

THE SOUTH CHINA SEA ARBITRATION AND HISTORIC RIGHTS IN THE LAW OF THE SEA

LOWELL BAUTISTA*

I. Introduction

On July 12, 2016, the arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (“UNCLOS”)¹ issued its award in the dispute between the Philippines and China over maritime claims in the South China Sea.² The arbitral tribunal categorically declared that China’s nine-dash line claim is incompatible with UNCLOS, which supersedes and nullifies any “historic rights” that may have existed prior to the Convention.³

In the final award, the Tribunal applied the rules of international law, principally UNCLOS, universally regarded as the constitution of the oceans, as well as other rules of international law not incompatible with the Convention.⁴ The Arbitral Tribunal unanimously decided in favor of the Philippines.⁵ However, the Chinese Government continues to stand in

* Senior Lecturer, School of Law, and Staff Member, Australian National Centre for Ocean Resources and Security, University of Wollongong. PhD, University of Wollongong; LL.M., Dalhousie University; LL.B., University of the Philippines; BA Political Science (cum laude), University of the Philippines.

¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3. [hereinafter, UNCLOS].

² Philippines v. China, PCA Case No. 2013-19, Award, Permanent Court of Arbitration, Award, (July 12, 2016) [hereinafter, The South China Sea Arbitration Award of July 12, 2016] (The Philippine claim in the South China Sea encompasses the “maritime areas on the western side of the Philippine archipelago ... as the waters around, within and adjacent to the Kalayaan Island Group and Bajo De Masinloc, also known as Scarborough Shoal”, which has been renamed the “West Philippine Sea”); Adm. Order No. 29 (2012), secs. 1, 2 (For purposes of consistency, the disputed territorial and maritime areas will be referred to as the “South China Sea.”).

³ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 261, 278, 1203 (B)(2); *see also id.* ¶¶ 232, 246, 252, 262, 263.

⁴ UNCLOS, *supra* note 1, art. 293(1); The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 236, 1173, 1201.

⁵ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 1202, 1203.

defiance of international law.⁶ The community of nations, through categorical and strongly worded diplomatic notes, has responded strongly to reject and denounce China's maritime claims in the South China as having no basis under international law.⁷

This paper will discuss historic rights in the UNCLOS in light of the decision of the South China Sea arbitral award.⁸ It will be in three parts. The first part will briefly discuss the concept of historic rights in the law of the sea and relevant case law prior to the South China Sea arbitration. The second part will examine China's historic rights claim and the relevant aspects of the

⁶ Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of July 12, 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, July 12, 2016; Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines, Oct. 30, 2015; Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, Dec. 7, 2014; *see also* The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 166, 1180.

⁷ Nguyen Hong Thao, *South China Sea: The Battle of the Diplomatic Notes Continues*, DIPLOMAT, (Aug. 4, 2020) (The following countries have submitted diplomatic notes to the UN in regarding their protest over China's claims in the South China Sea: Brunei, Malaysia, Vietnam, Indonesia, Australia, the United States, and a joint note verbale from France, Germany and the United Kingdom).

⁸ The author has written extensively on various aspects of the South China Sea disputes. *Please see*, Lowell Bautista, *The South China Sea Arbitral Award amidst Shifting Philippine Foreign Policy*, 6 KOR. J. INT'L & COMP. L., 1-20 (2018); Lowell Bautista, *The South China Sea Arbitral Award: Evolving Post-Arbitration Strategies, Implications and Challenges*, 10 (2) ASIAN POL. & POL'Y, 178-189 (2018); Lowell Bautista, *There are no Davids and Goliaths in International Law: Some Lessons from Territorial and Maritime Disputes Settled through International Adjudication*, in THE SOUTH CHINA SEA READER 119 – 147 (Foreign Service Institute, Department of Foreign Affairs, 2016); Lowell Bautista and Aries Arugay, *Philippines v. China the South China Sea arbitral award: implications for policy and practice*, 9 (1) ASIAN POL. & POL'Y, 122-152 (2017); Lowell Bautista, *Philippine Arbitration Against China over the South China Sea*, 1 ASIA-PAC. J. OCEAN L. & POL'Y, 116-121 (2016); Lowell Bautista, *The Philippines and the Arbitral Tribunal's Award: A Sombre Victory and Uncertain Times Ahead*, 38 (3) CONTEMP. SOUTHEAST ASIA, 349-355 (2016); Lowell Bautista, *The arbitration case between Philippines and China over their dispute in the South China Sea*, 19 J. SOUTHEAST ASIAN STUD., 3-24 (2014); Lowell Bautista, *The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute*, 6 (2) J. EAST ASIA & INT'L L. 497-529 (2013); Lowell Bautista, *Thinking Outside the Box: The South China Sea Issue and the United Nations Convention on the Law of the Sea (Options, Limitations and Prospects)*, 81 PHIL. L. J., 699-731 (2007).

decision of the arbitral tribunal. The third part, by way of conclusion, will offer some reflections on the impact and contribution of the South China Sea arbitral award to the clarification and development of the rules and principles of UNCLOS on historic rights.

II. Historic Rights and the Law of the Sea

In international law, a State acquires historic rights of title over territories through a process of historical consolidation involving a long period of continuous and undisturbed exercise of sovereignty.⁹ In order to ripen into a valid title in international law, historic rights require effective occupation and the acquiescence of the international community.¹⁰ Such rules pertaining to the acquisition and loss of territory have developed largely from State practice, customary international law, and from the jurisprudence of international courts and tribunals.¹¹

International law recognizes the acquisition of territorial sovereignty through occupation, accretion, cession, conquest, and prescription.¹² Acquisitive prescription, which is based on immemorial possession, applies to historic waters where original title is uncertain and is validated by long and uninterrupted possession.¹³ Historic titles, “must enjoy respect and be

⁹ ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 16-28 (Manchester University Press, 1963); *see also* YEHUDA Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* (Martinus Nijhoff, 1965); Yehuda Z. Blum, *Historic Rights*, in RUDOLF BERNHARDT (Ed.), *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 120 (North-Holland Publishing Company, 1984).

¹⁰ GILLIAN TRIGGS, *INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES* 271-343 (Lexis Nexis, 2011).

¹¹ *See* academic writings on this topic, MALCOLM SHAW, *TITLE TO TERRITORY* (Ashgate, 2005); MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA INTERNATIONAL LEGAL ISSUES* (Clarendon Press, 1986); JENNINGS, *supra* note 9; SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* (Springer, 1997); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (Clarendon, 2006); ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (Cambridge University Press, 1995); JOSHUA CASTELLINO AND STEPHEN ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* (Ashgate, 2003), among others.

¹² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 127-128 (Oxford, 2008).

¹³ *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/143, ¶¶ 63-66 [hereinafter, *Juridical Regime of Historic Waters*]; *see also* LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, VOLUME 1 294, ¶ 242 (Longmans, Green, and Company, 1905).

preserved as they have always been by long usage.”¹⁴ Historic title is exceptional in character by its very nature and is considered a derogation from general international law.¹⁵ Historic rights, could only be acquired as a result of practices conducted “from time immemorial,” or at least “over a long period.”¹⁶ A State, in order to validly assert historic rights over maritime areas necessitate immemorial possession accompanied by *animo domini* which is peaceful, continuous, and tolerated by the community of nations.¹⁷ However, historic rights cannot be invoked or used as the basis for more extended and different maritime claims other than those allowed under UNCLOS.¹⁸

A. Defining “Historic Rights”

The term “historic rights” is in itself ambiguous partly due to the lack of any specific treaty provision that defines or elaborates it and the montage of similarly confusing terms and concepts related to historic rights—historic

¹⁴ Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. Intervening), Judgment, 1992 I.C.J. Rep. 351, 589, ¶ 384 (Sept. 11) (citing *Gulf of Fonseca* case, I.C.J. Rep. 1982, p. 73).

¹⁵ Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 130 – 131 (Dec. 18).

¹⁶ See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. Rep. 12, 32 (May 23) (the Court citing Malaysia’s argument of immemorial possession quoting the award rendered in the *Meerauge* arbitration); see also Subject of the Difference Relative to the Sovereignty over Clipperton Island (Fr. v. Mex.), 2. R.I.A.A. 1107, 1110 (1931) (for the original French text) and 26 Am. J. Int’l L. 390 (1932), 393 (for the English translation). However, these cases pertain to historic title over land territory and not over maritime areas.

¹⁷ Land, Island and Maritime Frontier Dispute, *supra* note 14, at 591, ¶ 391 (In the context of land territory, the consolidation of title requires evidence of intention to claim the islands *à titre de souverain*); see JENNINGS, *supra* note 9, 23-27; 114 International Law Reports at page 69, paragraphs 239 and 241.

¹⁸ As Judge Jiménez de Aréchaga cautions in the *Continental Shelf* case, “But these historic rights, based as they are on prolonged exercise, and having an exceptional character, by their very nature, cannot be invoked or used as having a potential effect which would make them capable of a projection seaward, and thus as the basis for more extended and different maritime claims. Historic rights must be respected and preserved, but as they were and where they were, that is to say, within the limits established by usage and history. In particular, to transform these historic waters into internal or territorial waters in order to project a further claim to a continental shelf beyond them is unjustified.” *Continental Shelf* (Tunis. v. Libyan Arab Jamahiriya), Separate Opinion of Judge Jiménez de Aréchaga, 1982 I.C.J. Rep. 18, 112, ¶ 114 (Feb. 24); The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 239, 243, 244, 246.

waters, historic title, historic claims, and historic bays.¹⁹ Historic rights pertain to rights that exist “over certain land or maritime areas acquired by a State, through a continuous and public usage from time immemorial and acquiescence by other States, although those rights would not normally accrue to it under general international law.”²⁰

Historic rights, according to Clive Symmons, “implies, in its widest sense, a State claiming to exercise certain jurisdictional rights in what usually are international waters, most particularly fishing rights.”²¹ Nonetheless, there is an apparent distinction between “historic title” and “historic rights.” Dupuy and Dupuy, distinguish “historic title,” which comprise of “full territorial sovereignty” versus historic rights, which “may include rights falling short of sovereignty, such as exceptional fishing rights or the right of passage.”²² As for historic waters and historic bays, Franckx and Benatar simply put it as “historic rights” being the “genus under which one can place the species ‘historic waters’” and “historic bays” as a “species of ‘historic waters.’”²³

The classical and much cited definition of “historic waters” provided by the International Court of Justice (“ICJ”) in the *Fisheries Case*, establishes the intricate relationship between historic waters and historic title—“By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.”²⁴ These claims are justified when a State “has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her

¹⁹ Professor Zou Keyuan pointed out this confusion noting that: “...there are a number of legal terms in the historical context, such as ‘right’, ‘title’ and ‘consolidation’, which may cause confusion. It is even more complicated when one tries to explore so-called historic rights in the maritime area, particularly when the term is used along with other related terms such as historic waters and historic bays.” See Zou Keyuan, *Historic Rights in International Law and in China’s Practice*, 32(2) OCEAN DEV’T & INT’L L., 149 (2001).

