# JURISDICTIONAL REQUIREMENTS FOR ARBITRATION UNDER UNCLOS: DOES THE *SOUTH CHINA SEA* DECISION BRING LONG SOUGHT CLARITY TO THE SCOPE OF HISTORIC CLAIMS?

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## I. INTRODUCTION

For quite some time now, the conflict among the six neighboring states bordering the South China Sea[1] has caused disturbance in the region. These states have been fighting over influence, access to resources, and sovereignty over this area

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1. The Philippines refer to this area in its submissions sometimes as the "West Philippine Sea". For this Article the geographical terminology as in the final award will be used. See Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L 663 (2014), for the Chinese names of the disputed areas and Daniel Andreeff, *Legal Implications of China's land reclamation projects in the Spratly Islands*, 47 N.Y.U. J. INT'L L. & POL. 885 (2015), for the Filipino and Vietnamese names.

with increasing intensity.[2] On July 12, 2016, a Tribunal established under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)[3] rendered its decision[4] regarding several claims of the Philippines and China.

This decision was an important milestone shedding light on several legal issues emerging from the conflict. The dispute centered on the question of whether China could base its sovereignty or the exercise of certain rights (such as fishing rights or the access to resources) on historic claims over the region. The assertion of sovereignty further determined whether the jurisdiction of a Tribunal was barred under UNCLOS.

In short, the Tribunal decided that it has jurisdiction. According to UNCLOS Article 298 (1)(a)(i) "disputes . . . involving historic bays or titles" can be excluded from jurisdiction by a declaration of a signatory state. As China filed such a declaration, the Tribunal conducted an in-depth analysis on the scope of this provision but decided it had jurisdiction nonetheless: historic titles entail the (historic) exercise of sovereignty, and China only claimed rights short of sovereignty over this region.

This Commentary explores whether the Tribunal came to a convincing conclusion in this regard. Part II provides an overview of the procedural history of the present case and Part III a summary of the Tribunal's argument on why it has jurisdiction. Part IV assesses the current state of the literature and jurisprudence regarding historic titles before concluding that the decision of the Tribunal is mostly in line with common legal wisdom. An assessment about whether the Chinese or Philippine claims per se are justified is omitted.

## II. Procedural History

Based on both parties' membership to UNCLOS, the Philippines formally commenced arbitration proceedings against

2. *See* Michael Davis, *Can International Law Help resolve the Conflicts over Uninhabited Islands in the East China Sea?*, 43 Denv. J. Int'l. & Pol'y 119 (2015), for similar issues in the East China Sea.

3. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

4. Republic of the Phil. v. China, PCA 2013-19, Award (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.

China over the South China Sea dispute by a note verbale[5] with the Notification and Statement of Claim according to article 287 and Annex VII of UNCLOS on January 22, 2013. This arbitral proceeding is one of four possible procedures[6] for settling disputes between the parties over the interpretation or application of UNCLOS.[7]

The Philippines asked the Tribunal to make the determination that the rights of both parties are restricted to those defined by UNCLOS. It also asked the Tribunal to declare that any claims made by China with regard to the "Nine-Dash Line" cannot constitute a valid assertion of "historic rights" within the area delimited and that it contravenes UNCLOS.[8] This line, drawn by China in the South China Sea, is derived from ancient Xia and Han dynasty records and maps produced in 1947/1953,[9] and the area was named as a part of the Chinese territory in the Chinese Law on the Territorial Sea and the Contiguous Zone in 1992.[10] When China ratified UNCLOS in 1996, it reaffirmed its sovereignty over all its archipelagos and islands listed in the 1992 law.[11]

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5. Note Verbale from Republic of the Phil., Dep't Foreign Affairs, to H.E. Ma Kequing, Chinese Ambassador to the Republic of the Phil. (Jan. 22, 2013), https://www.dfa.gov.ph/images/UNCLOS/Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf, *reprinted in* Kristen Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. U. GLOBAL STUD. L. REV. 487, 494 (2014).

6. And only a second step after a compulsory binding dispute settlement. *See generally* Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute*, 38 B.C. INT'L & COMP. L. REV. 129, 138 (2015).

