

## SYMPOSIUM ON THE SOUTH CHINA SEA ARBITRATION

### THE SOUTH CHINA SEA ARBITRATION DECISION: THE NEED FOR CLARIFICATION

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#### *Introduction*

On July 12, 2016, a five-person panel of the Permanent Court of Arbitration in the Hague, constituted as an Arbitral Tribunal under Annex VII of the United Nations Convention on the Law of the Sea (1982) (UNCLOS), handed down a judgment<sup>1</sup> that is surely the most important set of jurisprudential rulings in the modern history of the international law of the sea.

In a case brought in 2013 by the Philippines against China to contest Chinese claims and actions in the South China Sea, the Tribunal ruled in favor of the Philippines on virtually every issue of the dispute. The Tribunal also clarified many murky issues and problems inherent in provisions of the UNCLOS. The judgment, therefore, is a landmark ruling that is significant not only for the South China Sea, but also for contested maritime rights and responsibilities in other maritime areas of the world.

But despite the stellar credentials of the legal experts on the Tribunal and the close legal analysis and reasoning of the two judgments in the case, one on Jurisdiction and Admissibility (151 pages),<sup>2</sup> and the second on the Merits (479 pages),<sup>3</sup> the Tribunal's Awards retain a whiff of unfairness, specifically unfairness to China and to the Chinese people. Unfortunately, there is danger that this perception of unfairness surrounding the case may linger, obscuring the landmark rulings of the judgment itself.

The Tribunal's Award adjudicated fourteen of the fifteen claims made by the Philippines against China in the South China Sea. The only claim not adjudicated was Submission No. Fifteen, the issue of "future conduct of the parties."<sup>4</sup> When it came to this crucial question, the Tribunal—to put it bluntly—decided to "punt," stating only that "the Tribunal is not persuaded that it is necessary or appropriate for it to make any further declaration."<sup>5</sup>

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<sup>1</sup> Technically this judgment is termed an arbitration "Award." For a complete summary of the Award, see Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AJIL (forthcoming 2016).

<sup>2</sup> The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015) [hereinafter Award on Jurisdiction].

<sup>3</sup> The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (July 12, 2016) [hereinafter Final Award].

<sup>4</sup> *Id.* at paras. 1191-1201.

<sup>5</sup> *Id.* at para. 1201.

The Award is a one-sided victory for the Philippines; the Tribunal ruled in favor of the Philippines on all of its claims. China has denounced the Award as “null and void.”<sup>6</sup> Not only does this result in disrespect for international law, the dangerous disputes in the South China Sea are exacerbated.

My argument in this Comment is that the Tribunal should have made an effort to fashion an Award that would not only call upon the parties to negotiate their differences in the South China Sea, but would provide incentives to start such a negotiation.

### *The Merits Award*

In the Award of 12 July 2016, the Arbitral Tribunal decided four sets of questions. First, the Tribunal decided the status of the “nine-dash line” maintained by China in the South China Sea. Second, the Tribunal decided the legal status of various “features” in the South China Sea—submerged reefs, low-tide elevations, “rocks,” and islands. Third, the Tribunal addressed the lawfulness of various Chinese actions in the South China Sea, and fourth, the Tribunal decided the question whether China was guilty of aggravating the disputes in the area.

In this comment, I will discuss only one aspect of the case: the nine-dash line.

### *The nine-dash line*

The nine-dash line is a cartographic denotation that was developed, first by the Republic of China in the 1940s, and then by the People’s Republic of China (PRC) in the 1950s and subsequent years to affirm Chinese control over the islands and maritime areas of the South China Sea.<sup>7</sup> As stated by two Chinese scholars<sup>8</sup> who are very close to the Chinese government: “the nine-dash line . . . has become synonymous with a claim of sovereignty over island groups that have always belonged to China and with an additional Chinese claim of historical rights of fishing, navigation, and other marine activities . . . on the islands and in the adjacent waters.”<sup>9</sup>

The Tribunal had to overcome an important jurisdictional obstacle before addressing the merits of the nine-dash line. UNCLOS Article 298(1)(a)(i) states that a State-party may declare, as an optional exception to compulsory dispute settlement, jurisdiction over all disputes that relate to “sea boundary delimitations or . . . historic bays or titles.” China, in fact, activated this exception in 2006. This jurisdictional obstacle caused the Tribunal, in its October 2015 ruling on Admissibility, to reserve a jurisdictional determination on this matter.<sup>10</sup>