²⁰ YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 299 (Hart Publishing, 2006).

²¹ CLIVE R. SYMMONS, HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-APPRAISAL 4 (Martinus Nijhoff, 2008) (citing Blum, *supra* note 9, at 710–15).

²² Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China’s Historic Rights Claim in the South China Sea*, 107 (1) AM. J. INT’L L., 137 (2013).

²³ Erik Franckx and Marco Benatar, *Dots and Lines in the South China Sea: Insights from the Law of Map Evidence*, 2 ASIAN J. INT’L L., 89, 95-96 (2012).

²⁴ Fisheries Case, *supra* note 15, at 130.

jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force.”²⁵

The above definition of historic waters should be read within the context explained by the ICJ in the *Libya/Tunisia Continental Shelf Case*:

There are, however, references to “historic bays,” or “historic titles” or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law which does not provide for a single “régime” for “historic waters” or “historic bays,” but only for a particular régime for each of the concrete, recognized cases of “historic waters” or “historic bays.”²⁶

Historic waters, according to Leo Bouchez, “are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.” As a subset of the concept of “historic title,” Gidel provides a narrower and more concise definition of “historic waters” as “those areas of water the legal status of which differs—with the consent of other States—from what it ought to have been according to the generally recognized rules.”

The 1958 United Nations (“UN”) Secretariat memorandum on historic bays clarified that historic rights “are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water.”²⁷ The 1962 UN study on the juridical régime of historic waters, including historic bays, defined historic

²⁵ *Id.*

²⁶ Continental Shelf, *supra* note 18, ¶ 100.

²⁷ U.N. Secretariat, *Historic Bays: Memorandum by the Secretariat of the United Nations*, 2, U.N. Doc. A/CONF.13/1 (Sept. 30, 1957) [hereinafter *Historic Bays*].

title as the “continued effective exercise of sovereignty by the coastal States over the area in question combined with the inaction of other States.”²⁸

B. Historic Rights in UNCLOS

The UNCLOS constitutes the primary legal framework addressing maritime claims. However, the legal regime of historic rights, historic title or historic waters is not defined in the UNCLOS nor does it contain specific provisions which clarify, explain or elaborate the constitutive elements which define historic rights, historic waters, or historic bays.²⁹ Nevertheless, the Convention recognizes the legal regime of historic rights over waters.³⁰ Textually, the UNCLOS as well as the 1958 Convention on the Territorial Sea and the Contiguous Zone refer to historic rights in the context of territorial sea delimitation.³¹ The Convention recognizes historic title in relation to maritime delimitation, the status of bays, and the rights of States in respect of archipelagic waters.³² Article 46 of the UNCLOS, defining an “archipelago,” makes reference to historical facts in the determination of what can be regarded as an archipelago under the Convention.³³ However, the reference to historical recognition was not expounded in the Conference.³⁴ Article 298(1)(a)(i) of the UNCLOS allows States when signing, ratifying or acceding to the Convention to declare in writing that it does not accept compulsory procedures entailing binding decisions with respect to disputes concerning

²⁸ *Juridical Regime of Historic Waters*, *supra* note 13, ¶ 108.

²⁹ Please see Seokwoo Lee and Lowell Bautista, *Historic Rights*, in ØYSTEIN JENSEN (Ed.), *THE DEVELOPMENT OF THE LAW OF THE SEA CONVENTION: THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS* 244-261 (Edward Elgar Publishing, 2020); also see R. R. CHURCHILL AND A. V. LOWE, *THE LAW OF THE SEA* 43 (Manchester University Press, 1999); Guo Yuan, *On Historic Rights under the Law of the Sea*, 2008 (1) CHINA OCEANS L. REV., 190 (2008).

³⁰ R. R. CHURCHILL AND A. V. LOWE, *supra* note 29, at 41-45, 455-456; DONALD R. ROTHWELL AND TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 47-49, 454-455 (Hart Publishing, 2010).

³¹ 1958 Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 205, Apr. 29, 1958, art. 12 (1); UNCLOS, *supra* note 1, art. 15.

³² NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* 249 – 279 (Cambridge University Press, 2005); The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, in art. 7, ¶ 6, recognized the historic rights of coastal States to “historic” bays regardless of their area or width of entrance.

³³ UNCLOS, *supra* note 1, art. 46(b).

³⁴ SATYA N. NANDAN AND SHABTAI ROSENNE (Eds.), *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, VOLUME II* 414-415 (Martinus Nijhoff, 2003).

the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations, or those involving historic bays or titles.³⁵

The Philippines in the preparatory work for the Third UN Conference on the Law of the Sea (UNCLOS III) submitted draft articles on “historic waters,” and on the breadth of the territorial sea.³⁶ The proposed articles introduced by the Philippines were not reflected in any of the texts brought to UNCLOS III.³⁷ Out of the “historic waters” claimed by the Philippines evolved the *sui generis* concept of archipelagic waters.³⁸ China, on its part, in the negotiation of the UNCLOS, identified itself as a developing coastal State and was a vocal supporter of the demands of developing coastal States for exclusive jurisdiction over the natural resources in the exclusive economic zones (“EEZ”) and continental shelves off their respective coasts.³⁹ China was consistently critical of any attempts to limit the content of the jurisdiction of developing coastal States.⁴⁰ It made no attempt whatsoever to secure an

³⁵ SHABTAI ROSENNE AND LOUIS B. SOHN, (Eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, VOLUME V 115-116 (Martinus Nijhoff, 1989).

³⁶ The draft article on “historic waters” introduced by the Philippines stated, “Historic rights or title acquired by a State in a part of the sea adjacent to its coasts shall be recognized and safeguarded.” (A/AC.138/SC.II/L.46) The Philippines also introduced a draft article on the breadth of the territorial sea, which stated, “This article shall not apply to a part of the sea adjacent to the coasts of a State which it acquired by historic right or title.” (A/CONF.138/SC.II/L.47/Rev.1) The second proposal on the breadth of the territorial sea stated, “Each State shall have the right to establish the breadth of its territorial sea up to a limit not exceeding ... nautical miles, measured from the applicable baseline. The maximum limit provided in this article shall not apply to historic waters held by any State as its territorial sea. Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein. (A/AC.138/SC.II/L.48).

³⁷ Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.; Nicar. Intervening), Dissenting Opinion of Judge Oda, 1992 I.C.J. Rep. 409, ¶ 43 (Sept. 11) [hereinafter Land, Island Maritime Frontier Dispute, Oda Dissent].

³⁸ *Id.* at 409, ¶ 44; see historical discussion of the problem of mid-ocean archipelagos pre-LOSC in C.F. Amerasinghe, *The Problem of Archipelagos in the International Law of the Sea*, 23 INT’L & COMP. L. Q., 539 (1974).

³⁹ Third UN Conference on the Law of the Sea (“UNCLOS III”), Plenary, 191st Meeting, ¶¶ 20-22, U.N. Doc. A/CONF.62/SR.191 (Dec. 9, 1982) [hereinafter UNCLOS III, 191st Meeting]; UNCLOS III, Second Committee, 25th Meeting, ¶¶ 13-14, 19, U.N. Doc. A/CONF.62/SR.25 (July 2, 1974) [hereinafter UNCLOS III, 25th Meeting]; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 194.

⁴⁰ UNCLOS III, 191st Meeting, *supra* note 39, ¶ 25; UNCLOS III, 25th Meeting, *supra* note 39, ¶ 19.

exception protecting historic claims of maritime rights of the kind that are now at issue.

The issue of historic rights has always been connected to the economic interests and concerns, particularly fishing privileges, of both coastal and flag States as shown in discussions by State representatives from the records of both the First and Second UN Conferences on the Law of the Sea (UNCLOS I and UNCLOS II).⁴¹ The recognition of historic rights in the UNCLOS was contentious because States argued that the recognition of historic rights would unjustly favor more capable States who have the capability to establish rights well beyond their territories and discriminate against countries which lack economic resources to have distant fishing fleets.⁴² Meanwhile, States who favor the recognition of historic rights argue for the protection of their territorial waters, specifically for self-preservation or survival.⁴³

Ultimately, the UNCLOS acknowledged historic rights in several of its provisions. Article 10(6) of the UNCLOS, which mirrors Article 7(6) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, provides: “The foregoing provisions do not apply to so-called ‘historic’ bays, or in any case where the system of straight baselines provided for in Article 7 is applied.”⁴⁴ Article 15 of the UNCLOS, which reflects Article 12(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, states that:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of *historic title* or other special

⁴¹ UN Conference on the Law of the Seas, U.N. Doc. A/CONF.19/9 (Mar. 17-Apr. 26, 1960).

⁴² *Id.* at 66.

⁴³ *Id.* at 77, 98; UNCLOS III, Second Committee, 23rd meeting, U.N. Doc. A/CONF.62/C.2/SR.23, 186, ¶ 54 (Aug. 1, 1974); UNCLOS, *supra* note 1, art. 51; see requirements for the right of traditional fishing in archipelagic waters in MOHAMMED MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA 161 (Brill, 1995).

⁴⁴ NANDAN AND ROSENNE (Eds.), *supra* note 34, at 118-119.

circumstances to delimit the territorial seas of the two States in a way which is at variance therewith. (emphasis added)

The relevant deliberations during UNCLOS III of Article 15 indicate that China favored a delimitation of the territorial sea “on the principles of mutual respect for sovereignty and territorial integrity, equality and reciprocity.”⁴⁵ The proposal of the Philippines was that the proposed limits of the territorial sea should not apply to historic waters or territorial seas established prior to the approval of the Convention.⁴⁶

The Philippines, as early as 1955, submitted a position paper applying the principle of historic waters.⁴⁷ The Philippine position was not adopted at the 1960 UNCLOS Conference, which was among the reasons why the Philippines refused to sign the four 1958 Geneva Conventions.⁴⁸ The head of the Philippine delegation outlined the history of the Philippine territorial waters claim at the 72nd meeting of Sub-Committee II of the Sea-Bed Committee on Aug. 9, 1973. These waters essentially referred to the Treaty of Paris limits, which passed from the sovereignty of Spain to that of the United States in 1898, over which the Philippines continued to exercise sovereignty after independence in 1946.⁴⁹

A working paper which reflected generally acceptable formulations and main trends which have emerged from the proposals submitted to the

⁴⁵ *Id.* at 137.

