Legal Dilemmas and Regime-Building in the East Asia Maritime Conflicts
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Chapter 2
Reflections on the Evolution of “the Monetary Gold Principle” and Its Application in International Adjudication

2.1 Introduction

In the previous chapter, some preliminary observations concerning the Monetary Gold principle in the general framework of international law were presented. Chapter two provides a more specific examination concerning the definition and applicable scope of the Monetary Gold principle. Notably, the formation of this principle constitutes an evolutionary process. In other words, it has not been confined to the Monetary Gold case on the responsibility of a third party, but is applied by international courts and tribunals by extension so as to identify the real subject matter in a mixed legal dispute.

Overall, as Maarten Den Heijer observes, the Monetary Gold principle “has been identified as a prominent procedural hurdle for multilateral dispute settlement”. According to the procedural rules of an international court or tribunal, as asserted by Filippo Fontanelli, international case law demonstrates that the Monetary Gold principle “appears to affect, at the same time, its jurisdiction and the claim’s admissibility both”.

This chapter will elaborate jurisprudence relating to the Monetary Gold principle and the principle’s application in the settlement of a mixed dispute. The chapter consists of

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five parts. First, it will introduce the Monetary Gold case and preliminarily outline the Monetary Gold principle. Second, in terms of subsequent judicial practice, it will present requirements for applying the Monetary Gold principle and analyze the role of this principle in the exercise of the jurisdiction of a court or tribunal as well as the admissibility of claims from parties to the case. Third, it will shift to jurisdictional and MA in the SCS Arbitration as a typical case and examine how the Arbitral Tribunal (the Tribunal) identified the real subject matter of the case and addressed the presence of third parties in this controversial dispute. Fourth, there will be an examination of the impact of the MA on two principal parties and third States in the SCS. Last but not the least, there will be some concluding remarks on the applicability of the Monetary Gold principle under international law.

2.2 Reflections on the Monetary Gold case and a preliminary outline of the Monetary Gold principle

With regard to the Monetary Gold principle, academia has adopted different connotations. This principle is interchangeably proclaimed as “the indispensable third party principle (rule or doctrine)” or “indispensable parties doctrine (principle or rule”).58 Shabtai Rosenne alludes to this principle as “the concept of essential parties”, while Natalie Klein calls it “the doctrine of necessary parties”.59 Moreover, Sir Elihu Lauterpacht takes a bit broader of a title and refers to “the problem of ‘the recalcitrant third party’”.60 Indeed, these alternative illustrations tilt toward highlighting the “indispensable” role of third-party States in the adjudicative process, in relation to the continuance of a pending proceeding.


2.2.1 A brief overview of the ICJ’s case law potentially involving absent third States before the Monetary Gold case

In a multipolar and interdependent world, as stated by Lori Fisler Damrosch, “it is increasingly unlikely that any particular dispute will be strictly bilateral in character”. This section highlights how the rights and interests of third States may be implicated to some extent in international litigation. Before the Monetary Gold case, the Permanent Court of International Justice (PCIJ) and the ICJ addressed some cases where other parties were involved. As James Crawford observes, “an early example in which the consent principle was used as a bar to proceedings in order to protect absent third parties was Status of Eastern Carelia, but this was an advisory opinion”. In the Corfu Channel case, the Court found that Former Yugoslavia’s absence as a third State led its documents submitted before the Court “only to be admitted as evidence”. The Court eventually did not make observations on Former Yugoslavia’s evidentiary role, but still upheld Albania’s international responsibility without determining FY’s responsibility. In the Anglo-Iranian Oil Co case, since the Iranian declaration of accepting the Court’s compulsory jurisdiction was made after Iran concluded treaties with some States other than the United Kingdom (UK) concerning the most-favored-nation clause, the Court considered the UK was not “entitled to invoke these treaties” for the same treatment from the respondent. In the Ambatielos case, the Court merely dealt with a treaty between Greece and the UK, without responding to Greece’s request for the same undertakings from other States in treaties similar to those of the UK. In short, the presence of absent third States does not produce an adverse impact on the competence of the Court—in other words, such States were not “indispensable” to the dispute settlement before the Court. Just as James Crawford asserts, “in such cases, the Court has generally proved reluctant to make decisions that would involve directly pronouncing on the legal position of absent third parties, on the basis that they have not consented to the jurisdiction of the Court”.

62 Crawford, State Responsibility, 655. Status of Eastern Carelia, Advisory Opinion, Ser B, No. 5, 27-9 (PCIJ, 1923). The PCIJ asserted that “there has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties, it is unnecessary in the present case to deal with this topic”. The primary reason was that the Soviet Union was not a member of the League of Nations. Since the PCIJ merely owned its jurisdiction razione personae over member States, the exercise of its jurisdiction over this case involving a non-party State was evidently barred.
63 The Corfu Channel Case, United Kingdom v. Albania, I.C.J. Rep 4, 17 (IJC. 1949).
64 United Kingdom v. Albania, at 17. The Court finally found it unnecessary to express an opinion on their probative value.
65 Anglo-Iranian Oil Co Case, United Kingdom v. Iran, I.C.J. Rep 93, 108-10 (IJC. 1952).
67 Crawford, State Responsibility, 655.
2.2.2 The Monetary Gold case: An issue of jurisdiction and admissibility relating to absent third States

This section will first briefly introduce the Monetary Gold case. Second, it will make some remarks on the basis of the Court’s examination of its jurisdiction and admissibility of Italy’s claim.

2.2.2.1 A summary of the Monetary Gold case

In 1943, Germany “looted and removed the monetary gold from Rome in Italy to Germany”. In 1946, France, the UK, and the US, as well as Albania and other states, “signed Part III of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold”. Italy “adhered to the provisions of Part III of the Agreement by a Protocol signed in 1947”. To implement this agreement, France, the UK, and the US “appointed a Tripartite Commission to assist them in distributing the monetary gold”, while both Albania and Italy claimed the possession of the gold. Later, France, the UK, and the US “signed the Washington Agreement which determined to submit this issue to an arbitrator” in 1951. It was said that “if the monetary gold were determined to be in favour of Albania, they would deliver the gold to the UK in partial satisfaction of the judgment in the Corfu Channel case, unless Albania or Italy filed an application to the ICJ to decide which state had the priority over the monetary gold”. The Arbitral Award finally “decided the gold in 1943 belonged to Albania.”

By submitting an application to the ICJ, Italy claimed that “three states should deliver to Italy the gold that might be due to Albania”; the other claim was that “Italy’s right to receive the gold must have priority over the UK’s claim to the gold”. Afterwards, Italy contended that the examination of the first submission in merits would “pass upon the

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69 The Monetary Gold, at 25.
70 Ibid.
71 Ibid., at 25-6.
72 Ibid., at 26.
73 In the Corfu Channel case, Albania was adjudicated to make reparation to the United Kingdom. However, Albania declined to pay compensation.
74 The Monetary Gold, at 26.
75 Ibid.
76 Ibid., at 22.
international responsibility of Albania to Italy without Albania’s consent”. 77 “The Washington Statement is not a sufficient basis upon which to found the jurisdiction of the Court to deal with the merits of the claim”. 78 Additionally, it submitted that “the proceedings instituted by Italy in conformity with the Washington Statement are in reality directly against Albania, which is not a party to the suit”. 79 The UK required the Court to find that “Italy’s application in the preliminary question did not conform or no longer conformed to the conditions and intentions of the Washington Statement” and to decide “Italy must be considered as not having made an application in accordance with the conditions laid down by the Statement” 80

The Court was conscious of the fact that the applicant challenged its jurisdiction, but it found that “the Statute or Rules of the Court did not prohibit the applicant to raise a preliminary objection”. 81 It further observed that, to decide whether Italy was entitled to receive the gold in its first submission, it was necessary to determine “the lawful or unlawful character of certain actions of Albania” or the “international responsibility of Albania”. 82 Without Albania’s consent, the Court “cannot decide such a dispute”. 83 Otherwise, it would “run counter to a well-established principle of international law that the Court can only exercise jurisdiction over a State with its consent”. 84 Within the meaning of Article 62 under the ICJ Statute, the Court intended to clarify that Albania had legal interests in this case and might have applied to intervene, and the proceedings may continue. Notwithstanding, the case of Albania appears to be different as a third State since the Court was even unable to adjudicate the pending dispute. Therefore, the Court concluded that “in the present case, Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania”. 85 Though “Italy and the three respondent states have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy. Regarding the second application, the Court found that this claim was dependent upon its decision on Italy’s first claim. 86

77 Ibid.
78 Ibid., at 27.
79 Ibid.
80 Ibid.
81 Ibid., at 29.
82 Ibid., at 32.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid., at 33.
Given it cannot exercise jurisdiction over the first claim, the Court “must refrain from examining the question of priority between Italy and the UK”. 87

2.2.2.2 Reflections on the ICJ’s reasoning in the Monetary Gold case

First, it is suggested that a third State’s legal interests and rights form “the very subject matter” of the case. They are out of the jurisdictional scope of the Court, since the ICJ is only requested to address the rights and obligations of two principal parties. Due to lack of the “very subject matter” of the pending dispute in question, the Court’s jurisdiction ratione personae over absent third State cannot be exercised. Peter Tzeng considers the Court’s way as “the characterization approach”, “where the court or tribunal must characterize the dispute as one relating more to the participating States or the absent State”. 88

Second, the Court is required to identify whether the real dispute between parties exists—that is, the real subject matter of that pending dispute. The Court must ensure that both claimant and respondent States have consented to the Court’s exercise of jurisdiction since the beginning of the dispute, in accordance with maxim “nemo dat quod non habet: states that have consented to the Court’s jurisdiction cannot authorize it to rule on the legal position of a state not before the Court,” as indicated by Jörg Kammerhofer and André de Hoogh. 89 The Monetary Gold case, like what the ICJ has summarized in Nauru, further manifests a logical sequence in the identification of a real dispute. It is observed that “in the latter case (the Monetary Gold case), the determination of Albania’s responsibility was a prerequisite for a decision to be taken on Italy’s claims”. 90 Additionally, “in the Monetary Gold case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical”.91 Such a reasoning constitutes “the logic-based approach” elaborated by Peter Tzeng, “where the court or tribunal must determine the logical relationship between the exercise of jurisdiction over the participating State and the exercise of jurisdiction over the absent State”. 92 Specifically, whereas the first dispute (the real dispute) is between one of the parties and an absent third State, the second dispute is the pending dispute between the two original litigants. Without consent from the original parties in the proceedings to decide the first dispute logically, 87 Ibid., at 34. 88 Tzeng, “The Implicated Issue Problem,” 460. 89 Kammerhofer and de Hoogh, “All Things to All People?” 975. 90 Case concerning Certain Phosphate Lands in Nauru, Nauru v. Australia, I.C.J. Rep 240, 261, para. 55 (ICJ. 1992) 91 Nauru v. Australia, at 261, para. 55. 92 Tzeng, “The Implicated Issue Problem,” 460.
it is not possible to deal with a pending dispute before the Court. Therefore, the ICJ cannot have jurisdiction *ratione materiae* over the dispute submitted by the principal parties before it.

Third, in the *Monetary Gold* case, the Court did not declare that it had no jurisdiction, but said it “cannot exercise the jurisdiction”.93 Robert Kolb indicated that “the Court was seeking to avoid the introduction of a back-door form of compulsory jurisdiction”.94 To be noted, the court’s decision that the legal interests and rights of an absent third State would form the “very subject matter” of the case relates to the provision of “an interest of legal nature” within the meaning of Article 62 of the ICJ’s Statute.95 According to Karel Wellens, either the procedure of intervention or the *Monetary Gold* principle is ascribed to a type of “direct third-party participation” in international adjudication.96 In fact, both the rule enshrined in the *Monetary Gold* case and Article 62 contain “affected” legal interests of a third State, but the extent and scope are different—the former becomes broader so that the Court cannot exercise its jurisdiction without the presence of a third State; alternatively, the latter is narrower, so the proceedings continue with the implication of absent third States. Last but not the least, the Court in the *Monetary Gold* case observed that Article 59 of the Statute was so insufficient as to be applicable even if the decision was only binding upon the applicant and respondent states. Article 59 postulates that the Court was “at least able to render a binding decision,” but the Court could not give such a decision on that issue without the consent of an absent third State or the settlement of the real dispute.97 Likewise, Natalie Klein also emphasizes that “it is unrealistic to expect Article 59 to serve as a blanket protection of third States’ interests”98. James Crawford admitted as well that “the terms of Article 59 of the Statute alone may be insufficient to ensure protection in all cases”.99

In short, the *Monetary Gold* case reflects the limit of the Court’s jurisdiction in addressing of a mixed dispute at the early stage of the ICJ, but debates on this issue within the Court have not yet ended. The jurisprudence of the *Monetary Gold* case has

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93 *The Monetary Gold*, at 33.
94 Kolb, *The International Court of Justice*, p. 568.
95 “The Statute of the International Court of Justice,” International Court of Justice, accessed October 16, 2018, https://www.icj-cij.org/en/statute. Article 62 of the ICJ Statute provides that: 1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request. The legal interest of a third State has the same meaning as the interest of a legal nature under Article 62 of the Statute.
97 *The Monetary Gold*, at 33.
98 Klein, “Multilateral Disputes and the Doctrine of Necessary Parties,” 327.
been repeatedly examined in a series of cases decided by a court or tribunal and will be elaborately illustrated below.

2.2.2.3 The concurrent involvement of jurisdiction and admissibility in the Monetary Gold case

The preceding part of this section gives an impression that this case is merely confined to the jurisdiction of the Court. A further question would be whether this case is also involved in the admissibility of an applicant State’s claim. The Court in Oil Platforms explicitly states that “objections 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”. Therefore, “it may proceed to an examination of the merits only when it finds the application and submissions admissible,” as illuminated by Chinese Society of International Law. Filippo Fontanelli also points out that “jurisdictional objections challenge the scope of the tribunal’s mandate over certain categories of disputes”, whereas “admissibility objections refer to defects of the specific claim or claimant”. In the Monetary Gold case, the Court at face value only deals with the consent of an absent third State to the exercise of the Court’s jurisdiction. Nonetheless, Italy’s claim is simultaneously inadmissible, as the claim is not against the UK’s legal responsibility but Albania’s, which goes beyond Italy’s application before the Court. As a result, the Monetary Gold case concurrently considers issues relating to jurisdiction and admissibility. The discussion above focuses on jurisprudence in the Monetary Gold case; international case law indicates that the ICJ’s legal reasoning has been developed in an evolutionary way. The next section will examine more cases and further illustrate the Monetary Gold case’s impact on international dispute settlement.

