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### **Arbitration Jurisdiction in Philippines v PRC: Quixotic Judicialisation and Sovereign Resistance in Law of the Sea**

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### Abstract

Law of the sea is an area where few opportunities to take jurisdiction are declined by international tribunals. Expansion of judicial fiat satisfies the lawyerly appetite for binding global law. However, it poses risks to the maritime interests of States subject to compulsory binding procedures under the Law of the Sea Convention, by eroding the premise of their direct consent to international law obligations. The Philippines v China arbitration is demonstrated here to be an instance, part of a pattern in international law, where judicial jurisdiction is adventurously asserted while sovereign consent is diminished. In response, China is resisting international law in the South China Sea. Indications for the near future are that international maritime relations will be judicialised further. In the longer term, this may result in disrepute, disuse and disobedience of the judiciary in connection with maritime dispute settlement.

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# **Soochow Law Journal**

Arbitration Jurisdiction in Philippines v. PRC : Quixotic  
Judicialisation and Sovereign Resistance  
in Law of the Sea

by

Gregory Rose

**ARBITRATION JURISDICTION IN *PHILIPPINES V PRC*: QUIXOTIC JUDICIALISATION AND SOVEREIGN RESISTANCE IN LAW OF THE SEA**

**Gregory Rose\***

**Abstract**

Law of the sea is an area where few opportunities to take jurisdiction are declined by international tribunals. Expansion of judicial fiat satisfies the lawyerly appetite for binding global law. However, it poses risks to the maritime interests of States subject to compulsory binding procedures under the Law of the Sea Convention, by eroding the premise of their direct consent to international law obligations. The Philippines v China arbitration is demonstrated here to be an instance, part of a pattern in international law, where judicial jurisdiction is adventurously asserted while sovereign consent is diminished. In response, China is resisting international law in the South China Sea. Indications for the near future are that international maritime relations will be judicialised further. In the longer term, this may result in disrepute, disuse and disobedience of the judiciary in connection with maritime dispute settlement.

“Whosoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself.” Walter Raleigh: *A Discourse of the Invention of Ships Anchors, Compass, etc.*’

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## 1. Introduction

This paper examines the jurisdiction asserted by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea<sup>1</sup> on 22 January 2013, to resolve aspects of the dispute between the Philippines and China over activities in the South China Sea.<sup>2</sup> Its purpose is to assess the Arbitral Tribunal's determinations using a critical and realist perspectives on the legal process. It then seeks to consider the problems that arise from global legalism in the international law of the sea and whether or how these might be addressed.

Each of the multitude of matters raised in the pleadings by the Philippines contained its own set of circumstances, each with particular set of questions of relating to jurisdiction for that matter. The various decisions on jurisdiction for each of these matters are analysed doctrinally, to assess whether the decisions were correct as a matter of formal law, and a logical exercise of discretion. If not, then jurisdiction over that particular matter was either asserted erroneously or could have been declined as an exercise of discretion. No analysis is undertaken here of substantial issues that went to the merits in this case, but merely matters of jurisdiction, including justiciability, admissibility and discretion.

Following the doctrinal analysis, the Arbitral Tribunal's determinations on jurisdiction that appear incorrect or adventurous will be regarded through the prism of 'legalism' in international

1. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (hereafter 'LOSC').

2. The legal documents for the case can be found at South China Sea Arbitration (the Republic of the Philippines v the People's Republic of China) available at <<https://pca-cpa.org/en/cases/7/>>

affairs. This has been termed 'global legalism'.<sup>3</sup> The paper characterises the determinations on jurisdiction as manifestations of global legalism. Finally, it contemplates from a realist geopolitical perspective the emerging hazards of global legalism confronting States and the consequences for the rule of law premised on State consent in international law of the sea.

## 2. Global Legalism

Global legalism dominates both contemporary practice and scholarship in international law. According to Posner Global legalism reconciles an old utopian impulse to solve the world's real and very serious problems through world government and a modernist scepticism about the feasibility of world government. The reconciliation generates a paradoxical commitment to, and faith in the capacity of, international law without government.<sup>4</sup>

This means that international lawyers advocate the use of legal processes and adjudicative procedures to address problems in global governance, as stand-alone solutions, without a supporting infrastructure of coercive international governmental enforcement mechanisms. Its cosmopolitan aim is to civilise global society, and its method is transactional, i.e. use of legal dispute resolution procedures under formalised rules. Triggs describes this as the "judicialising" of international relations' and notes its alleged democratic deficit and the risk of fragmented jurisprudence across various tribunals.<sup>5</sup> Posner argues that global legalism places 'excessive faith in the efficacy of international law'<sup>6</sup> and that

3. Eric A. Posner *The Perils of Global Legalism* University of Chicago Press 2009 (hereinafter 'Posner').

4. Ibid 2.

5. Gillian D Triggs *International Law: Contemporary Principles and Practices* 2nd edn LexisNexis Butterworths 2011, at 684.

'the most distinctive and lasting contribution of global legalism' is international adjudication itself.<sup>7</sup> Its utopian ideology is disconnected from the realpolitik of power and deserves scepticism.

Posner's scepticism has been critiqued for relying on a narrow unrealistic conception of legal compliance by transposing into the sphere of international governance the idea of national government with coercive powers. Trachtman argues that there are other alternative functional forms of legal order and that 'we cannot afford to foreclose the pragmatic functionalist middle ground between airy idealism and groundless pessimism'.<sup>8</sup> Thus, rather than being reliant on coercion, compliance in the world legal order might rely upon the disputing parties recognising both the legitimacy of the substantive norms and the efficiency of the procedural rules, as well as their respect for the authority of the dispute resolution body. Given these prerequisites, no coercive enforcement is needed. Thus, international adjudication can provide an alternative system to confrontation on political, economic or military battlefields as a way to resolve disputes.

Trachtman's critique is true of the easy cases, where national interests converge across States so that international law merely formalises their collaboration. However, it does not address complex hard cases, where there are schisms between cultures, values and interests across nations, generating difficult interstate conflicts and consequent challenges to the legitimacy of the norms, rules and adjudicative body. Further, it does not reflexively consider how self-interest might influence critique.

6. Posner, xii.

7. Ibid 130.

8. Joel P. Trachtman *European Journal of International Law*, Volume 20, Issue 4, 1 November 2009, Pages 1263 – 1270, 1270.

The substantive norms and procedural rules to be used in international adjudication arise prior to dispute resolution but are often substantially elaborated upon during the resolution processes themselves. Prior to embarking on the adjudication process, international lawyers are the primary agents engaging in formulation of both the international norms and the procedural rules. Then, as a product of their deliberations, judges refine or generate further international norms and procedures. At both stages, international law is formulated, refined and interpreted by them. Thus, international lawyers are directly interested in the development of the global legal order.

It is plain to see that global legalism empowers international lawyers, as a sectoral interest group and as individuals. It is they – whether within tribunals, or in legal working groups that draft text, or as influencers and commentators – who typically formulate the norms, propose the procedural rules and mediate the transactional process of dispute resolution. Zarbiyev writes 'international law scholars display a real complicity with international judges, supplying them with the rationalisation that crosses over the tensions, arbitrariness, contingencies, and contradictions running through legal practice'.<sup>9</sup> Advocacy for the increasingly important role of international law experts outside of national executive governments, i.e. within the judiciary, bar, academe, think tanks and lobby groups, is implicit in and fundamental to global legalism.<sup>10</sup> A presumption within global legalism is the empowerment of non-State actors in the international legal order. Indeed, global legalism can be regarded as 'the will to power' expressed by international lawyers.<sup>11</sup>

9. Fuad Zarbiyev 'Judicial Activism in International Law a Conceptual Framework for Analysis' *Journal of International Dispute Settlement* vol. 3 no. 2 (2012) pp. 247-278.