7. *See* UNCLOS, *supra* note 3, art. 287(1) (parties may also adjudicate before the International Tribunal for the Law and the Sea, the International Court of Justice, or a special Tribunal constituted in accordance with Annex VIII); *see also* Thomas Grant, *International Dispute Settlement in Response to an unlawful seizure of Territory: Three Mechanisms*, 16. CHINESE J. INT'L L. 1 (2015) (presenting further possible proceedings outside the scope of UNCLOS).

8. Note Verbale, *supra* note 5, at 495.

9. In the latter, two dashes from the original eleven-dash line were removed.

10. Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 103 (2013).

11. *Id.* at 104.

In an "unprecedented manner,"[12] China refused to participate in the arbitration proceedings,[13] even failing to meet the deadline to submit its counter memorial.[14] It was the first state to refuse to participate in arbitration proceedings since UNCLOS came into force. Instead, the Chinese government presented a note verbale to the Philippines on February 9, 2014, and released two position papers on December 7, 2013[15] and December 14, 2014.[16] In these statements, China provided three major arguments against the jurisdiction of the Tribunal. First, the Tribunal did not have subject-matter jurisdiction as the claims concern questions of territorial sovereignty, which are beyond the scope of UNCLOS. Second, the parties agreed to settle their relevant disputes through negotiations and, through initiating the present proceedings, the Philippines had breached its international obligations.[17] Third, even if the Tribunal had subject matter jurisdiction under UNCLOS, the current claim fell within the scope of the declaration according to UNCLOS Article 298 (1)(a)(i) filed in

12. Kingdon, *supra* note 6, at 129.

13. Republic of the Phil. v. China, PCA 2013-19, Award ¶ 116 (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.

14. The deadline was December 15, 2014. Republic of the Phil. v. China, PCA 2013-19, Procedural Order No. 2, 3 (June 2, 2014), http://www.pcacases.com/web/sendAttach/1805; Republic of the Phil. v. China, PCA 2013-19, Award on Jurisdiction and Admissibility, ¶ 58 (Oct. 29, 2015), http://www.pcacases.com/web/sendAttach/1506.

15. Suzanne Kimble, *Is China Making Waves in International Waters by Building Artificial Islands in the South China Sea?*, 24 TUL. J. INT'L & COMP. L. 263, 280 (2015).

16. 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, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA Dec. 7, 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml; *see also* Zhu Lijang, *Chronology of Practice: Chinese Practice in Public International Law in 2014*, 14 CHINESE J. INT'L L 585 (2015) (summarizing the position paper).

17. China is referring to the 2002 ASEAN declaration. *See* Tiffany Lin, *Chinese Attitudes Toward Third-Party Dispute Resolution in International Law*, 48 N.Y.U. J. INT'L L. & POL. 581, 604 (2016).

2006[18] where China opted out of compulsory jurisdiction regarding disputes "involving historic bays or titles."[19]

This strategic approach allowed China to both submit its views on the dispute without formally participating and to selectively address the claims it wanted to make without clarifying the issues that it refused to elaborate.[20] However, this move should not lead one to conclude that China had no interest in a geopolitical area that is home to one of the most important sea lanes and rich with natural resources.[21] The opposite is the case: China has added the South China Sea to its short list of "core interests"[22] and tried to persuade the Philippines to abandon the proceedings through a carrot and stick; it offered $20 billion in loans but also threatened to exclude the Philippines from China's Maritime Silk Road Initiative.[23]

Neither of these incentives however persuaded the Philippines to withdraw from the proceedings. On October 29, 2015, the Tribunal rendered its first decision on Jurisdiction and Admissibility making two major conclusions.

First, the Tribunal decided that the non-participation of China did not constitute a bar to the proceedings. UNCLOS Article 9 of Annex VII clearly states that even in the case of non-participation the proceedings may continue if the moving party wishes to continue.[24] In order to ensure due process, the Tribunal may not however enter into a default judgment but must satisfactorily show that it has jurisdiction and that the

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18. *See* Donald Rothwell, *Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention, in* ARBITRATION CONCERNING THE SOUTH CHINA SEA 55, 61-63 (Shicun Wu et al. eds., 2016) (providing more details regarding the proceedings of such declarations).