2.3 The evolution of the Monetary Gold principle in the international adjudication

In order to illustrate the evolutionary process of the Monetary Gold principle, this section will be divided into three parts. As the logical sequence of two disputes in a mixed dispute constitutes the linchpin for applying this principle, this section will begin by discussing two norms that have been touched upon in brief, i.e., “simultaneous” as well as “not purely temporal but also logic”. Afterwards, this part will examine the

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100 Case concerning Oil Platforms, Iran v. United States of America, I.C.J. Rep 161, at 177, para. 29 (ICJ. 2003).
operation of the *Monetary Gold* principle, in order to showcase the identification of a real dispute’s subject matter in accordance with this principle. In the second part, it concerns the identification of the subject matter of a real dispute directly involving absent third States as required by the *Monetary Gold* principle. The final part involves the identification of the subject matter of a mixed dispute when the real dispute and a superficial dispute exist without the implication of absent third parties, based on the *Monetary Gold* Principle.

### 2.3.1 The requirements in the evolution of the *Monetary Gold* principle

In *Nauru* and *East Timor*, the *Monetary Gold* case was interpreted as follows: the determination of the international responsibility of a third State should be the prerequisite or basis to determine the international responsibility of one of parties to the dispute.\(^{103}\) A simultaneous determination “would not be precluded by the *Monetary Gold* decision.”\(^ {104}\) The link between the findings on the claim of a third State and the requested judgment was not “purely temporal but also logical.”\(^ {105}\) In the *Larsen v. Hawaii Kingdom* Arbitration, the Tribunal observed that “as the International Court of Justice explained in the *Monetary Gold* case, an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction. That rule applies with at least as much force to the exercise of jurisdiction in international Arbitral proceedings”.\(^ {106}\) The Arbitral Award not only implicates a superficial dispute between Mr. Larsen and the Hawaiian Kingdom, but entails another dispute between Mr. Larsen and the United States due to the responsibility of the United States. By extension, since two disputes are integrated into one mixed dispute holistically, terms like “prerequisite” or “basis” offer a more specified manifestation of the inherent sequence between the dispute implicating an absent third State and the pending dispute. As Peter Tzeng remarks, “there is no question that courts and tribunals consider the ‘prerequisite determination’ test to be determinative on whether they can exercise jurisdiction over a dispute”.\(^ {107}\)

However, not all judges accede to this reasoning adopted by the Court, and their diverging views are primarily expressed with regard to the extent to which the rights

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\(^{104}\) *Nauru v. Australia*, at 55.

\(^{105}\) Ibid.

\(^{106}\) Larsen v. Hawaii Kingdom, No. 1999-01, 32-3, para.11.17 (PCA. 2001). The Tribunal continued to declare that, “while it is the consent of the parties which brings the arbitration Tribunal into existence, such a Tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings”.

\(^{107}\) Tzeng, “Investments on Disputed Territory,” 124.
and interests of a third State in absentia are affected. In Nauru, due to the Trusteeship Agreement to which three States (the United Kingdom, New Zealand, and Australia) are parties, Judge Jennings observed that the Court would “unavoidably and simultaneously” be deciding “legal interests of those two other States”. Judge Ago also stated that the Court’s decision would “equally and inevitably affect the interests” of third States in absentia. A “simultaneous” or “equal” determination is sufficient to deprive the Court of its jurisdiction. Judge Schwebel considered that the decisive matter in the Monetary Gold case was “whether the determination of the legal rights of the present party effectively determines the legal rights of the absent party”. But, the opinion per se seems not to clearly define the scope of “effectively” and remains to be inexplicit. In concurrence with the Court’ ruling, Judge Shahabuddeen said, “what was involved was a judicial determination purporting to produce legal effects for the absent Party, as was visualized in the Monetary Gold case, and not merely an implication in the sense of extended consequence of the reasoning of the Court”. In the East Timor case, in opposition to applying the Monetary Gold decision, Judge Weeramantry warned that, so as to undertake “the judicial duty to decide the cases brought before it within its jurisdictional competence”, the Court had to take great caution to avoid the abuse of the Monetary Gold case.

In spite of varying views above, as argued by Robert Kolb, the Court “requires that the effect on the third State’s rights must be a powerful one” and sets up a high and stringent threshold to adopt this principle. Such a “logic or prerequisite” norm flows from seeking balance between the proper exercise of judicial duty of a court or tribunal and the role of the consent of an absent third State. Moreover, the logical sequence in a mixed dispute —i.e., the real dispute determines a submitted dispute at face value—is of great essence to resolve that particular dispute.

2.3.2 The identification of the subject matter of a real dispute directly involving a third State in accordance with the Monetary Gold principle

In fact, previous observations have implicitly made out the applicable scope of the Monetary Gold principle. For one thing, it is a dispute with the direct participation of an absent third State that necessitates the application of the Monetary Gold principle. For another, it is a dispute incidental to the submitted dispute before third-party litigation

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108 Nauru v. Australia, Dissenting opinion of President Jennings, at 301-2.
109 Ibid., Dissenting opinion of Judge Ago, at 328.
110 Ibid., Dissenting opinion of Judge Schwebel, at 331.
111 Ibid., Separate opinion of Judge Shahabuddeen, at 296.
113 Kolb, International Court of Justice, 569.
bodies that requires the invocation of the *Monetary Gold* principle to identify the real subject matter. Whether this principle may be applicable or not has been examined in the ICJ and arbitral proceedings covering different fields of international law.

### 2.3.2.1 The *Monetary Gold* principle and cases concerning international responsibility due to international wrongful acts

If the act committed by one of parties to the dispute hinges on the international legal responsibility of a third State which is not a party to the proceedings, the very subject matter of the dispute becomes the international wrongful act commissioned by a third State in the proceedings. In *Nicaragua v. U.S.*, the United States claimed the rights and interests of El Salvador, Costa Rica, and Honduras formed the very subject matter of the dispute and invoked the *Monetary Gold* decision to make Nicaragua’s claim inadmissible. The US’ deterrence against Nicaragua was acting in collective self-defence of three States” and cannot be insularly addressed. Nevertheless, the Court found that El Salvador’s affected rights and interests merely led to it seeking intervention and did not become the very subject matter of the decision. In *Nauru*, the Court rejected its application of the *Monetary Gold* principle. In *East Timor*, the Court recognized that “the very subject-matter of the Court’s decision would necessarily be a determination whether it (Indonesia) could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf”. So, this principle was applicable. In *DRC v. Uganda*, the Court said, “the interests of Rwanda clearly do not constitute ‘the very subject-matter’ of the decision to be rendered by the Court on the DRC’s claims against Uganda, nor is the determination of Rwanda’s responsibility a prerequisite for such a decision”. In *Larsen v. Hawaiian Kingdom*, the Tribunal considered that the determination on the responsibility of the United States would be a prerequisite to adjudicate the responsibility of the Hawaiian Kingdom. In *Marshall Islands*, the Court declared the nonexistence of a dispute, without expressing its view regarding jurisdiction and admissibility in the claim that other States as parties to the Treaty on the Non-Proliferation of Nuclear Weapons and other affected States were absent in the proceedings. Judge Xue suggested that “these

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115 *Nicaragua v. United States of America*, at 430-1, para. 87.
116 Ibid., at 431, para. 88.
117 *Portugal v. Australia*, at 102, para. 28.
119 *Larsen v. Hawaii Kingdom*, at 32-3, para.11.17.
120 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, Marshall Islands v. Pakistan, Counter-Memorial of Pakistan on Questions of Jurisdiction and/or Admissibility, paras. 7.23-7.33, 7.70-8.86 (ICJ. 2015).
objections deserve an immediate consideration of the Court at the preliminary stage, as the answer to them would have a direct effect on the jurisdiction of the Court and the admissibility of the Application”. Judge Crawford indicated that, “in the present case, Monetary Gold may well impose limits on the consequences that can be drawn from the Respondent’s conduct, if indeed it is held to involve a breach of international law. But precisely what those limits are will depend on the ground of decision”. In M/V “Norstar”, Italy contested that Spain’s execution of Italy’s request for the seizure of the M/V “Norstar” based on the 1959 Strasbourg Convention formed the very subject matter of Panama’s submission, and the Monetary Gold principle prevents the International Tribunal for the Law of the Sea (ITLOS) from exercising jurisdiction ratione personae. The Tribunal considered that Spain’s seizure was incidental to Italy’s conduct of order and authorization and should be examined separately. Consequently, Italy’s legal interests remained to be the very subject matter of this case and the Monetary Gold principle was not an obstacle to debar the Tribunal’s jurisdiction. Nonetheless, with regard to the nature of Spain’s conduct, the Tribunal indeed concluded that “the present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State”. Just as Filippo Fontanelli comments, “it is difficult to say that the position of Spain is not prejudged by the Norstar precedent, which will have been decided on the merits”.

To be noted, there are some cases involving international wrongful acts of international organizations that are regarded by respondent States as absent third parties within the meaning of the Monetary Gold principle. In Legality of Use of Force, some respondents, like Portugal and France, argued that international responsibility arising out of military air strikes should be attributed to the North Atlantic Treaty Organization (NATO) and UN instead of member States. However, the Court did not respond to these objections

123 The M/V “Norstar” Case, Panama v. Italy, Case No. 25, Preliminary objections, 36-7, paras. 144-6 (ITLOS. 2016).
124 Panama v. Italy, at 43-4, paras. 171-5.
125 Ibid., at 36-7, paras. 144-6.
126 Ibid., at 43-4, paras. 171-5.
In cases of international responsibility, it is common for the respondent and absent third States or international organizations to commit a single international wrongful act against the applicant. Such a form of international responsibility, as defined by André Nollkaemper, is “shared responsibility”. In light of the ICJ’s international case law, He summarizes three scenarios where the *Monetary Gold* principle may be invoked, but showed negative attitudes regarding its application. Firstly, the *Monetary Gold* principle “does not prevent the Court from exercising jurisdiction in case of two concurrent independent wrongful acts”. Secondly, “the Court also has excluded from the scope of the *Monetary Gold* rule cases of double attribution, that is: responsibility arising out of an act of a joint organ that can be attributed to two or more states”. Thirdly, since the ICJ’s jurisdiction is merely based on State consent, “the Court by definition cannot determine the legal position of such organizations, and on that basis the *Monetary Gold* rule does not seem to apply”. In addition, in *Croatia v. Serbia*, the Court asserted that the *Monetary Gold* principle “has no application to a State which no longer exists, as is the case with the SFRY, since such a State no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court”.

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131 The *Interim Accord*, at 660-1, paras. 43-4.
132 André Nollkaemper, “Shared Responsibility in International Law: A Conceptual Framework,” *Michigan Journal of International Law* 34, Issue 2 (2013): 366-8. Shared responsibility has four features: “First, the concept of shared responsibility refers to the responsibility of multiple actors including States, international organizations, multinational corporations and individuals”; “Second, the term refers to the responsibility of multiple actors for their contribution to a single harmful outcome”; “Third, the term shared responsibility *strictu sensu* refers to situations where the contributions of each individual cannot be attributed to them based on causation”; “Four, the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively”.
2.3.2.2 The Monetary Gold principle and cases involving territorial sovereignty and maritime delimitation

In the delimitation of land boundaries, respondent States usually request that the Court take care of its competence to adjudicate the dispute before it, to the extent that the land boundary to be determined may encroach upon the rights and interests of a third State which is not party to the proceedings, and the Monetary Gold principle may debar the exercise of the Court’s jurisdiction. Nevertheless, the Court has shown negative attitudes toward such arguments. In the Burkina Faso/Mali case, the Special Chamber considered that the rights of Niger as a third State were “in any event” afforded protection by Article 59 of the Statute.\(^\text{137}\) In the Libya/Chad case, the Court determined the eastern end-point of the frontier would “lie on the boundary of the Sudan”; to the west, the Court was “not asked to determine the tripoint Libya-Niger-Chad” and its decision would “not be opposable to Niger as regards the course of that boundary’s frontiers”.\(^\text{138}\) In the Cameroon v. Nigeria case, the Court observed that, “the request to specify the frontier between Cameroon and Nigeria from Lake Chad to the sea does not imply that the (Cameroon-Nigeria-Chad) tripoint could be moved away from the line constituting the Cameroon-Chad boundary”.\(^\text{139}\) Overall, the Court did not find that the legal interests of Chad as an absent third State would be affected by the Court’s decision on the delimitation of a land boundary between two parties in the Lake of Chad; thus, the Monetary Gold principle did not debar the jurisdiction ratione personae of the Court and Nigeria’s objection is inadmissible.

In maritime delimitation cases, based on the Monetary Gold case, the Court made clear in the Nicaragua v. Honduras case, it “will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined”.\(^\text{140}\) It also laid out some previous cases that illustrated the equivalent rationale, including Tunisia/Libya, Libya/Malta, El Salvador/Honduras, and Cameroon v. Nigeria.\(^\text{141}\) Additionally, as was shown in Romania v. Ukraine, the Eritrea/Yemen arbitration, and the Barbados v. Trinidad and Tobago arbitration, the Monetary Gold principle had continued to be applied as long as the Court’s decision potentially touched upon the rights and interests

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\(^\text{137}\) Burkina Faso/Mali, at 577, para. 46.

\(^\text{138}\) Case concerning the Territorial Dispute, Libyan Arab Jamahiriya/Chad, I.C.J Rep 6, 33, para. 63 (ICJ. 1994).


\(^\text{140}\) Nicaragua v. Honduras, at 756, paras. 312.

of third States. As for that undefined part, rights and interests of third States constitute the very subject matter of the dispute before the court so that the delimitation task is unable to be fulfilled.

In addition, on September 28, 2018, Palestine instituted proceedings against the United States before the ICJ, claiming that moving the U.S. Embassy in Israel to Jerusalem violated a series of articles in the VCDR. Particularly, Article 3 of VCDR provides that “the diplomatic mission of a sending State must be established on the territory of the receiving State”. As a sovereign State, Palestine considered Jerusalem to be its territory, and that America’s action amounted to an acknowledgment of Israel’s territorial sovereignty over Jerusalem and a rejection of Palestine’s. In the end, the Court is essentially requested to determine the territorial sovereignty over Jerusalem without the consent of Israel as an absent third State. Israel’s legal rights and interests may form the very subject matter of the case and hinder the Tribunal from exercising its jurisdiction ratione personae. Thus, the Monetary Gold principle may be applicable. On the other hand, Palestine may have formulated a territorial sovereignty dispute regarding Jerusalem as a dispute regarding the interpretation and application of VCDR. Given that the former constitutes the basis and prerequisite to decide the latter, the Court may be deprived of the jurisdiction ratione materiae as well. Additionally, Palestine’s application may also be recognized as inadmissible. Therefore, it is the Monetary Gold principle that may be applied in the proceedings. How the Court may deal with a potential jurisdictional hurdle created by the Monetary Gold principle remains to be seen.

2.3.2.3 The Monetary Gold principle and cases involving international investor-State arbitration and international criminal law

In international investor-State arbitration, the Monetary Gold principle has been referred to in the Chevron Corporation v. Ecuador case. The Tribunal acknowledged that this

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144 International Court of Justice, “The State of Palestine Institutes Proceedings.”

principle can be applicable “by analogy”, observing that “no arbitration tribunal has jurisdiction over any person unless they have consented”.  

