First Reactions to the *Philippines v China* Arbitration Award Concerning the Supposed Historic Claims of China in the South China Sea

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Judging from the conferences I have already attended on the Award on the Merits of the Arbitral Tribunal in the case of *Philippines v China* (2016), the Tribunal’s award has already received much critical comment from many international lawyers. However this may be, on the matter of *historic maritime claims* – speaking as one who has researched deeply into, and has written a book, on historic waters1 (wherein I belaboured the shortcomings of this customary international law doctrine as I found it), and who has since written critically-orientated papers on the validity of the supposed Chinese historic claim in the South China Sea (hereafter ‘SCS’)2 – I applaud the findings of the Tribunal on this issue. For the basic reason that at last the question of historic maritime rights in the contemporary law of the sea has arisen for adjudication in a very direct fashion; and has received a detailed consideration from an international adjudicative body *in the context of UNCLOS* (rather than as a superficial non-UNCLOS-based consideration as, for example, by the ICJ on the particular facts of the *Gulf of Fonseca* case3).

The reason, then, for this positive sentiment is that I consider that the Tribunal has not only clarified the past vague and inter-changeable terminology of the meanings of terms bandied about in past ICJ case law and international documentation relating to historic claims at sea (*eg*, in *Tunisia v Libya*)4 – such

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4 [1982] ICJ Reports, at 18. In this case the ICJ seems to use the expressions ‘historic rights’ and ‘historic title’ interchangeably, though the Tribunal in the *Philippines v China in the South China Sea* Award seems to prefer the term ‘historic rights’. This is because the Award is dealing with a historical claim, whereas the ICJ case concerned a ‘current’ boundary dispute.
as ‘historic rights’ and ‘historic title’ – but has also clarified the inter-relationship and interaction of this doctrine with UNCLOS; and, in so doing, has clearly and convincingly demonstrated the dominance of UNCLOS’ treaty regime in respect of such essentially customary international law issues (as are potentially preserved in UNCLOS’ preamble). Albeit this initially came about in the narrower context of the arbitral Tribunal needing to determine whether the Chinese supposed historic maritime claim in the SCS was caught by the ‘optional exceptions’ to the arbitral Tribunal’s jurisdiction. Article 298(1)(a) of UNCLOS provides that a State Party may declare that disputes involving ‘historic bays or titles’ be excluded from compulsory arbitration (as China indeed invoked by a declaration on 25 August 2006).

The way the Tribunal dealt with this issue was methodical, logical and legally acceptable, especially considering the ambiguity of the Chinese claim to historic rights (as was much commented on by the Tribunal, as also in the Philippines pleadings in the case). First the Tribunal rightly determined (having raised and considered the historic claim issue sua sponte in conjunction with the merits) that contrary to what China more generally had claimed in its ‘Position Paper’ of 7 December 2014, the question of historic claims involved a dispute relating to (as required in Art 298) “the interpretation and application” of UNCLOS because of “[its] interaction (with UNCLOS)”. Such rights were thus intrinsically affected by that treaty regime’s stipulations. This is because the question of whether rights arising under another instrument or body of law (here customary international law) were preserved by UNCLOS was “unequivocally” such a dispute. This was an important finding because Chinese legal commentators have invariably argued that China’s maritime historic rights claims are contained in customary international law outside the ambit of, and

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China Sea Arbitration cites the case as supporting its interpretative decision on the meaning of ‘historic title’. See Merits Award of 12 July 2016, PCA Case No. 2013–19, at para 224.

5 Ibid, at para 180.

6 Merits, supra note 4, at para 170.

unaffected by, UNCLOS, as implicitly indicated by its preamble relating to matters not covered in the convention.\(^8\)

Secondly, the Tribunal clarified the terminology which was vague and interchangeably used concerning previous historic maritime claims when it went on to consider the ‘nature’ of the Chinese claims in the SCS, and the ‘scope’ of the Article 298 ‘historic titles’ exception (paragraph 206). It is now clear, as the Tribunal commented,\(^9\) that there is “a cognisable usage among the various terms for rights deriving from historical processes”; and that 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”, “but may equally include more limited rights, such a fishing rights.” In other words, as I myself have suggested in past writings,\(^10\) the term ‘historic rights’ may have a broad meaning covering both historic claims to sovereign rights (ie, claims to historic bays and historic waters) and non-sovereign rights; but also a narrower meaning taking in only the latter (and generally non-exclusive) non-sovereign type historic rights falling short of title.\(^11\)

The Tribunal also more generally affirmed, in later considering China’s historic rights claim, that the traditional three-strand customary rules applicable to establishment of historic waters also notionally apply to historic rights claims of a non-sovereign nature.\(^12\) Further, it stated that “historic rights are, in most instances, exceptional rights”\(^13\).