19. Republic of the Phil., PCA 2013-19, Award on Jurisdiction, ¶ 14.

20. Such as, the exact scope of the "Nine-Dash Line." *See* Dustin Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128, 151 (2014); Kimble, *supra* note 15, at 281.

21. WU SHICUN, SOLVING DISPUTES FOR REGIONAL COOPERATION AND DEVELOPMENT IN THE SOUTH CHINA SEA, 7 (Chris Rowely ed., 2013); NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT 71 (2012).

22. Wallace, *supra* note 20, at 132.

23. Kimble, *supra* note 15, at 286.

24. This has been expressly requested by the Philippines. *See* Memorial of the Republic of the Phil. at ¶¶ 1.21, 7.39, Republic of the Phil. v. China, PCA 2013-19 (July 12, 2016), http://www.pcacases.com/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf.

claim is well founded in fact and law.[25] For this assessment the Tribunal also took notice of the public statements of China,[26] quoting the practice of international courts.[27]

Second, the Tribunal rendered a preliminary decision regarding its jurisdiction over the case, expressing that neither of the claims by the Philippines concerned questions of sovereignty[28] and that it had jurisdiction in seven of the fifteen issues raised by the Philippines.[29] With regard to the other issues—especially those in connection to historic rights—the Tribunal concluded that those were too closely connected to the merits of the case and would be treated in the final decision.[30] The Tribunal also answered the question of whether sufficient settlement negotiations had taken place in the affirmative: the talks[31] between the parties might not have been "negotiations," but they did accomplish "one of the principal goals of prior negotiations, namely to clarify the Parties' respective positions on the issues in dispute."[32] As UNCLOS Article 279 requires the parties to seek a solution "through means that may include negotiations,"[33] the Tribunal deemed this precondition as fulfilled.

After further hearings on the merits of the case, the Tribunal issued its final decision on July 12, 2016 in favor of the Philippines. The Tribunal concluded that China's historic

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25. Republic of the Phil. v. China, PCA 2013-19, Award on Jurisdiction and Admissibility, ¶ 115 (Oct. 29, 2015), http://www.pcacases.com/web/sendAttach/1506.

26. *Id.* ¶ 122.

27. *See, e.g.*, Aegean Sea Continental Shelf (Greece v. Turk.), Interim Measures, 1976 I.C.J. Rep 3, ¶ 13 (Sept. 11), http://www.icj-cij.org/docket/files/62/6219.pdf; Republic of the Phil. v. China, PCA 2013-19, Procedural Order No. 4, 5 (Apr. 21, 2015), http://www.pcacases.com/web/sendAttach/1807; Stanimir Alexandrov, *Non-Appearance Before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41, 55 (1995); Yee, *supra* note 1, at 663.

28. Republic of the Phil., PCA 2013-19, Award on Jurisdiction, ¶ 397-411.

29. Submissions No 3, 4, 6, 7, 10, 11 and 13. For an overview over these issues *see* Kimble, *supra* note 15, at 285.

30. Submissions No 1, 2, 5, 8, 9, 12, 14. For an overview over these issues *see* Kimble, *supra* note 15, at 285.

31. The Tribunal mentions regular bilateral discussions, the establishment of working groups, meetings between high-level officials and regular contacts between their respective foreign ministries and ambassadors. *See* Republic of the Phil., PCA 2013-19, Award on Jurisdiction, ¶ 348-352.

32. *Id.* ¶ 349.

33. *Id.* ¶ 350.

claims "are contrary to the Convention and without lawful effect,"[34] that its actions caused "permanent, irreparable harm to the coral reef habitat"[35] and that by building artificial islands China breached its obligations under UNCLOS.[36] Despite the binding effect of this decision,[37] China declared the decision to be "null and void" and without "binding force,"[38] and it has since increased its efforts in constructing artificial islands and its military presence.[39]

## III. The Tribunal's Argumentation for Its Jurisdiction Under Article 298

One of the cornerstones of the present decision is whether the Tribunal had jurisdiction to decide the validity of the historic claims of China over the disputed area.[40] China argued that the dispute concerns questions of territorial sovereignty, which are beyond the scope of UNCLOS, and that it issued a declaration pursuant to UNCLOS Article 298, activating all the possible exceptions[41] to jurisdiction,[42] including disputes with regard to all historic claims.[43] China's position was

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34. Republic of the Phil. v. China, PCA 2013-19, Award ¶ 278 (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.