Noam Zamir critically comments that individuals “do not possess the same status of international legal personality that states possess and they cannot incur the same general legal responsibility for violations of public international law”. Given such a decision is adhered to afterwards, it would help a respondent to refrain from the exercise of a tribunal’s jurisdiction, which may largely restrain the judicial capacity of investor-State arbitral tribunals. Additionally, international criminal law may implicate the Monetary Gold principle regarding whether it will prohibit the International Criminal Court (ICC) from exercising jurisdiction over cases involving a non-party State or party State without consent to the ICC’s jurisdiction for the crime of aggression. In James Crawford’s view, “the ICC has jurisdiction over natural persons, not States” and its decision “would not determine any issue of state responsibility”. Accordingly, there will be no scope for the application of the Monetary Gold principle.

2.3.2.4 A narrow reading of the Monetary Gold principle based on international case law when absent third States are directly implicated

Alexander Orakhelashvili highlights that “the doctrine of indispensable parties applied only in extreme cases where the interest of an absent State is so closely related to the subject-matter of a dispute that it makes it impossible to limit the adjudication to the rights and interests of the applicant and the respondent”. Regarding the direct implication of third parties, current case law recognizes that only absent States are qualified to debar jurisdiction ratione personae of an international court or tribunal, rather than international organizations and other individuals or private entities. Moreover, Tom Dannenbaum contends that “the ICJ’s “indispensable third party” rule has been applied narrowly”. Martins Paparinskis and André Nollkaemper also argue that a narrow reading of this principle is presented as far as shared responsibility is concerned. In addition, Judge Ajibola considers it as “a narrow interpretation if the Court is not to fall into the pit of shirking its duty to decide the case presented to it, as

147 Zamir, “The Applicability of the Monetary Gold principle,” 537.
146 Ibid., 537.
150 Crawford, “State Responsibility,” 668
153 Dannenbaum, “Politics, the Rule of Law,” 236.
between the parties before it." Noam Zamir holds the view that “the Monetary Gold must be interpreted narrowly and such reliance on this principle will only occur in limited circumstances”. Paolo Palchetti indicated that “on balance, this narrow reading of the Monetary Gold principle appears to be preferable”. Overall, it should be pointed out that the Monetary Gold principle is frequently considered but rarely invoked, in the event of absent third States’ direct participation.

To be concluded, when an absent third State is implicated in the proceedings, a mixed dispute will be on the table for an international court or tribunal to deal with. In the event that a dispute between a third State and one of parties to the proceedings determines other aspects of a mixed dispute on the whole, the interests of a third State would form the very subject matter of the decision. To fully exercise its competence over the dispute between States, an international court or tribunal commits itself to examining judicial obstacles or objections against its jurisdiction on the basis of State consent. In spite of wide-ranging international law fields involving the Monetary Gold principle, the strictly confined applicability gives rise to a side effect that a court or tribunal is not inclined to take the presence of third States into account on some occasions where this principle should be applicable. It is seemingly seen in the SCS Arbitration case and will be elaborated below.

2.3.3 The identification of the subject matter of a mixed dispute without implication of third States in accordance with the Monetary Gold Principle

One might propose another category in which the pending dispute before a court or tribunal does not reflect the real subject matter of that dispute; as a result, the existence of real and superficial disputes formulates a mixed dispute as a whole. The real dispute as the first dispute determines the pending dispute as the second dispute. This issue has been touched upon by the ICJ and arbitral tribunals under Article 287 and Annex VII of UNCLOS.

2.3.3.1 The Aegean Sea Continental Shelf case and the Malaysia/Singapore case

In the Aegean Sea Continental Shelf case, the Court observed that “any disputed delimitation of a boundary entails some determination of entitlement to be areas to be

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155 Ajibola, “The International Court of Justice,” 102.
delimited”. The dispute involving “the respective areas of continental shelf” made it “necessary to establish the boundary” between two States. It was further stated that “a dispute regarding entitlement and delimitation of areas of CS tends by very nature to be one relating to territorial status”. The reason is that legally coastal State rights over the CS are both appurtenant to and directly derived from the State’s sovereignty over the territory abutting on that continental shelf”. Finally, “a dispute regarding those rights would, therefore, appear to be one which may be said to ‘relate’ to the territorial status of the coastal State,” and the coastal State was Greece, the dispute in essence fell into the reservation invoked by Turkey. In terms of the Monetary Gold principle, a pending dispute on the entitlement to CS is determined by the delimitation dispute between two States, and both entitlement and boundary delimitation disputes require the determination of the territorial sovereignty dispute between two States as the first. However, without consent from Turkey, the Court cannot exercise jurisdiction ratione materiae over the pending dispute before it. In Malaysia/Singapore, the Court decided that Pedra Branca/Pulau Batu Puteh belonged to Singapore, while Middle Rocks belonged to Singapore. However, with respect to the sovereignty of South Ledge as a low-tide elevation (LTE), the Court found this feature fell within the overlapping territorial waters respectively generated by Pedra Branca/Pulau Batu Puteh and Middle Rocks. Therefore, this requires the delineation of overlapping territorial waters of two States. However, the Court found it had no jurisdiction ratione materiae to address the sovereignty of South Ledge without consent from two parties. Here, based on the Monetary Gold principle, it is suggested that the delimitation dispute concerning territorial waters between two States constitutes the prerequisite to rule on the sovereignty dispute concerning South Ledge.

2.3.3.2 The Chagos Marine Protected Area (MPA) Arbitration and the Chagos Archipelago Advisory Opinion

Under Article 288(1) of UNCLOS, all listed judicial forums have jurisdiction in any dispute concerning the interpretation or application of the Convention. Nevertheless, the sovereignty dispute originally lay outside of UNCLOS. Under Section 3 of Part XV of UNCLOS, disputes concerning sea boundary delimitation, historic bays or titles,
military activities, etc., are able to be excluded from compulsory procedures by a State’s declaration. In the *Chagos MPA Arbitration*, Mauritius submitted a dispute concerning the interpretation or application of the concept of “coastal State. The Tribunal observed that the dispute concerning the term coastal State “was properly characterized as relating to land sovereignty over the Chagos Archipelago”. But it also states that “an issue of land sovereignty might be within the jurisdiction of a Part XV court or tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of historic title”. Besides, “a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention”. Therefore, the Tribunal asserted that the first dispute concerning sovereignty as the real dispute of the case determined the second dispute concerning the term “coastal State” and had no jurisdiction *ratione materiae* over the first and second submissions. The Tribunal’s approach is basically in accordance with the *Monetary Gold* principle. Nonetheless, it actually opened a backdoor for a court or tribunal to address a mixed dispute in which the dispute concerning the interpretation or application of the Convention constitutes a major issue but territorial sovereignty forms a minor issue and could be ancillary to the prior issue. Such an interpretation on the characterization of a mixed dispute and art. 298(1)(a) has caused some criticism from scholars.

On 22 June 2017, the United Nations General Assembly (UNGA) passed a resolution to ask the ICJ to give an advisory opinion regarding the issue of separation of the Chagos Archipelago under Article 65 of the Statute in two aspects. This case concurrently involves two aspects which are composed of the function of decolonization of Mauritius discharged by the UNGA and potential legal consequences under international law due to the detachment of Chagos Archipelago from Mauritius. On the one hand, in some cases, advisory opinions relating to decolonization have been delivered by the Court. Therefore, the Court’s competence over the decolonization part mirrored by the pending case should be supported. On the other hand, in the *Western Sahara* Advisory Opinion, it was observed that “lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial

168 *Mauritius v. United Kingdom*, at 89-90, para. 218.
169 Ibid., at 90, para. 221.
170 Ibid., at 93, para. 230.
173 International Court of Justice, “Legal Consequences of the Separation of the Chagos Archipelago.”
propriety should oblige the Court to refuse an opinion”.\footnote{174} Given “to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction”.\footnote{175} Consequently, the Court was asked to examine “whether there are compelling reasons for the Court’s declining to reply to the request”.\footnote{176} The process of decolonization may entail a bilateral sovereignty dispute as regards the Chagos Archipelago; in the meantime, the United Kingdom opposes submitting it to an international court or tribunal, since this dispute can only be settled with the consent of two States. Regarding the issues involving sovereignty, the sovereignty dispute as the first matter determines the dispute regarding the decolonization at face value as the second. This dispute can only be settled with the consent of two States and Mauritius’s failed attempt in the Chagos MPA arbitration consolidates such a stance. Just as Sienho Yee indicates, “the fact that fully answering the questions put to the Court would necessitate addressing the main or essential issues, in the bilateral dispute between Mauritius and the United Kingdom without the latter’s consent, and would be incompatible with the Court’s judicial character, is a compelling reason calling for the Court’s refusal to give the requested opinion on such issues”.\footnote{177}

According to the Advisory Opinion issued on 25 February 2019, the Court noted that the GA “has not sought the Court’s opinion to resolve a territorial dispute between two States”.\footnote{178} In addition, “the purpose of the request is for the GA to receive the Court’s assistance so that it may be guided in the discharge its functions relating to the decolonization of Mauritius”.\footnote{179} Therefore, this case is not involved in the sovereignty dispute but only a dispute relating to the decolonization of Mauritius. It is meant that “the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another States and cannot, in the exercise of its discretion, decline to give the

\footnote{174} \textit{Western Sahara}, at 24-5, para. 32. 
\footnote{175} \textit{Ibid.}, at 25, para. 33. 
\footnote{176} \textit{Ibid.}, at 17, para. 12. 
\footnote{178} Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 22, para. 86 (ICJ. 2019). 
\footnote{179} \textit{Chagos Archipelago}, Advisory Opinion, at 22, para. 86.
opinion on that ground”.  

In the end, the Court concluded that “there are no compelling reasons for it to decline to give the opinion requested by the General Assembly”. Nonetheless, one may pose some doubts about the Court’s incomplete reasoning. Specifically, the Court’s decision merely follows from the GA’s request. Such a request, as far as the Court is concerned, does not show GA’s intention to address a territorial sovereignty dispute. However, the Court’s obligation to satisfy its jurisdiction is by nature objective, without depending on legal or political views from the applicant or any third State. As analyzed before, the GA’s request involves some agreements on the detachment of Chagos Archipelago from Mauritius, which has reflected a sovereignty dispute. Notably, the Court found that “the United Kingdom’s continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State”. Furthermore, the UK is obligated to end the administration of the Chagos Archipelago “as rapidly as possible”, “thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination”. One may argue that such a decision has already touched upon the determination of sovereignty over Chagos Archipelago. The UK’s illegal act results from infringing Mauritius’s sovereignty, and the Court’s mandate reveals that sovereignty is the essential dispute concerning the UK’s continued administration. Therefore, without the UK’s consent, the Court cannot make such a judicial decision and is in contravention of the application of the Monetary Gold principle. There is a compelling reason for the Court not to give an advisory opinion on this issue.

2.3.3.3 The Ukraine v. Russia Arbitration and the Crimea investment arbitrations

In Ukraine v. Russia, the Tribunal bifurcated the proceedings and considered Russian preliminary jurisdictional objections in a preliminary phase. The primary objection showcases that Ukraine’s submission regarding coastal State rights in the Black Sea, Sea of Azov and Kerch Strait reflect a dispute over sovereignty rather than a dispute concerning interpretation and application of UNCLOS provisions. Accordingly, the Tribunal has the judicial duty to identify which dispute is the first dispute to be determined—the sovereignty dispute or the interpretation of the application of coastal State rights in UNCLOS. Given the sovereignty dispute is the first one to be addressed,
the Tribunal will have no jurisdiction *ratione materiae* over Ukraine’s application, since the sovereignty dispute goes beyond the scope of UNCLOS without consent from two States. Notably, whether or not the *Monetary Gold* principle is applicable to identify the dispute cannot be disassociated with the background of the arbitration. Russia had *de facto* controlled Crimea since 2014, while Ukraine had lost it as part of its territory. Russia claimed that “it has a legal claim to sovereignty over the Crimean Peninsula,” whereas Ukraine argued that “Russia has no plausible legal claim to sovereignty over Crimea”.\(^\text{186}\) Therefore, the Tribunal cannot circumvent the sovereignty dispute over Crimea to decide whether Ukraine coastal State rights are infringed or not in relevant maritime areas, which have been pointed out by some scholars.\(^\text{187}\) Nonetheless, it remains to be seen how the Tribunal identifies the real dispute in the future.

In the meantime, Ukraine’s companies filed a series of arbitral proceedings against Russia on the basis of the Russia-Ukraine Bilateral Investment Treaty (BIT), for expropriating their investments in Crimea.\(^\text{188}\) Currently, no investment tribunals invoke the *Monetary Gold* principle to debar its jurisdiction or to make the application inadmissible.\(^\text{189}\) Notwithstanding, there are some areas to be explored when territorial disputes are involved in investment disputes. In the BIT, the notion of “investment” refers to “property and intellectual values” that “are put in by the investor of one Contracting Party on the territory of the other Contracting Party”.\(^\text{190}\) Therefore, the Tribunal first has to ascertain the ownership of territory where Russia’s confiscating act took place. The Court is obliged to determine the sovereignty dispute over Crimea as the first dispute, i.e., the legality of Russian occupation over Crimea. It is evident that Russia did not participate in any of these arbitrations and did not consent to the jurisdiction of the tribunals; thus, theoretically, the Tribunal has no jurisdiction *ratione materiae* over investment disputes as the second dispute. However, arbitral awards

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186 Ukraine *v.* The Russian Federation, Procedural Order No. 3.


189 Tzeng, “Investments on Disputed Territory,” 125.

rendered in five cases gave no decisions on this issue. So as to circumvent the resolution of a sovereignty dispute, Peter Tzeng provides several “escape mechanisms” for the Tribunal to be adopted. Nevertheless, this issue remains controversial and it remains to be seen how arbitral tribunals may deal with that issue in the future.

2.3.4 The Monetary Gold principle and judicial function of an international court or tribunal

The Monetary Gold principle is rooted in an international legal principle that a court or tribunal cannot exercise its jurisdiction over a State without its consent. Tobias Thienel points out that “the Monetary Gold principle has a role to play not only with respect to determination of the responsibility of a third State, but also in maritime and territorial delimitation cases”. In the cases involving a third State’s international responsibility, three perceptions of the Monetary Gold principle are formulated: the exercise of its jurisdiction can be fully and completely debarred, the exercise of its jurisdiction can be partially prohibited, or there are no jurisdictional obstacles imposed upon its jurisdiction even if a third State is implicated. Meanwhile, this principle is equally applicable in a mixed dispute in the absence of a third State. The essence of the Monetary Gold principle reflects an approach to making a distinction between a real dispute and a superficial dispute incidental to it, and the former determines the latter.