10. See also: Mark V Tushnet 'Academics as Lawmakers' (2010) 29 *University of Queensland Law Journal*, 19.

### 3. Binding dispute resolution procedures in the Law of the Sea Convention

Law of the sea is an area where few opportunities to take jurisdiction are declined by international tribunals. This appetite poses risks to the maritime interests of some States, particularly those subject to compulsory binding dispute resolution or advisory opinion procedures delivered under the Law of the Sea Convention.

Compulsory binding dispute resolution is provided for in Part XV of the United Nations Law of the Sea Convention (LOSC) for questions relating to the interpretation or application of the Convention. Under Article 287.3, if a party to a dispute has not declared its preferred means of dispute settlement, then arbitration is the default means. Neither the Philippines or China had declared a preferred means of dispute settlement and, so, arbitration was deemed to be the default means of resolving their dispute.

Under Article 288, any properly submitted dispute concerning the interpretation or application of the Convention will result in a nominated tribunal having jurisdiction over it. Article 288.4 provides that, 'in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal'. Consequently it fell to the Arbitral Tribunal itself to consider and decide whether it had jurisdiction in its own case.

The jurisdiction of an Arbitral Tribunal was invoked by the Republic of the Philippines by presentation of a Note Verbale to the Embassy of the People's Republic of the China in the Philippines.<sup>11</sup> The Philippines Statement of Claim made 15

11. The "will to power" was coined as a concept by Friedrich Nietzsche in *Thus Spake Zarathustra* 1883.

12. Notification and Statement of Claim of the Republic of the Philippines, 22

submissions in relation to matters concerning the conduct of China in the South China Sea, in the region of the Spratly Islands (known in Chinese as the Nansha Islands).<sup>13</sup>

Arbitrations under the LOSC are governed by its Annex VII. In its first Procedural Order,<sup>14</sup> the Arbitral Tribunal constituted under Annex VII decided that the Permanent Court of Arbitration, based in the building of the Peace Palace in The Hague, would act as the registry processing procedural steps and hosting the proceedings. It also established an initial timetable for the proceedings and set out Rules of Procedure supplementary to those set out in LOSC Annex VII.<sup>15</sup>

On 19 February 2013 the Chinese Government rejected and returned to the Philippines the Note Verbale together with its attached Philippine Notification and Statement of Claim. China stated that it did not and would not accept the proposed arbitration.<sup>16</sup> On 21 May 2014, the Permanent Court of Arbitration (PCA) received a Note Verbale from the People's Republic of China (PRC or China) in which it reiterated its position that "it does not accept

January 2013, cited in PCA Case No. 2013-19 in the matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China, Award on Jurisdiction and Admissibility, 29 October 2015 (hereafter 'Preliminary Judgement'), para. 26.

13. On 11 March 2014, the Tribunal granted leave pursuant to Article 19 of the Rules of Procedure for the Philippines to amend its Statement of Claim, which added a request to determine the status of Second Thomas Shoal, also in the Spratly Islands, Preliminary Judgement, para. 99.

14. Procedural Order No. 1, 27 August 2013 available at <<https://pcacases.com/web/sendAttach/1804>>.

15. Rules of Procedure, 27 August 2013 available at <<https://pcacases.com/web/sendAttach/233>>.

16. 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, 19 February 2013, cited *ibid*, para. 27.

the arbitration initiated by the Philippines” and that its Note Verbale “shall not be regarded as China’s acceptance of or participation in the proceedings.”<sup>17</sup>

On 7 December 2014, the PRC, through its Ministry of Foreign Affairs, elaborated on China’s reasons for rejecting the arbitration. It publicly released a Position Paper on the lack of jurisdiction of the Arbitral Tribunal.<sup>18</sup> The arbitration proceeded, nevertheless, in accordance with Article 9 of Annex VII to the Convention, which provides that arbitration proceedings shall continue, if the other party so requests, even if ‘one of the parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case’. However, Article 9 also imposes additional responsibilities upon the arbitrators in these circumstances where one of the parties does not appear to defend its own case. Article 9 of Annex VII goes on to provide that the Tribunal “must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law” before making any award.

Therefore, Arbitral Tribunal bifurcated the proceedings into two hearings, the first on preliminary matters and the second on the merits.<sup>19</sup> Article 20 of the Rules of Procedure allow bifurcations for this purpose:

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any

17. Note Verbale from the People’s Republic of China to the Permanent Court of Arbitration, 29 July 2013.

18. *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* (7 December 2014) (hereafter ‘China Position Paper’) available at <[http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)>.

19. Procedural Order No. 4, 21 April 2015 available at <<https://pcacases.com/web/sendAttach/1807>>..

claim made in the proceedings. ...

3. The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

4. Prior to a ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.<sup>20</sup>

This approach within the Law of the Sea Convention stands in contrast to that of the International Court of Justice, which may choose not to bifurcate proceedings in consideration of an objection. Thus, any ‘preliminary objection automatically results in the bifurcation of the proceedings’.<sup>21</sup>

Article 9 of Annex VII was supplemented by Article 25(2) of the Rules of Procedure for this dispute adopted by the Arbitral Tribunal on 27 August 2013. Article 25(2) adds that:

In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a

20. Rules of Procedure, 27 August 2013 available at <<https://pcacases.com/web/sendAttach/233>>.

21. Stefan Talmon ‘Objections Not Possessing an “Exclusively Preliminary Character” in the South China Sea Arbitration’ *Bonn Research Papers on Public International Law Paper* No. 10/2016, 16 June 2016 SSRN.com/abstract=2796716, p. 7.



supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing Party shall be communicated to the non-appearing Party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it considers necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

Therefore, the Arbitral Tribunal issued Procedural Order No. 3 of 17 December 2014,<sup>22</sup> which imposed additional responsibilities on the Philippines to address specific issues relating to jurisdiction raised in the Philippines' Memorial, and to address public statements made by the Chinese government in relation to the dispute. The Philippines had until 15 March 2015 to file the requested supplemental submission, and China had until 16 June 2015 to provide any comments in response to it. The Philippines sought to anticipate and address possible objections to the Arbitral Tribunal's jurisdiction and also "suggested that the Tribunal take into account statements by officials and review the academic literature".<sup>23</sup> China made no response by 16 June, or at all, but was still treated as having made a plea against the jurisdiction of the Arbitral Tribunal in the Position Paper of 7 December 2014.<sup>24</sup> On 21 April 2015, the Tribunal issued Procedural Order No. 4 bifurcating the proceedings.<sup>25</sup>

<sup>22</sup> Rules of Procedure available at <<https://pcacases.com/web/sendAttach/1806>>.

<sup>23</sup> Preliminary Judgement, para. 13.

<sup>24</sup> Ibid, para. 15.

<sup>25</sup> Procedural Order No. 4, 21 April 2015 available at <<https://pcacases.com/web/sendAttach/1807>>..