35. *Id.* ¶ 1181.

36. *Id.* ¶ 983.

37. UNCLOS art. 296, Annex VII art. 11.

38. Jeremy Page, *Tribunal Rejects Beijing's Claims to the South China Sea*, Wall St. J. (July 12, 2016, 9:38 AM), https://www.wsj.com/articles/chinas-claim-to-most-of-south-china-sea-has-no-legal-basis-court-says-1468315137.

39. Editorial, *China's Defiance in the South China Sea*, N.Y. Times (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/opinion/sunday/chinas-defiance-in-the-south-china-sea.html?_r=0.

40. Republic of the Phil. v. China, PCA 2013-19, Award on Jurisdiction and Admissibility, ¶ 160 (Oct. 29, 2015), http://www.pcacases.com/web/sendAttach/1506.

41. According to this provision, a country can also opt out of other categories of disputes—for example such covering military activities and law enforcement.

42. Republic of the Phil. v. China, PCA 2013-19, Award ¶ 203 (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.; Yee, *supra* note 1, at 663.

43. For the sake of completeness, it should be mentioned that the Tribunal also had to assess whether the exception applicable to disputes concerning the interpretation or application of the provisions relating to sea boundary delimitations is applicable, and came to the conclusion that this is not the case. Republic of the Phil., PCA 2013-19, Award on Jurisdiction, ¶ 155.

therefore that this declaration covered all disputes about historic claims. It drew no distinction between claims of (full) sovereignty and "title" or claims of lesser "rights," such as, for example, the right of exploitation of resources.

The Tribunal rejected this approach and argued that the term historic title simply meant the (historic) exercise of sovereignty and that, because China did not assert such title, the Tribunal had jurisdiction over the claims in the present case. First, it analyzed the provision and concluded that the South China Sea was not a "historic bay" as matter of plain geography, referring to the definition of bay in UNCLOS article 10.[44] The Tribunal then—with rather brief reasoning[45]—analyzed China's claim that the essence of the dispute regarded territorial sovereignty. It acknowledged that China understood its rights to extend beyond the maritime zones expressly described in UNCLOS and had therefore asserted "rights" arising independently of UNCLOS.[46] China, for example, claimed rights to petroleum resources and fisheries within the "nine-dash line."[47] But at the same time, the Tribunal pointed to China's statement that it respects freedom of navigation and overflight over the disputed area, principles which generally do not apply to territorial sea or internal waters.[48] From this fact, the Tribunal drew the conclusion that China did not consider those waters as forming a part of its territorial sea or internal waters, and therefore this dispute did not concern questions of territorial sovereignty.

Finally, the Tribunal scrutinized what the term "historic title" in UNCLOS Article 298 (1)(a)(i) entails through comparing it to the term "historic rights." Instead of focusing on the UNCLOS text alone, the Tribunal took a closer look at the evolution of the international law of the sea. The Tribunal scrutinized the development of UNCLOS as well as the recent jurisprudence of the ICJ and reasoned that the term "historic rights" is "general in nature and can describe any rights that a

44. Republic of the Phil., PCA 2013-19, Award, *supra* note 42, ¶ 205.

45. Boon, *supra* note 5, at 489. *See* Natalie Klein, *The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?*, 108 AM. SOC'Y INT'L L. PROC. 359, 362 (2014) (pointing out correctly that questions regarding sovereignty and boundary delimitation need to be resolved "skillfully").

46. Republic of the Phil., PCA 2013-19, Award, ¶ 207.

47. *Id.* ¶ 208-211.

48. *Id.* ¶ 212-213.