To illustrate, there are some safeguards for them, including the principles of res judicata and pacta sunt servanda, as well as res inter alios acta, the application of intervention under the Statute of the ICJ, and instituting new proceedings. They are normally

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192 Tzeng, “Investments on Disputed Territory,” 133-4. Tzeng, “The Implicated Issue Problem,” 490-1. Peter Tzeng observes that there are at least five ways for the Tribunal to steer by this issue. Firstly, “the Tribunals could find that, as a factual matter, Ukraine has sovereignty over Crimea”; Secondly, “the tribunals could interpret Article 1(1) of the BIT to require only that the investment be in territory under the ‘effective control’ and/or ‘jurisdiction and/or control’ of Russia”; Thirdly, “the tribunals could hold that the word ‘territory’ in Article 1(1) should be interpreted in reference to the time at which the BIT was concluded”; Fourthly, “along the same lines, the tribunals could emphasize that Article 1(1) requires that the investment be ‘put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter’s legislation’. Accordingly, regardless of which State currently has sovereignty over Crimea, the investments were originally put in by the Ukrainian investors on the territory of Ukraine in conformity with Ukraine's legislation”; Fifthly, “the tribunals could find that, despite the sovereignty dispute over Crimea, Russia is estopped from asserting that Crimea does not constitute part of its ‘territory’ given its consistent behaviour over the past few years in treating Crimea as part of its territory”.

193 Odysseas G. Repousis, “Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict,” Arbitration International 32, Issue 3 (2016): 480. All the Crimea investment arbitrations are confidential and little information has been revealed about how the Tribunals consider the sovereignty issue. To be added, Odysseas Repousis holds the view that it is possible for the Tribunal to invoke the Monetary Gold principle, since Ukraine’s sovereignty claim over Crimea indicates “Ukraine’s legal interests form the very subject-matter of the investor–state tribunal’s decision”. But if the Tribunal focuses only on the dispute between investor and Russia, it is possible that this principle may not be applicable.

sufficient to protect the interests of third States but should be determined on a case-by-case basis. The validity of a third State’s claim is a potentially overwhelming factor to appraise the effects of these safeguards. If the validity of a third State is dismissed without its consent, that would lead a third-party litigation body to cease the exercise of its jurisdiction *ratione personae*. Moreover, a court or tribunal may totally refrain from exercising jurisdiction *ratione materiae* when the real dispute as the first dispute constitutes the prior determination of the pending dispute as the second without consent from two parties. All in all, the origin and evolution of the *Monetary Gold* principle express a cautious balance that an international court or tribunal intends to seek between disputing parties and other States in the international community. On the basis of State consent, for an international court/tribunal to completely fulfill its judicial duty it may need an objective identification of the real subject matter of the case. However, among recent cases, the SCS Arbitration as a mixed dispute under UNCLOS is an exception to the application of the *Monetary Gold* principle and requires a specific examination of the Tribunal’s reasoning, which will be presented in the next section. To be noted, the SCS Arbitration has exposed some concerns with regard to whether the *Monetary Gold* principle provides safeguards for third States in a bilateral mixed dispute. A court’s or a tribunal’s reluctance has showed the insufficient capacity of international legal means when they are faced with a multilateral dispute. With the extension of multilateralism, much attention should be drawn to seeking supplementary means in response to a dispute’s traditional bilateralism.

2.4 Reflections on the applicability of the *Monetary Gold* principle in the SCS Arbitration

In general, the Philippines’ submissions can be categorized into three parts. The first part is about China’s claims to sovereign rights, sovereign jurisdiction, and to historic rights with regard to the maritime areas within the relevant part of the “nine-dash line” between the Philippines and China.\(^{195}\) The second part is about the legal status and maritime entitlement of certain maritime features occupied by China and associated maritime entitlements.\(^{196}\) The third part is about the legitimacy of China’s alleged activities in the area that the Philippines claims to be its EEZ and CS.\(^{197}\) The SCS Arbitration inherently contains two jurisdictional issues in the preliminary phase, namely, the direct participation of third States related to the Tribunal’s jurisdiction *ratione personae*, and the implication of disputes concerning territorial sovereignty and maritime delimitation which concern the Tribunal’s jurisdiction *ratione materiae*.

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\(^{195}\) *The Philippines v. China*, Submissions No. 1 to No. 2 (PCA. 2016).

\(^{196}\) Ibid., Submissions No. 3 to No. 7.

\(^{197}\) Ibid., Submissions No. 8 to No. 15.
Accordingly, the applicability of the *Monetary Gold* principle needs to be examined from two perspectives.

Regarding the former one, Vietnam and Malaysia formally asked the Court to consider their interests and rights which might be affected by the arbitral award.\(^{198}\) Other bordering States in the SCS did not make similar statements, and none of the neighboring States sought to intervene in the proceedings. Instead, they were all allowed to attend hearings of jurisdiction and merits as observer States.\(^{199}\) China did not make an assertion regarding how other surrounding States’ positions create a hurdle for the Tribunal’s jurisdiction *ratione personae*. Nevertheless, this section will take a closer look at this issue. In the latter case, without taking the presence of third States into account, the Philippines clashes with China concerning the essence of the dispute, namely, whether it is a dispute concerning the interpretation or application of certain UNCLOS provisions, or a mixed dispute implicating sovereignty and maritime delimitation. The Philippines asserted that no sovereignty or delimitation issues are involved and the former is the real dispute. However, China argued that the latter dispute constitutes the real dispute, which becomes the prerequisite for determining the former dispute and deprives the Tribunal of exercising jurisdiction *ratione materiae*.

### 2.4.1 The applicability of *Monetary Gold* principle in the SCS Arbitration in the context of direct participation of third States

This section will address how, due to the presence of third States, the *Monetary Gold* principle was interpreted and applied in the *SCS* Arbitration. First, it will introduce arguments from Vietnam, Malaysia, and the Philippines, and the decision of the

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198 Ministry of Foreign Affairs of Vietnam, “Statement of the Ministry of Foreign Affairs of Vietnam Transmitted to the Arbitral Tribunal in the Proceedings between The Philippines and China,” *South China Sea Research*, August 20, 2016, accessed September 16, 2018, https://seasresearch.wordpress.com/2016/08/20/document-statement-of-the-ministry-of-foreign-affairs-of-vietnam-transmitted-to-the-arbitral-tribunal-in-the-proceedings-between-the-philippines-and-china-dec-2014/. *The Philippines v. China*, Award on Jurisdiction and Admissibility, 72-3, paras. 183-4 (PCA. 2015). At the jurisdictional stage, on 7 December 2014, Vietnam delivered a statement and specified interests and rights for the Tribunal’s considerations. In the statement, the Tribunal was requested to have due regard for the position of Vietnam to protect its legal rights and interests of a legal nature in the South China Sea, which may be affected in this arbitration. Vietnam reserved its right to protect its legal rights and interests by any peaceful means as appropriate and necessary in accordance with the Convention and in addition reserved its right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law, including the relevant provisions of UNCLOS.

Note Verbale from the Federation of Malaysia to the Tribunal, No. PRMC 5/2016 (23 June 2016), enclosing Communication from the Ministry of Foreign Affairs of Malaysia,” June 23, 2016, *The Philippines v. China*, at 60-5, paras. 157-68 (PCA. 2016). After the merits hearing, on 23 June 2016, Malaysia in a communication to the Tribunal stated that its rights and interests as a third State also might be affected by the MA to be rendered, and it asked the Court to pay due regard to these interests.


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Tribunal. Following this part, some observations will be made about different States’ positions and the ruling, finding that this principle is sufficient to be applied.

2.4.1.1 Arguments from Vietnam, Malaysia, and the Philippines, and the Tribunal’s ruling regarding the applicability of the Monetary Gold principle

According to Vietnam’s statement, the Tribunal was asked to pay attention to its rights and interests in this arbitration. Vietnam supported the Tribunal’s jurisdiction over the dispute, expressing its position on China’s “nine-dash line” claim, the status and maritime entitlement of the features in question, and the legitimacy of certain Chinese activities in the West Philippine Sea (WPS). However, as Stefan Talmon indicates, the Philippine submissions were mainly concerned with Articles 13, 56, 57, 76, 77, and 121 of UNCLOS, and on Vietnam’s side “there was thus no express support of the Tribunal’s competence to interpret and apply the provisions most relevant to the Philippines’ case”. From Malaysia’s perspective, “Malaysia may also have overlapping maritime entitlements (including an extended continental shelf) in the areas of some of the features that the Arbitral Tribunal has been asked to classify”. The Tribunal’s ruling would not “express any position that might directly or indirectly affect the rights and interests of Malaysia”. It additionally declared that the final award could not “decide upon the maritime entitlements” generated by “any features within the EEZ and Continental Shelf of Malaysia as published in Malaysia’s Map of 1979”.

The Philippines first argued that, this case was not about a dispute of sovereignty or maritime delimitation between two parties and third States. Second, the Monetary...
Gold principle is “a narrow principle confined to “responsibility of an absent State for breach of an international obligation”. 207 In this arbitration, the Tribunal was not required “to pass judgment on the lawfulness of any actions or conduct of Vietnam”. 208 Third, Vietnam’s position had no indication of claims relating to indispensable third parties. 209 The Tribunal first pointed out that the legal rights and obligations of Vietnam did not require it to address the issue of territorial sovereignty as a prerequisite for determining the merits. 210 Second, none of the submissions entailed Vietnam’s conduct, which was considered to be the very subject matter of the arbitration if Vietnam was an indispensable party. 211 Third, Vietnam supported the Tribunal’s conclusion. 212 Fourth, no argument of indispensable third parties had been made by States in the WPS. 213 Therefore, the Tribunal found that the Monetary Gold principle was inapplicable. 214 With respect to Malaysia’s arguments, the Court first observed that Malaysia neither treated itself as a party to the dispute nor intended to intervene in the proceedings, and thus Malaysia would be protected by the res judicata principle. 215 Second, of certain features to be determined, none were situated “within the continental shelf limit claimed by Malaysia in the 1979 map”. 216 In the Tribunal’s view, Malaysia admitted that none of the features in the SCS can be fully entitled to EEZ and CS, which is consonant with the Philippines’ position. 217 As a result, the Tribunal’s decision did not affect features in the South China Sea - and the legal entitlements such features are entitled to generate as a matter of international law in accordance with the 1982 Convention -does not require the Tribunal to consider, as a prerequisite, any claim by any state that is not party to this arbitration”. Ibid., The Philippines Memorial, at 153-7, paras. 5.122-5.133. To be further clarified, the Philippines contended that the Monetary Gold principle was “an exceptional rule but rarely applied in practice” and “a narrow principle confined to a very limited category of cases”. 207 Ibid., at 153-157, paras. 5.122. Ibid., Final Transcript Day 2, p.123. 209 Ibid., The Philippines Memorial, at 158, paras. 5.134-5.135. Ibid., Final Transcript Day 2, at 121-123. Vietnam had not sought to intervene concerning the Court’s interpretation and application of the Convention, nor had it raised an indispensable third-party objection to the exercise of jurisdiction, but it expressed its support for the Tribunal’s jurisdiction over the arbitration. Vietnam’s claim in the joint submission to the CLCS with Malaysia in 2009 made clear that “none of the contested features in the South China Sea is capable of generating entitlement to an EEZ or continental shelf”. 210 The Philippines v. China, at 71, para. 180 (PCA. 2015). Ibid., para. 181 212 Ibid., at 72, 73, paras. 183, 186. “Unless Vietnam applied for intervention under UNCLOS, the Tribunal would address the permissibility of intervention in the arbitration, but Vietnam had not done that yet”. 211 Ibid., at 74, para. 188. 213 Ibid., paras. 187-8. The Philippines v. China, at 257, para. 635 (PCA. 2016). 214 Ibid., at 257, 259, paras. 637, 641 (PCA. 2016). The Court further stated that Malaysia’s rights and interests could not be affected because the Tribunal’s decision only constituted the res judicata between two parties. “Article 296(2) of the Convention expressly provides that “[a]ny such decision shall have no binding force except between the parties in respect of that particular dispute”. “In these circumstances, Malaysia’s rights and interests are protected, to the extent they are implicated at all, by its status as a non-party to the proceedings and by Article 296(2)”. 216 Ibid., at 257-8, para. 638. 217 From the Tribunal’s perspective, Malaysia recognized that none of features in the Spratlys could generate full maritime entitlements under Article 121 (3) of UNCLOS by its joint submission to the CLCS with Vietnam in 2009. “Malaysia’s joint submission (with Vietnam) to the CLCS sets out official coordinates for the outer limit of Malaysia’s 200-nautical-mile continental shelf claim, which is unequivocally drawn from basepoints adjacent to the coast of Borneo, rather than from any feature in the Spratly Islands”. 46
Malaysia’s rights and interests in the merits.\textsuperscript{218} Third, the Tribunal found that Malaysia rendered an expansive interpretation of the \textit{Monetary Gold} principle which was not applicable here.\textsuperscript{219}

As a result, the Tribunal’s ruling concerning the \textit{Monetary Gold} principle basically sides with the position of the Philippines. The dispute concerning the legal status and maritime entitlement of certain features has nothing to do with sovereignty or maritime delimitation. The \textit{Monetary Gold} principle is merely confined to the cases concerning the lawfulness or unlawfulness of conduct by third States, and it has a narrow scope of application when taking the rights and interests of absent third States into account. The rights and interests of third States may be affected by the Tribunal’s decision, but they do not form the very subject matter of the dispute before it. Thus, the \textit{Monetary Gold} principle is not applicable here. Neither of parties was an indispensable party to the proceedings before the tribunal.

\textbf{2.4.1.2 Reflections on the ruling as regards the inapplicability of the \textit{Monetary Gold} principle}

To illustrate, the Tribunal’s reasoning in the applicability of the \textit{Monetary Gold} principle becomes problematic based on several reasons. First, Vietnam claims indisputable sovereignty over Paracel Islands (Paracels) and Spratlys, respectively, as a whole.\textsuperscript{220} In Submission No. 4, no capability of appropriation by occupation or other means indicates that Vietnam would have lost some features as a part of its territory.\textsuperscript{221} As Antonios Tzanakopoulos observes, “any (implicit, or consequent) determination that

\textsuperscript{218} Ibid., para. 639.

\textsuperscript{219} Ibid., paras. 639–41. The Tribunal enunciated that such an interpretation “would impermissibly constrain the practical ability of courts and tribunals to carry out their function”. What is more, after recalling the ICJ’s jurisprudence in the \textit{Monetary Gold} case and \textit{Nicaragua} case, the Tribunal observed that, “to the extent it has examined certain features claimed by China (that are also claimed by Malaysia) for the purposes of assessing the possible entitlements of China in areas to which Malaysia makes no claim, the legal interests of Malaysia do not form ‘the very subject-matter of the dispute’ and are not implicated by the Tribunal’s conclusions”.


a particular feature is incapable of appropriation would have the effect of precluding not just a Chinese claim to sovereignty over the feature, but also those of other states not parties to the dispute, such as for example the claims of Viet Nam over maritime features in the Spratly Islands”. In Submission No. 5, the ruling that these features form part of the Philippines’ EEZ and CS amounts to removing features from the Spratlyys, and it directly fragmented the whole unit as claimed by Vietnam. Accordingly, only when the territorial conflict between Vietnam and the Philippines is settled can two Philippine requests be determined further. At this point, Vietnamese rights and interests in the sovereignty over the Spratlys form the very subject matter of Submission Nos. 4 and 5; therefore, the Tribunal has no jurisdiction *ratione personae*, according to the *Monetary Gold* principle. Concurrently, Vietnam’s sovereignty dispute with the Philippines constitutes the prerequisite for determining two submissions. The Tribunal has no jurisdiction *ratione materiae*, and Philippine claims are inadmissible.