In the Merits Award the Tribunal overcame this jurisdictional obstacle. First, the Tribunal defined the dispute over the nine-dash line as “a dispute over the source and existence of maritime entitlements.”<sup>11</sup> As a dispute over maritime entitlements, this does not implicate maritime delimitation. According to the Tribunal, “[w]hile all sea boundary delimitation will concern entitlements, the converse is not the case.”<sup>12</sup> As to whether the parties’ dispute involves historic titles, the Tribunal stated that this “depends first upon the nature of

<sup>6</sup> Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitration Tribunal on the South China Sea Established at the Request of the Republic of the Philippines (July 12, 2016).

<sup>7</sup> For a more complete account of the development and promulgation of the nine dash line, see Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AJIL 98 (2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 108.

<sup>10</sup> Award on Jurisdiction, *supra* note 2, at paras. 397-399.

<sup>11</sup> Final Award, *supra* note 3, at para. 204.

<sup>12</sup> *Id.*

China's claims . . . and, second, upon the scope of the [Article 298] exception."<sup>13</sup> The Tribunal then defined the nature of China's nine-dash line claim as not a claim involving "title," but rather a claim to historic "rights" to living and nonliving resources in maritime areas.<sup>14</sup> The Tribunal followed this determination with the holding that the scope of the exception in Article 298(1)(a)(i) is limited to historic "titles" which does not include historic "rights."<sup>15</sup> Thus, the Tribunal ruled that since China's claim is only a "constellation of historic rights short of title," it had jurisdiction over the Philippines' claims regarding the nine-dash line.<sup>16</sup>

On the merits, the Tribunal concluded, after summarizing UNCLOS jurisprudence, that "China's claim to historic rights to the living and nonliving resources within the nine-dash line is incompatible with the [UNCLOS] to the extent that it exceeds the limits of China's maritime zones as provided for by the [UNCLOS]."<sup>17</sup> Moreover, any rights that China possessed under the nine-dash line were "superseded . . . by the limits of the maritime zones provided for by the [UNCLOS]."<sup>18</sup> For good measure, the Tribunal added that China has not acquired any rights under the nine-dash line since the UNCLOS entered into force.<sup>19</sup>

*The possible legal significance of the nine-dash line*

The Tribunal's Award thus declares that the nine-dash line has no legal significance under the contemporary law of the sea. China may not claim historical rights under international law in the South China Sea. This Comment will argue that this ruling was incorrect and unwise. A better ruling would have been to leave open the possibility that the nine-dash line may be the basis for China to assert nonexclusive, historic/habitual fishing rights as specified in UNCLOS Article 62(3). Such a ruling would invite the parties—not only China and the Philippines, but other states littoral to the South China Sea—to enter into negotiations, which may then be extended to encompass matters of sovereignty over features in the South China Sea and protection of the marine environment.

The Tribunal ruled categorically that, "[n]o article of [UNCLOS] expressly provides for . . . the continued existence of historic rights to the living or non-living resources of the exclusive economic zone [EEZ]."<sup>20</sup> Moreover, the Tribunal added that UNCLOS "is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal state alone."<sup>21</sup> These categorical statements are not entirely correct.

To properly evaluate these statements and the Tribunal's holdings on this issue, we must examine the role historic factors play in the law of the sea. First, historic factors may be involved in a state's assertion of sovereignty or title to maritime areas. In the modern law of the sea, historic title is confined to three points: (1) UNCLOS Article 10(6) makes provision for possible recognition of historic bays; (2) UNCLOS Article 10(6) states that historic title may be relevant with regard to drawing straight baselines under UNCLOS Article 7; and (3) UNCLOS Article 15 provides that historic title may be taken into account in delimitation of the territorial seas between states with opposite or adjacent coasts. The concept of sovereignty over historic

<sup>13</sup> *Id.* at para. 206.

<sup>14</sup> *Id.* at paras. 207-214.

<sup>15</sup> *Id.* at paras. 215-229.

<sup>16</sup> *Id.* at para. 229.

<sup>17</sup> *Id.* at para. 261.

<sup>18</sup> *Id.* at para. 262.

<sup>19</sup> *Id.* at para. 275.

<sup>20</sup> *Id.* at para. 231.