\(^8\) See eg, the recent publication by the Chinese Society of International law in 2016 entitled “The Tribunal’s Award in the “South China Sea Arbitration” Initiated by the Philippines is Null and Void’ at 54/55, (“[I]t can safely be asserted that [historic rights] originated from and are governed by general international law... and rules of customary international law regarding ‘historic rights’ operate in parallel with the UNCLOS”).

\(^9\) Merits, supra note 4, at para 225.

\(^10\) Eg, Symmons, supra note 1, at 4/5.

\(^11\) See Merits above, supra note 4, at para 243, where China’s claim to historic rights was interpreted by the Tribunal as being claimed as ‘exclusive’ concerning rights to living and non-living resources.

\(^12\) Merits, supra note 4, at para. 265. As laid out in the UN Memorandum on the Juridical Regime of Historic Bays, Including Historic Bays (cited Merits, supra note 4, at para 265. Prior to this the matter was somewhat undetermined: see Symmons, supra note 1, at 4, where I merely speculated that “the process in this case is the same for claims to rights short of sovereignty”.

\(^13\) Emphasis added. See Merits, supra note 4, at para 268: “[Historic rights] accord a right that a State would not otherwise hold, were it not for the operation of the historical process giving rise to the right and the acquiescence of other States in the process’. The corollary of this is (id) that the “exercise of freedoms permitted under international law cannot
At the end of this more general interpretative exercise, the Tribunal also needed to interpret, more specifically, the important phrase ‘(historic) title’ (or (historic) ‘titles’ as the phrase appears in Article 298 of UNCLOS) in the context of UNCLOS. In the latter regard, after reviewing the legislative history of the term as it existed pre-UNCLOS (there being no definition of the phrase in UNCLOS)\(^\text{14}\) – particularly how UNCLOS inherited the term ‘title’ from the insertion into the 1958 Territorial Sea Convention (taken from the Anglo-Norwegian Fisheries case 1951\(^\text{15}\)) and its verbatim transposition into Article 15 of UNCLOS – the Tribunal found the term accorded with the only other “direct usage” of the phrase (albeit in the singular) in UNCLOS (namely, Article 15 concerning territorial sea delimitation).\(^\text{16}\) Thus it concluded that the phrase was intended to be “a reference to claims of sovereignty over maritime areas derived from historical circumstances” (emphasis added).

So, in effect, the term ‘title’ now takes in only ‘sovereignty-based rights’: \(\text{i.e., claims to historic waters.}\(^\text{17}\) Notably, it does not take in non-sovereign historic claims because these are “nowhere” mentioned in UNCLOS as a “broad and unspecified category of possible claims to historic rights falling short of sovereignty”\(^\text{18}\) or “a constellation of historic rights short of title”.\(^\text{19}\) Thus the term has this same meaning (\(\text{i.e., comprehending historic waters only}\) in both Articles 15 and 298 which is an incidentally-important finding to dispel previous ambiguity as to the meaning in the former Article. In so doing, the Tribunal noted the ambiguous wording in Article 298(1)(a) in the English-version of UNCLOS, which the Philippines interpreted as applying the ‘titles’ exception give rise to a historic right” as that would “involve nothing that would call for the acquiescence of other States and can only represent the use of what international law already freely permits”.

\(^{14}\) There is little textual help in the Convention itself except that it might be arguable that use of the word ‘or’ between ‘historic waters’ and ‘titles’ is used here in a conjunctive sense to take in ‘non-sovereign’ historic claims. However a conjunctive interpretation of the word ‘or’ is feasible here, because historic bays are not the only sort of historic waters that may be claimed in international customary law.

\(^{15}\) [1951] ICJ Reports 116, at 130, where (Merits, \textit{supra} note 4, at para 221) the verbal usage referred to an “area of sea claimed exceptionally as internal waters (or, possibly, as territorial sea).” See Merits, \textit{supra} note 4, at para 217 \textit{et seq.}

\(^{16}\) Merits, \textit{supra} note 4, at para 226.

\(^{17}\) As the Tribunal concluded (\textit{ibid}, at para 225), the term ‘historic titles’ “is used specifically to refer to historic sovereignty to land or maritime areas”.

\(^{18}\) Merits, \textit{supra} note 4, at para 226.