⁴⁶ *Id.*

⁴⁷ UNCLOS III, Second Committee, 36th meeting, U.N. Doc. A/CONF.62/C.2/SR.36, 264, ¶¶ 57-66 (Aug. 12, 1974). The Philippines advocated strongly for the principle of “historic waters” to apply over “all waters around, between and connecting the different islands of the Philippine Archipelago, irrespective of their width or dimension, were necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.” This essentially reflected the proposal for a new concept of a *sui generis* regime that applies to archipelagic States, originally submitted by the Philippines, along with Fiji, Indonesia, and Mauritius; *id.* ¶ 72.

⁴⁸ *Id.* at 264, ¶ 57; see also UNCLOS III, Plenary, 104th Plenary Meeting, U.N. Doc. A/CONF.62/SR.104, 70, ¶¶ 16-19 (May 18, 1978). The Philippines clarified, through Mr. Ingles, that, “The historic title which the Philippines claimed over its present territorial waters was based on the 1898 Treaty of Paris, under which Spain had ceded the Philippines to the United States and delimited its territorial boundaries. Those limits had been later confirmed by legislation enacted by the Philippine legislature in 1932 and by the United States Congress in 1934, and also in the Philippine Constitution of 1935.”; *id.* ¶ 18.

⁴⁹ See UNCLOS III, Second Committee, 5th Meeting, U.N. Doc. A/CONF.62/C.2/SR.5, 111-112, ¶30 (July 16, 1974) [hereinafter UNCLOS III, 5th Meeting]; for academic material on the

Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction or to the UNCLOS III included two provisions on historic waters:

Provision 2: The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea.

Provision 3: No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State.⁵⁰

The same working paper also reflected three formulas on the breadth of the territorial sea. The first formula sets the limit at twelve nautical miles from the baselines whilst the second formula sets a maximum distance of 200 nautical miles from the baselines. The third formula recognizes the exceptional nature of historic waters and its impact on the measurement of the breadth of the territorial sea:

The maximum limit provided in this article shall not apply to historic waters held by any State as its territorial sea.

Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the

Treaty of Paris limits, *please see* LOWELL BAUTISTA, THE PHILIPPINE TREATY LIMITS: HISTORICAL CONTEXT AND LEGAL BASIS IN INTERNATIONAL LAW (Institute of International Legal Studies International, University of the Philippines Law Center, 2015); Lowell Bautista, *The Legal Status of the Philippine Treaty Limits in International Law*, 1 AEGEAN REV. L. SEA & MAR. L., 111-139 (2010); Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN PACIFIC L. & POL'Y J., 1 - 31 (2008); Lowell Bautista, *The Historical Background, Geographical Extent and Legal Bases of the Philippine Territorial Water Claim*, 8 J. COMP. ASIAN DEV., 365-395 (2009); Lowell Bautista, *The Philippine Treaty Limits and Territorial Water Claim in International Law*, 5 (1-2) SOC. SCI. DILIMAN, 107-127 (2009); Lowell B. Bautista, *International Legal Implications of the Philippine Treaty Limits on Navigational Rights in Philippine Waters*, 1(2) AUSTL. J. MAR. & OCEAN AFF., 88-96 (2009); *see also*, *Magallona v. Ermita*, G.R. No. 187167, 655 SCRA 477, 16 August 2011, where the Philippine Supreme Court rejected the argument that the Treaty of Paris lines should be the baselines of the Philippines from where to measure its maritime zones.

⁵⁰ UNCLOS III, *Statement of activities of the Conference during its first and second sessions*, U.N. Doc. A/CONF.62/L.8/REV.1, 109 (Oct. 17, 1974).

maximum provided in this article shall not be subject to the limit provided herein.⁵¹

The Second Committee, which is one of three main committees of the UNCLOS III, established an informal consultative group on historic bays and historic waters.⁵² The Philippines submitted draft articles on historic waters and the delimitation of the territorial sea, which read as follows:

1. The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea.
2. The maximum limit provided in this Convention for the breadth of the territorial sea shall not apply to historic waters held by any State as its territorial sea.
3. Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein.⁵³

The substance of the Philippine draft articles was that any State which had already established a territorial sea with a breadth greater than the maximum provided in the Convention should not be subject to the limit set out therein.⁵⁴ Indonesia also submitted a draft article on historic waters, which stated, “No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State.”⁵⁵

The archipelagic principle advanced by the Philippines during the negotiations was successfully adopted in the Convention.⁵⁶ However, the

⁵¹ *Id.* at 111.

⁵² UNCLOS III, Second Committee, *Statement on the work of the Second Committee*, U.N. Doc. A/CONF.62/C.2/L.89/Rev.1 (July 15, 1975).

⁵³ UNCLOS III, *Philippines: revised draft article on historic waters and delimitation of the territorial sea*, U.N. Doc. A/CONF.62/C.2/L.24/Rev.1 (Aug. 19, 1974).

⁵⁴ UNCLOS III, *5th Meeting*, *supra* note 49, at 111, ¶ 30.

⁵⁵ UNCLOS III, *Indonesia: draft article on historic waters*, U.N. Doc. A/CONF.62/C.2/L.67 (Aug. 16, 1974).

⁵⁶ UNCLOS, *supra* note 1, Part IV; for a discussion of Philippine archipelagic doctrine, *please see*, Jorge R. Coquia, *Analysis of the Archipelagic Doctrine in the New Convention on the Law of the Sea* 8 PHIL. Y.B. INT'L L. 24 (1982); Jorge R. Coquia, *The Territorial Waters of Archipelagos*, 1(1) PHIL. Y.B. INT'L L. 139 (1962); Agim Demirali, *The Third United Nations*

exception it sought for its territorial waters based on historic title, over which the 12 nautical mile maximum breadth of the territorial sea provided under the Convention it argued should not apply, was unsuccessful. Nonetheless, in the spirit of compromise and accommodation, the Philippines signed and ratified the Convention.⁵⁷

C. Case Law

The issue of historic rights is not novel in cases brought before international courts and tribunals. Even before the South China Sea arbitration, judgments of international courts and tribunals have dealt with the issue of historic rights in the context of maritime boundary and territorial boundary disputes.⁵⁸ However, since most of the cases on “historic rights” to

Conference on the Law of the Sea and an Archipelagic Regime, 13 SAN DIEGO L. REV. 742 (1975-1976); BARRY HART DUBNER, *THE LAW OF TERRITORIAL WATERS OF MID-OCEAN ARCHIPELAGOS AND ARCHIPELAGIC STATES* (1976); Florentino P. Feliciano, *Comments on Territorial Waters of Archipelagos*, 1 PHIL. INT'L L. J. 160 (1962); L. L. Herman, *The Modern Concept of the Off-Lying Archipelago in International Law*, 23 CAN. Y.B. INT'L L. 172 (1985); Jose D. Ingles, *The Archipelagic Theory*, 3 PHIL. Y.B. INT'L L. 23 (1974); Charlotte Ku, *The Archipelagic States Concept and Regional Stability in Southeast Asia*, 23 CASE WESTERN RES. J. INT'L L. 463 (1991); Barbara Kwiatkowska, *An Evaluation of State Legislation on Archipelagic Waters*, 6 WORLD BULL. 22 (1990); Barbara Kwiatkowska, *The Archipelagic Regime in Practice in the Philippines and Indonesia -- Making or Breaking International Law*, 6 INT'L J. ESTUARINE & COASTAL L. 1 (1991); Estelito P. Mendoza, *The Baselines of the Philippine Archipelago*, 46 PHIL. L. J. 628 (1969-1973); MOHAMMED MUNAVVAR, *OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA* (1995); D. P. O'Connell, *Mid-Ocean Archipelagoes in International Law*, 45 BRIT. Y.B. INT'L L. 1 (1971); Miriam Defensor Santiago, *The Archipelago Concept in the Law of the Sea: Problems and Perspectives*, 49 PHIL. L. J. 315 (1974); Arturo M. Tolentino, *On Historic Waters and Archipelagos*, 3 PHIL. L. J. 31 (1974); Arturo M. Tolentino, *Philippine Position on Passage Through Archipelagic Waters*, 4 PHIL. Y.B. INT'L L. 44 (1975); Arturo M. Tolentino, *Territorial Sea and Archipelagic Waters*, 5 PHIL. Y.B. INT'L L. 47 (1976); Arturo M. Tolentino, *The Philippine Archipelago and the Law of the Sea*, 7 PHIL. L. GAZETTE 1 (1983); Arturo Tolentino, *Principles Relating to Archipelagic States* PHIL. Y.B. INT'L L. 28 (1974); Arturo Tolentino, *The Philippine Territorial Sea*, 3 PHIL. Y.B. INT'L L. 46 (1974).

⁵⁷ UNCLOS III, 189th Meeting, U.N. Doc. A/CONF.62/SR.189 (Dec. 8, 1982), 69-70, ¶¶ 43-60. The Republic of the Philippines signed UNCLOS on 10 December 1982 at the close of the UNCLOS III in Montego Bay, Jamaica. The LOSC entered into force for the Philippines on Nov. 16, 1994.

⁵⁸ THOMAS COTTIER, *EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION: THE QUEST FOR DISTRIBUTIVE JUSTICE IN INTERNATIONAL LAW* 485-488 (Cambridge University Press, 2015).

maritime areas predate the UNCLOS, rules of general international law were applied. Nonetheless, it is clear from settled jurisprudence that there is no legal basis for a State to validly claim “historic rights” in the EEZ or continental shelf of another State. A State party to the UNCLOS is not entitled to maritime areas outside of what is provided for in the Convention. In the dissenting opinion of Judge Oda in the *Land, Island and Maritime Frontier Dispute*, he noted that:

In sum, the concept of “historic waters” has become practically a redundancy, which is perhaps why it does not appear in either the 1958 or the 1982 Conventions. In fact, it is not so much a concept as a description expressive of the historic title on the basis of which a claim to a particular status for certain waters has been made.⁵⁹

1. *Formation and Acquisition of Historic Rights*

The starting point of historic rights claims is the assertion of sovereignty, which in itself is not sufficient, but is considered indispensable.⁶⁰ The assertion of sovereignty could be exercised through domestic legislation and exercise of jurisdiction. In order to acquire legal title, the acts of the State must be carried out in a sovereign capacity, openly, peacefully, without protest or competing activity by the existing sovereign, and for a sufficiently long time.

In the *Anglo-Norwegian Fisheries* case, the Court considered “historic rights” in upholding Norway’s method of straight baselines as not contrary to international law.⁶¹ The Court premised its judgment on the grounds that: (1) “the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose;”⁶² and (2) that “[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty

⁵⁹ *Land, Island and Maritime Frontier Dispute*, Oda Dissent, *supra* note 37, at 409, ¶ 44.

⁶⁰ *Historic Bays*, *supra* note 27, at 28-29.

