurisdiction and Admissibility on 13 July 2015, the Philippines asked "the Tribunal to declare that the claims brought by the Philippines, as reflected in its submissions […] are entirely within its jurisdiction and are fully admissible."[381] The Philippines emphasized that all issues of jurisdiction argued during the Hearing "could and should be resolved at this stage of the proceedings."[382]

153. The Tribunal initially stated in its Award that it was "satisfied that disputes [...] exist with respect to the matters raised by the Philippines in *all* of

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Modifications en Procédure Judiciaire Internationale (1963), 38.

375 Union Académique Internationale, Dictionnaire de la terminologie du droit international (1960), 141; as quoted in Shabtai Rosenne, The Law and Practice of the International Court, 1920-2005, Volume III: Procedure (2006), 1226. See also Jean Salmon, Dictionnaire de droit international public (2001), 225.

376 Rosenne (above n.375), 1336. See also ibid., 1227.

377 Juan José Quintana, Litigation at the International Court of Justice: Practice and Procedure (2015), 365.

378 SCS Arbitration, Award, para.101 (Submission No.15).

379 SCS Arbitration, Hearing, Day 1, 7 July 2015, 58: 3-5.

380 SCS Arbitration, Award, para.147; ibid., Day 2, 8 July 2015, 133: 17-18.

381 SCS Arbitration, Award, para.102; ibid., Day 3, 13 July 2015, 80: 9-15.

382 SCS Arbitration, Hearing, Day 3, 13 July 2015, 28: 3-4. See also ibid., Award, para.388.

its Submissions in these proceedings".[383] This was later reversed in the Tribunal's conclusions on its jurisdiction. The relevant paragraph of the conclusions on Submission No.15 reads as follows:

> In the Tribunal's view, the claims and activities to which this Submission could potentially relate are unclear from the Philippines pleadings to date. The Tribunal is therefore *presently unable to determine whether there exists a dispute* between the Parties concerning the interpretation or application of the Convention or to assess the scope of the Tribunal's jurisdiction in this respect. **The Tribunal therefore directs the Philippines to *clarify the content and narrow the scope of its Submission* No. 15. The Tribunal reserves the question of its jurisdiction in relation to Submission No. 15 for consideration in conjunction with the merits of the Philippines' claims.**[384]

The Tribunal was unable to determine whether there exists a dispute between the parties because the claims and activities to which Submission No.15 relates were unclear. This is a startling finding, considering that the Philippines had ample opportunity to clarify the content and scope of this Submission and to establish the existence of a dispute.

154. In this context, it is revealing to recall the procedural history of the arbitration. In the first Procedural Order, dated 27 August 2013, the Tribunal directed the Philippines "to *fully address all issues*, including matters relating to the jurisdiction of the Arbitral Tribunal, the admissibility of the Philippines' claim, as well as the merits of the dispute."[385] On 30 March 2014, the Philippines submitted its Memorial, addressing matters relating to the jurisdiction of the Arbitral Tribunal, the admissibility of the Philippines' claims as well as the merits of the dispute.[386] The Memorial consisted of 10 volumes. Volume I, which contained the Philippines' analysis of the applicable law and the relevant evidence, was 270 pages in length. Volumes II though X contained the documentary evidence and maps that support the Philippines' claims.

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383 SCS Arbitration, Award, para.178 (italics added).

384 SCS Arbitration, Award, para.412 (bold in original; italics added). See also ibid., para.413.I.

385 Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable, PCA Press Release, 27 August 2013 (italics added). See also SCS Arbitration, Award, para.39.

386 See PCA, Arbitration between the Republic of the Philippines and the People's Republic of China, Press Releases of 3 June 2014 and 17 December 2014.