To provide safeguards for objectivity and accuracy at the merits phase of the proceedings, despite the absence of China, the Arbitral Tribunal posed written and oral questions to experts appointed by the Philippines and also appointed its own independent technical experts to assist it. One expert was to provide a critical assessment of the 'geographic and hydrographic information, photographs, satellite imagery and other technical data' for characterisation of maritime features – as submerged features, low-tide elevations, rocks, reefs, or islands; another was a team of experts appointed by the Arbitral Tribunal to assess alleged coral reef environmental damage; and another was an expert to assess danger posed by the manoeuvring of Chinese law enforcement vessels.<sup>26</sup> In a sense, the Arbitral Tribunal took control of the dispute.

#### 4. China's arguments against jurisdiction and admissibility

Article 298 allows LOSC parties to opt out of compulsory binding dispute resolution relating to certain listed categories of dispute. Following its accession to the LOSC on 7 June 1996, the PRC submitted a Declaration on 25 August 2006 that opted out from 'all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298'.<sup>27</sup> These paragraphs concern, respectively: sea boundary delimitations and historic bays or titles; military activities; and disputes over which the United Nations Security Council is already exercising its functions. The

<sup>26</sup> PCA Case No. 2013-19 in the matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People's Republic of China, Award, 12 July 2016 (hereafter 'Final Award') paras. 133-138.

<sup>27</sup> United Nations Division for Ocean Affairs and Law of the Sea, *Declarations and Statements* (2013) available at <[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)>.

Security Council is not engaged on South China Sea matters, but the Arbitral Tribunal would lack jurisdiction over any matters within the dispute that could be characterised under 298.1(a) or (b) as concerning maritime delimitation, or historic titles, or military activities, or law enforcement activities.

The Position Paper issued by China on 7 December 2014 elaborated on the following four propositions against the Arbitral Tribunal's jurisdiction:

1. The essence of the subject-matter of the arbitration is the 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.

2. China and the Philippines have agreed, through bilateral instruments and the ASEAN Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;

3. Even assuming, *arguendo*, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlements.

4. The current arbitration is an abuse of process.

In its Preliminary Judgement, the Tribunal considered that China in its Position Paper had expressed three main reasons why it considered that the Tribunal had no jurisdiction:<sup>28</sup>

- The subject matter concerns territorial sovereignty, which is beyond jurisdiction;
- The Philippines is obliged under other legal instruments to settle the dispute through alternative means; and
- Questions of delimitation are beyond the jurisdiction of the tribunal.

Nevertheless, the Arbitral Tribunal specified that it was not limiting itself to these three main reasons and that it would also consider a broader range of issues that might form potential objections to its jurisdiction. Other issues raised by China were that the Philippines initiation of the arbitration was an abuse of international legal procedure or of good faith, and that the lack of participation of affected third-party States placed the dispute outside the Tribunal's jurisdiction. In addition, the Tribunal considered whether a legal dispute existed to trigger the invocation of dispute settlement procedures.<sup>29</sup>

China's objections and the Arbitral Tribunal's summary of the jurisdictional challenges can be conceptually reorganised into three categories, concerning the satisfaction of preliminary conditions, the justiciability of the subject matter, and the admissibility of the procedure. These categories hold subsidiary questions that are organised in this paper, as follows:

#### Preliminary Conditions: Not satisfied?

<sup>28</sup> Preliminary Judgement, para. 14.

<sup>29</sup> In its final decision, the Arbitral Tribunal organised these issues into the following categories: Preliminary Matters (abuse of process); Existence of a Dispute; Involvement of Indispensable Third Parties; Preconditions to Jurisdiction (other alternative compulsory processes); and Exceptions and Limitations to Jurisdiction (sovereignty, delimitation): Final Award, paras. 145-163.

1. Non-existence of a dispute;
2. Failure to exchange views; or
3. Abuse of process or lack of good faith.

Justiciability: Impermissible subject matter?

4. Territorial sovereignty is not subject to compulsory binding arbitration;
5. Maritime delimitation is not subject to compulsory binding arbitration; or
6. Law enforcement and military activities not subject to compulsory binding arbitration.

Admissibility: Improper procedure?

7. Other alternative dispute resolution agreements were compulsory and binding; or
8. Third-party states were indispensable but not participating.

Sections 6, 7 and 8 of this paper are structured so as address these questions sequentially.

The following sections examine arguments for and against jurisdiction of the Arbitral Tribunal in relation to each question individually decided, as well as overall. It first describes the procedural history and then finds that, on some justiciability issues and on inadmissibility of third-party interests, arguments against jurisdiction had significant strengths that were not well addressed by the Arbitral Tribunal. It concludes that, on some questions decided, arguments against were stronger than those

for jurisdiction, although, the Arbitral Tribunal properly asserted jurisdiction on others.

## 5. Overview of Arbitral Tribunal award on jurisdiction

The Arbitral Tribunal conducted a hearing 7-13 July 2015 to address the objections to jurisdiction set out in China's Position Paper and other matters concerning its jurisdiction and the admissibility of the Philippines' claims. As it stated:

If the Tribunal finds it has no jurisdiction, the matter ends here. If the Tribunal finds it has jurisdiction over any of the Philippines' claims, it will hold a subsequent hearing on the merits of those claims. If it finds that any of the jurisdictional issues are so closely intertwined with the merits that they cannot be decided as "preliminary questions", the Tribunal will defer those jurisdictional issues for decision after hearing from the Parties on the merits.<sup>30</sup>

At the hearing conducted 7-13 July 2015, no agents or representatives were appointed for the PRC. China did not attend the hearing but was provided with daily transcripts and all documents submitted during the course of it.<sup>31</sup> On 29 October 2015 the Award on Jurisdiction and Admissibility was handed down by the Arbitral Tribunal. It that found it did have jurisdiction to go ahead and consider the Philippine claims on the merits.

Although China's Position Paper challenging the Tribunal's jurisdiction was found not to have raised insuperable obstacles, several of the 15 submissions made by the Philippines raised issues of jurisdiction that were found to be intertwined with

<sup>30</sup> Preliminary Judgement, para. 16.

<sup>31</sup> Ibid, para. 15.

issues on the merits. These were principally issues dealing with the justiciability of the subject matter. Accordingly, the Tribunal declined to rule on the permissibility of its jurisdiction over certain subject matters, until the characterisation of the subject matter had been addressed during the merits phase of the hearing.<sup>32</sup> In particular, China's assertion that questions over sovereignty were essential to the arbitration were analysed in Part VIIIA of the Jurisdiction and Admissibility judgement, where they were considered not to be distinctively preliminary to the merits but interwoven with them. This resulted in jurisdictional issues in several Philippine submissions being deferred for consideration in conjunction with the merits of the claims.<sup>33</sup>

The Arbitral Tribunal proceeded to conduct a hearing on the merits on 24-26 and 30 November 2015 and it handed down its Award on the merits on 12 July 2016.<sup>34</sup> In addition to the merits, in this decision it evaluated questions of jurisdiction that it had held over until matters of merits that were intertwined could be addressed. These were questions that raised territorial sovereignty, maritime delimitation and fisheries law enforcement or military activities in the exclusive economic zone. The following sections of this paper analyse China's arguments on jurisdiction and admissibility and their treatment in both the Arbitral Tribunal's preliminary and merits judgements.

<sup>32</sup> Ibid, paras. 397- 412.