State may possess that would normally arise under the general rules of international law, absent particular historical circumstances."[49] These rights may include sovereignty, but could also include more limited rights, such as fishing rights or rights of access. In contrast, the term "historic title"—as used in UNCLOS—is more narrow, and refers specifically to historic sovereignty to land or maritime areas.[50] As China did not claim historic title to the waters of the South China Sea, but rather a constellation of historic rights short of title (especially the right to access several resources[51]), the Tribunal was not barred from jurisdiction over the case. UNCLOS article 298 (1)(a)(i) only excludes jurisdiction over historic sovereignty.[52]

## IV. THE TRIBUNAL'S CONCLUSION IN THE FRAMEWORK OF THE APPLICABLE LAW

Was the Tribunal's decision correct in terms of international law? First, the Tribunal rightly examined adjudications of other international courts and the evolution of international law to determine the scope of the term "historic title" because a definition is lacking in UNCLOS itself. This method of interpretation conforms with Article 31 of the Vienna Convention on the Law of the Treaties (VCLT),[53] according to which a treaty shall be interpreted "with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[54] As a supplementary means of interpretation, the historical background of a treaty can also be considered.[55]

In UNCLOS itself, the term "historical title" is used twice.[56] Furthermore, similar[57] terms are mentioned in UN-

49. *Id.* ¶ 225.
50. *Id.* ¶ 225.
51. *Id.* ¶¶ 208-211, 214.
52. *Id.* ¶ 229.
53. The Vienna Convention on the law of the Treaties May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Both the Philippines and China are parties to the Vienna Convention, the Philippines having ratified on November 15, 1972 and China having acceded on September 3, 1997.
54. *Id.* art. 31. *See also* Oliver Dörr, *Article 31*, *in* VIENNA CONVENTION ON THE LAW OF THE TREATIES 521, 542 (Oliver Dörr et al. eds., 2012).
55. VCLT, *supra* note 53, art. 32. *See also* Dörr, *supra* note 54, at 578.
56. In addition to UNCLOS Article 298, "historical title" is also mentioned in Article 15. *See* Ted McDorman, *Rights and Jurisdiction Over Resources*

CLOS Article 51(1) and in UNCLOS Article 62(3).[58] The lack of a definition goes back to the negotiations of UNCLOS, when draft provisions on this topic were proposed, but "there was strong opposition to a general doctrine of historic waters"[59] due to different point of views over the general concept, the burden of proof, the legal status of those waters, and other issues. Hence no explicit provisions or definitions were adopted.[60]

### A. *The General Jurisdiction of a Tribunal Over Historic Claims Under UNCLOS*

The explicit reference to only some historic claims in UNCLOS leads to two important implications: first, that there are historic claims covered by international law that are not entirely regulated by this convention, and second, that the Tribunal does have jurisdiction over historic claims as long as they have a nexus to UNCLOS. Under the presumption that the dispute does not concern questions of territorial sovereignty, the Tribunal came to a comprehensible solution, as this following section shows.

First, historic claims are not entirely regulated by UNCLOS and "continue to be governed by the rules and princi-

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*in the South China Sea: UNCLOS and the "Nine-Dash Line," in* THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA 144, 152 (Shunmugam Jayakumar et al. eds., 2014).

57. Albeit the word "historical" is missing.

58. UNCLOS, *supra* note 3, art. 51(1) (archipelagic States have to recognize "traditional fishing rights"); *id.* art. 62(3) (States are required to acknowledge fishing rights of other States which have been "habitually" exercised when giving access to its economic zone). *See also* Clive Symmons, *Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal, in* UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA, 191, 195 (Shicun Wu et al. eds., 2015). For the definition of archipelagic States *see* UNCLOS, *supra* note 3, art. 46. It is a State that is constituted wholly by a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that this region forms an intrinsic geographical, economic and political entity, or which historically has been regarded as such.

59. *U.S. Delegation Report of Third Session, 1975, in* Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea, 81, 94 (Myron Nordquist et al. eds., 1983).