Volumes II through X consisted of more than 3,700 pages, making for a total submission of nearly 4,000 pages. According to Philippine Foreign Minister del Rosario the Memorial

> demonstrates that the Arbitral Tribunal has jurisdiction over all of the claims made by the Philippines' in its Statement of Claim, and that every claim is meritorious. It sets out the specific relief sought by the Philippines in regard to each of its claims, and shows why it is entitled to such relief.[387]

One of the claims made in the Philippines' Statement of Claim was, of course, that "China desist from these unlawful activities."[388] This claim later became Submission No.15.

155. When China did not submit a Counter-Memorial, the Tribunal, in accordance with Article 25(2) of its Rules of Procedure,[389] requested further written argument and information from the Philippines on 26 questions relating to the Tribunal's jurisdiction as well as the admissibility and the merits of the Philippines' claims.[390] In response to the Tribunal's request, on 16 March 2015 the Philippines filed a Supplemental Written Submission which consisted of 12 volumes totalling over 3,000 pages. Volume I consisted of 201 pages of written argument. On submitting the documents, the Philippines

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[387] See Philippines, Department of Foreign Affairs, Statement of Secretary Albert F. del Rosario on the Submission of the Philippines' Memorial to The Arbitral Tribunal, 30 March 2014 (www.dfa.gov.ph/).

[388] SCS Arbitration, Notification and Statement of Claim, 22 January 2013, para.41 (bullet point 13).

[389] Article 25(2) of the Rules of Procedure provides: "In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation."

[390] See SCS Arbitration, Procedural Order No.3, Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure, 16 December 2014. See also Philippine Mission to the United Nations, Note Verbale No.72/2015, dated 2 February 2015, addressed to Permanent Missions Accredited to the United Nations; and PCA, Arbitration between the Republic of the Philippines and the People's Republic of China, Press Release, 17 December 2014; SCS Arbitration, Award, paras.59, 120.

declared that it "is confident that its answers to the Tribunal's questions leave no doubt that the Tribunal has jurisdiction over the case".[391]

156. On 23 June 2015, the Tribunal sent a letter to the Philippines with guidance as to issues to address in connection with the hearing,[392] and provided the Philippines with an Annex of 38 issues set out in eight different categories, listed A to H, which the Philippines may wish to address at the July hearing.[393] In Issue A1 the Tribunal expressly invited the Philippines "to address whether there 'exists a legal dispute between the Philippines and China' with respect to each of the Philippines' submissions" set out in its Memorial, which included Submission No.15.[394] Between 7 and 13 July 2015, the Philippines had the opportunity to present its case orally to the Tribunal. The Philippines devoted considerable time to show that there existed legal disputes between the parties and submitted to the Tribunal "a document which identifies each of the 15 submissions and directs you to each place in the oral arguments where they have been addressed."[395] The Philippines also confidently declared: "we are very clear that each and every one of the submissions is indeed the subject of a legal dispute".[396] On 10 July 2015 the Tribunal put six questions to the Philippines to be addressed in the Second Round of the hearing. In question 1 the Tribunal invited the Philippines "to direct the Arbitral Tribunal to the sources relied upon for ascertaining China's position with respect to each of the Philippines' specific submissions in the context of establishing the existence of a legal dispute."[397] In response to this request, the Philippines created a document which it submitted to the Tribunal on the final day of the oral hearing.[398] In that document the Philippines presented "a list of the documentary and other sources in the written pleadings, and in the public record, upon which the Philippines has relied for ascertaining China's positions opposing those of the Philippines, and establishing the existence of legal

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391 See Philippines, Department of Foreign Affairs, Statement on the Philippines' Supplemental Submission to the Arbitral Tribunal, 17 March 2015 (www.dfa.gov.ph/). See also SCS Arbitration, Hearing, Day 2, 8 July 2015, 130: 19-23.

392 See SCS Arbitration, Award, paras.77, 120. See also PCA, Arbitration between the Republic of the Philippines and the People's Republic of China, Press Releases of 13 July 2015, 2.

393 SCS Arbitration, Hearing, Day 2, 8 July 2015, 131: 4-11 and 20-21.

394 SCS Arbitration, Hearing, Day 2, 8 July 2015, 133: 8-12.

395 SCS Arbitration, Hearing, Day 2, 8 July 2015, 145: 6-8.

396 SCS Arbitration, Hearing, Day 2, 8 July 2015, 133: 16-18.

397 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 4: 3-7.