<sup>33</sup> Talmon identifies four categories of preliminary objections in the jurisprudence of the International Court of Justice: (1) objections that cannot be the proper subject of a preliminary objection; (2) objections that are so independent of the merits that their exclusively preliminary character can never be in doubt; (3) objections that are intertwined with the merits and can only be dealt with along with the merits; and (4) intermediate objections touching upon but not prejudging the merits that are treated as having an exclusively preliminary character: Talmon, n. 15 above.

<sup>34</sup> Final Award.

## 6. Jurisdiction: Preliminary conditions

In its Position Paper, China alleged that the Philippines and failed to exchange views prior to initiating the arbitration and that it was acting in bad faith to abuse international legal process. In addition to these allegations, the Arbitral Tribunal considered the threshold issue of whether there was in fact a dispute to form the subject matter of arbitration. It considered all three of these possible objections to its jurisdiction in its preliminary judgement.

### 6(i) Non-existence of a legal dispute

The question of whether a legal dispute existed between the parties was one of the issues examined by the Arbitral Tribunal in Part V of its preliminary judgement. The Tribunal used the definition established in international law of a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.<sup>35</sup> It considered that a dispute could exist, even if its exact scope was not determined<sup>36</sup> and that the existence of 'a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature'.<sup>37</sup>

It held that, in this case, it was clear that 'the claim of one party is positively opposed by the other'.<sup>38</sup> Thus, the Arbitral

<sup>35</sup> Preliminary Judgement, para. 149, citing *Mavrommatis Palestine Concessions* Jurisdiction Judgement of 30 August 1924 *PCI J Series A*, No. 2, p.6, at p. 11.

<sup>36</sup> Preliminary Judgement, para. 171, citing *Land and Maritime Boundary (Cameroon v Nigeria)* Preliminary Objections, Judgement, *ICJ Reports* 1998 p. 275 at pp. 316-17, para. 93.

<sup>37</sup> Preliminary Judgement, para. 171.

<sup>38</sup> Ibid, para. 149, citing *Southwest Africa (Ethiopia v South Africa; Liberia v South Africa)* Preliminary Objections, Judgement, *ICJ Reports* 1962, p. 319 at p. 328.

Tribunal was in no doubt that a dispute existed between the parties.<sup>39</sup> The Tribunal then went on to consider whether the dispute could be characterised as one about the 'interpretation and application of the Convention' in relation to those disputed maritime features. Articles 286 and 288 of the LOSC provide for compulsory procedures entailing binding decisions in a dispute concerning the interpretation or application of the Convention. China had asserted, in its Position Paper, that the dispute was not about the interpretation and application of the Convention but about competing claims to sovereignty. The sovereignty issue is dealt with below, in section 3, concerning whether sovereignty was in essence the subject matter of the dispute.

The Tribunal considered that the Philippines submissions numbers 3, 4, 6 and 7 reflected disputes concerning nine maritime features as islands, rocks, low tide elevations or submerged features.<sup>40</sup> As these disputes concerned the characterisation of the features, the disputes were treated as being about 'interpretation and application of the Convention'.<sup>41</sup> Indeed, this distinction was central to the Philippines' litigation strategy, because interpreting and applying the LOSC is essential to determine the legal status of maritime features.

Philippine Submissions 1 and 2 (concerning limitation of China's claims to those permitted within the LOSC), and Submission 5 (concerning designation of two features as being within the Philippine EEZ) were treated as interconnected by the Arbitral Tribunal, albeit in one sentence only.<sup>42</sup> Further interconnections between Submissions 8-14 (concerning certain Chinese activities

<sup>39</sup> Ibid, para. 152.

<sup>40</sup> Ibid, para. 169. Namely: Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gavan Reef and McKennan Reef (including Hughes Reef), Johnson Reef, Cuarteron Reef and Fiery Cross Reef.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid, para. 172. Namely: Mischief Reef and Second Thomas Shoal.

being declared illegal) were recognised by the Tribunal, again in only one sentence, but there is no explicit treatment of the manner of interconnections between them and Submissions 1-7 (concerning China's claims and the status of maritime features).<sup>43</sup> That the Arbitral Tribunal did not address explicitly the interconnections between its characterisation of South China Sea marine features and their implications for the Chinese claims of sovereignty suggests that it was avoiding those implications. The implicit problem avoided in this passage of the preliminary judgement was that the Tribunal might lack jurisdiction as it was indirectly determining sovereignty. Each of the Philippine submissions could be determined only by characterising each of the features in the South China Sea, that is, by interpreting the LOSC and applying it to them, but those legal characterisations implicitly determine disputed sovereignty over maritime features.<sup>44</sup> Hence, the Tribunal declined to address thoroughly at this point in its judgement on jurisdiction these arguments against its jurisdiction. It failed to notice the elephant in the courtroom.

## 6(ii) Failure to exchange views prior to arbitration

The Arbitral Tribunal considered whether China and the Philippines had discharged their obligations under LOSC Article 283 to exchange views concerning the settlement of the dispute by negotiation or other means prior to the commencement of arbitration. China's Position Paper claimed that the parties had been involved in various exchanges of views since 1995, but that the countries had not engaged in an exchange of views on the

<sup>43</sup> Ibid, para. 173.

<sup>44</sup> The other submissions, i.e. 3, 4, 6 and 7, concerned the characterisation of maritime features as islands, rocks, low tide elevations or submerged features). See Sreenivasa Rao Pemmaraju 'The South China Arbitration (The Philippines v China): Assessment of the Award on Jurisdiction and Admissibility' *Chinese Journal of International Law* 2016 at 265, pp. 282-286.

subject matter of the arbitration itself.<sup>45</sup>

This argument was rejected by the Tribunal on the basis that the continuing negotiations between the parties did constitute an exchange of views in relation to the dispute. Two rounds of bilateral consultations on the means of settling the dispute took place in 1995 and 1998,<sup>46</sup> as well as multilateral consultations culminating in the ASEAN Declaration on the Conduct of Parties in the South China Sea in 2002,<sup>47</sup> and a further bilateral consultation in 2012. Although incidents of conflict occurred during this period such that the dispute evolved, the Tribunal was 'convinced that the Parties ... unequivocally exchanged views regarding the possible means of settling the disputes' across their correspondence in 2012.<sup>48</sup>

This does seem to be the correct view, particularly in light of China's reluctance to progress the bilateral exchange of views towards an agreement, while at the same time manoeuvring facts in the water to its favour by building fortified artificial islands. Despite a firm rejection of the Tribunal's decision on jurisdiction and admissibility in an analysis by the former President of the International Law Commission, this aspect of the decision was beyond his criticism.<sup>49</sup>

45. Ibid, para. 324; China Position Paper, para. 49.

46. Preliminary Judgement, para. 334-336.

47. Ibid, para.s 335 - 336; Association of South East Asian Nations (ASEAN) *Declaration Conduct of Parties in the South China Sea* (4 November 2002).

48. Preliminary Judgement, para.s 337-342.

49. Sreenivasa Rao Pemmaraju 'The South China Arbitration (The Philippines v China): Assessment of the Award on Jurisdiction and Admissibility' *Chinese Journal of International Law* 2016 at 265, pp. 282-286.