⁶¹ *Anglo-Norwegian Fisheries* (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 128, 143 (1951) (In the dispositive, “Judge Hackworth declares that he concurs in the operative part of the Judgment but desires to emphasize that he does so for the reason that he considers that the Norwegian Government has proved the existence of an historic title to the disputed areas of water.”); *id.* at 144.

⁶² *Id.* at 138.

years the United Kingdom Government itself in no way contested it.”⁶³ Applying the *Anglo-Norwegian Fisheries* case, in order for “historic rights” to be recognized, the practice should be constant and sufficiently long, notorious, enjoying the general tolerance of the international community as evidenced by the attitude of government which do not consider it to be contrary to international law.⁶⁴

The ICJ directly addressed historic fishing rights in the *Fisheries Jurisdiction* cases (*United Kingdom v. Iceland*; *Federal Republic of Germany v. Iceland*).⁶⁵ The decision, rendered in 1974, upheld Iceland’s fisheries zone but noted that Iceland’s “preferential rights” in respect of the fish stocks are not absolute or exclusive and limited by the rights of other States, including the coastal State, and of the needs of conservation.⁶⁶ It is well to remember that this case was decided before the UNCLOS was able to codify the consensus over the *sui generis* regime of the 200-nautical-mile EEZ.

In the *Libya/Tunisia Continental Shelf* case, the regime of historic rights was based on acquisition and occupation.⁶⁷ Notably, Tunisia based its historic rights claim on “long established interests and activities” of its fishing population over the seabed and waters of the Mediterranean Sea.⁶⁸ The ICJ did not undertake any thorough discussion regarding historic fishing rights but the Court recognized that “historic titles must enjoy respect and be preserved as they have always been by long usage.”⁶⁹

In the *North Atlantic Coast Fisheries* case, it was maintained that “a servitude [which in this case was manifested through historic fishing] in international law predicates an express grant of a sovereign right.”⁷⁰ However, it is to be noted that such possession must also be exclusive. In the aforementioned case⁷¹ and *Eritrea v. Yemen*, the Tribunals denied claims to

⁶³ *Id.*

⁶⁴ *Id.* at 139.

⁶⁵ Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Reports 3.

⁶⁶ *Id.* at 31, ¶ 71, 34, ¶ 79.

⁶⁷ Continental Shelf, *supra* note 18, ¶ 100.

⁶⁸ *Id.* ¶ 98.

⁶⁹ *Id.* ¶ 100.

⁷⁰ N. Atl. Coast Fisheries (U.K. v. U.S.) 11 R.I.A.A. 167, 181 (Perm. Ct. Arb., 1910).

⁷¹ *Id.* at 184.

historic rights mainly due to the non-exclusivity of fishing rights.⁷² The unopposed shared access of multiple States cannot establish historic title over the maritime areas.⁷³

The requirement of exclusivity was further established in *Qatar v. Bahrain* where the Tribunal recognized that although the pearling industry in the Gulf area was historically carried out by Bahraini fishermen, it was traditionally considered a “right which was common to the coastal population” and therefore, “never [...] led to the recognition of an exclusive quasi-territorial right to the fishing grounds.”⁷⁴ In contrast, the ICJ held in the *Fisheries* case that Norway was able to prove the existence of a historic title to the disputed maritime areas as Norwegian fishermen had exploited the fishing grounds “from time immemorial” and that “British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906.”⁷⁵ Thus, it seems clear that historic title over maritime areas may be formed by fishing activities, but only if such fishing grounds were exclusive to the claiming State’s fishermen.

From case law, it also appears that historic rights must meet the test of intertemporal law, i.e., “it needs to be shown that these rights have been continuously exercised until present times.”⁷⁶ This requirement of continuous exercise was not fulfilled in the *Gulf of Maine* case.⁷⁷ Thus, historic title cannot be said to have been created once the “effective exercise of sovereignty” has been interrupted or other States act against it.⁷⁸ In the *Gulf of Maine* case, the ICJ addressed the incompatibility of historic fishing rights with the regime of the EEZ established under the UNCLOS.⁷⁹

While the ICJ in the *Fisheries* case found that the historic rights of Norway over the disputed fishing grounds included *sovereignty* based on historic title,

⁷² Territorial Sovereignty and Scope of the Dispute (*Eri. v. Yemen*), 22 R.I.A.A. 209, 335-410, ¶¶ 38, 66, 126 (Perm. Ct. Arb., 1998).

⁷³ *Id.* ¶ 66.

⁷⁴ Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 2001 I.C.J. Rep. 40, 112, ¶ 236 (March 16).

⁷⁵ Fisheries Case, *supra* note 15, at 124.

⁷⁶ COTTIER, *supra* note 48, at 487.

⁷⁷ Delimitation of the Maritime Boundary in the Gulf of Maine Area (*Can. v. U.S.*), Judgment, 1984 I.C.J. Reports 246, 305 (Oct. 12).

⁷⁸ SYMMONS, *supra* note 21, at 151–152, 161-162.

⁷⁹ Delimitation of the Maritime Boundary in the Gulf of Maine Area, *supra* note 77, ¶ 235.

such is not always the case. A State can be recognized to have historic rights over a particular area, yet not territorial sovereignty. Such was the case in *Eritrea v. Yemen*, where the Tribunal concluded that while the southern Red Sea had become historical fishing grounds, the maritime area's openness for fishing, the unrestricted traffic, and the "common use of the islands by the populations of both coasts" created what the Tribunal described as a form of "*servitude international*."⁸⁰ Such servitude, while arising out of a historic right, fell short of sovereignty since the said historic rights accrued in favor of both disputing States. Notably, the Tribunal also declared that no historic title can be established by either countries "as long as the colonial situation prevailed."⁸¹ Thus, colonization is an interruption to "effective exercise of sovereignty."

A similar conclusion was established in the *North Atlantic Coast Fisheries* case. The United States argued that the treaty between the United Kingdom and itself granting American citizens "forever [...] the liberty to take fish of every kind" from the southern coast of Newfoundland, constituted an international servitude in its favor, and thus, negating any right for the United Kingdom to regulate American citizens fishing activity on the said coast.⁸² The Tribunal disagreed and held that the right to fish which the United States had, was solely an economic right, and not an attribute of sovereignty. Contending otherwise would be inconsistent with the "historical basis of the American fishing liberty."⁸³ These "historic fishing rights" merely granted the liberty to fish over the coast of Newfoundland because they were primarily grounded on the fact that Americans, while still under British rule, enjoyed fishing rights concurrently with British citizens.⁸⁴ The Tribunal then described historic fishing rights as "a purely economic right" which do not entail

⁸⁰ Territorial Sovereignty and Scope of the Dispute, *supra* note 72.

⁸¹ *Id.* ¶ 125.

⁸² N. Atl. Coast Fisheries, *supra* note 70, at 173, 181.

⁸³ *Id.* at 181, 183.

⁸⁴ *Id.* at 183–184.

sovereignty.⁸⁵ The distinction then is clear; historic rights may or may not include sovereignty,⁸⁶ while historic title is closely linked to sovereignty.⁸⁷

2. *Conduct by Other States*

The opposition, failure to or lack of a reaction of relevant States to the actions of the claiming States is a decisive factor in determining the existence of historic rights.⁸⁸ This is comparable with the general requirement that possession must be public, peaceful, and uninterrupted in cases of acquisitive prescription. It is universally recognized in international law that continuous, open, and notorious occupation and use of a defined territory over a long period of time, along with the exercise of sovereignty in the territory, and failure of the other party having knowledge of these facts to object, protest, or assert its rights will be sufficient to establish title to the territory by prescription.⁸⁹

As stated by the Chamber of the Court in the *Gulf of Maine* case, “acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.”⁹⁰ In the *Fisheries* case, this was described as the “general toleration of foreign States.”⁹¹ Conversely, the presence of opposition from foreign states interferes with the “peaceful and continuous” possession of the State claiming historic rights and which effectively may prevent its formation.⁹² Thus, unopposed,

⁸⁵ *Id.*

⁸⁶ Xuechan Ma, *Historic Title over Land and Maritime Territory*, 4(1) J. TERRITORIAL & MAR. STUD. 31, 34 (2017).

⁸⁷ Yoshifumi Tanaka, *Reflections on Historic Rights in the South China Sea Arbitration (Merits)*, 32 *Int'l J. Mar. & Coastal L.* 458, 464 (2017).

⁸⁸ BROWNLIE, *supra* note 12, at 149.

⁸⁹ H. LAUTERPACHT (Ed.), L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 576 (8th ed 1955); ROBERT Y. JENNINGS AND A. WATTS (eds.), *OPPENHEIM'S INTERNATIONAL LAW*, 706; D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 *BRIT. Y.B. INT'L L.*, 353-4 (1950); *Island of Palmas Case (Neth. v. U.S.)*, 2 *R.I.A.A.* 829, 93 (1928); *Legal Status of Eastern Greenland (Den. v. Nor.)*, P.C.I.J. Series A/B, No. 53, 45 (1933).

⁹⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 77, at 305.

⁹¹ *Fisheries Case*, *supra* note 15, at 138.

⁹² Ying Wang, *Rethinking the Concept of Historic Rights in International Law*, 7 *KOR. J. INT'L & COMP. L.*, 153, 164 (2019).

uninterrupted possession of parts of the sea over a certain period of time is one factor in the acquisition of historic title.⁹³

The time period sufficiently necessary for prescription is a question of fact, depending on all the circumstances.⁹⁴ In the *Fisheries* case, a silence of sixty years in the face of Norwegian use of the disputed waters was enough to preclude the claim of the United Kingdom.⁹⁵ In the *Temple of Preah Vihear* case, the ICJ held that Thailand is precluded by its own conduct from asserting that she did not accept the map of 1908. The Court noted the dates, observing they were a long time ago or a period of more than a century since Thailand recognized the line on map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory.⁹⁶

A State having a potential historic title over a particular territory may nevertheless lose title because of subsequent inaction to adverse possession of the territory by another State.⁹⁷ Such was the case in *Pulau Batu Puteh*—albeit over land territory and not over maritime waters—where Malaysia lost its territorial sovereignty over the island of Pedra Branca, despite having historic title because it failed to take action against the occupation of the island by Singapore and its predecessors.⁹⁸ The investigation of marine accidents, control over visits, installation of naval communication equipment, and reclamation plans by Singapore and the United Kingdom (as Singapore’s predecessor) were considered by the Court as “acts à titre de souverain”⁹⁹ and concluded that sovereignty over the disputed island had passed to Singapore because of the aforementioned acts and the failure of Malaysia and its predecessors to respond accordingly.¹⁰⁰ However, the Court did not make the same conclusion with regard to Middle Rocks, a maritime feature located a few nautical miles away from the Pedra Branca island.¹⁰¹ It found that “none of the conduct reviewed in the preceding part of the Judgment which has led

⁹³ MALCOLM N. SHAW, *INTERNATIONAL LAW* 507 (Cambridge University, Press 2008).