398 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 4: 9-11.

disputes."[399] At the end of the hearing, the Philippines was given a further opportunity to submit by 23 July 2015 "written answers to any of the arbitrators' questions, or to amplify their oral answers in writing", including their answers on the existence of a legal dispute,[400] which the Philippines did. The Tribunal could not have given the Philippines any more opportunities to clarify the content and scope of its Submission No.15.

157. Nevertheless, in its Award on Jurisdiction and Admissibility the Tribunal directed the Philippines "to clarify the content and narrow the scope of its Submission No.15" at the merits stage of the proceedings. At the end of the hearing on the merits, the Philippines presented a new Submission No.15 which reads:

> China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.[401]

158. Irrespective of whether this restated Submission No.15 will allow the Tribunal to determine the existence of a dispute, the question remains whether the Tribunal was allowed, in the first instance, to direct the Philippines "to clarify the content and narrow the scope" of an inadequate submission. This seems to be the first case in which an international tribunal has allowed a party in a decision on jurisdiction and admissibility to rectify a defective submission.

159. In the *Fisheries Jurisdiction* case, the ICJ was faced with an "abstract" submission by the applicant.[402] Germany reserved its right to claim full compensation from Iceland for the unlawful interference by Icelandic patrol boats with German fishing vessels and requested the Court to adjudge and declare that Iceland "is, in principle, responsible for the damage inflicted on German fishing vessels".[403] The ICJ stated that the "manner of presentation of

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399 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 4: 20-25.

400 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 81: 22-24. See also PCA, Arbitration between the Republic of the Philippines and the People's Republic of China, Press Releases of 13 July 2015, 5.

401 SCS Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 4, 30 November 2015, 203: 24-26, and 204: 1-5. See also ibid., Day 3, 26 November 2015, 90: 15-26, and 91: 1-7.

402 Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974, 175, 204, para.74.

403 Ibid., 203, para.73.

this claim raises the question whether the Court is in a position to pronounce on a submission maintained in such an abstract form." The submission did not refer to specific acts of interference but asked for "a declaration of principle" that Iceland was under an obligation to make compensation in respect of all unlawful acts of interference with German fishing vessels.[404] The ICJ held that "it would not be appropriate for the Court", in a case where the respondent was absent,

> to take the initiative of requesting specific information and evidence concerning the indemnity which, in the view of the Applicant, would correspond to each incident and each head of damage. In these circumstances, the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence. Accordingly, the fourth *submission* of the Federal Republic of Germany *as presented to the Court cannot be acceded to*.[405]

The ICJ did not provide Germany with another opportunity to specify its fourth submission but dismissed the submission altogether. One reason for this approach is that the Court must "reply to the questions as stated in the final submissions of the parties."[406] There is thus no room either for the Court to reformulate an inadequate submission itself,[407] or to allow the applicant to do so.[408] Another reason is that the clarification of the content and scope of a submission may require the introduction of new evidence after the closure of the written proceedings.[409]

160. It has been said that one of the conditions of admissibility is that "a

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404 Ibid., 203-204, para.74.

405 Ibid., 205, para.76.

406 Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Judgment, ICJ Reports 1950, 395, 402. See also Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, ICJ Reports 1960, 6, 27; and Speech by HE Judge Rosalyn Higgins, President of the ICJ, to the Sixth Committee of the General Assembly, 27 October 2006 (www.icj-cij.org/presscom/files/1/13901.pdf).

407 Cf. Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, 457, 466, para.30; Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974, 253, 262, para.29. See also Quintana (above n.377), 369.

408 Cf. Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, ICJ Reports 1960, 76, 76-77 (diss. op. Armand-Ugon).

409 See ICJ, Rules of Court, Article 56.

submission must express a dispute".[410] Only submissions that express a dispute can be considered on their merits.[411] If the Tribunal was "unable to determine whether there exists a dispute between the Parties" it should have dismissed Submission No.15 as inadmissible.