Moreover, Submission No. 5 required the Tribunal to address the status and entitlement of all features in the Spratlys. Malaysia asserted that “the Arbitral Tribunal cannot purport to decide upon the maritime entitlements pursuant to Articles 13 and 121 of UNCLOS 1982 of any features within the EEZ and Continental Shelf of Malaysia”. One would say the tribunal’s decision may far beyond what Malaysia requested of it, without Malaysia’s consent. Regarding the legal status and maritime entitlement of features in the EEZ and CS of Malaysia, the rights and interests of Malaysia form the very subject matter of the case, so the Tribunal has no jurisdiction *ratione personae*, based on the *Monetary Gold* principle. Additionally, the decision on the non-existence of fully entitled islands in the Spratlyys will reduce Malaysia’s overlapping maritime areas with other States and delineated maritime boundaries for Malaysia, without Malaysia’s consent. It is affirmed from international case law that the determination of legal status and maritime entitlement of features has become an integral part of the process of delimitation. Therefore, the delimitation dispute between Malaysia and

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224 *The Philippines v. China*, at 179, para. 399 (PCA. 2016). The Court considered that the determination of Submission No. 5 “would require the Tribunal to rule out the possibility that any feature claimed by China could generate an entitlement to an exclusive economic zone that would overlap that of the Philippines at either Mischief Reef or Second Thomas Shoal. In practice, this would require a finding that none of the Spratly Islands are fully entitled islands under Article 121 of the Convention”.
225 Ibid., at 257, para. 635.
other States, including the original litigating parties, constitutes a prerequisite for determining Submission No. 5 and forms the very subject matter of this submission. Thus, in terms of the Monetary Gold principle, without consent from two States, the Tribunal cannot exercise jurisdiction ratione materiae over two submissions.

In international adjudication and negotiation relating to maritime boundary delimitation, the presence of a third State evolves into a relevant factor. In other words, the presence of a third party can be inclusive as a part of the delimitation process. Before the arbitration, it is revealed that, at least twelve features constitute fully entitled islands in general. Additionally, according to the Philippines’ Note Verbale in 2011, the Kalayaan Island Group (the KIG) consists of islands and other geographic features, which means the Philippines recognizes the existence of islands in the Spratlys within the meaning of Article 121 of UNCLOS. Such an assertion was also confirmed by Malaysia’s statement, since the recognition of overlapping CSs and EEZs indicated islands did exist in the disputed area. As regards Submission No. 6, it is argued that

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Barbara Kwiatkowska and Alfred H.A. Soons, “Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own,” Netherlands Yearbook of International Law 21, (1990): 181. One of the arbitrators in the arbitration has clarified that “the definition of rocks and their entitlement to maritime spaces form an inherent part of maritime boundary delimitation between opposite/adjacent states and, as state practice evidences, these issues will not give rise to controversies, unless such delimitation is in dispute”. Barbara Kwiatkowska and Alfred H.A. Soons, “Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3),” The Global Community—Yearbook of International Law and Jurisprudence 2011, Issue 1(2011): 114-5. In this paper, he later pointed out that “the issue of eventual application of Article 121(3) does not arise in practice, unless in the context of specific maritime delimitations”.


Commission on the Limits of the Continental Shelf, “Joint submission by Malaysia and the Socialist Republic of Viet Nam.”

The Philippines v. China, at 257, para. 635 (PCA. 2016). It should be remembered that Malaysia indicated that “it may also have overlapping maritime entitlements (including an extended continental shelf) in the areas of some of the features that the Arbitral Tribunal has been asked to classify”.

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East Asia Maritime Conflicts
Gaven Reef is simultaneously located in the overlapping TS between and China.\(^{231}\) Meanwhile, McKennan Reef simultaneously lies in the overlapping EEZ and CS between Vietnam and China.\(^{232}\) Therefore, to determine the status and entitlement of Gaven Reef and McKennan Reef, the Tribunal would first demarcate overlapping TS, EEZ, and CS between two States. With respect to Submission No. 7, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are located in overlapping CS and EEZ between Vietnam and China.\(^{233}\) In addition, three features simultaneously fall within overlapping CS and EEZ between Vietnam and the Philippines.\(^{234}\) Accordingly, two disputes, between China and Vietnam and between Vietnam and the Philippines constitute the prerequisite for determining the legal status and entitlement of these features. The Tribunal cannot exercise its jurisdiction \textit{ratione personae} over Submission No. 7 without consent from Vietnam, in terms of the \textit{Monetary Gold} principle. In addition, according to Malaysia’s Statement, Mischief Reef and Second Thomas Shoal are simultaneously situated in the overlapping CS and EEZ of the Philippines and Malaysia, which results in the delimitation between two countries.\(^{235}\) Provided three features are defined as rocks, overlapping maritime entitlements with other States will vanish in the disputed area. Nonetheless, the Tribunal has no jurisdiction \textit{ratione personae} to delimit these overlapping maritime zones for Malaysia without its consent. What is more, the decision on Submissions No. 6 and No. 7 requires first a solution to the delimitation disputes between Vietnam or Malaysia and two principal parties, rather than the dispute

\(^{231}\) Gaven Reef (North: 10°12′27″N-114°13′21″E, South: 10°09′42″N-114°15′09″E) is simultaneously located in the 12-NM TS of both Itu Aba Island (10°22′38″N-114°21′56″E) China occupies and Namyit Island (10°11′N, 114°22′E) Vietnam controls. Additionally, the distance between two islands becomes less than 12 NM, which means there is overlapping TS between Vietnam and China. The coordinates of Gaven Reef and Itu Aba Island can be found in \textit{The Philippines v. China}, at 122, 179, paras. 288, 401 (PCA. 2016). The coordinate of Namyit Island can be found in can be found in Nanhai Zhudao Website [translated in Chinese], accessed September 18, 2018, http://www.unanhai.com/nhzddm.htm. The distances between Gaven Reef and Itu Aba, between Gaven Reef and Namyit Island and between Itu Aba Island and Namyit Island are calculated by “Latitude/Longitude Distance Calculator,” National Oceanic and Atmospheric Administration, accessed September 18, 2018, http://www.nhc.noaa.gov/gccalc.shtml.

\(^{232}\) McKennan Reef (9°54′13″N-114°27′53″E) is simultaneously located in the 200-NM EEZ and CS of both Itu Aba Island and Namyit Island, which means there is overlapping EEZ and CS between Vietnam and China. The coordinate of McKennan Reef can be found in Nanhai Zhudao Website, “List of Partial Standard Names.” The distances between McKennan Reef and Itu Aha, between Gaven Reef and Namyit Island and between Itu Aha Island and Namyit Island are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.”

\(^{233}\) Johnson Reef (9°43′00″N-114°16′55″E), Cuarteron Reef (8°51′41″N, 112°50′08″E), and Fiery Cross Reef (9°33′00″, 112°53′25″E) are situated in the CS and EEZ within 200 NM of Namyit Island. Three features also fall simultaneously within the CS and EEZ within 200 NM of Itu Aha Island. The coordinates of Johnson Reef, Cuarteron Reef, and Fiery Cross Reef can be found in \textit{The Philippines v. China}, at 121, paras. 285-7 (PCA. 2016). The distances between Johnson Reef and Itu Aha, between Johnson Reef and Namyit Island, between between Cuarteron Reef and Itu Aha, between Cuarteron Reef and Namyit Island, between Fiery Cross Reef and Itu Aha, and between Fiery Cross Reef and Namyit Island are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.”

\(^{234}\) Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are located in the CS and EEZ within 200 NM of Thitu Island (11°23′N, 114°17′E) controlled by the Philippines but claimed by Vietnam and China. The coordinate of Thitu Island can be found in Nanhai Zhudao Website, “List of Partial Standard Names.” The distances between Johnson Reef and Thitu Island, between Cuarteron Reef and Thitu Island, between Fiery Cross Reef and Thitu Island and between Thitu Island and Namyit Island are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.”

\(^{235}\) Tzanakopoulos, “Resolving Disputes over the South China Sea,” 144.
concerning the interpretation and application of UNCLOS provisions at the jurisdictional stage. Therefore, according to the Monetary Gold principle, the Tribunal would be deprived of exercising jurisdiction ratiocina materiae over the Philippines’ Submission Nos. 4 to 7.

To be sure, during the arbitral proceedings, the amicus curiae brief was submitted by Chinese (Taiwan) Society of International Law regarding the legal status and marine entitlement of Itu Aba Island to the Tribunal. Moreover, there are some scholars who argue that Taiwan can be an indispensable party in this case. Tsu-sung Hsich argues that “had these direct evidences relating to Taiping Island (Itu Aba Island) been provided by the indispensable third-party Taiwan to the tribunal, mainland China would have had a more favorable position in this case”. Anne Hsiu-An Hsiao observes as well that “no consideration was given to Taiwan as an ‘indispensable third party’ throughout the proceedings”. Brian McGarry holds the similar opinion that the lack of analysis about Taiwan’s position does not affect the fact that it has the same interests as the PRC. In fact, at the hearing on the merits, as Yen-Chiang Chang describes, the Tribunal “asked the Philippines about the legal status of Taiwan and whether Taiwan can be differentiated from the People’s Republic of China”. The Philippines considered that “there is only one China, and that it is the People’s Republic of China”. Since 1949, only the People’s Republic of China has been able to speak for or on behalf of China. The actions before 1949 including the Republic of China are attributed to China, whereas “the actions of the Taiwanese authorities since 1949 are not per se attributable to the PRC”. As far as China is concerned, Philippine intentional exclusion of Itu Aba Island from China’s occupied features constituted “a grave violation of the One-China Principle and an infringement of China’s sovereignty and territorial integrity”. In the MA, the Tribunal proclaimed Taiwan as Taiwan Authority of China instead of Republic of China (Taiwan) and even referred to historic records and amicus curiae brief from it to identify the legal status and entitlement of certain features, including Hughes Reef, Gaven Reef (North), and Subi Reef occupied by the

242 Ibid.
243 Ibid.
PRC.\textsuperscript{245} Indicatively, the Tribunal rejected the existence of the Republic of China (Taiwan) as a sovereign State but considered it to be affiliated as a part of the PRC in this case.\textsuperscript{246} As argued above in the third section of this chapter, the \textit{Monetary Gold} principle or the indispensable party rule can only be applied to absent States as third parties directly involved. In the Tribunal’s view, Taiwan Authority of China constitutes a part of China, and it seems there is no space for it to become an indispensable third party to the arbitration. Notably, after the SCS arbitration, Taiwan Authority gradually shifts its official position on the SCS, as Shicun Wu observes, “insulating itself from Chinese mainland, and pandering to the policy of the United States and Japan”.\textsuperscript{247} Such a deviation aims to depict Taiwan as an equally sovereign entity but may cause objection from the mainland, which results in uncertainties and unpredictability regarding regional peace and security.

All in all, the presence of third States as procedural hurdles is indispensable to the proceedings and at least can debar the Tribunal from exercising jurisdiction \textit{ratione personae} and jurisdiction \textit{ratione materiae} over some of the Philippine submissions. As concluded by Antonios Tzanakopoulos, “all this is merely meant to indicate that South China Sea disputes, as multilateral disputes, may not be fit for determination in the context of a bilateral, adversarial proceeding between only two of the many disputing states”.\textsuperscript{248}

\subsection*{2.4.2 The application of the \textit{Monetary Gold} principle to a dispute of a purely bilateral nature in the SCS Arbitration}

Given that the dispute is confined to China and the Philippines without taking account of other surrounding States in the WPS, the core controversy is whether it is a mixed dispute and thus goes beyond the jurisdiction \textit{ratione materiae} of the Tribunal under Article 288(1).

\textsuperscript{245} \textit{The Philippines v. China}, at 82, 165, 179, 202-3, 241, paras.197, 371, 401, 467-8, 587 (PCA. 2016).
\textsuperscript{246} Hsiao, “The South China Sea Arbitration,” 218. Wei-chin Lee, “Taiwan, the South China Sea Dispute, and the 2016 Arbitration Decision,” \textit{Journal of Chinese Political Science} 22, Issue 2 (2017), 242. One of reasons for Taiwan to reject the MA is “the ruling’s reference to Taiwan as ‘Taiwan Authority of China’ is an inappropriate designation of Taiwan as a sovereign State”, as observed by Wei-chin Lee.
\textsuperscript{247} Shicun Wu, “Reviewing the South China Sea Situation and Exploring the Way Forward,” \textit{Ocean Yearbook} 32, Issue 1 (2018): 67-8. Shicun Wu further states that “on the one hand, Tsai (Ing-wen) has deliberately distanced Taiwan’s stance held by the Kuomintang authorities on the U-shaped line and the territorial sovereignty over the four island groups in the South China Sea, in an attempt to narrow Taiwan’s claims to the Donsha Islands (Pratas Islands) and Taiping Dao (Itu Aba Island) of the Nansha Islands (Spratly Islands). On the other hand, the Tsai Administration has stressed that Taiwan should, as a party of ‘equal sovereignty’ to the Chinese mainland, take part in the multilateral frameworks for the negotiation and consultation of the South China Sea dispute”.
\textsuperscript{248} Tzanakopoulos, “Resolving Disputes over the South China Sea”, 143-4.
2.4.2.1 A mixed dispute concerning historic rights within the nine-dash line

With respect to Submission Nos. 1 and 2, the Philippines alleged that China’s claim of historic rights within the relevant part of the nine-dash line between two States infringed its sovereign rights and jurisdiction in the WPS. The Philippines relied on China’s Note Verbale in 2009 to demonstrate that China first asserted its sovereign rights and jurisdiction based on the “nine-dash line” 249 However, the official map with the “eleven-dash” line in 1947 marked the location of maritime features under China’s territorial sovereignty, and it gradually evolved into the “nine-dash line” (“the dotted line” or “the U-shaped line”). It is suggested that this line is a demonstration of Chinese sovereignty in the SCS, as commented by a series of scholars. 250 Michael Sheng-ti Gau further contends that “given the situation that most maritime features in the Spratly Islands Group are under foreign occupation, USL (the nine-dash line) symbolizes China’s national shame for stolen territories”. 251 The term “historic right” is provided in Article 14 of China’s Exclusive Economic Zone and the Continental Shelf Act in 1998. 252 The focus of this Act is on how China claims EEZ and CS, namely, sovereign rights and jurisdiction based on UNCLOS. In addition, China claims TS, EEZ, and CS from four archipelagos as a single unit. As far as China is concerned, historic rights are supplemental and residual rights that are not statutory entitlements under the Convention. 253 As illustrated by Hong Nong, “historic rights, relating to a particularized regime, reflect a continuous, long-established, and undisturbed situation”. 254 For a long historic period of more than 2000 years, Chinese people have constantly carried out

249 Philippines v. China, Memorial of the Philippines, at 70, para. 4.5.
various activities in the SCS and the Chinese government “continuously exercise[s] sovereign powers over them”. The assertion of historic rights originated from Chinese people’s long-term activities which are subject to a longstanding management and regulation implemented by Chinese government. It is depicted by Sreenivasa Rao Pemmaraju that “China’s case is that, as it repeatedly emphasized, it acquired historic rights over several of these maritime features through exercise of acts à titre de souverain”. Moreover, he indicates that, “they [the geological nature and the entitlements of the maritime features] can be assessed only by examining the nature of acts and functions of sovereignty China claims to have performed from times immemorial or through history”. What is more, the notion of historic title has also been recognized by international courts and tribunals as a factor to claim territorial sovereignty. Historic evidence consolidates the existence of historic title over maritime features as well as connecting waters in the SCS, including the WPS. Stefan Talmon elaborates that “every ancient title is a historic title as it is one based on history”. He also notes that, “China’s claim to territorial sovereignty over the Nansha Islands as a whole constitutes a plausible claim to ancient title over land and maritime areas in the SCS”. In light of Article 298(1)(a), China made a declaration in 2016 to exclude the dispute involving historic title; therefore, the Tribunal cannot exercise jurisdiction ratione materiae over the claim of historic rights. Overall, the dispute relating to the validity of historic rights under UNCLOS reflects the dispute concerning territorial sovereignty as the prerequisite, in terms of the Monetary Gold principle, to decide the latter constitutes the basis of a prior dispute, which should be out of the Tribunal’s jurisdiction ratione materiae.