<sup>21</sup> *Id.* at para. 243.

waters predates UNCLOS and is a matter of customary international law.<sup>22</sup> In the 1951 *Fisheries Case*,<sup>23</sup> the International Court of Justice stated that historic waters are “waters that are treated as internal waters but which would not have that character were it not for the existence of historic title.” However, the successful assertion of historic title requires the asserting state to prove open, effective, long-term, and continuous exercise of authority over the waters in question coupled with acquiescence by concerned foreign states.<sup>24</sup> Considering these criteria, the nine-dash line does not qualify even remotely as an assertion of sovereignty; the South China Sea is not a bay; straight baselines and delimitation are not relevant; and the *Fisheries Case* requirements are unmet.

There is, however, a second meaning to historic factors under the law of the sea. Historic factors may give rise to historic *rights*—not sovereign rights or title to maritime areas, but rather nonexclusive rights that must be taken into account by other states. The UNCLOS expressly recognizes the existence of such rights in Article 62 concerning utilization of living resources (fisheries) in a coastal state’s exclusive economic zone. Article 62(3) provides, in relevant part, that a coastal state “[i]n giving access to other States to its exclusive economic zone . . . shall take into account . . . the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.” This provision means that, contrary to the Tribunal’s ruling, certain nonexclusive, historic/habitual fishing rights in coastal states’ EEZs could remain and were not superseded by UNCLOS.

Nevertheless, the Tribunal ruled that in the EEZ “the drafters of the [UNCLOS] did not intend to preserve those rights.”<sup>25</sup> The Tribunal arrived at this erroneous ruling by—inexplicably—holding that UNCLOS treats traditional fishing rights differently in different maritime zones: while such rights exist in archipelagic waters and in the territorial seas, they are extinguished in the EEZ.<sup>26</sup> It is evident why the Tribunal drew this distinction—recognition of traditional fishing rights in EEZs would have conflicted with the Tribunal’s earlier ruling that all historical rights claimed by China by reason of the nine-dash line were extinguished by UNCLOS.

Contrary to the Tribunal’s ruling, it would appear that China may assert historic/traditional fishing rights under customary international law and UNCLOS Article 62(3) even in the EEZs of other states. It is, of course, up to China to assert such historical rights, but the best meaning of the nine-dash line would appear to be as a possible assertion of historical/traditional fishing rights at a minimum under Article 62(3). The nine-dash line is drawn in such a way so as to encompass parts of the EEZs of the Philippines, Malaysia, Brunei, Indonesia, and Vietnam.

Both the express language of Article 62(3) and the jurisprudence under the law of the sea<sup>27</sup> lead to the conclusion that coastal states have an obligation to take historic/habitual fishing rights’ claims into account

<sup>22</sup> *Continental Shelf* (Tunis. v. Libya), 1982 ICJ REP. 18, 74, para. 100 (Feb. 24).

<sup>23</sup> *Fisheries Case* (U.K. v. Nor.), 1951 ICJ REP. 116, 130 (Dec. 18).

<sup>24</sup> *Continental Shelf*, *supra* note 22, at 74; *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond., Nicar. intervening), 1992 ICJ REP. 351, para. 384 (Sep. 11). In U.S. practice, assertion of an historic waters claim requires not silent acceptance by foreign states but affirmative, knowing acquiescence. ARTHUR W. ROVINE, 1973 *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW*, 244-245 (1974); MARJORIE M. WHITEMAN, 4 *DIGEST OF INTERNATIONAL LAW*, 233-238 (1965).

<sup>25</sup> *Final Award*, *supra* note 3, at para. 804(b). The Tribunal cited (*id.* at para. 256) in support of its conclusion the case, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can v. U.S.), 1984 ICJ REP. 246, 341-342, para. 235 (Oct. 12). This ruling may be distinguished since the adjudication in the *Gulf of Maine* case occurred ten years before UNCLOS went into force, and specific provisions of UNCLOS were not involved in the case.

<sup>26</sup> *Final Award*, *supra* note 3, at para. 804.