161. The Tribunal's decision to provide the Philippines with another opportunity to make its case with regard to Submission No.15 is also contrary to the Tribunal's own Rules of Procedure, which provides in Article 20(3):

> The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

Once the Tribunal had decided to treat China's Position Paper and certain communications from China as constituting, in effect, "a plea concerning jurisdiction",[412] the Tribunal was under an obligation to rule on this plea as a preliminary question unless it determined that the objection to its jurisdiction did not possess an exclusively preliminary character. There is no third option. The Tribunal did not rule that there was a Chinese jurisdictional objection to Submission No.15 that did not possess an exclusively preliminary character and that the Tribunal, for that reason, had to rule on that objection in conjunction with the merits. On the contrary, the Tribunal found that it was unable to determine whether there existed a dispute. Whether there exists a dispute depends on whether a claim by one party is positively opposed by the other.[413] The existence of a dispute is thus clearly an issue that can be approached as a preliminary issue in the proceedings.

162. The decision to direct the Philippines to clarify the content and narrow the scope of its Submission No.15 is also contrary to Article 10(1) of the Tribunal's Rules of Procedure. This rule requires the Tribunal to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute".

163. The requirements of judicial integrity set limits to the kinds of actions the Tribunal can take. The absence of the respondent does not absolve the applicant from meeting the burden of proof with regard to the existence of a

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410 Aslaoui (above n.374), 38 : "Une conclusion doit exprimer un différend". See also ibid., 38-44.

411 Cf. ibid., 41.

412 SCS Arbitration, Procedural Order No.4, dated 21 April 2015. See also ibid., Award, para.15.

413 See above section II.1.a.

dispute at the proper stage of the proceedings.[414] Giving the Philippines a second bite at the apple by allowing it to rectify a defective final submission at the merits stage leaves the impression that the Tribunal was acting in a partisan way and thereby violating the due and proper administration of justice.

2. Conditional findings of jurisdiction

164. In Submissions No.10 and No.13 the Philippines asked the Tribunal to adjudge and declare that "China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities *at* Scarborough Shoal",[415] and that "China has breached its obligations under the Convention 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".[416] The Philippines argued that the Chinese activity in both cases was a "law enforcement activity" which raised the question of a preliminary objection based on Article 298(1)(b) of the Convention which allowed China to exclude from the Tribunal's jurisdiction certain "law enforcement activities in regard to the exercise of sovereign rights and jurisdiction" in its EEZ.[417]

165. The Tribunal noted that its jurisdiction to decide on the merits of Submissions No.10 and No.13 "may depend on the maritime zone in which alleged Chinese law enforcement activities in fact took place",[418] and that no limitation to its jurisdiction existed with regard to law enforcement activities in the territorial sea.[419] In its conclusions on jurisdiction the Tribunal therefore stated:

> Accordingly, *to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal*, the Tribunal concludes that it has jurisdiction to address the matters raised in the Philippines' Submission No. 10 [13].[420]

166. The Tribunal's Rules of Procedure do not know of "conditional" or "contingent" findings of jurisdiction. According to Article 20(3) of its Rules of

414 See SCS Arbitration, Rules of Procedure, 27 August 2013, Article 22(1).
415 SCS Arbitration, Award, para.101 (Submission No 10) (italics added).
416 SCS Arbitration, Award, para.101 (Submission No 13) (italics added).
417 See SCS Arbitration, Hearing, Day 2, 8 July 2015, 86: 11-22; 89: 15-26, and 90: 1-9.
418 SCS Arbitration, Award, para.395.
419 See SCS Arbitration, Award, para.410.
420 SCS Arbitration, Award, paras.407, 410.