⁹⁴ JENNINGS AND WATTS (Eds.), *supra* note 89, at 707.

⁹⁵ *Fisheries Case*, *supra* note 15, p. 138.

⁹⁶ *Temple of Preah Vihear (Cambodia v. Thai.)*, Merits, Judgment, 1962 I.C.J. Rep. 6, 32-3 (June 15).

⁹⁷ *Island of Palmas Case*, *supra* note 89, at 831, 838.

⁹⁸ *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malay. v. Sing.)*, Judgment, 2008 I.C.J. Rep. 12 (May 23).

⁹⁹ *Id.* ¶ 274.

¹⁰⁰ *Id.* ¶ 276.

¹⁰¹ *Id.* ¶ 278.

the Court to the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh passed to Singapore or its predecessor before 1980 has any application to the [case] of Middle Rocks.”¹⁰²

Nevertheless, such scenario can be prevented, as illustrated in the case of *Chamizal*.¹⁰³ In the territorial dispute between the United States and Mexico, the Tribunal found that the United States failed to acquire title over the disputed border territory by means of prescription because Mexico effectively interfered by constantly challenging and questioning the former’s occupation through diplomatic agents.¹⁰⁴ Therefore, applying the Tribunal’s decision, it seems that a State need not actually physically possess the disputed territory nor file an official action against another State for an international dispute settlement body to effectively prevent the abandonment of a title. Diplomatic protests, as long as consistent, are sufficient to impede the acquisition of title to a territory by another State.¹⁰⁵

III. The South China Sea Arbitration

On Jan. 22, 2013, the Philippines instituted arbitral proceedings against China under Annex VIII of the UNCLOS in respect of its maritime jurisdictional dispute in the South China Sea.¹⁰⁶ The arbitration is the first international litigation initiated by a claimant State in the South China Sea.¹⁰⁷ China neither accepted nor participated in the proceedings, articulating its position through public statements and in many diplomatic Notes Verbales to

¹⁰² *Id.* ¶¶ 289, 290.

¹⁰³ The *Chamizal* Case (Mex. v. U.S.), 11 R.I.A.A. 309 (1911).

¹⁰⁴ *Id.* at 330, 329.

¹⁰⁵ BROWNIE, *supra* note 12, at 149; SYMMONS, *supra* note 21, at 72-73.

¹⁰⁶ Republic of the Philippines, Department of Foreign Affairs, Notification and Statement of Claim, Manila, Jan. 22, 2013 [hereinafter *Notification and Statement of Claim*].

¹⁰⁷ For academic material on the UNCLOS dispute settlement, *please see*, Lowell Bautista, *Dispute settlement in the Law of the Sea Convention and territorial and maritime disputes in Southeast Asia: issues, opportunities, and challenges*, 6(3) ASIAN POL. & POL’Y, 375-396 (2014); Robin Churchill, *The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use*, 48 OCEAN DEV. & INT’L L., 216-238 (2017); NONG HONG, *UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA* (Routledge, 2012); NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* (Cambridge University Press, 2005); IGOR V. KARAMAN, *DISPUTE RESOLUTION IN THE LAW OF THE SEA* (Martinus Nijhoff, 2012); *inter alia*.

the Philippines and to the Permanent Court of Arbitration.¹⁰⁸ In accordance with the provisions of the UNCLOS, the arbitration proceeded in China's absence.¹⁰⁹ In keeping with settled international jurisprudence, whilst China had chosen not to appear in the proceedings, it remains a party to the case, and bound by the eventual judgment.¹¹⁰

The award is only legally binding between the Philippines and China.¹¹¹ However, the landmark verdict will have significant, lasting, and far-reaching implications affecting the legal rights of all the claimant States because of the nature of the award as a subsidiary means for the determination of rules of law under Article 38(1)(d) of the ICJ Statute.¹¹² Judicial and arbitral decisions are not an independent source of obligations for States, except between the parties to the dispute.¹¹³ Nonetheless, the jurisprudence and practice of

¹⁰⁸ Philippines v. China, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, Permanent Court of Arbitration, ¶¶ 10, 27 (Oct. 29, 2015) [hereinafter Award on Jurisdiction and Admissibility]; Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, Feb. 19, 2013; Note Verbale from the Embassy of the People's Republic of China in The Hague to the Permanent Court of Arbitration, No. (013)-117, July 29, 2013.

¹⁰⁹ UNCLOS, *supra* note 1, art. 9, Annex VII; Rules of Procedure, South China Sea Arbitral Tribunal, art. 25; *see also*, Celeste Ruth L. Cembrano-Mallari, *Non-Appearance and Compliance in the Context of the UN Convention on the Law of the Sea Dispute Settlement Mechanism*, 88 (2) PHIL. L. J. (2014) 300-341.

¹¹⁰ Arctic Sunrise Case (Neth. v. Russ), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, ¶ 48, 52; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 24, ¶ 28.

¹¹¹ UNCLOS, *supra* note 1, art. 296(2).

¹¹² *See for example*, Vladyslav Lanovoy, *The authority of inter-state arbitral awards in the case law of the International Court of Justice*, 32 LEIDEN J. INT'L L. 561, 563 (2019), who argues that the International Court of Justice, in a significant number of decisions since the 1990s, "attributes considerable authority to arbitral awards in its reasoning, well beyond their subsidiary role in the classic theory of sources in international law."

¹¹³ Statute of the International Court of Justice, arts. 38(1)(d), 59, Apr. 18, 1946, 33 U.N.T.S. 993. Decisions of international courts do not have stare decisis effect. The ICJ has clarified that, "To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."; *see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, Judgment, 2008 I.C.J. Rep. 412, 428, ¶ 53 (Nov. 18); *see also*, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 292, ¶ 28.

international courts and tribunals confirm the weight attributed to judicial and arbitral decisions.¹¹⁴

A. The Philippines' Claim

The Philippine arbitration case against China over the South China Sea asked the Tribunal three fundamental questions. First, whether “the Parties’ respective rights and obligations in regard to the waters, seabed and maritime features of the of the South China Sea are governed by UNCLOS, and that China’s claims based on its “nine-dash line” are inconsistent with the Convention and therefore invalid.”¹¹⁵ Second, whether “under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12M.”¹¹⁶ And lastly, whether the Philippines should be allowed “to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention.”¹¹⁷

The Philippines formally set out 15 specific submissions in its Memorial of Mar. 30, 2014.¹¹⁸ The Philippines wanted, *inter alia*, a declaration from the Tribunal that China’s rights and entitlements in the South China Sea had to be based on UNCLOS and not on any claim to historic rights.¹¹⁹ Specifically, the Philippines argued that China’s claim to rights within its so-called nine-dash line marked on Chinese maps were without lawful effect to the extent that they exceeded the entitlements that China would be permitted under

¹¹⁴ Lanovoy, *supra* note 112, at 565; MOHAMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 26 (Cambridge University Press, 1996), who states that the ICJ “also follows its own case law.”

¹¹⁵ *Notification and Statement of Claim*, ¶ 6; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 28.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 4-7; Memorial of the Philippines, Volume I, Mar. 30, 2014, 271-272.

¹¹⁹ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 7, 28; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 99, 101.

UNCLOS.¹²⁰ The Philippines requested, *inter alia*, for the Tribunal to adjudge and declare that:

- (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by UNCLOS;
- (2) China's claims to sovereign rights jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS.¹²¹

The issues before the tribunal related exclusively to the interpretation or application of the UNCLOS, in respect of matters over which China has not availed itself of the optional exceptions provided in Article 298 of the Convention.¹²² The Philippines at all stages of the arbitration never requested the Tribunal to rule on the territorial aspects of its disputes with China or to delimit any maritime boundaries.¹²³

1. *Jurisdiction*

The Philippines possesses the right to submit a dispute concerning the interpretation or application of the UNCLOS to a court or tribunal having jurisdiction using the compulsory procedures entailing binding decisions provided for in the Convention.¹²⁴ The UNCLOS is the principal basis for the arbitration, of which both the Philippines and China are States Parties, the Philippines having ratified it on May 8, 1984, and China on June 7, 1996.¹²⁵ The refusal of China to participate in the proceedings did not impair the

¹²⁰ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 7.

¹²¹ *Id.* ¶ 112.

¹²² *Id.* ¶¶ 1202(G), 1203; On 25 August 2006, China made the following Declaration under Article 298 of the Convention: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in Paragraph 1(a)-(c) of Article 298 of the Convention."

¹²³ See *Notification and Statement of Claim*, ¶ 7; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 8, 152-154.

¹²⁴ UNCLOS, *supra* note 1, art. 286.

¹²⁵ *Id.* arts. 286, 287, 1, Annex VII.

arbitration.¹²⁶ The UNCLOS Annex VII arbitral procedure was so designed that even the failure of a party to take the requisite action will not frustrate the arbitral proceedings.¹²⁷ The non-participation of China in both the written and oral proceedings of the Arbitral Tribunal did not have any bearing on the process of the proceedings and the validity of the arbitral award.¹²⁸ The Arbitral Tribunal only needed to satisfy itself that it had jurisdiction and that the claim of the Philippines was well founded in fact and law.¹²⁹

In consideration of the non-participation of China, the Tribunal carried out measures in order to ensure procedural fairness to both Parties without compromising the efficiency of the proceedings. The Tribunal ascertained the position of China on the issues based on public statements made by Chinese officials as well as through communications to the members of the Tribunal.¹³⁰ There was no duty for China to appear before the Tribunal. However, it does have the duty to comply with the decision of the Tribunal,¹³¹ provided it had jurisdiction.¹³² Its non-appearance did not affect the validity of the judgment. It is final and there is no provision for appeal.¹³³

2. *Merits*

The Philippines asserted that prior to the UNCLOS, there were only two principles that govern the sea: “the principle of the freedom of the seas, which prohibits appropriation by any state; and the principle of control over a limited area by the immediately adjacent coastal state, which prohibits appropriation by any other state.”¹³⁴ The Philippines argued that China’s claim is not consistent with both of these principles. Before the UNCLOS was

¹²⁶ *Id.* art. 9, Annex VII.

¹²⁷ Military and Paramilitary Activities in and against Nicaragua, *supra* note 109, ¶ 28; Arctic Sunrise Case, *supra* note 110, ¶¶ 48, 52.

¹²⁸ UNCLOS, *supra* note 1, art. 9, Annex VII; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 143.

¹²⁹ UNCLOS, *supra* note 1, art. 9, Annex VII; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 117, 143-144.

¹³⁰ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 129-142.