60. Keyuan Zou, *Historic Rights in the South China Sea, in* UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA, *supra* note 58, at 239, 241.

ples of general international law."[61] International law helps explain how, for example, historic rights or titles are acquired, how they are proven and what they entail.[62] The ICJ shares this opinion: "It seems clear that the matter continues to be governed by general international law which does not provide for a single 'régime' . . . , but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays.' "[63] The Tribunal was guided by this point of view, even if not clearly articulating it. It vaguely mentioned that "historic titles" "should be understood in the particular context of the evolution of the international law of the sea."[64]

Second, the jurisdiction exclusion of "historic titles" in UNCLOS does not mean that all disputes regarding other historic claims necessarily fall within the jurisdiction of a Tribunal; rather, they require a nexus. After all, UNCLOS is not an exhaustive framework[65] and does not regulate all the rights a state may have regarding waters and resources.[66] If such a nexus exists—for example, because there is a dispute over resources of the continental shelf (UNCLOS Article 76)—and one state claims that UNCLOS is not applicable due to the jurisdiction exclusion provisions, a Tribunal needs to take a closer look at this objection.[67] If unable to do so, the Tribunal would not be able to determine whether UNCLOS is applicable or not.[68] The Tribunal therefore correctly pointed out that the present dispute is not "about the existence of specific historic rights, but rather a dispute about historic rights in the

61. UNCLOS, *supra* note 3, preamble para 8.

62. Stefan Talmon, *The South China Sea Arbitration: Is there a Case to answer?*, *in* THE SOUTH CHINA SEA ARBITRATION, A CHINESE PERSPECTIVE 15, 53 (Stefan Talmon et al. eds., 2014).

63. Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. Rep 18, ¶ 100 (Feb. 24), http://www.icj-cij.org/docket/files/63/6267.pdf.

64. Republic of the Phil. v. China, PCA 2013-19, Award ¶ 217 (July 12, 2016), http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.

65. McDorman, *supra* note 56, at 153.

66. Ryan Mitchell, *An International Commission of Inquiry for the South China Sea? Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 760 (2016).

67. McDorman, *supra* note 56, at 152.

68. Talmon, *supra* note 62, 54 (different conclusion).

framework of the Convention."[69] As several of the claims in dispute were regulated in UNCLOS—for example, the right to exploit natural resources—the dispute had a nexus thereto and concerned the interpretation and application of the convention.[70]

Additionally, some authors[71] have claimed that this conclusion contravenes the non-retroactivity principle of treaties that is reflected in VCLT Article 28,[72] but this is misleading. Whether a treaty has a retroactive effect—China ratified UNCLOS in 1996, and differences over the exercise of rights have arisen before that date—depends on nature of the treaty.[73] However, a closer assessment about whether the states did have the intention to give UNCLOS a retroactive effect, which is doubtful with regard to the wording,[74] is not required in the present case. VCLT Article 28 requires that the incident in question took place or ceased to exist, and has therefore been completed, before the entry into force of the respective treaty. If there are a large number of successive incidents, VCLT Article 28 is not applicable as long as the overall incident is still occurring.[75] As China did still claim historic rights over the region in dispute and exercised these rights even after the present decision has been rendered, the overall incident did still continue, and the non-retroactivity principle was not applicable.

### B. *Scope of the Exception to Jurisdiction Regarding Historic Titles Under UNCLOS*

After it has been established that a Tribunal has jurisdiction over historic claims with a nexus to UNCLOS, it is re-

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69. Republic of the Phil. v. China, PCA 2013-19, Award on Jurisdiction and Admissibility, ¶ 168 (Oct. 29, 2015), http://www.pcacases.com/web/sendAttach/1506.

70. *Id.*

71. Yee, *supra* note 1, at 663.

72. VCLT, *supra* note 53, art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.").

73. Kerstin Odenhal, *Article 28, in* VIENNA CONVENTION ON THE LAW OF THE TREATIES, *supra* note 54, at 477, 480.

74. Yee, *supra* note 1, at 663.

75. Odenhal, *supra* note 72, at 483.

quired to assess to what extent historic claims can be excluded by a declaration according to UNCLOS Article 298. As noted above, China sought to exclude jurisdiction referring to the notion of "historic titles."