Procedure, the Tribunal must rule on any plea concerning jurisdiction as a preliminary question, unless it determines that any objection to jurisdiction does not possess an exclusively preliminary character. There is no third option. This provision is similar to Rule 41(4) of the Arbitration Rules of the International Centre for the Settlement of Investment Disputes ("ICSID") which provides that the Tribunal "may deal with the objection [to the Tribunal's jurisdiction] as a preliminary question or join it to the merits of the dispute."[421] In an ICSID investment arbitration where it was suggested to the Tribunal "to declare its jurisdiction conditionally", the Tribunal stated that "Rule 41 of the ICSID Arbitration Rules does not provide for deciding on a 'conditional' jurisdiction of the Centre. All the Tribunal could do, under paragraph 4 of that Rule, is to join the Respondent's preliminary objections to the merits."[422] Under Article 20(3) of the Tribunal's Rules of Procedure this is, however, only possible, if the jurisdictional question is "not of an exclusively preliminary nature (meaning that the Tribunal cannot decide them without also examining the merits)".[423]

167. At the preliminary objection stage of the proceedings, the Tribunal must not attempt to examine the claim itself in any detail, but must only be satisfied that the claim, as stated by the applicant, is within its jurisdictional mandate.[424] In other words, the Tribunal is not required to consider whether the claims are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant's allegations were proven correct, the Tribunal would have jurisdiction to consider them.[425] Rather than making a conditional finding of jurisdiction the Tribunal should have determined whether or not the Philippines' claims are covered by the exception to jurisdiction in Article 298(1)(b). If the Philippines had actually claimed that specific interferences with Philippine fishing activities occurred in the territorial sea of Scarborough Shoal, the Tribunal should have found that it has jurisdiction. Whether or not and, if so, where these interferences in fact occurred would have been a question for the merits. The problem for the

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421 ICSID, Rules of Procedure for Arbitration Proceedings, as amended, 10 April 2006, reproduced in ICSID, ICSID Convention, Regulations and Rules (2006), 99.

422 EI Paso Energy International Company v. The Argentine Republic, ICSID Case No.ARB/03/IS, Decision on Jurisdiction of 27 April 2007, para.45.

423 SCS Arbitration, Award, para.24.

424 Cf. Chagos MPA Arbitration, Award, para.296; Amco v. Indonesia, Decision on Jurisdiction of 25 September 1983, ICSID case No. ARB 8111, ICSID Reports, Vol 1 (1993), 389, 405.

425 Cf. Siemens AG v. Argentina, Decision on Jurisdiction of 3 August 2004, ICSID case No. ARB/02/8, 44 ILM (2005) 137, 167, para.180.

Tribunal may have been that the Philippines merely stated that this "legal dispute is *premised* on [the] fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal",[426] but did not put forward any specific instances of interferences. In this latter case, the Tribunal should have declined jurisdiction as it could not have satisfied itself that the Philippines claim was, in fact, within its jurisdictional mandate.

3. Production of new documents

168. During the oral hearing from 7 to 13 July 2015, the Philippines submitted several new documents that did not form part of the case file.[427] For example, on Sunday, 12 July 2015, the Philippines submitted a Note Verbale from the Chinese Embassy in Manila to the Department of Foreign Affairs of the Philippines, dated 6 July 2015,[428] which became Annex 580 of the case file and was referred to extensively by the Philippines during the last day of the hearing.[429] It was also referenced by the Tribunal in its Award on Jurisdiction and Admissibility.[430]

169. At the last day of the oral hearing, in the morning of Monday, 13 July 2015, the President of the Tribunal simply "note[d] the receipt of these documents",[431] but the Tribunal never took any decision on the admissibility of these documents. The documents were delivered to the Chinese Embassy in The Hague,[432] but unlike with regard to other matters, the Tribunal did not expressly record that it "sought and received no comments from China".[433]

170. Article 22(3) of the Tribunal's Rules of Procedure provides that, "[i]n

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426 SCS Arbitration, Award, para.147; ibid., Hearing, Day 2, 8 July 2015, 141: 19-22. See also ibid., Award, para.407: "The Philippines has clarified that these activities occur within the 12 nautical mile territorial sea".