In addition, Nong Hong states that “China’s historical claim in the SCS based on the ‘U-shaped line’ overlaps with the claims to EEZ and continental shelf of Vietnam, Indonesia, Malaysia, Brunei and the Philippines”. Furthermore, the “nine-dash line” is presumed to be a line of maritime boundary. Sienho Yee comments that, it is “not just a descriptive marker in the map”. Notably, The Philippines does not explicitly submit
which area in the WPS consists of the zone where historic rights are exercised. Consequently, this hardly makes it possible or the Tribunal to ensure how the Philippines’ sovereign rights are being infringed. Philippine formulation that historic rights are the same exclusive as EEZ and CS can only be dealt with until concrete EEZ and CS between two States are demarcated and considered in a delimitation framework. Accordingly, the “nine-dash line” can be deemed as a provisional maritime boundary to be determined for further delimitation. Therefore, the first dispute regarding the EEZ and CS delimitation between China and the Philippines determines the second dispute relating to historic rights within the nine-dash line. According to the Monetary Gold principle, the tribunal’s jurisdiction ratio materiae can not be exercised.

2.4.2.2 A mixed dispute concerning the status and maritime entitlement of certain maritime features

As claimed by the Philippines, Articles 13 and 121 were concerned with a particular or insular feature. However, China explicitly regarded the Spratlys as a single unit and claimed TS, EEZ, and CS from the unit as a whole. In order to drag China into submissions concerning several insular features, the Philippines erroneously misrepresented China’s position and dissembled the single unit into separate individual features. Therefore, Submission Nos. 4 to 7 have fragmented or dissected China’s sovereignty over the Spratlys as a single unit. By the same token, Scarborough Shoal forms part of Zhongsha Islands/Archipelago (Macclesfield Bank and Scarborough


266 Commission on the Limits of the Continental Shelf, “Joint submission by Malaysia and the Socialist Republic of Viet Nam.” The Philippines v. China, Final Transcript Day 2-Jurisdictional Hearing, at 29, note 33, at 37. Ibid., Transcript Day 3-Jurisdictional Hearing, at 11. In response to the Tribunal’s question in the hearing for further clarifications on the existence of a legal dispute throughout each submission, the Philippines erroneously modified China’s official position in the Note Verbale. China originally claims “Nansha Islands is fully entitled to …”; however, the Philippines stated that “Nansha Islands are fully entitled to …”. The wording of “are” in a plural form represents that China claims maritime entitlements from individual features instead of the archipelago as whole.

267 The Philippines misconceives China’s position on the meaning of “dissection” or “distortion”. China’s claim on maritime entitlements (TS, CS, and EEZ) of the Spratlys is based on sovereignty over a group of features as a unit; therefore, “all maritime features comprising the Nansha Islands must be taken into account”. Mere selection of several insular features constitutes a “dissection” of China’s sovereignty over the Spratlys as a single unit. However, from the Philippines’ perspective, what China complained of was that the Philippines did not ask the Tribunal to decide whether the rest of insular maritime features in the Spratlys were capable of generating TS, CS, and EEZ. No considerations on other insular features are understood as China’s accusation on the dissection of the Spratlys. Such a misconception remains to be established in the misrepresentation of China’s position on maritime entitlements in the Spratlys. Ministry of Foreign Affairs of People’s Republic of China, “Position Paper,” para. 21. The Philippines v. China Final Transcript Day 1-Jurisdictional Hearing, at 86-9.
Shoal), over which China also claims sovereignty and TS, EEZ, and CS as a single unit. Submission No. 3 treated Scarborough Shoal as an insular feature to claim TS, EEZ, and CS, which prejudged and dissembled China’s sovereignty over Zhongsha Islands/Archipelago as a single unit.

With respect to Submission Nos. 4 to 7, three insular features were considered as LTEs and “incapable of appropriation by occupation or otherwise”. As James Crawford states, occupation forms one of the “orthodox” modes of acquisition of territorial sovereignty.268 Additionally, Lee Seokwoo and Leonardo Bernard explain that “the issue regarding ‘occupation’ relates to sovereignty, which is not under the purview of UNCLOS”.269 China claimed to the first country to occupy and “exercise sovereign powers over the South China Sea islands”.270 If three features were incapable of appropriation by occupation, it amounts to saying that China’s exercise of territorial sovereignty has been rejected. As previously presented, sufficient historic evidence on the exercise of jurisdiction by successive Chinese governments and long-term activities by Chinese people affirms the existence of historic (ancient) title to features in the SCS, including the WPS.271 Therefore, no capability of appropriation by other means would prejudge or possibly infringe upon China’s historic title claim on the territorial sovereignty over the Spratlys.272 Based on the Nicaragua v. Colombia case, the Philippines further argued that “China cannot have sovereignty over any LTE … unless that LTE is located within 12 NM from Chinese islands or land territory”.273 China could not “acquire full territorial sovereignty by any means” over Mischief Reef, Second Thomas Shoal, and Subi Reef each beyond 12 NM from Chinese islands or land territory.274 As a result, the real purpose of Submission No. 4 that asks the Tribunal to determine the capability of appropriation over three LTEs is to derogate China’s sovereignty over these features but justify the Philippines’ sovereignty over them.275 Consequently, the appropriation over LTEs constitutes an issue about territorial sovereignty as a prerequisite to be determined, which goes beyond the jurisdiction ratione materiae of the Tribunal. In addition, the Philippines argued that “sovereign rights over LTEs within the Philippines’ continental shelf and EEZ are exercisable only

272 Tzanakopoulos, “Resolving Disputes over the South China Sea,” 133-4.
274 Ibid.
275 Ibid, at 113, para. 19. The Philippines positively pointed out that “the Philippines necessarily enjoys sovereignty over those LTEs which are within 12 NM of its own territory. Sovereign rights over LTEs within the Philippines’ continental shelf and EEZ are exercisable only by the Philippines”.
by the Philippines”. 276 In other words, Submission No. 5 essentially claimed the Philippines was the only country capable of exercising sovereign rights over Mischief Reef and Second Thomas Shoal. Nevertheless, Stefan Talmon underlines that “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”. 277 Therefore, China’s sovereignty over two features which constitute indispensable parts of the Spratlys as a single unit may be fragmented and derogated, given any favorable decision made by the Tribunal. As argued by Wang Jiangyu, “it is conceptually impossible to separate sovereignty issues from the determination of the status of maritime features as rocks or islands”. 278 The dispute of sovereignty prevails over the dispute relating to the status and entitlement of a maritime feature as the prerequisite; the Tribunal has to decline to exercise jurisdiction ratiore materiae according to the Monetary Gold principle.

What is more, with respect to sea boundary delimitation as an exception under Article 298(1)(a), Submission Nos. 3 to 7 give rise to a question regarding what the relationship is between certain insular features and the delimitation process. It has been indicated above that the status and entitlement of a feature form an inherent part of maritime delimitation. In addition, the term “concerning” in Article 298(1)(a) further confirms the integrity of maritime delimitation. In the M/V Lousia case, ITLOS observed that “the use of the term ‘concerning’ in the declaration indicates that the declaration does not extend only to articles which expressly contain the word ‘arrest’ or ‘detention’ but to any provision of the Convention having a bearing on the arrest or detention of vessels”. 279 Such an interpretation follows the ICJ’s decision in the Aegean Sea Continental Shelf case. 280 With regard to China’s 2006 declaration, the use of term “concerning” or “relating to” means that the declaration does not extend only to articles which expressly contain the word “sea boundary delimitation” but to any provision of the Convention having a bearing on the “sea boundary delimitation”. 281 The term

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276 Ibid. Roberto Lavalle holds a similar opinion. “Elevations located within the EEZs of states are absorbed into the regime of the maritime space surrounding them, meaning that the state concerned has over them the rights it enjoys over its EEZ”. Roberto Lavalle, “The Rights over States over Low-tide Elevations: A Legal Analysis”, International Journal of Marine & Coastal Law 29, Issue 3 (2014): 478.


279 M/V “Louisa”, Saint Vincent and the Grenadines v. Kingdom of Spain, ITLOS Rep 4, 31, para. 83 (ITLOS. 2013). The term “concerning” has the same meaning of the term “have a bearing on”.

280 Greece v. Turkey, at 34, paras. 81, 86. The Court considered that “the real question for decision is, whether the dispute is one which relates to the territorial status of Greece”, so as to decide whether the Court had jurisdiction over Greece’s Application. The Court further determined that “a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status”.

281 Conciliation Between the Democratic Republic of Timor-Leste and The Commonwealth of Australia, Decision on Australia’s Objection to Competence, No. 2016-19, 27, para. 97 (PCA. 2018). In the Conciliation between Timor-Leste and Australia, the Conciliation Committee reverses the Tribunal’s interpretation regarding concerning in the SCS arbitration. The Committee stated that “it is apparent from an examination of these articles of the
“concerning” is frequently read in other articles of Part XV of the Convention, and as indicated by Sienho Yee, “it should be taken to have the same meaning throughout the entire UNCLOS dispute settlement system.” Yet this term requires interpretation in a nonrestrictive way. Yet in the Jurisdictional Award, as revealed by Xiaoyi Zhang, “the Tribunal mysteriously replaced ‘concerning’ with ‘over’” in its reasoning. A dispute over maritime delimitation merely points to drawing a maritime boundary and helps the Tribunal narrow the applicable scope of the exception. Additionally, the Tribunal neither interpreted the term “concerning” nor considered the delimitation exception to cover steps relating to demarcating a boundary line. Furthermore, the Tribunal contended that it was not requested to delimit any overlapping maritime entitlements and would not “effect the delimitation of any boundary.” Nevertheless, this decision remains a subjective test rather than an objective determination. One could argue that the Tribunal improperly addressed the interpretation and application of “concerning” or “relating to”. Therefore, the terms “concerning” or “relating to” indicate that Article 298(1)(a)(i) sets up a broader applicable scope than mere contents of Articles 15, 74, and 83 or “sea boundary delimitation” itself.

Last but not least, regarding Submission No. 3, Scarborough Shoal lies in the CS beyond 200 NM of Woody Island in the Paracels, which may overlap with the CS beyond 200 NM of Thitu Island that the Philippines controls and in which Scarborough Shoal is located. Regarding Submission Nos. 4 to 7, all maritime features other than Gaven Reef are simultaneously located in the CS and EEZ of Itu Aba Island that China...

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285 Ibid.
288 The coordinate of Scarborough Shoal (15°09′16″N-114°45′58″E) can be found in The Philippines v. China, at 120, paras. 284 (PCA. 2016). The coordinate of Woody Island (16°52′N, 112°20′E) can be found in Nanhai Zhudao Website, “List of Partial Standard Names.” The distances between Scarborough Shoal and Woody Island, and Scarborough Shoal and Thitu Island are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.” The coordinates of Gaven Reef and Itu Aba Island can be found in The Philippines v. China, at 122, 179, paras. 288, 401 (PCA. 2016).
occupies and Thitu Island controlled by the Philippines. Gaven Reef is situated in the TS of Itu Aba Island but is concurrently located in the CS and EEZ of Thitu Island, and the overlap between TS and CS or EEZ still requires maritime delimitation. In addition, Johnson Reef, McKennan Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal are in the CS and EEZ of Itu Aba Island. Meanwhile, they are in the CS and EEZ from the archipelagic baselines of the Philippines. Those overlapping maritime entitlements where certain features submitted by the Philippines are located necessitate maritime delimitation between two States, and they form an integral part of the delimitation framework between two countries in the WPS. To wrap up, if the subject matter of the dispute is related to maritime delimitation, the determination of the maritime delimitation dispute constitutes the prerequisite for determining these submissions. From this perspective, the Tribunal should be excluded from the application of compulsory procedure and deprived of its jurisdiction ratione materiae, in line with the Monetary Gold principle.

2.4.2.3 A mixed dispute concerning the legality of alleged Chinese activities in the WPS

Submission Nos. 8 and 9 are concerned with China’s interference with the Philippines’ sovereign rights over living or non-living resources in its EEZ and CS. From a Chinese perspective, China believes that the Philippines’ unilateral actions regarding the exploration and exploitation of non-living resources violate Chinese sovereignty and sovereign rights over the Spratlys as a single unit. In particular, it was the establishment of Petroleum Blocks at Reed Bank in the WPS that infringed China’s sovereignty over the Spratlys and adjacent water in the WPS. With respect to North-West Palawan Petroleum Blocks, China claimed to have historic titles, including sovereign rights and jurisdiction over the waters in which those blocks were located. By contrast, the Philippines affirmed its sovereignty and jurisdiction over the KIG and claimed that two areas where petroleum blocks were set up are located in the CS of the Philippines but not part of Chinese sovereignty. Therefore, on the one hand, China claims to exercise sovereignty over these areas but the Philippines clearly rejects it, which indicates the origin of such conflicts is the dispute concerning territorial sovereignty. On the other

289 These features are Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, Hughes Reef, Mischief Reef, Second Thomas Shoal, and Subi Reef. The coordinates of Hughes Reef (09°54′48″N-114°29′48″E), Subi Reef (10°55′22″N-114°05′04″E), Mischief Reef (09°54′17″N-115°31′59″E), and Second Thomas Shoal (15°54′17″N-115°51′49″E) can be found in The Philippines v. China, at 121-2, paras. 287, 289, 290 (PCA. 2016). The distances between four features and Itu Aba Island, between four features and Thitu Island and between Itu Aba Island and Thitu Island are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.”