¹³¹ UNCLOS, art. 11, Annex VII.

¹³² UNCLOS, sec. 2, Part XV.

¹³³ UNCLOS, art. 11, Annex VII (“unless the parties to the dispute have agreed in advance to an appellate procedure.”); *id.* art. 296; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 1172.

¹³⁴ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 193.

adopted, the Philippines argued, international law did not allow “assertions of historic rights over such a vast area” similar to China’s claims in the South China Sea.¹³⁵ The Philippines asserts that unless the Convention makes an express exception for prior uses or rights, “those historic rights would not have survived as derogations from the sovereignty, sovereign rights and high seas freedoms of other states.”¹³⁶ Consequently, the Convention proscribes assertions of rights to control activities beyond the limits specified fixed in the Convention “in derogation of the sovereign rights of other coastal states or the rights and freedoms of all states.”¹³⁷

In respect of China’s claim to historic rights, the Philippine presented a two-fold argument:

First, the Philippines submits that international law did not historically permit the type of expansive claim advanced by China’s “nine-dash line” and that, even if China did possess historic rights in the South China Sea, any such rights were extinguished by the adoption of the Convention. Second, the Philippines argues that, on the basis of the historical record of China’s activities in the South China Sea, China cannot meet the criteria for having established historic rights within the “nine-dash line”.¹³⁸

The Philippines directly challenged the existence of Chinese historic rights in the maritime areas of the South China Sea, which according to the Philippines, were first claimed by China on May 7, 2009.¹³⁹ The Philippines presented Chinese historic maps that date back to 1136, including maps that purportedly illustrate the entirety of the Chinese Empire, which consistently depicted Hainan as China’s southernmost territory.¹⁴⁰ The Philippines presented evidence to show that in the 14th century and for much of the 15th and 16th centuries, the Imperial Chinese Government actively prohibited maritime trade by Chinese subjects.¹⁴¹ The Philippines relied on published archival records of the Taiwan Authority of China, which prove the absence of

¹³⁵ *Id.*

¹³⁶ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 194.

¹³⁷ *Id.*

¹³⁸ *Id.* ¶ 192.

¹³⁹ Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 195.

¹⁴⁰ *Id.* ¶ 195, *citing* Merits Hearing Tr. (Day 1), pp. 79 – 80.

¹⁴¹ *Id.* ¶ 195, *citing* Merits Hearing Tr. (Day 1), p. 81; Supplemental Written Submission, paras. A13.3-A13.11.

“any documents evidencing any official Chinese activities in regard to any South China Sea feature prior to the beginning of the 20th century.”¹⁴² In the aftermath of the Second World War, following the defeat of Japan, the Chinese identified the features of the South China Sea using transliterations of their English names.¹⁴³

The Philippines argued that historical documents obtained by the Tribunal from the *Bibliothèque Nationale de France* and the *Archives Nationales d’Outre-Mer* confirm that “prior to the Second World War France did not consider China to have made a claim in regard to any of the Spratlys, or to the waters of the South China Sea far removed from China’s mainland coast.”¹⁴⁴ In addition, post-war documents as well as internal records of France confirm that France retained its claim to those features, consistent with position of the United Kingdom and United States to protect the sovereignty claim of France in relation to the Cairo Declaration and Potsdam Proclamation.¹⁴⁵

B. China’s Claim

The Tribunal, *proprio motu* on the basis of China’s Position Paper of Dec. 7, 2014 and other communications, treated the objections as constitutive of China’s plea against the Tribunal’s jurisdiction.¹⁴⁶ In China’s view, “the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention.”¹⁴⁷ The dispute raised by the Philippines, according to China, actually involves sovereignty because in order for the Tribunal to decide upon any of the Philippine claims, “the Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea.”¹⁴⁸ China argues that even granting that the dispute were concerned with the

¹⁴² *Id.* ¶ 196.

¹⁴³ *Id.* ¶ 197. For example, according to the Philippines, “Lord Auckland Shoal was thus ‘Ao ke lan sha’, and Mischief Reef ‘Mi-qi fu’. Gaven Reef was ‘Ge wen’, and Amy Douglas Reef ‘A mi de ge la’.” *Id.*, *citing* Merits Hearing Tr. (Day 1), p. 96.

¹⁴⁴ *Id.* ¶ 198.

¹⁴⁵ *Id.*, *citing* Written Responses of the Philippines on French Archive Materials, ¶ 31 (June 3, 2016).

¹⁴⁶ *Id.* ¶¶ 132-133.

¹⁴⁷ *Id.* ¶ 133, *citing* China’s Position Paper, ¶ 3.

¹⁴⁸ *Id.* ¶ 134, *citing* China’s Position Paper, ¶ 29; *id.* ¶¶ 138-139.

Convention, the dispute would fall within the scope of its 2006 Declaration since maritime delimitation would be an integral part of this dispute.¹⁴⁹ As such, the subject matter of the proceedings are excluded from the Tribunal's jurisdiction by virtue of Article 298.¹⁵⁰ China maintains that in the event that the Philippines and China disagree with respect to whether the dispute is covered by China's declaration, "the Philippines should first take up this issue with China, before a decision can be taken on whether or not it can be submitted for arbitration."¹⁵¹ The Tribunal considered and rejected China's characterization of the dispute and does not consider the dispute to be over maritime boundary delimitation.¹⁵² Nevertheless, the Tribunal took into consideration how the exclusion of jurisdiction over disputes relating to sea boundary delimitations in Article 298 may constrain the Tribunal's jurisdiction.¹⁵³

The Tribunal also addressed China's position that the Philippines is precluded from submitting the dispute to arbitration by virtue of other agreements between the Philippines and China which commit the parties to settle their disputes by consultations and negotiations.¹⁵⁴ This argument is premised on a number of statements jointly made by the parties starting in the mid-1990s and on the signing of the Declaration on the Conduct of Parties in the South China Sea in 2002.¹⁵⁵ In addition, the Tribunal also considered *proprio motu* whether the Treaty of Amity and Cooperation in Southeast Asia,¹⁵⁶ and the Convention on Biological Diversity could preclude the submission of the parties' dispute to arbitration.¹⁵⁷ The Tribunal concluded that these agreements and their dispute settlement provisions do not, by

¹⁴⁹ *Id.* ¶ 133, *citing* China's Position Paper, ¶ 3.

¹⁵⁰ *Id.* ¶ 138.

¹⁵¹ *Id.*, *citing* China's Position Paper, paragraph 73

¹⁵² *Id.* ¶¶ 366, 155-157.

¹⁵³ *Id.* ¶¶ 368-371.

¹⁵⁴ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 190, *citing* China's Position Paper, ¶¶ 3, 30-44; *see* Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039, p. 1 (Feb. 19, 2013); *see also* UNCLOS, *supra* note 1, arts. 281, 282, 283.

¹⁵⁵ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 198-229.

¹⁵⁶ *Id.* ¶¶ 252-269.

¹⁵⁷ *Id.* ¶¶ 270-289.

virtue of Article 281 or Article 282 of the UNCLOS, bar the Tribunal's jurisdiction.¹⁵⁸

In respect of China's claim to historic rights, the Tribunal acknowledged that "China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the 'nine-dash line'"¹⁵⁹ This ambiguity, the Tribunal admitted, makes the resolution of the Philippine submissions complicated.¹⁶⁰ Nonetheless, the Tribunal took cognizance of established facts regarding China's claim. The "nine-dash line," the Tribunal noted, originally depicted eleven dashes and first appeared in a 1948 official Chinese map.¹⁶¹ In 1953, the two dashes in the Gulf of Tonkin were removed, consequently rendering it a "nine-dash line," in which form it has since consistently appeared in official Chinese cartography.¹⁶²

On May 7, 2009, in response to the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, China sent two Notes Verbales to the UN Secretary-General, with a map depicting the 'nine-dash line' appended, which stated as follows:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community.¹⁶³

The statement above from China encapsulates its position in respect of the historic rights and maritime entitlements it claims over the South China Sea,

¹⁵⁸ *Id.* ¶¶ 229, 269, 289, 158-160, 164 (E).

¹⁵⁹ *Id.* ¶ 180.

¹⁶⁰ *Id.* ¶ 181; see also Keyuan Zou, *The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands*, 14(1) INT'L J. MAR. & COASTAL L., 27-56 (1999).

¹⁶¹ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 181.

¹⁶² *Id.* ¶ 181; see for example Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 (1) AM. J. INT'L L., 98 -124 (2013).

¹⁶³ Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (May 7, 2009); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (May 7, 2009).

which China has repeated—with some degree of variation—in diplomatic correspondence, public statements, and even academic literature from Chinese scholars.¹⁶⁴

C. Award of the Tribunal

The bifurcated nature of the South China Sea arbitration proceedings meant that there were two awards issued by the arbitral tribunal: first, is the award on jurisdiction and admissibility on Oct. 29, 2015; and secondly, the award on the merits on Jul. 12, 2016. The following sections will discuss these awards.

1. Award on Jurisdiction

On Oct. 29, 2015, the arbitral tribunal issued an award on jurisdiction and admissibility, largely ruling in favor of the Philippines.¹⁶⁵ The arbitral tribunal decided that the proceedings be bifurcated in order to resolve the issue of jurisdiction before proceeding on the merits of the Philippine claim.¹⁶⁶ The unanimous award found that the Tribunal was properly constituted in accordance with Annex VII of the UNCLOS and that China's non-appearance does not deprive the Tribunal of jurisdiction.¹⁶⁷ As a preliminary matter, the Tribunal explained that the “dispute settlement provisions set out in Part XV of the Convention were heavily negotiated and reflect a compromise” and whilst States Parties possess the flexibility to resolve disputes in the manner of their choice, the UNCLOS provides strict and limited exceptions to the compulsory dispute procedures spelled out in the Convention itself.¹⁶⁸ The Tribunal emphasized that “States Parties to the Convention are accordingly

¹⁶⁴ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 186-187.

¹⁶⁵ Award on Jurisdiction and Admissibility, *supra* note 108.

¹⁶⁶ *Procedural Order No. 4*, Apr. 21, 2014, 6, ¶ 1(1.3); Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 68. On the fallacy of China's historic claim, *please see* Antonio T. Carpio, *The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea*, 90 PHIL. L. J., 459, 493-510 (2017).

¹⁶⁷ Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(a)(b), 112-123.