427 At least four new documents were introduced on 13 July 2015; see SCS Arbitration, Hearing, Day 3, 13 July 2015, 2: 11-22 (President Mensah).

428 Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No.(15) PG-299 (6 July 2015); see SCS Arbitration, Hearing, Day 3, 13 July 2015, 2: 11-13 (President Mensah); ibid., Award, para.91.

429 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 10: 4-26, and 11: 1; and 14:18-20, and 15: 1-8.

430 See SCS Arbitration, Award, para.147 n.91.

431 See SCS Arbitration, Hearing, Day 3, 13 July 2015, 2: 6-8 (President Mensah).

432 See SCS Arbitration, Award, paras.89, 91.

433 See e.g. SCS Arbitration, Award, paras.18, 34, 43, 44, 46, 47, 48, 50, 59, 60, 61, 69, 75, 79, 80, 90, 92.

so far as is possible, all documentary evidence shall be submitted with the respective Memorial and Counter-Memorial of the Parties." Unlike the ICJ's Rules of Court or the ITLOS's Rules, the Tribunal's Rules of Procedure do not contain any specific rule on the submission of new documents after the closure of the written proceedings. Both Article 56(1) of the ICJ's Rules of Court and Article 71(1) of the ITLOS Rules provide that "after the closure of the written proceedings, no further documents may be submitted to the Court [Tribunal] by either party except with the consent of the other party" or, in the absence of consent, if the Court/Tribunal authorizes their production because it considers the new documents necessary. There is only one exception to this rule. Documents that are part of a publication readily available may be referred to during the oral proceedings.[434] The fact that a document has become available only after the closure of the written proceedings does not automatically mean that it can be submitted during the oral hearing.[435] As a rule, the other party will be held to have given its consent if it does not expressly object to the production of the document.[436] If the other party objects, or must be presumed to have objected, the Tribunal has to take a formal decision on the admissibility of the new document; i.e. it has to decide that it considers the new document necessary.[437] Such a decision must be taken after hearing the parties. The party wishing to submit a new document during the oral proceedings must explain why it considers it necessary to include the new document in the case file and not just indicate the reasons preventing the production of the document at an earlier stage.[438] The rule aims to ensure the orderly conduct of oral proceedings and to prevent either side, or the Court, from being taken by surprise.[439] The rule is thus an expression of the general principle of the proper administration of justice[440] that should also have been applied to the proceedings in the *SCS Arbitration*.[441]

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434 See ICJ, Rules of Court, Article 56(4); Rules of the ITLOS, Article 71(5).

435 But this seems to be the view of the Philippines; see SCS Arbitration, Hearing, Day 3, 13 July 2015, 14: 18-20, and 15: 1.

436 See Stefan Talmon, Article 43, in: Andreas Zimmermann et al. (eds.), The Statute of the International Court of Justice: A Commentary (2nd edn., 2012), 1088-1171, MN 71, 166.

437 Cf. Anna Riddell and Brendan Plant, Evidence before the International Court of Justice (2009), 174-175; Quintana (above n.377), 330-332.

438 Riddell and Plant (above n.437), 176-177.

439 Ibid., 172.

440 Cf. Talmon (above n.436), MN 71, 72.

441 It is of interest to note in this connection that the Tribunal noted "the practice of international courts and tribunals" with regard to other matters; see SCS Arbitration, Award, paras.68, 122.