291 Ibid., at 262, 263-5, paras. 657, 659-60.
hand, although China has not officially claimed specified areas of its CS, it also asserts sovereign rights, since the foregoing areas are likely to be located in Chinese CS. Meanwhile, these areas are simultaneously included in Philippine CS. As a result, there is an overlapping CS between two States, which necessitates maritime delimitation. In addition, with respect to Chinese prevention of the Philippines’ fishing activities at Mischief Reef and Second Thomas Shoal, the Philippines argued Chinese actions started after China took “physical” or “de facto” control of two features. From a Philippine perspective, these alleged activities took place after China occupied two features, in other words, exercised sovereignty over these features. Since the Philippines claims sovereignty over the KIG, losing control indicates it cannot exercise sovereignty over two features. On the Chinese side, it seems incorrect to assert China took control of two features in 1995, because it exercised sovereignty over two features much earlier than 1995. Thus, a superficial dispute is China’s infringement on the Philippines’ fishing activities, but the real subject matter of the dispute remains within the dispute concerning territorial sovereignty. In addition, China’s prevention of Philippine fishing at two features and enforcing a moratorium on fishing derives from China’s claim to EEZ from four island groups as a unit in the WPS. However, the Philippines rebutted that these activities prejudiced Philippine sovereign rights, as these areas where two features are situated and part of maritime areas where the moratorium on fishing was enforced fall within the EEZ of the Philippines. As a consequence, overlapping EEZs give rise to maritime delimitation between two States.

Submission Nos. 10 and 13 concern bilateral conflicts at Scarborough Shoal, including traditional fishing rights and the operation of law enforcement vessels. From the Philippines’ perspective, Scarborough Shoal forms a part of its territorial sovereignty. Therefore, Chinese vessels only enjoy innocent passage in the TS of Scarborough Shoal. In the same vein, China has been exercising sovereignty over Scarborough as an inherent part of Zhongsha Islands/Archipelago. Accordingly, Philippine ships are merely entitled to innocent passage instead of traditional fishing rights. Since traditional fishing rights exist in the TS of another State which has sovereignty over that maritime feature, even if traditional fishing rights in the TS of Scarborough Shoal belong to Philippine fishermen, this would amount to recognizing China’s sovereignty over Scarborough Shoal, but this is not what the Philippines expected. This is fully

292 Ibid., at 268, 273, paras. 669, 679.
recognized by the Tribunal in the MA. Besides, in Submission No. 13, China’s law enforcement activities, in light of China’s position, become the manifestation of sovereignty over Scarborough Shoal. Philippine law enforcement activities are also due to the Philippines’ sovereignty claim over Scarborough Shoal and adjacent waters. In conclusion, Submission Nos. 10 and 13 are not concerned with the dispute relating to traditional fishing rights of the Philippines’ people, but they still represented a sovereignty dispute over Scarborough Shoal.

Submission Nos. 11 and 12(b) focus on China’s failure to comply with the obligation to protect and preserve the marine environment. Regarding Chinese fishermen’s activities at the Scarborough Shoal, Philippine navy vessels implemented enforcement actions against them. A further question is why the Philippines carried out these enforcement activities. They are fundamentally consequential with respect to the Philippines’ exercise of sovereignty over Scarborough Shoal and adjacent maritime areas. Meanwhile, Chinese protests against Philippine enforcement activities reaffirm China’s sovereignty over Scarborough Shoal and adjacent waters. From a Chinese perspective, China considered itself to be the only country to carry out enforcement actions at Scarborough Shoal. In addition, China claims sovereignty over the Spratlys as a whole; each feature is regarded as a component of Chinese land territory. China’s land reclamation activities on some features indicate the exercise of its sovereignty over them. Thus, incidents at Scarborough Shoal and land reclamation in seven features are concerned with the dispute of sovereignty over these maritime features. Apart from that, other features are located in the EEZ of either the larger Philippine-controlled features or the EEZ from the Philippines’ archipelagic baseline. In the Philippines’ view, non-coastal States, including China, should respect its sovereign rights and jurisdiction over these features and pay due regard to the rights and obligations of the Philippines as a coastal State. China’s land reclamation actions are taken in the EEZ of the Philippines without the Philippines’ authorization and regulation, which constitutes an infringement on its sovereign rights. Therefore, to justify the Philippines’ sovereign rights, China’s sovereignty claim should be dismissed first, but such a decision cannot be made under the Convention.

296 The Philippines v. China, at 310-1, para. 791 (PCA. 2016). The Tribunal admitted, “The international law relevant to traditional fishing would apply equally to fishing by Chinese fishermen in the event that the Philippines were sovereign over Scarborough Shoal as to fishing by Filipino fishermen in the event that China were sovereign. The Tribunal’s conclusions with respect to traditional fishing are thus independent of the question of sovereignty”.


298 Ibid., at 323-5, paras. 830-4.

299 Ibid., at 324-6, paras. 833, 837.
Submission No. 12 is concerned with China’s occupation and construction activities on Mischief Reef. The Philippines considered China to have violated UNCLOS’s provision concerning artificial islands, installations, and structures, since China’s alleged actions were carried out in the EEZ of the Philippines. However, it is repeated that alleged construction activities represent China’s exercise of its sovereignty over these features, which goes beyond the scope of UNCLOS. In addition, China claims EEZ from the Spratlys, where Mischief Reef is located, as a single unit. As a result, two States have overlapping EEZs and require maritime delimitation under Article 74(3). Additionally, the issue of appropriation also constitutes an issue of territorial sovereignty and should be out of the Convention. In this context, the allegation that China’s occupation constitutes unlawful acts of attempted appropriation amounts to declaring that China’s sovereignty over Mischief Reef as part of the Spratlys is illegal. Therefore, Submission No. 12(a) and (c) is concerned with the dispute of territorial sovereignty. With regard to Submission No. 14, China took some measures against Philippine vessels and prevented supplies for its military personnel at Second Thomas Shoal, since China claims Second Thomas Shoal to be a part of the Spratlys as a single unit and exercises sovereignty over it. Though the Philippines rejects China’s claim to this feature, the submitted dispute still reflects a dispute concerning territorial sovereignty. The Philippines’ dispatch of the military vessel and personnel, from a Chinese perspective, prejudices China’s sovereignty over the Spratlys. However, the Philippines considered Second Thomas Shoal to be part of its CS from an archipelagic baseline, and that it can exclusively exercise sovereign rights and jurisdiction over this feature without interference from other States. In addition, China is entitled to CS from the Spratlys as a single unit. Overlapping CSs between two States requires maritime delimitation.

In the Costa Rica v. Nicaragua case, the Court first determined that the disputed territory belonged to Costa Rica and then considered that Nicaragua’s activities in Costa Rica’s territory breached its international obligations and that Nicaragua had to bear international responsibility. In the Ghana/Côte d’Ivoire case, ITLOS found that Côte d’Ivoire would not have international responsibility for its unilateral exploration and exploitation activities, since such actions were carried out in the EEZ and CS of Côte d’Ivoire after the Tribunal’s decision on maritime boundary delimitation. Therefore,
the legality of activities in disputed territory or maritime zones can be determined unless the dispute relating to sovereignty or maritime boundary has been settled. In short, Submission Nos. 8 to 14 are based on the determination of Submission Nos. 3 to 7. These submissions reflect disputes concerning territorial sovereignty and maritime delimitation and constitute the prerequisite for determining the pending disputes before the Tribunal—accordingly, the Monetary Gold principle applies. This would suggest the Tribunal cannot exercise jurisdiction ratione materiae over Submission Nos. 8 to 14. In the following part, how the Merits decision impacts third States will be discussed, and it will further affirm that the Monetary Gold principle should be applicable in the SCS arbitration.

To briefly sum up, some critical observations in this section assert that this principle has sufficient legal grounds to be applicable and should not be overlooked and left aside. Relying on pure bilateralism in addressing a multilateral dispute one-sidedly rejects the role of third States and reveals the deficiency of solely resorting to legal means under particular circumstances. The fifth section of this chapter, from a consequential perspective, aims to consolidate the view that sheer reliance on legal means in the face of a multilateral dispute produces adverse impacts on third States in the SCS.

2.5 The impacts of the SCS Arbitration Award on third States and the applicability of the Monetary Gold principle

To illuminate, the Tribunal’s final Award was regarded as a huge “win” for the Philippines.\(^\text{304}\) This section will examine the impacts of the MA on two principal parties and third States in the SCS. Such impacts to be elaborated are interactive and will be discussed together. There are three parts currently under discussion. The first is how the Tribunal’s decision on historic rights affects the rights and interests of third States. The second is how the Tribunal’s ruling on the legal status and marine entitlement of certain features may affect the rights and interests of third States. The third is how the verdict concerning alleged Chinese activities in the WPS affects the rights and interests of third States. In the end, the analysis will return to the Monetary Gold principle and see how those affected rights and interests of third States as the real subject matter of a case are indispensable to the proceedings. This part is closely related to the fifth chapter how, given the MA in the arbitration, the disputing parties complied with the delimitation hypothesis. This section asserts that underlying negative consequences may pose doubts to the legitimacy of the final ruling. The delimitation task is hardly likely to be fulfilled

due to the presence of third States in the SCS. As a result, the goal of the two related chapters is the same, that is, the legal means has its limitation and an inadequate ability to address the existence of third States in the SCS.

2.5.1 The Tribunal’s decision on China’s historic rights in the WPS and impacts on third States in the SCS

In the Jurisdiction Award, the Tribunal reserved its considerations of jurisdiction over Submissions 1 and 2, since “the nature and validity of any historic rights claimed by China is a merits determination and do not possess an exclusively preliminary character”. At the merits stage, the Tribunal focused on whether two submissions involve historic titles as an exception within the meaning of Article 298(1)(a)(i). As far as the Tribunal is concerned, this issue depended on “the nature of China’s claims” in the SCS and the scope of the exception of “historic title”. Concerning the first issue, the Tribunal considered rights claimed by China within the “nine-dash line” as rights to the living and non-living resources, but such relevant waters did not “form part of its territorial sea or internal waters”. With regard to the second one, the Tribunal asserted that China did not “claim historic title to waters of the SCS, but rather a constellation of historic rights fall short of title”; therefore, Article 298 (1)(a)(i) did not bar the jurisdiction of the Tribunal. In the final decision, concerning Submission No. 1, China had relinquished claims to historic rights when acceding to UNCLOS and its entry into force. The Tribunal stated that “the Convention defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein”. As regards Submission No. 2, the Tribunal concluded “China’s claims to historic rights, or other sovereign rights or jurisdiction, regarding the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceeded the geographic and substantive limits of China’s maritime entitlements under the Convention”. It is revealed that “the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein”.

The Philippines asked the Tribunal to decide China’s claims to historic rights encompassed by maritime areas only within the relevant part of the nine-dash line in the

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307 Ibid., at 456, 473, paras. 1161-2, 1203 A (6) a, b.
308 Ibid., at 96-7, paras. 225-9.
309 Ibid., at 111-2, para. 262.
310 Ibid., at 116, para. 277.
311 Ibid., at 117, para. 278.
312 Ibid.
WPS. Michael Sheng-ti Gau also proposes that “only three dashes of the USL within the WPS may be affected by the Merits Award”. Oppositely, the Tribunal extended the scope of maritime zones where China claims historic rights to the entire region of the SCS, that is, maritime areas within relevant parts of the “nine-dash line” between China and other States, including Vietnam, Malaysia, Brunei, and Indonesia. There are two relevant observations. First, the nullity of Chinese historic rights claims may have touched upon China’s sovereignty over the SCS islands. Second, in pursuance with the Monetary Gold principle, without consent from third States, the Tribunal has no jurisdiction ratione materiae over a dispute between maritime zones where China’s potential historic rights exist and the maritime entitlements of third States. Even if the Tribunal had made a decision on this issue, the ruling would create a delimitation framework for two original parties and other third States and harms on the non ultra petita principle.

What is more, China regards this line as a provisional maritime boundary for future maritime delimitation between China and other States, but currently China’s sovereign rights, jurisdiction and historic rights within the “nine-dash line” are without lawful effect to the extent they exceed the limits permitted by the Convention. The waters where China claims historic rights within this line may therefore disappear. Simultaneously, potential overlap between maritime areas where historic rights are claimed and the EEZ and CS of other States may be eliminated. The “nine-dash line” may have no role to play in the delimitation between China and the Philippines. Besides, such a provisional boundary line may not be useful for the final maritime delimitation between China and Vietnam as well. On October 11, 2011, China and Vietnam agreed to solve sea-related disputes through friendly talks and negotiations. A provisional maritime boundary provides an opportunity for both parties to enter into possible provisional arrangements, according to Articles 74 and 83 of UNCLOS. It serves for two States to continue negotiations and reach final delimitation agreement in the Sea Area beyond the mouth of the Gulf of Tonkin (Beibu Bay). However, the Tribunal’s decision may render this line futile.

313 Gau, “A Preliminary Assessment of the Merits Award,” 208.
315 Hanqin Xue, Jurisdiction of the International Court of Justice (Leiden, Netherlands: Brill Nijhoff, 2017), 101. Judge Xue defines this principle as “the Court is under a duty to abstain from deciding points not included in the submissions of the parties”.
316 Xinmin Ma, “Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal,” Asian Journal of International Law 8, Issue 1 (2018): 18. It is directly explained by Xinmin Ma that “historic rights in maritime areas, which overlap with sovereignty rights of the EEZ and continental shelf under the Convention”.
Notably, China claims “traditional fishing grounds in the southwest of the South China Sea where China and Indonesia have overlapping claims for maritime rights and interests”\(^{318}\). The Tribunal has acknowledged that “the text and context of the Convention was clear in superseding any historic rights that China may once have had in the areas that now formed part of the exclusive economic zone and continental shelf of another State”\(^{319}\). Based on the MA, China may not exercise traditional fishing rights over waters in the southwestern part since that portion forms part of the EEZ and CS of Indonesia from the Natuna Islands.\(^{320}\) Therefore, there may be no overlapping maritime areas between two States within the “nine-dash line”. In the same vein, according to this decision, China’s historic rights within “the nine-dash line” over some waters which may overlap with the EEZ and CS of Malaysia or the CS of Brunei may be superseded; thus, overlapping maritime zones rights within “the nine-dash line” between Malaysia or Brunei and China may disappear.

In short, maritime areas where China can claim historic rights within the “nine-dash line” may be narrowed, and overlapping maritime areas between China and the Philippines as well as other third States may be reduced as well. The Tribunal’s decision has fulfilled the task of maritime delimitation for China and neighboring States; therefore, a delimitation framework may be formed. In light of China’s declaration in 2016, the problem flowing from the decision on China’s historic rights within the “nine-dash line” is that the Tribunal has no competence to implement maritime delimitation which has excluded compulsory procedures. To recall the Monetary Gold principle, without consent from neighboring States on the delimitation as the prerequisite, the Tribunal should refrain from jurisdiction \textit{ratione personae} and \textit{ratione materiae} over the second matter.