### 6(iii) Abuse of international legal procedure

China alleged in its Position Paper that the Philippines' initiation of arbitration was an abuse of the LOSC compulsory dispute settlement procedures.<sup>50</sup> In this regard, the Tribunal observed that, under LOSC Article 286, the resort to arbitration is a unilateral right to be exercised unilaterally. It quoted: 'Unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right'.<sup>51</sup> Therefore, it held that the Philippines invocation of its right to arbitration could not in itself be an abuse of international legal procedure.<sup>52</sup>

Article 294 of the LOSC provides that a Tribunal may determine whether the claim constitutes an abuse of legal process, in which case it shall take no further action or, otherwise, whether the claim is well founded so that the process may proceed. The Arbitral Tribunal went on to consider that such a finding of abuse of procedure is appropriate 'only in the most blatant cases of abuse or harassment'.<sup>53</sup> This would seem a reasonable and balanced interpretation of the abuse of procedure provisions. In the present case, therefore, the Arbitral Tribunal declined to find that there was any abuse of process.

## 7. Justiciability: Impermissible subject matter?

Those Chinese objections to the Arbitral Tribunal's jurisdiction

50. China Position Paper, para. 74.

51. *Barbados v Trinidad and Tobago* Award of 11 April 2006 *PCA Award Series* pp. 96-97, para 208, RIAA vol. XXVIII, p 147 pp. 207-08, para. 208.

52. Preliminary Judgement, para.126.

53. Ibid, para. 128. The Tribunal cited records from the 61st plenary meeting of the UN conference on the Law of the Sea, 6 April 1976, in support of this position; see: *Third United Nations Conference on the Law of the Sea, Official Record*, vol. 5, para. 49.

that were most closely intertwined with the substance of the dispute concerned whether the subject matters of the dispute were justiciable within the remit of the Arbitral Tribunal. The subjects outside its remit were territorial sovereignty, maritime delimitation, and military or law enforcement activities. They were considered principally in the judgement on the merits.

China asserted that questions of territorial sovereignty, over which the Convention itself is silent and the LOSC Annex VII Tribunal lacked jurisdiction, were necessarily involved in the dispute, thus depriving the Tribunal of its jurisdiction altogether.<sup>54</sup> The manner in which the Arbitral Tribunal dealt with this issue in its Preliminary Judgement on jurisdiction and admissibility was neither clear nor final. It did consider whether it was necessary to decide questions of sovereignty prior to questions of characterization and application of the Convention, or whether they could be decided independently.<sup>55</sup> It observed that, while the parties were in a dispute concerning land sovereignty over certain maritime features in the South China Sea,<sup>56</sup> a dispute over sovereignty was merely part of a wider and more complicated bundle of disputes between the parties over several distinct issues (including rights to fish and to build artificial islands).<sup>57</sup> The Tribunal adopted the precedent established by the International Court of Justice that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".<sup>58</sup>

In the merits phase, these questions of jurisdiction were reconsidered and they turned upon matters of sovereignty and

54. China Position Paper, para. 4.

55. Preliminary Judgement, paras. 152-154.

56. Ibid, para. 152.

57. Ibid.

58. Ibid, citing *United States Diplomatic and Consular Staff in Teheran* (United States v Iran) Judgement *ICJ Reports* 1980, p. 3 at pp. 19-20, para. 36.

matters in relation to which China had exercised its rights to exempt itself from jurisdiction under LOSC Article 298. Thus, the Preliminary Judgement left matters of the legal status and possible appropriation of maritime features to its later decision on the merits, and itself did not address whether China's claim of historic maritime waters and rights was legitimate. These matters went beyond territorial sovereignty and also concerned maritime boundary delimitations, military activities, and fisheries law enforcement activities in the exclusive economic zone.

### 7(i) No jurisdiction over subject matter of territorial sovereignty

China's Position Paper alleged that "the essence of the subject matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea"<sup>59</sup> and that it is impossible to decide whether any maritime claim based on a particular maritime feature is consistent with the Convention until sovereignty is decided. The argument was premised on the notion that "a maritime feature *per se* possesses no maritime rights or entitlements whatsoever" when not subject to State sovereignty.<sup>60</sup> China asserted that questions of territorial sovereignty were essential because all waters within its declared 'nine dash line' comprised its historic territorial waters, encompassing the vast majority of the South China Sea. Further, China asserted that low tide elevations in the South China Sea belonged to it as territory that generated territorial sea title.<sup>61</sup> Unhelpfully, China did not specify which maritime features it considers to be islands, rocks, low-tide elevations, reefs or completely submerged features. An alternative Chinese strategy to the nine dash line could have been to base

59. China Position Paper, para. 86.

60. Ibid, para. 17.

61. Ibid, paras. 16-25.

its claim upon these individual features and their various maritime zones.

The claim of historical sovereign title to the South China Sea was the foundation of China's argument that the Tribunal was trespassing beyond its authority to address matters of disputed sovereignty. This posed a dilemma for the Tribunal because, although China framed the dispute as being over sovereignty, its claim of sovereignty raised issues of interpretation and application of the LOSC. As noted by Symmons, there is little recent analysis of historic title under the LOSC.<sup>62</sup> This required some delicate treatment of the claim to historic waters and rights by the Arbitral Tribunal. Ultimately, the Tribunal itself did not expressly decide on any of China's claims to sovereignty over maritime features in the South China Sea. However, it did dismiss China's asserted sovereignty over the waters within the nine-dash line, albeit indirectly.

In the preliminary phase of the arbitration, the Tribunal distinguished its case from the arbitration on the *Chagos Marine Protected Area*,<sup>63</sup> in which the parties (Mauritius and the United Kingdom) had agreed that sovereignty was a necessary preliminary matter to be decided. Instead, resolution of the Philippines' claims would *not* 'require the Tribunal to first render a decision on sovereignty, either expressly or implicitly' over disputed maritime

<sup>62</sup> Symmons notes that his own book *Historic Waters in the Law of the Sea: A Modern Reappraisal* (Leiden Nijhoff 2008) is the only book on the topic in recent years: Clive R. Symmons 'Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal' in Shicun Wu, Mark Valencia and Nong Hong *UN Convention on the Law of the Sea and the South China Sea*, Ashgate 2015, p. 191.

<sup>63</sup> PCA Case No. 2011-3 in the matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom, Award of 18 March 2015.

features such as Scarborough Shoal or the Spratly Islands.<sup>64</sup> Therefore, the Tribunal found that it could consider the Philippines claims as being about legal characterisation of various maritime features, without exceeding its jurisdiction (which excluded deciding questions of territorial title). Further, it did not agree that the Philippines' focus in its submissions particularly on those maritime features occupied by China carried implications that would advance the position of either party in their dispute over sovereignty.<sup>65</sup> However, the implications for sovereignty were of course obvious.

In the merits phase of the arbitration, the Tribunal considered China's claim to an historic territorial title in the South China Sea, but dismissed it as untenable. Principally, it looked to China's conduct to infer that China does not claim historic 'title' but, rather, historic 'rights', which comprise a lesser entitlement than full title or dominion.<sup>66</sup> This inference was based upon China's statements and actions expressly permitting foreign vessels to exercise their rights to freedom of navigation and overflight. These are high seas freedoms, neither of which is compatible with full dominion in the territorial sea, where only innocent passage applies.<sup>67</sup>

In addition, the Tribunal considered that the rights that China had asserted were those over natural resources that may be exercised in the EEZ, where full title or dominion does not arise. Under Article 311, the LOSC supersedes other incompatible agreements. The Arbitral Tribunal ruled that the LOSC supersedes any incompatible claim by China to historic 'rights' (i.e. less

<sup>64</sup> Preliminary Judgement, para. 153.