Over the past years, a triad of historic claims have been established within the context of the law of the seas and have been accepted by the jurisprudence. Due to the lack of a definition and the inconsistent usage of the notions by states, sharp distinctions between these partially overlapping terms is not possible.[76] The three most recognized types of historic claims are historic waters, historic rights, and historic titles.[77] As this section shows, the Tribunal followed the predominant view in jurisprudence and doctrine with regard to the term of "historic title"—the relevant term in UNCLOS article 298 (1)(a)(i). The same cannot however be said with regard to the Tribunals definition of "historic rights." The Tribunal has gone beyond the established conception of historic rights as those short of sovereignty (such as fishing rights or right to access) to occasionally cast "historic rights" as entailing sovereign claims.[78] The Tribunal therefore eliminated the term "historic waters" completely, and solely used the term "historic rights," although without effect to the outcome of the decision.

The term "historic waters" is defined as "waters over which a costal 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."[79] As it references both sovereignty and rights, it can be seen as an umbrella term of them.[80] Like the South China Sea, "historic waters" are claimed areas that would be, but for such a claim, high seas

76. HONG, *supra* note 21, at 62.

77. Maps per se do not constitute any form of territorial claim, but rather information. *See* Florian Dupuy & Pierre-Marie Dupuy, *Agora: The South China Sea: A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L L. 124, 133 (2013).

78. Symmons, *supra* note 58, at 191; McDorman, *supra* note 56, at 150.

79. LEO BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW, 281 (M. Bos ed., 1964).

80. Keyuan Zou, *The Legal Status of the U-shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction*, 14 CHINESE J. INT'L L 57 (2015).

because they are not covered by any rules specially concerned with bays or the delimitation of coastal waters.[81] The concept of historic waters evolved from the theory of historic bays,[82] which is the only term where UNCLOS contains some guidance on the scope. UNCLOS Article 10 (6) defines "bays" but goes on to state that this definition does not apply to "historic bays" and that UNCLOS contains no further definition of this term.[83] This term dates back at least to the First Codification Conference of The Hague in 1930, however no convention resulted from this conference and the general scope of historic waters was not discussed.

The first examination of the notion of historic waters was conducted by the ICJ in the Fisheries Case,[84] when the Court had to decide the validity of the methods used to delimitate Norway's territorial sea/fisheries zone. The ICJ found that this maritime delimitation method of Norway was used without interruption for about 60 years, and was never opposed by other countries. The Court concluded that this method was consistent with international law, and recognized Norway's claims as part of its historic waters.[85] More precisely, the ICJ recognized that the claim rested on a "historic title," that enabled Norway to exercise sovereignty over these waters.[86] Hence, the Court has equated the term historic title with the exercise of sovereignty.

This conclusion found its way into Article 12 of the Convention on the Territorial Sea and the Contiguous Zone[87] of 1958, and since then, a basic distinction between historic titles and historic rights has been established in international law. The first term implies a claim to sovereignty in the specified waters, while the latter term—contrary to the definition used

81. 1 DANIEL O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 417 (Ivan Shearer ed., 1982).

82. Yehuda Blum, *Historic Rights, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 120, 124 (Rudolf Dolzer et al. eds., 7th Installment 1984).

83. GEORGE WALKER, DEFINITIONS FOR THE LAW OF THE SEA, TERMS NOT DEFINED BY THE 1982 CONVENTION, 225 (2012).

84. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep 116 (Dec. 18), http://www.icj-cij.org/docket/files/5/1809.pdf.

85. *Id.* at 120, 130.

86. *Id.* at 130-131.

87. Convention on the Territorial Sea and the Contiguous Zone, art. 12, Apr. 29, 1958, 15 U.S.T. 1605, 516 U.N.T.S. 205.

by the Tribunal—implies a lesser claim to exercise rights (for example fishing rights) in (inter)national waters but not sovereignty.[88] This approach has been confirmed by the 1962 U.N. Secretariat Study "Juridical Regime of Historic Waters Including Historic Bays," according to which the determination of a title requires the effective exercise of sovereignty,[89] and has not been modified during the adoption of UNCLOS.[90] Since then, this basic concept has been applied by international courts.