\(^{19}\) \textit{Ibid}, at para 228.
only in a delimitation situation as referred to in the words preceding it.\textsuperscript{20} This interpretation was rightly rejected by the Tribunal following examination of the clearer ‘other-language’ UNCLOS versions.\textsuperscript{21} Accordingly, here a “broader exception” was found.\textsuperscript{22} Any narrower viewpoint would in any case have entailed applying the ‘titles’ exception to situations \textit{already separately excepted} in Articles 15, 74 and 83 (the delimitation provisions).

In the light of its finding on the meaning of ‘titles’ in Article 298, the Tribunal found that China \textit{did not make such a claim in the SCS}; as the Tribunal did not consider China’s claim there within the ‘nine-dash-line’ to be “equivalent to its territorial sea or internal waters”.\textsuperscript{23} Accordingly, as mere ‘historic rights’ were not covered by the Article 298 exception, the Tribunal thus found it had jurisdiction to consider the Philippines Submissions 1 and 2,\textsuperscript{24} essentially concerning China’s \textit{claimed historic rights}.

Thirdly, having determined it had jurisdiction on the above-mentioned issue, the Tribunal went on to consider the \textit{merits on the historic rights issue}.\textsuperscript{25} In so doing it found, convincingly, that the UNCLOS regime had made a deep incision into the former doctrine of historic maritime claims, establishing a “comprehensive system of maritime zones”.\textsuperscript{26} As a consequence, to the extent that China’s claim to historic rights extended to “areas that would be considered to form part of the entitlement of the Philippines to an [EEZ] or continental shelf, it would at least be at variance with [UNCLOS]”\textsuperscript{27} This was the first of several references by the Tribunal to the dominance of UNCLOS in the modern-day law of the sea over historic rights.

In this consideration of the present day status of mere historic (non-sovereign) rights, the Tribunal first examined whether such rights which “may have been established \textit{prior to} [UNCLOS’] entry into force” but being now at variance with it, were still preserved.\textsuperscript{28} In deciding this in the negative, the

\begin{itemize}
\item \textsuperscript{20} \textit{Ibid}, at para 191.
\item \textsuperscript{21} \textit{Ibid}, at paras 215–216.
\item \textsuperscript{22} \textit{Ibid}, at para 216.
\item \textsuperscript{23} \textit{Ibid}, at para 213. This was particularly because China had not restricted freedom of navigation within the nine-dash line.
\item \textsuperscript{24} \textit{Ibid}, at para 229.
\item \textsuperscript{25} \textit{Ibid}, at para 230 \textit{et seq}.
\item \textsuperscript{26} \textit{Ibid}, at para 231. This reference by the Tribunal to UNCLOS’ \textit{comprehensive} coverage is much repeated; \textit{eg}, in paras 246 and 253 (without any provision, \textit{eg}, for reservations under Art 309: which prohibition was found to be “informative”, \textit{ibid}, at para 254). See also \textit{ibid}, at paras 253 and 261.
\item \textsuperscript{27} \textit{Ibid}, at para 232.
\item \textsuperscript{28} \textit{Ibid}, at para 234 (emphasis added).
\end{itemize}
Tribunal made an innovative consideration\(^\text{29}\) of Article 311 of UNCLOS which in paragraphs (1) and (2) effectively together provide that UNCLOS trumps prior treaty rights which are incompatible with UNCLOS.\(^\text{30}\) It accordingly concluded,\(^\text{31}\) particularly taking into account Article 62(3) on past ‘habitual fishing practices’ in another State’s EEZ, that the notion of sovereign rights over resources in an EEZ was generally incompatible with another State having historic rights to the same resources\(^\text{32}\) or on such other State’s continental shelf.\(^\text{33}\)

The Tribunal concluded\(^\text{34}\) that not only did UNCLOS not “include any express provisions preserving or protecting historic rights that are at variance” with UNCLOS, but that the treaty also “superceded any earlier rights and agreements to the extent of any incompatibility”. Thus the Tribunal concluded that China “necessarily” relinquished any historic rights in what may once have claimed in waters now allocated by UNCLOS forming EEZS of other States.\(^\text{35}\)

As a final matter in this context, the Tribunal considered whether China could have established ‘exceptional rights or jurisdiction’ since the adoption of UNCLOS.\(^\text{36}\) Here, citing paragraphs 3 and 4 of Article 311 of UNCLOS, the Tribunal found a mere unilateral act would not suffice to establish post-UNCLOS historic rights. This is because it would require fulfilment of the usual international rules for proving the claim (essentially acquiescence, and sufficient

\(^{29}\) Innovative because (at para 235, the Tribunal found that this provision (which ostensibly refers only to treaties) “applies equally to the interaction of [UNCLOS] with other norms of international law, such as historic rights, that did not take the form of an agreement”. This is interesting analogical reasoning in applying a treaty rule to international customary law in this instance.