¹⁶⁸ *Id.* ¶ 107; *see* UNCLOS, *supra* note 1, arts 289, 298; Furthermore, beyond the specific exceptions provided under UNCLOS, art. 309 provides that “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” Article 298, *inter alia*, excludes disputes “involving historic bays or titles”, disputes concerning “military activities”, as well as “law enforcement activities” related to marine scientific research or fisheries.

not free to pick and choose the portions of the Convention they wish to accept or reject.”¹⁶⁹

The arbitral tribunal recognized, which the Philippines concedes, that a dispute over land sovereignty exists between the China and the Philippines over certain maritime features in the South China Sea.¹⁷⁰ However, the Philippines has not asked the Tribunal to rule on the question of sovereignty, and on the contrary, has expressly and repeatedly requested that the Tribunal refrain from doing so.¹⁷¹ The Tribunal ruled that the Philippine submissions do not require an implicit determination of sovereignty.¹⁷²

The award on jurisdiction clarified that the dispute does not concern sovereignty over the features within the South China Sea or delimitation of maritime boundaries, since the Philippines was conscious that the Convention is not concerned with territorial disputes and aware of China’s 2006 Declaration in accordance with the UNCLOS to exclude maritime boundary delimitations from its compulsory dispute settlement procedures,¹⁷³ but “unequivocally a dispute concerning the interpretation and application of the Convention.”¹⁷⁴ The Tribunal also ruled that the arbitration case filed by the Philippines did not constitute an abuse of process,¹⁷⁵ and that there is no indispensable third party whose absence deprives the Tribunal of jurisdiction.¹⁷⁶

The Tribunal further ruled that the 2002 China-Association of Southeast Asian Nations (“ASEAN”) Declaration on the Conduct of the Parties in the South China Sea, being a political agreement which was not intended to be legally binding, along with other agreements and joint statements by China and the Philippines, do not preclude recourse to the compulsory dispute settlement procedures under the UNCLOS.¹⁷⁷ In respect of jurisdiction, the

¹⁶⁹ Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 107.

¹⁷⁰ *Id.* ¶ 152; *see also* Memorial of the Philippines, Volume I, Mar. 30, 2014, paragraphs 1.16, 1.26, 2.13; Philippine Supplemental Written Submission, ¶ 26.8.

¹⁷¹ Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 153; *see also* Philippine Memorial, ¶ 1.16.

¹⁷² Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 153.

¹⁷³ *Id.* ¶¶ 8, 26.

¹⁷⁴ *Id.* ¶¶ 152–157, 168; The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 283.

¹⁷⁵ Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(c), 124–129.

¹⁷⁶ *Id.* ¶¶ 413(d), 179–188.

¹⁷⁷ *Id.* ¶¶ 413(e), 189–353.

Tribunal ruled that it has jurisdiction to consider seven out of the fourteen submissions of the Philippines,¹⁷⁸ except those that involve consideration of issues that do not possess an exclusively preliminary character, which the Tribunal reserves to the merits phase.¹⁷⁹

The Tribunal considered the issue of jurisdiction, particularly the limitations and exceptions to jurisdiction in Articles 297 and 298 of the UNCLOS, as interwoven with the merits of the Philippine claim.¹⁸⁰ In respect of the Tribunal's jurisdiction to decide on the merits on the Philippines' submissions regarding the nature and validity of China's historic rights claim in the South China Sea, the Tribunal clarified that the nature of such historic rights may determine whether the dispute is covered by the exclusion from jurisdiction of "historic bays or titles" in Article 298 and whether there is overlapping entitlement to maritime zones in the area where certain Chinese activities are alleged to have occurred, which in turn, will potentially impact the application of other limitations and exceptions in Articles 297 and 298 of the UNCLOS.¹⁸¹

In respect of the first Philippine submission on the question of whether China's maritime entitlements in the South China Sea, may not extend beyond those permitted by the UNCLOS,¹⁸² the Tribunal ruled that it "reflects a dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention" and it is "not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV."¹⁸³ The Tribunal, in reserving its decision on its jurisdiction with respect to the Philippines' Submission No. 1 for consideration in conjunction with the merits of the Philippines' claims, reasoned as follows:

The Philippines' Submission No. 1 does, however, require the Tribunal to consider the effect of any historic rights claimed by China to maritime entitlements in the South China Sea and the interaction of

¹⁷⁸ Philippine Submissions No. 3, 4, 6, 7, 10, 11 and 13; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(g), 398–412.

¹⁷⁹ Philippine Submissions No. 1, 2, 5, 8, 9, 12 and 14; Award on Jurisdiction and Admissibility, *supra* note 108, ¶¶ 413(h), 398–412.

¹⁸⁰ *Id.* ¶ 392.

¹⁸¹ *Id.*; *see also id.* ¶¶ 394 to 396 (in respect of the Tribunal's reasoning on its jurisdiction to decide on the merits of the other Philippine submissions).

¹⁸² Memorial of the Philippines, Volume I, Mar. 30, 2014, 271.

¹⁸³ Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 398.

such rights with the provisions of the Convention. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination.¹⁸⁴

In respect of Philippine Submission No. 2, which pertains to "China's claims to sovereign rights and jurisdiction, and to 'historic rights', with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS,"¹⁸⁵ the Tribunal also ruled that this is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV.¹⁸⁶ The Tribunal, in reserving its decision on its jurisdiction with respect to the Philippines' Submission No. 2 for consideration in the merits phase of the arbitration, reasoned as follows:

The Philippines' Submission No. 2 directly requests the Tribunal to determine the legal validity of any claim by China to historic rights in the South China Sea. This is a dispute concerning the interpretation and application of the Convention. The Tribunal's jurisdiction to consider this question, however, would be dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 2 therefore do not possess an exclusively preliminary character.¹⁸⁷

The Tribunal concluded that a determination of its jurisdiction to consider Philippine Submission Nos. 1 and 2 (as well as Philippine Submission Nos. 5, 8, 9, 12, and 14) "would involve consideration of issues that do not possess an

¹⁸⁴ *Id.*

¹⁸⁵ Memorial of the Philippines, Volume I, March 30, 2014, 271.

¹⁸⁶ Award on Jurisdiction and Admissibility, *supra* note 108, ¶ 399.

¹⁸⁷ *Id.* ¶ 399; *please see id.* ¶ 400-412 (for the Tribunal's conclusion on its jurisdiction in respect of the Philippines' other submissions).

exclusively preliminary character,” and reserved consideration of its jurisdiction on these submissions to the merits phase.¹⁸⁸

2. Award on Merits

The South China Sea arbitral tribunal categorically declared that China’s nine-dash line claim is incompatible with the UNCLOS,¹⁸⁹ and China’s historic rights claim over living and non-living resources in the South China Sea finds no basis in international law and is incompatible with the UNCLOS.¹⁹⁰ The Tribunal, in deciding in favor of the Philippines, concluded that any historic rights which China may have had over the disputed territory were extinguished as far as they were incompatible with the regime of the exclusive economic zone provided for in the Convention.¹⁹¹ In the words of the Tribunal:

[B]etween the Philippines and China, China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to 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 exceed the geographic and substantive limits of China’s maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.¹⁹²

In the final award on the merits, the Arbitral Tribunal distinguished the concept of historic rights and historic title:

The term “historic rights” is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. “Historic title”, in

¹⁸⁸ *Id.* ¶ 413.

¹⁸⁹ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶¶ 261, 278, and 1203 (B)(2); *see also id.* ¶¶ 232, 252, 246, 262-263.

¹⁹⁰ *Id.* ¶¶ 239, 243, 278.

¹⁹¹ *Id.* ¶ 261.

¹⁹² *Id.* ¶ 278.

contrast, is used specifically to refer to historic sovereignty to land or maritime areas. “Historic waters” is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although “general international law . . . does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognized cases of ‘historic waters’ or ‘historic bays’.” Finally, a “historic bay” is simply a bay in which a State claims historic waters.¹⁹³

In the view of the Tribunal, the reference to ‘historic titles’ in Article 298(1)(a)(i) of the UNCLOS, as understood by the drafters of the Convention, pertains to claims of sovereignty over maritime areas derived from historical circumstances.¹⁹⁴ This is reflected in Article 15 of the UNCLOS, which also mentions this terminology.¹⁹⁵ In contrast, the UNCLOS does not mention “historic rights,” and the Tribunal concludes that there is “nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty.”¹⁹⁶

On the basis of this critical terminological distinction, as well as China’s conduct,¹⁹⁷ the Tribunal distinguishes China’s claim as one of “historic rights” rather than “historic title.”¹⁹⁸ The Tribunal concludes that “China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title.”¹⁹⁹ Since China has not made a historic title claim, the exception to jurisdiction in Article 298(1)(a)(i), which is limited to

¹⁹³ *Id.* ¶ 225. This view is shared by commentators, who also differentiate between historic title as being “sovereignty-based rights” as opposed to non-sovereign type historic rights falling short of title. See Symmons, *First Reactions to the Philippines v China Arbitration Award Concerning the Supposed Historic Claims of China in the South China Sea*, 1 ASIA-PACIFIC J. OCEAN L. & POL’Y 260, 262-263 (2016); SYMMONS, *supra* note 21, at 5; Zou Keyuan, *China’s U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT’L L. 18, 23 (2012).

¹⁹⁴ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 226.

¹⁹⁵ Art. 298 (1)(a)(i) also mentions “historic bays or titles” in reference to disputes concerning the interpretation or application of arts. 15, 74 and 83 of UNCLOS relating to sea boundary delimitations.

¹⁹⁶ The South China Sea Arbitration Award of July 12, 2016, *supra* note 2, ¶ 226.

¹⁹⁷ *Id.* ¶¶ 228, 207-214.

¹⁹⁸ *Id.* ¶ 227.

¹⁹⁹ *Id.* ¶ 229.

disputes involving historic titles, does not apply, which assures the jurisdiction of the Tribunal to consider Philippine Submission Nos. 1 and 2.²⁰⁰

The Tribunal further clarified that “historic waters are merely one form of historic right and the process is the same for claims to rights short of sovereignty.”²⁰¹ It also reiterated, as summarized in the UN Secretariat’s 1962 Memorandum on the Juridical Regime of Historic Waters, Including Historic Bays, that the formation of historic rights in international law “requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States.”²⁰²

The Tribunal ruled that China failed to establish any exclusive historic right to living and non-living resources within the “nine-dash line.” The Tribunal declared that:

[U]pon China’s accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the “nine-dash line” were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.²⁰³

In order to establish the emergence of a historic right, historical navigation and fishing beyond the territorial sea are insufficient; rather, it is “necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right.”²⁰⁴ China failed to show that it had historically prohibited or restricted the exploitation of such resources by the nationals of other States and that these States acquiesced to such restrictions. There is likewise no evidence to support the argument that China has historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea.²⁰⁵

The Tribunal recognized the theoretical difficulty of extending China’s historic right claim over non-living resources of the seabed, which was only at

²⁰⁰ *Id.*

²⁰¹ *Id.* ¶ 265.

²⁰² *Id.* ¶ 263.

²⁰³ *Id.* ¶¶ 262-263.