<sup>65</sup> Ibid.

<sup>66</sup> Final Award, paras. 202-229, citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits Judgment, ICJ Reports 2001, p. 40 at pp. 112-113, para. 236.

<sup>67</sup> Final Award, paras. 212-213.



than title) to the living and non-living resources throughout the extent of its nine-dash line around the South China Sea.<sup>68</sup>

The Tribunal's approach here can be critiqued for interpreting China's public statements on historic title and rights as binary alternatives. Another approach could have been to regard them as co-existing and mutually complementary. This approach would have better met the Tribunal's duty to safeguard the legal interests of the non-participating party to the proceedings. Thus, China's claims to protect foreign freedoms of navigation and overflight islands could be read as relating to spaces in or above the high seas or EEZs of islands or through archipelagic waters. Indeed, this was the position set out by China in two *Notes Verbales* quoted by the Tribunal but not addressed in the judgement.<sup>69</sup> At the same time, innocent passage would apply to foreign vessels only in territorial seas of the islands. Chinese claims to sovereignty over territorial seas could subsist despite the Tribunal's findings that the claimed islands were merely rocks above water at high tide that are incapable of generating EEZs. In fact, China has actively denied freedom of navigation of foreign naval vessels within 12 nm, i.e. territorial seas, of its claimed islands and has scrambled jets to ward off United States naval ships.<sup>70</sup>

In response to Philippine Submission 2, claiming that China's "nine-dash line" is contrary to LOSC, the Tribunal also considered the scope of the historic title exception in the LOSC. The notion of historic title is recognised in the LOSC in relation to historic

<sup>68</sup> Ibid, para. 261-262.

<sup>69</sup> Quoted in the Final Award, paras 182 and 185, see: Chris Whomersley 'The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique' *Chinese Journal of International Law* (2017) 387-423, 391.

<sup>70</sup> Idrees Ali and Matt Spetalnick 'U.S. warship challenges China's claims in the South China Sea' *Reuters* 21 October 2016 <http://www.reuters.com/article/us-southchinasea-usa-exclusive-idUSKCN12L109>

bays under Article 10, but the nine-dash line encompassing the South China Sea claimed by China as historic waters is too unrelated to the Chinese coast to qualify as a bay.<sup>71</sup> Further, bays are internal waters, but this status is inconsistent with foreign navigation, fishing and other activities that occur there without Chinese permission.

The notion of an historic title is one that is recognised also in relation to the territorial sea, in Article 15, concerning delimitation of contiguous territorial seas where there is international competition over their boundary line.<sup>72</sup> However, China's claim to historic title along the nine-dash line runs counter to a fundamental rationale of the law of the sea, i.e.: title to land dominates the sea.<sup>73</sup> China's Position Paper argued that very point, i.e. 'maritime rights derive from the coastal State sovereignty over the land'.<sup>74</sup> However, China's asserted title to the South China Sea is disconnected by vast distances and by disharmony from the shape of the mainland Chinese coast, rendering absurd the notion of its being an adjustment to a median line of delimitation. Thus, a connection between historic title based on coastal territorial seas delimitation, and historic title under Article 298, was not viable legal support for a claim to historic waters

<sup>71</sup> Symmons, *supra* n 62, Whomersley n 69.

<sup>72</sup> LOSC Article 15 provides that, where it is necessary by reason of historic or other special circumstances to depart from the median point for the purposes of delimitation with an opposite or adjacent coastal States, it is possible to delimit the territorial sea in a fashion at variance with the median line.

<sup>73</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v Bahrain*) Merits, Judgement, 16 March 2001, *ICJ Reports* 2001 p. 97, para. 185. Territorial and Maritime Dispute (*Nicaragua v Columbia*) Judgement 19 November 2012 *ICJ Reports* 2012 p. 51, para. 140.

<sup>74</sup> China's Position Paper, para. 11, quoting Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (*Qatar v Bahrain*) Merits Judgement, 16 March 2001 *ICJ Reports* 2001, p. 97, para. 185, and citing four other cases to support the principle that "the land dominates the sea".

throughout the vast area within the nine-dash line.

Considering, instead of the Chinese mainland coastline, China's claimed sovereignty over maritime features in the South China, the Arbitral Tribunal found that none of the high tide features or rocks in the Spratly Islands was an island generating an exclusive economic zone.<sup>75</sup> Therefore, the Arbitral Tribunal determined that none of the features generates an EEZ that could need to be delimited from the Philippine EEZ offshore from the island of Palawan.<sup>76</sup>

As a final matter, for the sake of completeness, the Tribunal considered the possibility of other forms of pre-existing historic title and recalled that the formation of historic rights requires 'continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States'.<sup>77</sup> In this case, it found that continuous exercise and acquiescence by affected States was not evident. Symmons has authoritatively assessed the Chinese claim to historic waters in the South China Sea as failing to meet the prerequisite requirements of a formal historic waters claim, i.e. demonstrating clarity and consistency, sufficiently publicised, to which other states acquiesced, and which was supported by a relevant exercise of jurisdiction.<sup>78</sup>

As the final paragraph of the LOSC Preamble recognises that that the Convention is not comprehensive<sup>79</sup> and, in light of the Tribunal's duty to protect the legal interests of an unrepresented Party, and for even greater completeness (sic), the Arbitral Tribunal

75. Final Award paras. 473-647.

76. i.e. not within 12 nm of Palawan low water baseline

77. Final Award. Para. 265; citing UN Secretariat *Memorandum on the Juridical Regime of Historic Waters, including Historic Bays* 1962.

78. Symmons, n. 62 above, pp. 212-232.

79. LOSC Preamble: 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.

could have gone a step further to consider whether China's claim to historic waters was a matter that could might have been protected under that last paragraph of the Preamble. Pemmaraju is particularly critical of this aspect of the Final Award, as the LOSC 'package deal' is not *jus cogens* or excluding of other rights.<sup>80</sup> Thus, he suggests that the Chinese claim to historic waters could have been treated by the Arbitral Tribunal as *sui generis*. Nevertheless, his criticism does not persuade us that a treatment as *sui generis* would have been other than the weakest of thin straws to grasp anyway, given its apparent lack of historicity and inconsistency with the rationale of the LOSC.

In summary, the Tribunal concluded that statements made by the PRC asserting full title were compromised by conflicting statements, i.e. merely asserting rights, and by actions allowing foreign freedoms of navigation and overflight that were consistent with mere rights. Therefore, it was superficially possible to rule on the characterisation of the maritime features without going beyond the Tribunal's remit by addressing sovereignty over alleged historic waters. Nevertheless, even the historic title was found to depend upon continuous claim and acquiescence conditions set out by the LOSC, which had not been met. Thus, even though the Tribunal was doctrinally correct in its disregard of historic title, the outcome was one that determined sovereignty.