<sup>27</sup> Historic/traditional fishing rights have been relevant in many cases. *See Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, 2001 ICJ REP. 40, paras. 235-236 (Mar. 16); *Eritrea v. Yemen*, Award of the Arbitral Tribunal, Phase I, 22 RIAA 209, paras. 525-526 (Oct. 9, 1998); *Fisheries Jurisdiction Case* (U.K. v. Ice.), Merits, 1974 ICJ REP. 3, 26 (July 25); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 ICJ REP. 38, para. 15 (June 14); *Barbados v. Trinidad & Tobago*, Award of the Arbitral Tribunal, 45 ILM 798, paras. 247, 266, 292 (Apr. 11, 2006).

and to negotiate in good faith with respect to such claims. For example, in the *Eritrea v. Yemen Arbitration case*,<sup>28</sup> the arbitral tribunal, after recognizing the traditional fishing rights of the parties, stated that “sovereignty is not inimical to, but rather entails the perpetuation of the traditional fishing regime in the region.” In the *Barbados v. Trinidad & Tobago Arbitration case*,<sup>29</sup> the tribunal stated that Trinidad & Tobago was “obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries” within the EEZ of Trinidad & Tobago.

The Tribunal in the South China Sea arbitration was too quick to dismiss the possible existence of traditional fishing rights under customary international law as recognized in the *Eritrea v. Yemen* and *Barbados v. Trinidad & Tobago* arbitrations. The Tribunal also ignored the rights granted by UNCLOS Article 62(3) as well as the relationship between this article and the traditional fishing rights recognized in these two arbitrations. Accordingly, it appears to be open for China to bring an additional case to claim historic/traditional fishing rights based upon the nine-dash line. A new arbitration is needed to clarify international law of the sea on these points.

The Tribunal in the South China Sea case may also be faulted on the grounds that, after ruling in one part of its merits opinion that China’s claimed historic rights were superseded by UNCLOS, in another part of the merits opinion the Tribunal affirmed the existence of Filipino and Chinese traditional fishing rights based on historical practice around Scarborough Shoal.<sup>30</sup> The Tribunal affirmed these traditional fishing rights regardless of what state has sovereignty over Scarborough Shoal because traditional fishing rights may exist within the territorial sea.<sup>31</sup> This part of the judgment appears to contradict the earlier section of the judgment that ruled that historical rights were superseded by UNCLOS.<sup>32</sup> The Tribunal attempts to reconcile the two holdings by stating that UNCLOS “extinguished” historic/traditional fishing rights within EEZs, but not within territorial seas.<sup>33</sup> This statement is a novel ruling that is inconsistent with prior jurisprudence concerning the law of the sea.<sup>34</sup> The Tribunal also concedes that China’s assertion of traditional fishing rights around Scarborough Shoal is in “good faith.”<sup>35</sup> This part of the Tribunal’s judgment does not hold together well. The Tribunal appears to bend over backwards to recognize the existence of Filipino traditional fishing rights, while ruling that virtually all of China’s traditional fishing rights were extinguished by UNCLOS.

### *Conclusions*

The Arbitral Tribunal established under UNCLOS to adjudicate the claims of the Philippines against the PRC in the South China Sea has handed down a landmark judgment that greatly clarifies important legal questions involving the contemporary law of the sea. The Tribunal’s judgment provides convincing interpretations of many UNCLOS articles that are important not only in the context of the South China Sea but in other maritime areas as well. The Tribunal’s judgment affirms and enhances freedom of navigation in ocean areas and the rights of coastal states. The Tribunal also handed down a groundbreaking ruling on protection of the marine environment.

<sup>28</sup> *Eritrea v. Yemen*, *supra* note 27, at para. 526.

<sup>29</sup> *Barbados v. Trinidad & Tobago*, *supra* note 27, at para. 292.

<sup>30</sup> *Final Award*, *supra* note 3, at para. 803, 812.

<sup>31</sup> *Id.* at para. 812.

<sup>32</sup> *Id.* at paras. 231-243.

<sup>33</sup> *Id.* at para. 804.

<sup>34</sup> The Tribunal expressed its disagreement with the arbitral tribunal in the *Eritrea v. Yemen* case. *Id.* at para. 803.

<sup>35</sup> *Id.* at paras. 805-806.

However, the Tribunal's one-sided rulings are unlikely to contribute to resolving the dangerous disputes in the South China Sea. Moreover, the Tribunal's rulings concerning traditional/historic fishing rights lack clarity and logical coherence. A ruling that transforms the nine-dash line into an UNCLOS-sanctioned right under customary law and Article 62(3) could conceivably provide a basis for opening comprehensive negotiations on the future of the South China Sea.