²⁰⁴ *Id.* ¶ 270.

²⁰⁵ *Id.*

its nascent stages during the UNCLOS negotiations. The Tribunal concluded that China has no basis for a historic right with respect to the seabed since there is no evidence of any historical activity that China could have restricted or controlled since offshore oil extraction was then still in its infancy and only recently became possible in deep water areas.²⁰⁶ The Tribunal explained that “China’s ratification of the Convention in June 1996 did not extinguish historic rights in the waters of the South China Sea;” rather, “China relinquished the freedoms of the high seas that it had previously utilised with respect to the living and non-living resources of certain sea areas which the international community had collectively determined to place within the ambit of the exclusive economic zone of other States.²⁰⁷” China’s ratification of the UNCLOS allowed it a greater degree of control over the maritime zones adjacent to and projecting from its coasts and islands, and preserved China’s freedom to navigate the South China Sea.²⁰⁸

In the final award, the Tribunal took the occasion to clarify that the question of historic rights with respect to maritime areas is separate and distinct from claims to historic rights to land. In this regard, the Tribunal emphasized that “nothing in this Award should be understood to comment in any way on China’s historic claim to the islands of the South China Sea. Nor does the Tribunal’s decision that a claim of historic rights to living and non-living resources is not compatible with the Convention limit China’s ability to claim maritime zones in accordance with the Convention, on the basis of such islands.”²⁰⁹

There are other aspects of the final award, for example, pertaining to the status and maritime entitlements of the disputed insular features in the South China Sea which were part of the Philippine submissions, *inter alia*, which are not covered in this paper.²¹⁰

IV. Concluding Remarks

The South China Sea arbitral tribunal directly addressed the question placed squarely before it: whether China’s “historic rights” claims in the South

²⁰⁶ *Id.*

²⁰⁷ *Id.* ¶ 271.

²⁰⁸ *Id.*

²⁰⁹ *Id.* ¶ 272.

²¹⁰ Some of the more notable aspects of the final include the declaration of the Tribunal that none of the high tide features in dispute are “islands” being incapable of sustaining human

China Sea are in accordance with the rules of international law. The arbitral tribunal unequivocally responded to this question in the negative. China's "historic rights" claim contravenes the practice of the majority of States, and represents a brazen violation of existing international conventions—which China does not deny—particularly its obligation to respect the international commitments which it had entered into when it signed and ratified the UNCLOS. Notwithstanding the non-appearance and non-participation of China in the arbitration, it remains a party to the proceedings and bound by the decision of the Tribunal.²¹¹

The notion of historic rights whilst not sufficiently clarified in treaty law or in international jurisprudence, the South China Sea arbitral award did shed some light on the subject matter. Notably, the award demonstrated that historic rights claims that are incompatible or inconsistent with the rights

habitation or economic life of their own, but merely "rocks" for purposes of art. 121(3) of the UNCLOS, which do not generate entitlements to an exclusive economic zone or continental shelf. The Tribunal, after a detailed examination, concluded that the following features in their natural condition are high-tide features: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North); and the following features are low-tide elevations: Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, Second Thomas Shoal, and as such, generate no entitlement to maritime zones of their own. The Tribunal is of the opinion, applying its measured considerations in the application of art. 121(3) of the UNCLOS, that the following features are considered "rocks" for purposes of art. 121(3) of the UNCLOS: Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), and McKennan Reef. The Tribunal concluded that Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay are not capable of sustaining human habitation or economic life of their own within the meaning of art. 121(3) of the UNCLOS, and therefore such features are not entitled to have an exclusive economic zone or continental shelf. In respect of Mischief Reef and Thomas Shoal, the Tribunal decided that they form part of the EEZ and continental shelf of the Philippines, both being located within 200 nautical miles of the coast of the Philippine island of Palawan in an area which does not overlap with any entitlements generated by any maritime feature claimed by China. The tribunal also declared China's reclamation activities have interfered with the rights of the Philippines under the UNCLOS, aggravated the dispute and undermined the integrity of the proceedings, irreparably damaged the fragile marine environment of the South China Sea, and are clearly in violation of China's obligations under UNCLOS. *Please see* The South China Sea Arbitration Award of July 12, 2016, ¶¶ 382-383, 540-551, 554-570, 622, 625-626, 643- 647, 852-890, 983, 992-993, 1038, 1043, 1177-1179, 1181.

²¹¹ Military and Paramilitary Activities in and against Nicaragua, *supra* note 109, at 24, ¶ 28; Arctic Sunrise Case, *supra* note 110, at 242, ¶ 51; *Arctic Sunrise Case* (Neth. v. Russ.), Jurisdiction, Award of Nov. 26 2014, ¶ 60; *Arctic Sunrise Case* (Neth. v. Russ.), Merits, Award of Aug. 14, 2015, ¶ 10.

provided for under the UNCLOS are nullified or superseded or relinquished upon a State's accession or ratification of the Convention. In the event of such incompatibility, the UNCLOS treaty regime prevails.

The arbitral tribunal's pronouncement that China's "historic rights" are invalid having without foundation in international law, is only strictly binding between the Philippines and China. However, it will be reasonable to argue by logical extension, that China's "historic rights" claim in the South China Sea is *ipso jure*, illegal and invalid *erga omnes*. China's position is unsupported *de lege lata*, and difficult to imagine *de lege ferenda*. The Arbitral Tribunal's denial of any historic rights over the South China Sea is not merely a denial of their opposability *vis-à-vis* the Philippines, but is a complete denial of their effect *erga omnes*. Claims of historic title are effectively restrictions on the rights of the international community in those waters. These claims constitute a derogation from general international law. In order for such exceptional claims to succeed and be recognized, the State claiming derogation needs to have exercised the necessary jurisdiction over them for a long period of time without opposition from other States. This is clearly not the case in the waters claimed by China.

China's "historic rights" claim within the areas encompassed by the nine-dash line clearly exceeds the limits of its potential maritime jurisdictional entitlement under the Convention, and is therefore legally invalid. Its claim is patently incompatible with the rights of the Philippines and other States under the UNCLOS and bereft of legal basis under international law. The general rule of interpretation as embodied in Article 31 of the Vienna Convention on the Law of Treaties provides that the treaty and its relevant provision must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."²¹² The ordinary meaning of Article 56 of UNCLOS is clear and unambiguous. The coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil..." These rights in the EEZ, are necessarily exclusive

²¹² Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331; *see also id.* art. 32, which sets out as supplementary means of interpretation, recourse to the preparatory work of the treaty to confirm its meaning, or determine the meaning when it is otherwise ambiguous, obscure, or leads to a manifestly absurd or unreasonable result. A textual reading, as well as analysis of the context, the object and purpose of the Convention, and the *travaux préparatoires*, will bear the same result.

to the coastal State. Therefore, no other State may exploit the natural resources in the EEZ without the express consent of the coastal State.

Furthermore, China's "historic rights" claim within the nine-dash line does not satisfy the requirements for historic rights under general international law. In order for historic rights to be established, three elements need to be satisfied: first, the State exercised open, notorious and effective authority over the area where it claims the historic rights; second, the authority exercised was continuous and for a long period of time; and third, other States either acquiesced or failed to oppose those rights.²¹³ China does satisfy any of these requirements. China never exercised continuous, uninterrupted, unopposed, let alone exclusive authority over the area enclosed by the nine-dash line. The littoral States and other States never acquiesced or recognized China's historic rights claim over the same area. The opposite is true: China's historic rights claim in the South China Sea has been widely criticized and denounced by the relevant littoral States as well as major maritime States.²¹⁴

Indeed, the interpretation provided by the Award on the concept of historic rights represents continuity and does not considerably depart from previous case law on the matter. The award of the South China Sea arbitral tribunal is a significant contribution to the development and clarification of the concept of historic rights. The South China Sea award will certainly carry

²¹³ *Juridical Regime of Historic Waters*, *supra* note 13, ¶ 80.

²¹⁴ The Philippines, Malaysia, Vietnam, Brunei and Indonesia, through their respective official communications and note verbales to the UN, have submitted their opposition to the historic rights claimed by China over the South China Sea. *See, for example*, the Joint Note Verbale of France, Germany and the United Kingdom, UK NV No. 162/20, New York, Sept. 16, 2020, which categorically states that "France, Germany and the United Kingdom also highlight that claims with regard to the exercise of "historic rights" over the South China Sea waters do not comply with international law and UNCLOS provisions and recall that the arbitral award in the Philippines v. China case dating to 12 July 2016 clearly confirms this point."; *see also* Letter of United States Representative to the United Nations Ambassador Kelly Craft to the Secretary-General of the United Nations, June 1, 2020, which states that "the United States objects to China's claim to "historic rights" in the South China Sea to the extent that claim exceeds the maritime entitlements that China could assert consistent with international law as reflected in the Convention. The United States notes in this regard that the Tribunal unanimously concluded in its ruling—which is final and binding on China and the Philippines under Article 296 of the Convention—that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention."

substantial and compelling precedential weight upon future cases involving similar issues.

The precedential aspect of the South China Sea arbitral award—not just in the context of its pronouncements in respect of historic rights but all other aspects of the award—carries its own force of law.²¹⁵ The practical reality is that the pronouncement of the South China Sea arbitral tribunal will be difficult to disregard let alone challenge in any future litigation or negotiated agreement in respect of the South China Sea.²¹⁶ It will also strongly impact the management and resolution of the conflicting claims in the South China Sea since the claimant States may use the award as a legal and political leverage to induce conduct amongst the parties which are more in line with international law, especially on the part of China.

²¹⁵ The empirical study of the behavior and practice of international courts towards precedential reasoning strongly support this argument. See Wolfgang Alschner and Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network*, 29 (1) EUR. J. INT'L L. 83 (2018); Cesare Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 NYU J. INT'L L. & POL. 755 (2008); Aldo Zammit Borda, *The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals*, 14 MELBOURNE J. INT'L L. 608(2013). The study by Alschner and Charlotin point out that, "Overall, 101 out of 126 ICJ cases (80 per cent) in our database refer to prior ICJ or PCIJ judgments.²⁷ The remaining 25 out of the 126 cases (20 per cent) in which we did not detect any self-citations, are concentrated in the Court's early years, with citations becoming virtually ubiquitous in more recent decades." *id.* at 89.

²¹⁶ Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. INT'L DISPUTE SETTLEMENT 5, 9-10, 12 (2011), who observes that "the Court refers to itself frequently to ensure 'consistency of jurisprudence'. It sometimes does this by simply insisting on its 'settled jurisprudence' (*jurisprudence constante*) and sometimes by mentioning judgments previously rendered." The ICJ, for example, does not recognize any binding value to its own precedent; however, previous cases are given great consideration, and usually result in confirmation of earlier decisions especially in matters of procedure.