The Tribunal, in the present case,[91] used only the cases of *Tunisia v. Libyan Arab Jamahiriya*[92] and *Qatar v. Bahrain* to support its conclusion,[93] but in fact several further cases supported its definition of historic title. In the decision regarding the Gulf of Fonseca, the ICJ concluded that historic titles to specific water—in this case, a bay—enables the claiming country to exercise sovereignty over these waters,[94] and can lead to joint entitlement of several States over these waters.[95] The Court in *Eritrea v. Yemen* made a similar conclusion claiming that both states' fishermen may have continuing reciprocal rights of fishing in the scrutinized area, even though the Parties each have sovereignty over various areas of the disputed islands. But the Tribunal came to the conclusion "that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region,"[96] and supports the conclusion that historic rights in one area do not

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88. Symmons, *supra* note 58, at 193; Dupuy & Dupuy, *supra* note 77, at 137.

89. U.N. Secretariat, Juridical Regime of Historic Waters Including Historic Bays, U.N. Doc. A/CN.4/143 (1962).

90. Clive Symmons, Historic Waters in the law of the Sea 2, 21, 286-287 (Vaughan Lowe ed., 2008).

91. Philippines v. China, PCA 2013-19, Award, ¶ 224 (July 12, 2016).

92. Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. Rep 18 (Feb. 24), http://www.icj-cij.org/docket/files/63/6267.pdf.

93. Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahr), Merits, Judgment, 2001 I.C.J. Rep 40 (Mar. 16), http://www.icj-cij.org/docket/files/87/7027.pdf.

94. Land, Island and Frontier Maritime Dispute (El Sal./Hond, Nicar. intervening), Judgment, 1992 I.C.J. Rep 350, ¶ 394 seq. (Sept. 11), http://www.icj-cij.org/docket/files/75/6671.pdf.

95. *Id.* ¶ 432.

96. UNCLOS, *supra* note 3, art. 56; Eritrea v. Yemen, PCA 1996-04, Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea

require sovereignty. In the case of *Barbados v. Trinidad and Tobago*, the Tribunal concluded that no international rule exists where a state can establish "international maritime boundary . . . on the basis of traditional fishing"[97] and hence only a historic title can establish sovereignty.

In sum, the Tribunal came to a well-founded conclusion, that the notion "historic title" in UNCLOS article 298(1)(a)(i) denotes only the performance of sovereign rights due to historical consolidation, but not rights short of sovereign title. Under the presumption that China has not asserted sovereign claims, the Tribunal therefore had jurisdiction over the present case.

## V. Conclusion

After the ratification of UNCLOS, it seemed that historic claims would only play a small role in the modern law of the sea, especially due to the determination of Exclusive Economic Zones up to 200 nautical miles, in which the costal state had sovereign rights to exploit natural resources.[98] The current dispute has proven otherwise. Did the Tribunal overcome the inconsistencies that exist with regard to historic claims in UNCLOS? Definitely not. But it did clarify the meaning of "historic title" in UNCLOS Article 298(1)(a)(i). Hopefully this adjudication offers some guidance for future matters that stretch beyond the geographical limits in dispute. Sadly, it remains questionable whether these clarifications helped solve this dispute through arbitration,[99] but the decision will play an important role in the reopened talks between the two countries.[100]

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and Yemen (Territorial Sovereignty and Scope of the Dispute), ¶ 526 (Oct. 9, 1998), https://pcacases.com/web/sendAttach/517.

97. Barbados v. Republic of Trinidad and Tobago, PCA 2004-02, Award, ¶ 269 (Apr. 11, 2006), https://www.pcacases.com/web/sendAttach/1116.

98. Leonardo Bernard, *The Effect of Historic Fishing Rights on Maritime Boundaries Delamination*, (Law of the Sea Inst., U.C. Berkeley-Korea Inst. Ocean Sci. & Tech. Conference 2012), https://www.law.berkeley.edu/files/Bernard-final.pdf.

99. For an alternative resolution and the establishment of a Commission of Inquiry *see* Mitchell, *supra* note 66, at 760.

100. Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, N.Y. Times (Oct. 20, 2016), https://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html.