## 7(ii) No jurisdiction due to maritime delimitation as subject matter

In its Position Paper, China argued that the 'subject matter of the proceedings is an integral part of the dispute of maritime delimitation between the two States'.<sup>81</sup> In connection with this,

80. Pemmaraju, n. 44 above, p. 294.

81. China Position Paper, para. 75.

on 5 August 2006, China had submitted a declaration under Article 298 of the LOSC stating that it no longer accepted any of the procedures concerning dispute resolution that are optional under LOSC Part XV, including for disputes over maritime delimitation.<sup>82</sup>

The Tribunal in Part VIIIB of the Preliminary Judgement agreed with China that maritime boundary delimitation is a systemic and integral process. It disagreed that the particular matters at issue in this dispute necessarily, in themselves, constituted a maritime boundary delimitation dispute.<sup>83</sup> In particular, 'a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones'.<sup>84</sup> As none of the high tide features or rocks in the Spratly Islands was an island generating an exclusive economic zone, no delimitation them and other features was necessary. Therefore, LOSC Article 298 operated in relation to maritime delimitation but did not exclude jurisdiction to consider the legal status of maritime features in the South China Sea. The outcome was that the Philippine litigation strategy was successful. Although the Arbitral Tribunal could have declared characterisation of maritime features as an integral to determinations of delimitation, it avoided doing so as that would have made the issues non-justiciable.<sup>85</sup>

<sup>82</sup> United Nations Division for Ocean Affairs and Law of the Sea, *Declarations and Statements* (2013) available at <[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)>.

<sup>83</sup> Preliminary Judgement, para. 155.

<sup>84</sup> Ibid, para. 156.

<sup>85</sup> For a more extensive analysis, see: Whomersley n 69, 392ff.

### 7(iii) No jurisdiction due to military or law-enforcement subject matter

Philippine claims 8 through 13 concerned Chinese activities in the South China Sea, fisheries law enforcement activities and military activities in particular, that were alleged to interfere with the Philippine sovereign rights in the Philippine exclusive economic zone and continental shelf.

In relation to military activities, Philippines Submission 12 raised the characterisation of Chinese occupation and construction activities on Mischief Reef and Submission 14(a)-(c) concerned Chinese military interference with Philippine resupply of its marines at Second Thomas Shoal. Under LOSC Article 298(1) (b), parties can exempt themselves from arbitral jurisdiction in relation to their military activities. The question therefore arose as to whether the Chinese activities on Mischief Reef and Second Thomas Shoal were military, so as to be exempt from its jurisdiction.

Concerning the stand-off at Second Thomas Shoal, the Arbitral Tribunal concluded that it had no jurisdiction as the Chinese activities were military. Concerning Chinese land reclamation activities, the Tribunal disposed of the question of jurisdiction by giving great weight to China's own assurances that the activities were not military:

The Tribunal will not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level. Accordingly, the Tribunal accepts China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations on Mischief Reef.<sup>86</sup>

<sup>86</sup> Ibid, para. 1028.

Implicitly, Chinese land reclamation activities at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef and Subi Reef could also be characterised as military. The Tribunal demonstrated a lack of curiosity to characterise Chinese activities by means of examination of the actual conduct beyond formal statements. It implicitly invoked the doctrine of estoppel<sup>87</sup> without formally noting the doctrine's application. Thus, China's own statements rendered it subject to arbitral jurisdiction. However, in contrast, the Tribunal did deconstruct and critically examine objective facts against China's assurances concerning historic title and analysed their meaning. Further, the Arbitral Tribunal also employed independent technical experts to inform it concerning regional maritime hydrography and geography features, and Chinese environmental damage and hazardous navigation.

In relation to fisheries law enforcement activities in the exclusive economic zone, in its Final Award, the Arbitral Tribunal held that, Article 298(1)(b) did not exempt China from arbitral jurisdiction. Rather, the provision exempted a State from claims 'against a State's exercise of its sovereign rights in respect of living resources in its *own* exclusive economic zone'.<sup>88</sup> Although it would exempt China from claims against its exercise of law enforcement powers where those powers were exercised in its own exclusive economic zone only, it did not apply to Chinese exercise of law enforcement powers in the Philippines exclusive economic zone. Again, as none of the high tide features or rocks in the Spratly Islands was an island generating its own exclusive economic zone, China could not claim to be acting in its own zone.

87. I.e. a party cannot retract its own legal assurances so as to disadvantage another party who has relied upon them; see: *Temple of Preah Vihear (Cambodia v Thailand)* [] ICJ Reports, available at <https://www.icj-cij.org/en/case/45>

88. Final Award, para. 265.

The Arbitral Tribunal's reading to limit the law enforcement exemption to a coastal State's own waters gives clearly sensible meaning to Article 298(1)(b). In contrast, its implicit and selective use of estoppel to accord itself jurisdiction in circumstances where the exemption under Article 298(1)(b) would otherwise apply blemishes its Final Award. Had the Tribunal called in objective expert evidence, as it did in other matters where it was necessary to protect the interests of the non-participating party, it would have excluded at least Philippine Submission 12 concerning China's construction activities on Mischief Reef.

## 8. Admissibility: Improper procedure?

Concerning whether the arbitration was inadmissible because legal procedures had been improperly followed, the two issues examined were whether other alternative dispute resolution agreements were compulsory and binding, and whether third-party states that were not participating were indispensable to the proceedings because they would be directly affected.

### 8(i) Alternative binding agreements make arbitration inadmissible

In its Position Paper, China stated that negotiation was legally agreed to be the only means of dispute settlement, without time limit, and to the exclusion of all other means,<sup>89</sup> such that the Philippines was precluded from recourse to arbitration.<sup>90</sup> The PRC argued that by signing the Declaration on the Conduct of Parties in the South China Sea 2002 (DOC), the parties had undertaken mutual obligations (in paragraphs 4, 7, 8 and 10) to

89. Preliminary Judgement, para. 196.

90. Ibid, para. 190; China's Position Paper, paras. 3 and 30-44.

settle the dispute through friendly negotiations and consultation. China stated that this position was reinforced by other bilateral instruments reiterating this commitment.<sup>91</sup> It acknowledged that the DOC contained no express exclusion of other procedures but argued that the emphasis on direct negotiations impliedly excluded other means of resolution.

Part VIIA of the Preliminary Judgement considered the application of Article 281 of the Convention, which provides that if the parties have agreed to seek settlement by a peaceful means of their own choice, the LOSC procedures can be used only where no settlement has been reached and the other agreement does not exclude further procedures. The Tribunal found that the DOC was not a formal agreement, as the language used merely restated existing obligations,<sup>92</sup> and that it is an "aspirational political document."<sup>93</sup>

The Tribunal also held that an express exclusion of further LOSC dispute resolution procedures was required but that no exclusion was present in the DOC.<sup>94</sup> In this approach it departed from the ruling in the *Southern Bluefin Tuna case*,<sup>95</sup> which decided against requiring an express exclusion of alternative means of dispute resolution. Reasons for the Arbitral Tribunal's difference of view were not elaborated, instead contributing to fragmentation in international law. China's Position Paper had referred specifically to this aspect of the *Southern Bluefin Tuna case*, arguing that the Arbitral Tribunal had no compulsory jurisdiction where parties had agreed upon other procedures, even if those procedures were

<sup>91</sup> Preliminary Judgement, para. 203.

<sup>92</sup> Ibid, para. 215.

<sup>93</sup> Ibid, para. 217.

<sup>94</sup> Ibid, para. 223-225.