171. The rule on the submission of new documents is fully applicable in cases of non-participation by one of the parties.[442] In this case, the non-appearing party must be given every opportunity to raise an objection to the submission of the new document. The proper procedure therefore is to transmit copies of the new document to the absent party.[443] In case of non-participation of a party, where that party has publicly opposed the arbitration, consent cannot be presumed. It was correctly pointed out that "given that the defendant no longer participated, it hardly could have been expected to lodge an objection; the idea underlying the presumption of consent thus no longer applied."[444] On the contrary, the absent party must be presumed to have objected to any procedural step by the other party which would require its consent. In the present case, China expressly objected to the submission of new documents. On 6 February 2015, the Chinese Ambassador to the Kingdom of the Netherlands wrote individually to the members of the Tribunal, stating that the Chinese Government "holds an *omnibus objection to all procedural applications or steps that would require some kind of response from China*." The letter further clarified that China's non-participation and non-response to any issue raised by the Tribunal "shall not be understood or interpreted by anyone in any sense as China's acquiescence in or non-objection to any and all procedural or substantive matters already or might be raised by the Arbitral Tribunal."[445]

172. The fact that China has expressly objected to the submission of any new documents by the Philippines does not preclude such documents from becoming part of the case file. However, in case of an express objection by the absent party the proper procedures have to be followed. For example, the Chinese Note Verbale which the Philippines submitted on 13 July 2015 cannot be considered "part of a publication readily available". The Tribunal should

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442 See e.g. Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14 at 26, para.31. See also Quintana (above n.377), 335.

443 See e.g. Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, 18, para.12.

444 Christian Tams, Article 52, in: Andreas Zimmermann et al. (eds.), The Statute of the International Court of Justice: A Commentary (2nd edn., 2012), 1312-1323, MN 12.

445 See SCS Arbitration, Award, para.64 (italics added). For a second letter of the Chinese Ambassador, dated 1 July 2015, which stated that China "opposes any moves to initiate and push forward the arbitral proceeding, and does not accept any arbitral arrangements, including the hearing procedures", see ibid., para.83.

therefore have taken a formal decision on the admissibility of the Note Verbale setting out the reasons why it considered the document necessary.

V. Conclusions

173. In case of default of appearance by the respondent the Tribunal must satisfy itself that it has jurisdiction over the dispute and that the applicant's claims are admissible. The Tribunal in the *SCS Arbitration* noted that China's non-participation imposes "a special responsibility on the Tribunal" and that it cannot "simply adopt the Philippines' claims".[446] On the basis of the above analysis it must be concluded that the Tribunal has not lived up to this special responsibility.

174. The Tribunal held that there existed a legal dispute with regard to each of the Philippines' Submissions No.1-14. As it was unable to establish a positive opposition by China with regard to the Philippines' claims concerning the status of the individual maritime features in the Spratly Islands, the Tribunal set out to "infer" the existence of a dispute. Unlike the ICJ, which inferred the existence of a dispute from a State's silence or its failure to respond to a claim, the Tribunal "constructed" artificial disputes over the status of certain maritime features in the South China Sea in the face of, and contrary to China's explicit legal position.[447] The Tribunal also accepted the existence of a dispute based on the Philippines' tactical "assumption" which was contradicted by the Philippines' own behaviour outside the courtroom.[448] But perhaps most damaging to its credibility, the Tribunal accepted and adopted the Philippines' misrepresentation of China's position that the "Nansha Islands *are* [instead of *is*] fully entitled" to maritime entitlements and, consequently, focused on the status and entitlements of individual maritime features in the Nansha Islands, rather than on the Nansha Islands as a whole.[449] The Tribunal paid neither sufficient regard to China's Position Paper and other official statements, nor to the academic literature.[450] Judge Lagergren, acting as sole arbitrator, in *B.P. Exploration Company v. Libya*, stated that in case of an absent respondent, the Tribunal is "compelled to undertake an independent examination of the legal issues deemed relevant by it, and to engage in considerable legal research going beyond the confines of the materials relied

446 SCS Arbitration, Award, para.12.
447 See above section II.1(a)(3).
448 See above section II.1.(a)(4)(c).
449 See above section II.1.(a)(4)(b).
450 See e.g. Talmon (n.295), 39, 42-43, 77.

upon by the Claimant."[451] The Tribunal in the present case clearly failed in its task to test the assertions of the applicant. Absent any inference, assumption and misrepresentation the Tribunal should have concluded that there was no dispute between the parties with respect to the Philippines' Submissions No.3, 4, 6, 7, and 10. In addition, without a dispute there could also not have been an exchange of views on the settlement by negotiation or other peaceful means of these (non-existing) disputes.[452]