\textbf{2.5.2 The Tribunal’s decision on the legal status of certain maritime features and its impacts on third States in the SCS}

In terms of the Tribunal’s decision under Article 13 of UNCLOS, Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal are LTEs and not features that are capable of appropriation. In particular, Mischief Reef and Second Thomas Shoal are LTEs as well and “within the exclusive economic zone and


\(^{319}\) The Philippines v. China, at 103, para. 247 (PCA. 2016).

continental shelf of the Philippines”.\textsuperscript{321} According to Article 121 (3) of UNCLOS, Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are “rocks” generating no entitlement to an EEZ or CS.\textsuperscript{322} Furthermore, “none of the high-tide features in the Spratlys generate entitlements to an exclusive economic zone or continental shelf”, which means all features in the Spratlys are rocks or LTEs or submerged features.\textsuperscript{323} The following paragraphs will analyze how this ruling on the status and entitlement of maritime features impacts principal parties and other third States.

First, based on the Tribunal’s ruling, if some features which are LTEs fall within TS as 12 NM of some rocks (bigger features) particularly occupied by China, controlled by the Philippines and Vietnam, each State can claim these features constitute a part of its sovereignty in line with general international law.\textsuperscript{324} For one thing, from China’s perspective, the position of non-compliance indicates China is not ready to rely on this ruling to claim sovereignty over these LTEs, since they consist of inseparable parts of sovereignty over the Spratlys as a single unit and UNCLOS does not address the issue of sovereignty. For another, the Philippines claims sovereignty over the KIG, including part of maritime features in the Spratlys. According to this ruling, the Philippines may use some rocks it controls to exercise sovereignty over LTEs which are not controlled by it but fall within TS of these rocks. Though Vietnam also claims the Spratlys as a whole, as it is currently controlling the largest portion of bigger features in the SCS, the MA is considered “to consolidate Vietnam’s legal grounds for exercising its sovereignty in these features”, as described by Tran Thang Long.\textsuperscript{325} Additionally, Vietnam may also use its controlled rocks to exercise sovereignty over LTEs which are not controlled by the Philippines but fall with TS of these rocks.\textsuperscript{326}

Second, if some LTEs are located in the TS of some rocks which are not occupied by China or controlled by the Philippines or Vietnam, they may become part of land territory of other claimant States. Therefore, China or the Philippines or Vietnam may not exercise sovereignty over some LTEs.

Third, based on this ruling, China can merely claim EEZ or CS from coastal baselines instead of the Spratlys as a single unit. Given some LTEs in the Spratlys are situated in

\textsuperscript{322} Ibid., at 474, para. 1203 B (6).
\textsuperscript{323} Ibid.
\textsuperscript{324} Their low-water line may be used to determine the baseline from which the breath of the TS of these features is measured.
\textsuperscript{326} Tran, “Impacts of the Award of the Arbitral Tribunal,” 196.
the EEZ and CS (including an extended CS) from the coastal baselines of the Philippines, Vietnam, Malaysia, and Brunei, this ruling may be seen as a confirmation and justification of their sovereign rights and jurisdiction over these features according to Articles 56 and 77 of UNCLOS. However, it seems impossible for other States to exercise sovereignty over these features falling within the EEZ and CS of one particular State. For example, the Philippines is granted sovereign rights and jurisdiction over Mischief Reef and Second Thomas Shoal by the Tribunal as a coastal State, which indicates no sovereignty over them can be exercised by other States, including China. Two features may not be no longer part of sovereign territory claimed by Vietnam in the Spratlys as well. Likewise, no appropriation of LTEs in this case means such features may be “absorbed into” the Philippines’ 200-NM EEZ and CS, and the Philippines can exercise sovereign rights and jurisdiction, while others cannot. Similarly, some of the Vietnamese and Chinese features may fall within the EEZ and CS of Malaysia, and sovereignty over them may no longer be exercised either. Hence, neither China nor Vietnam may claim sovereignty over these features. In sum, the Tribunal’s interpretation and application of LTE and capability of appropriation indicate that maritime space determines sovereignty over land territory, which is not consistent with the basic principle of the Law of the Sea, i.e., land dominates the sea.

Fourth, if some features as LTEs are not in the EEZ and CS (including an extended CS) from coastal baselines of littoral States, and additionally, the Tribunal’s decision excludes the EEZ and CS generated by some rocks controlled by littoral States, these features will be beyond sovereign jurisdiction of all States in the SCS. It is therefore impossible for each State to claim sovereignty over these features, which will prejudice sovereignty claims from these States. In this arbitration, Subi Reef is an LTE which may be neither covered by the EEZ and CS (including an extended CS) from Vietnam’s coastal baseline nor located in the EEZ and CS within 200 NM of any features controlled by Vietnam. Consequently, Vietnam is unable to claim sovereignty over Subi Reef.

Fifth, as regards some rocks occupied by China, or controlled by the Philippines and Vietnam, they have been defined as rocks by the Tribunal, and they merely generate 12-

NM TS but no longer have EEZ and CS. Specifically, Itu Aba Island, occupied by China; Namyyit Island and Sandy Cay, controlled by Vietnam; and Loaita Island, controlled by the Philippines, will have overlapping TS.\textsuperscript{331} On the one hand, overlapping maritime entitlements may be diminished to a large extent; on the other hand, since the distance between some of them is less than 12 NM, there may be overlapping TS among three States.\textsuperscript{332} What is more, some rocks controlled by Vietnam are situated in the EEZ and CS within 200 NM from the coastal baseline of the Philippines, which may cause Vietnam’s TS generated by its controlled features to overlap with CS and EEZ of the Philippines. However, this “is an overlap of entitlements and delimitation that does not appear to have been regulated by the Convention”.\textsuperscript{333} In addition, some features Vietnam controlled as rocks merely generating TS may well be enclosed with the CS and EEZ within 200 NM from the coastal baseline of Malaysia.\textsuperscript{334} Thus, it will lead to an overlap between the TS of Vietnam and the CS and EEZ of Malaysia. Malaysia considers there may be overlapping maritime zones between Malaysia and other States in the areas of certain features identified by the Tribunal.\textsuperscript{335} As the ruling itself shows, overlapping maritime entitlements may be reduced since no EEZ and CS (including an extended CS) are generated from high-tide features. Likewise, as observed by Evan Laksmana and Ristian Supriyanto, “if China makes its claim consistent with UNCLOS, there would be no potential overlap with Indonesia’s EEZ or CS around the Natuna Islands. There should be no doubt therefore that there are no overlapping maritime claims between China and Indonesia”.\textsuperscript{336} Ostensibly, a delimitation process for Malaysia and Indonesia is consequential upon the Tribunal’s decision. The same situation is equally applicable to Brunei.


\textsuperscript{332} Between Vietnam and China, there will be overlapping TS between Namyyit Island and Itu Aba Island, between Namyyit Island and Gaven Reef North, between Sincowe Island and McKennan Reef, between Sincowe Island and Johnson Reef, between Sand Cay and Itu Aba Island, between Sand Cay and Gaven Reef North. Between Vietnam and the Philippines, there will be overlapping TS between Southwest Cay and Thitu Island, Southwest Cay and Northeast Cay, between Sincowe Island and Loaita Island. Between China and the Philippines, there will be overlapping TS between Loaita Island and Itu Aba Island. The coordinates of Sincowe Island (9°52′N, 114°20′E), Sand Cay (10°23′N, 114°28′E), Southwest Cay (11°26′N, 114°20′E), Northeast Cay (11°27′N, 114°22′E), and Loaita Island (10°40′N, 114°25′E) can be found in Nanhai Zhudao Website, “List of Partial Standard Names.” The distances between such feature are less than 12 NM. They are calculated by National Oceanic and Atmospheric Administration, “Latitude/Longitude Distance Calculator.”


\textsuperscript{334} For instance, Amboyna Cay, which Vietnam controls, is located in the CS and EEZ within 200 NM from the coastal baseline of Malaysia.

\textsuperscript{335} The Philippines v. China, at 257-8, paras. 635, 640 (PCA. 2016). “Malaysia may also have overlapping maritime entitlements (including an extended continental shelf) in the areas of some of the features that the Arbitral Tribunal has been asked to classify”.

\textsuperscript{336} Laksmana and Supriyanto, “Abandoned at Sea,” 307.
Last but not least, the Tribunal considered the application of Article 121 to the Spratlys. Pursuant to the Tribunal’s decision, China is not entitled to TS, EEZ, and CS as a single group. However, China’s maritime entitlement is based on China’s sovereignty over the Spratlys as a unit. The Tribunal actually presumed China’s position and lacked the evidence from showing how China formulated its claim based on the Spratlys as a single unit. The rejection of China’s maritime claim based on a group of maritime features as a single unit amounts to belittling China’s sovereignty as a whole—in other words, the Tribunal does not accept that the sovereignty of the Spratlys can be claimed as a group or unit. This is beyond what the Philippines asks the Tribunal to decide and violates the principle of “non ultra petita”. No EEZ or CS that can be generated from the Spratlys surely reduces overlapping maritime zones with the Philippines, as a result, the delimitation framework is created by the Tribunal.

2.5.3 The Tribunal’s decision on the legality of Chinese activities and its impacts on third States in the SCS

The Tribunal’s ruling on Submission Nos. 3 to 7 has made China claim EEZ and CS merely from coastal baseline or some rocks it occupies. On the Philippines’ side, the Philippines is fully entitled to CS and EEZ from its archipelagic baseline where Mischief Reef, Second Thomas Shoal, and Scarborough Shoal are located in the WPS. With respect to Submission Nos. 8, 9, 10, and 13, the Tribunal determined that China breached its obligation under Articles 56, 58(3), 77, and 94, since China’s law enforcement activities at these features infringed the Philippines’ sovereign rights and jurisdiction in its EEZ and CS. It has been argued that the implementation of China’s law enforcement activities represents not only China’s sovereignty over these features but also overlapping EEZ and CS between two States. The Tribunal’s decision observes that Chinese law enforcement activities are not allowed unless the Philippines agrees and authorizes China’s actions in its EEZ and CS. As the only coastal State in the WPS, other absent third States in this case have to respect the existence of the Philippines’ full sovereign rights and jurisdiction as required by UNCLOS provisions. In addition, the Tribunal’s decision on Submission No. 11 indicates that China did not fulfill its obligation to protect and preserve marine environment under China’s jurisdiction or control. However, the ruling itself also asserts China did not pay due regard to the Philippines’ jurisdiction over the protection and preservation of the marine environment.
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in its EEZ and CS. Therefore, such a decision *de facto* may recognize the Philippines is fully entitled to EEZ whereas China is not. Last but not least, regarding China’s land reclamation activities in Submissions No. 12 and No. 14, the decision requests that China refrain from such actions at these features, since these activities are carried out in the EEZ of the Philippines. Additionally, as a way to exercise Chinese sovereignty over these features, given that land reclamation activities are forbidden, China’s sovereignty over these features remains to be derogated. Since absent third States also carry out a series of land reclamation activities in some features that are located in the EEZ and CS within 200 NM of the Philippines, the sovereignty of other states also remains to be derogated. Such unilateral actions can be potentially considered as a breach of its international obligation under UNCLOS.  

In summary, in the SCS arbitration, the MA indeed produces negative effects upon China’s sovereignty over the Spratlys and Scarborough Shoal. Besides, rejection of China’s EEZ and CS in the WPS and full recognition of the Philippines’ EEZ and CS indicate the task of maritime delimitation has been finished by the Tribunal.  

Sam Bateman solemnly remarks that, while the Tribunal’s ruling “had theoretically ‘cleaned the air’ with some aspects of maritime boundary-making in practical terms, it may not have helped the situation”.

From an opposite perspective, one still can prove that the Tribunal cannot exercise jurisdiction *ratione materiae* over territorial sovereignty and maritime delimitation disputes in the arbitral proceedings, in line with the *Monetary Gold* principle. Furthermore, the deficiency of the legal means in the settlement of a multilateral dispute in the SCS has been laid bare. The existing dilemma triggers a question about whether some supplementary means should be taken into account. This question will be answered in the fourth chapter.

2.6 Conclusion

Overall, the *Monetary Gold* principle is not only applicable to a dispute involving direct participation of a third State, but it also permissible in a dispute merely between two principal parties to the proceedings. Such a principle frequently instructs international courts and tribunals to identify the subject matter of a mixed dispute, in order to decide

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341 Davenport, “Island-Building in the South China Sea,” 85.
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jurisdiction *ratione personae*, jurisdiction *ratione materiae*, and admissibility. Since it is the principle of State consent that becomes a cornerstone of international adjudication, third-party judicial bodies have to ensure whether a pending dispute before them forms the real dispute two original litigants consent to resolve. Furthermore, the applicability of the *Monetary Gold* principle as a procedural issue varies case by case. For one thing, in the instance that third States are directly involved, it is illuminated by international case law that this principle is narrowly interpreted for application. For another, in the instance that a seemingly bilateral dispute is merely presented between bilateral States, the test regarding this principle is persistently carried out and predominantly applied. However, the *SCS* Arbitration, in the Tribunal’s view, seems exceptional for this principle, which may need further considerations.

Given the direct participation of Vietnam and Malaysia as third States, this principle should be applicable at least in addressing Submission Nos. 4 to 7. It is the rights and interests of third States in sovereignty and maritime delimitation that constituted the very subject matter of the case and precluded the Tribunal to exercise jurisdiction *ratione personae*. Additionally, sovereignty and maritime boundary disputes between third States and principal parties constitute a bar against the Tribunal’s jurisdiction *ratione materiae*. With respect to a mixed dispute without third States, the case essentially concerns territorial sovereignty and maritime delimitation disputes. The determination of prior disputes constitutes a prerequisite to settle the second one submitted by the Philippines. Thus, the Tribunal’s jurisdiction *ratione materiae* over this dispute is precluded under the *Monetary Gold* principle without China’s consent. Moreover, such a ruling indeed has influences upon all States in the region. It is observed that the derogation on China’s and Vietnam’s sovereignty claims and the creation of a new delimitation framework for littoral States prove to be inescapable. These consequences indeed pose doubts to the Tribunal’s jurisdiction *ratione personae* and jurisdiction *ratione materiae*, and, more importantly, the *res judicata* of this ruling. From the opposite perspective, such a result necessitates the applicability of this principle. It is revealed that international legal methods have been subject to some limitations and restraint in the maritime dispute settlement of a multistate contested zone like the SCS. But this does not mean that the role of international law has disappeared; instead, some extra means have to be adopted to strengthen the function of international law. Notably, this unresolved issue will be discussed further in the fourth chapter.

What is more, the rights and interests of third States may be affected by the decision but such potentially affected rights and interests do not form the very subject matter of the
dispute between two principal parties to the case. A third State is allowed to seek application for permission to intervene in the proceedings, which is particularly salient in international maritime boundary delimitation. The jurisprudence of international courts and tribunals relating to intervention by third States will be examined in the third chapter.