\(^{30}\) Ibid, at para 238.

\(^{31}\) Ibid, at para 243.

\(^{32}\) Ibid, at para 243.

\(^{33}\) Ibid, at para 244.

\(^{34}\) Ibid, at para 246 (emphasis added).

\(^{35}\) Ibid, at para 257. The Tribunal distinguished possible adverse precedents to this, such as the Fisheries Jurisdiction Cases ([1974] ICJ Reports 3 (decided in the context of the pre-UNCLOS law of 1974 and involving ‘non-exclusive’ claims (para 258) and the Eritrea v Yemen arbitration (Award of 17 December 1999, RIAr Vol. 335,361) on the basis it was not an ‘Annex VII’ arbitration and so bound only to apply the UNCLOS rules. Chinese commentators and others have relied on the latter arbitration to indicate a possible exception to the Art 62(3) rule in UNCLOS; but my view is that the case is anyway distinguishable in that the cross-boundary rights there in issue were mutually acceptable anyway to both States and reciprocal in nature, like traditional ‘voisinage’ arrangements between immediate neighbours.

\(^{36}\) Ibid, at para 273 et seq.
passage of time) “to establish beyond doubt the existence of both the right and a general acquiescence”.37 However, in the SCS instance, there was nothing that “would enable another State to know the nature or extent of the rights claimed”; and since the assertion of the nine-dash-line in May 2009 by China in its note verbale to the United Nations, “China’s claims have been clearly objected to by other States”.38

Besides confirming that the question of historic maritime claims do concern disputes relating to the “interpretation or application” of UNCLOS for the purpose of the third-party settlement procedures laid out in Annex VII of UNCLOS, the Tribunal has, in so doing, incidentally clarified the meaning of various formerly interchangeably-used terms relating to historic maritime claims (as used in customary international law), notably ‘historic rights’ (which now can be seen to have both a broad and narrow meaning, as seen above). This is in itself a welcome development in a formerly arcane and obscure area of international law.

The Tribunal has also (as was its primary task in this regard in the arbitration) clarified the meaning of historic ‘titles’ concerning optional exceptions from compulsory arbitration under Article 298 (and consequentially, the meaning of ‘historic title’ in Article 15 concerning delimitation of the territorial sea). This determination thus confines the scope of the historic ‘title’ exception (twice-mentioned in UNCLOS) to sovereignty-based jurisdictional aspects of historic claims; in other words to ‘historic waters’ as exemplified particularly by ‘historic bays’ mentioned in Article 10(6) of UNCLOS. This entails that it is only in the latter type of instances that any customary rules can now exist separably and independently from the UNCLOS treaty regime (such as evidencing the rules relating to proof of historic waters).

In all other instances, the Tribunal has emphasised how UNCLOS has now superseded and extinguished mere ‘non-sovereign’ and ‘non-exclusive’39 historic claims, effectively leaving only claims to historic waters (and the rules relating thereto) outside the large incision which UNCLOS can be seen to have made to the former customary law regime in this area of the law of the sea. This entails – as the Tribunal went on to show – that any lesser/historic rights’ of a non-sovereign and ‘exceptional’40 nature are today of little practical legal

38 Ibid.
39 See Merits, supra note 4, at para 270, where the Tribunal indicated how difficult it would be for a State to prove it had exclusive historic rights far out to sea in modern times.
40 See Merits, supra note 4, at para 246: “The Convention does not include any express provisions preserving or protecting historic rights that are at variance with [UNCLOS]”.

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value to claimants because of their supercession by the comprehensively laid-out juridical rights in UNCLOS. They may simply now be seen as reflective of a former (non-exclusive) exercise of a juridical right under the freedom of the high seas.

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41 Ironically, perhaps, the Tribunal did uphold the concept of traditional fishing rights under the current law of the sea in the territorial sea of other States, as claimed by the Philippines in their Submission No. 10, Merits, supra note 4, at para 299 et seq.

42 As the Tribunal put it (at para 271): China has “relinquished the freedoms of the high seas which it had previously utilised with respect to the living and non-living resources in certain sea areas which the international community had collectively determined to place within the ambit of [EEZ] of other States” (emphasis added). Also the Tribunal (see supra note 12), in emphasising that historic rights are “in most instances, exceptional rights” (Ibid, at para 268), stated that it followed that “the exercise of freedoms [of the high seas] permitted under international law cannot give rise to a historic right” as it “involves nothing that would call for the acquiescence of other States and can only represent what international law already freely permits.”