175. The misrepresentation of China's position as a claim to sovereignty over individual maritime features, rather than a claim to the island groups in the South China Sea as geographical units allowed the Tribunal to reject China's objection that the disputes are actually about the scope of its territorial sovereignty in the South China Sea. If the Tribunal had engaged with China's actual position it would have had to conclude that the "real dispute" in the case was about territorial sovereignty over these island groups and thus outside its jurisdiction.[453] If the Tribunal had focused on the Spratly Islands as an island group it would also have had to conclude that Viet Nam was an indispensable third party to the proceedings as Viet Nam, like China, claimed sovereignty not over individual maritime features in the Spratly Islands but over the "Truong Sa (Spratlys) archipelago" as a whole, including all islands, parts of islands, interconnecting water and other natural features closely related.[454] Against this background, the Tribunal should have dismissed the Philippines' Submissions No.1, 2, 4, 5, 8, 9, 12(a) and (c).

176. The Tribunal demonstrated a striking lack of awareness of procedural issues. It accepted new claims that were materially different from the claims set out in the Notification and Statement of Claim and, at least in part, transformed the subject matter of the dispute.[455] It also pronounced on purely hypothetical disputes,[456] and deferred inadequate submissions not specifying any particular dispute to the merits stage of the proceedings.[457] These are not just technicalities but go to the heart of the good administration of justice. In order to safeguard its judicial function and integrity the Tribunal should have dismissed Submissions No.11, 12(b), 14 and 15 as inadmissible.

177. The Tribunal's Award on Jurisdiction and Admissibility has been

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[451] B.P. Exploration Company (Libya) v. Libyan Arab Republic, Award of 10 October 1973, 53 ILR 297, 313.

[452] See above section II.3.

[453] See above section II.1.b(1)(a) and (b).

[454] See above section II.2.

[455] See above section III.1.

[456] See above section III.2.

[457] See above section IV.1.

commended for its "straightforward legal simplicity".[458] But, the Award rather seems to suffer of substantive simplification and a number of procedural defects. The Award was rendered at the speed of judicial lightning within three and a half months of the closure of the hearing. By comparison, during the last ten years the average time between the closure of the oral proceedings and the rendering of judgment by the ICJ was almost seven months.[459] Of the 151 pages of the Award less than 60 pages are devoted to the Tribunal's legal reasoning; the majority of the Award recounts the procedural history, lists the Philippines' submissions and sets out the (possible) arguments of the parties. The Award gives the impression that the Tribunal allowed the Philippines to make claims it would not have been able to make in the presence of the respondent, and that it accepted these claims without really testing them. But, as Robert Kolb aptly pointed out with regard to the non-participation in proceedings before the ICJ,

> the Court is at the service not only of the parties but also of objective international law. This means that the Court cannot simply rely on the maxim that [...] disadvantages suffered by an absent party are just [a] consequence of its deliberate decision not to appear. Here, indeed, there is an issue as to the general credibility of a Court deciding cases and creating precedents that will be referred to in the future. The Court cannot deliver 'discounted' justice, even if the fault would lie with one of the parties.[460]

The Tribunal's Award looks like an example of such "discounted" justice. By assuming jurisdiction on the basis of inferences, assumptions and misrepresentations the Tribunal has failed both the absent party and the international rule of law.

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458 James Kraska, Forecasting the South China Sea Arbitration Merits Award, 27 April 2016 (maritimeawarenessproject.org/2016/04/27/ forecasting-the-south-china-sea-arbitration-merits-award/).

459 See Alina Miron, Les méthodes de travail de la Cour, Tableau n°2: Durée des procédures pour les affaires introduites durant les 10 dernières années (paper presented at the Seminar in honour of the 70th anniversary of the International Court of Justice, 18-19 April 2016).

460 Kolb (above n.321), 1129.