<sup>95</sup> *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, p. 1 at pp. 43-44, para. 57.

not expressly exclusive.<sup>96</sup> The Tribunal interpreted Article 281 differently, requiring parties to expressly opt out of LOSC compulsory dispute resolution procedures.<sup>97</sup> It noted that, even if LOSC dispute settlement procedures could be implicitly excluded, no exclusion could be implied from the DOC.<sup>98</sup> Pemmaraju considers that, while the Arbitral Tribunal was correct in finding that the DOC was insufficient to render the Arbitral Tribunal's jurisdiction inadmissible in this instance, as it is not a binding agreement, nevertheless it was incorrect to require in such an agreement the express exclusion of LOSC binding dispute resolution procedures. Rather, he says, 'what is decisive for exclusion is the clear intent and existence of consensus' between the parties in another agreement.<sup>99</sup> Although this is true, clear intent in an agreement usually is articulated in express terms.

The Tribunal also rejected China's argument that other bilateral statements amounted to an agreement between the parties, finding that these were merely repetitions of aspirational statements,<sup>100</sup> and they did not expressly exclude other procedures.<sup>101</sup> In addition, the Tribunal considered possible objections arising under instruments that were not specifically addressed in the Chinese Position Paper, i.e. the ASEAN Treaty of Amity and Cooperation in Southeast Asia 1976 (Chapter IV) and the Convention on Biological Diversity

<sup>96</sup> China Position Paper, para. 82; citing *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000, RIAA, Vol. XXIII, pp. 102-103, para. 62.

<sup>97</sup> Ibid, paras. 223-225. The Tribunal preferred interpretations of Article 281 given in the provisional measures orders as well as the separate opinion of Judge Keith the *Southern Bluefin Tuna case*, and views of the International Tribunal on the Law of the Sea (ITLOS) in the *MOx case (MOx Plant (Ireland v United Kingdom) Provisional Measures Order of 3 December 2001; ITLOS Reports 2001, p. 95)*.

<sup>98</sup> Preliminary Judgement, paras. 226-229.

<sup>99</sup> Pemmaraju, n. 43 above, p. 281.

<sup>100</sup> Ibid, para. 244.

<sup>101</sup> Ibid, para. 246.

1992 (Article 27). It held that these treaties contained no binding agreement to resolve disputes by other means and therefore its jurisdiction was not excluded.<sup>102</sup>

The Tribunal then considered whether its jurisdiction was excluded by operation of LOSC Article 282, concerning binding dispute resolution obligations under general, regional or bilateral agreements applicable in lieu of the procedure in the LOSC. China had not addressed the application of Article 282 in its Position Paper, however the Tribunal reconsidered the DOC, the Treaty of Amity, and the Convention on Biological Diversity in the context of Article 282.<sup>103</sup> It held that the DOC did not constitute a legally binding agreement for the same reasons outlined in the Article 281 discussion.<sup>104</sup> The Treaty of Amity did not contain an agreement to enter into binding dispute resolution<sup>105</sup> and did not exclude other forms of dispute resolution.<sup>106</sup> Finally, the Tribunal considered that the Convention on Biological Diversity did not constitute an agreement for the settlement of disputes within the meaning of Article 282.<sup>107</sup> These three documents were Potemkin villages, designed to give the impression of fair and comprehensive consideration, but were inhabited by 'straw men' put up to be knocked down.

In conclusion, in relation to alternative binding agreements, the Arbitral Tribunal undertook a technically meticulous and thorough analysis that resulted in its finding of no obstacle to its jurisdiction. In connection with LOSC Article 281, its reading of the provision as requiring an explicit opt out from LOSC compulsory binding dispute resolution, procedures is preferable

<sup>102</sup> Preliminary Judgement, paras. 266-268 and 286-287.

<sup>103</sup> Ibid, paras. 292-293.

<sup>104</sup> Ibid, para. 299.

<sup>105</sup> Ibid, para. 309.

<sup>106</sup> Ibid, para. 310.

<sup>107</sup> Ibid, para. 319 citing its reasons at paras. 281-289.

to the broad open-ended reading allowing implicit opt out. The latter, employed in the *Southern Bluefin Tuna* final decision, undermines Part XV of the Convention. In light of its findings under Article 281, the discussion of Article 282, the discussion was superfluous.

### 8(ii) Third-parties absences make arbitration inadmissible

China, in its position paper, had stated that 'the South China Sea issue involves a number of countries and it is no easy task to solve it'.<sup>108</sup> Nevertheless, China did not assert that third country interests were at stake, likely due to its own claim to exclusive historic title. Vietnam had lodged a communication with the Arbitral Tribunal in late 2014, prior to the preliminary hearing on jurisdiction, requesting that its rights not be prejudiced<sup>109</sup> and afterwards Malaysia lodged a confidential communication less than a month before the Final Award was handed down.<sup>110</sup> The two ASEAN countries have a common interest in their joint application for recognition of a extended continental shelf in the South China Sea.

At the preliminary hearing on jurisdiction, 7-13 July 2015, representatives from Malaysia, the Republic of Indonesia, the Socialist Republic of Viet Nam, the Kingdom of Thailand, and Japan attended as observers. Vietnam issued a Note Verbale to the Tribunal on 12 April 2014 requesting that its embassy in the Netherlands be furnished with copies of pleadings and any documents relevant to the proceedings.<sup>111</sup> Malaysia similarly requested copies of pleadings and other relevant documents on

<sup>108</sup> China Position Paper para. 47.

<sup>109</sup> Preliminary Judgement, para. 54, citing Letter from Vietnam (7 December 2014).

<sup>110</sup> Final Award para 105, citing Communication from the Ministry of Foreign Affairs of Malaysia (23 June 2016).

<sup>111</sup> Ibid, para. 47.

11 June 2015 'as its interests might be affected'.<sup>112</sup> On 26 June, Japan requested to attend the hearing on jurisdiction as an observer.<sup>113</sup> Vietnam and Indonesia requested on 29 June 2015 that they be allowed to send observers to the hearing.<sup>114</sup> Brunei Darussalam asked for transcripts and any other relevant information to be provided to it as soon as they become available.<sup>115</sup> On 3 July 2015, the Tribunal notified that it had agreed to requests by the governments of Vietnam, Indonesia, Japan, Malaysia and Thailand and to permit a small delegation of observers from each to attend the hearing on jurisdiction.<sup>116</sup> At the hearing on the merits, 24-26 and 30 November 2015, representatives from these countries again attended as observers. In addition, representatives from Australia and Singapore attended.<sup>117</sup> Thus, a wide range of interested third parties attended as observers and indicated no objection to the proceedings.

In its Preliminary Judgement, the Tribunal considered the issue of whether third parties were indispensable to the proceedings.<sup>118</sup> The participation of interested third parties as observers and the total absence of their objections or interventions might have been what inclined the Tribunal to deal with third parties in only 10 brief paragraphs as a relatively short part of the judgement. It noted that there were very few cases in which international legal proceedings had been declined due to the absence of indispensable third parties.<sup>119</sup> It distinguished those cases from the proceedings between the Philippines and China because, in each of them, the rights of third parties would not only have been affected but

<sup>112</sup> Ibid, para. 74.

<sup>113</sup> Ibid, para. 79.

<sup>114</sup> Ibid, para. 80.

<sup>115</sup> Ibid, para. 85.

<sup>116</sup> Ibid, para. 84.

<sup>117</sup> Final Award, para. 65-68.

<sup>118</sup> Preliminary Judgement, paras. 179-188.

<sup>119</sup> Ibid, para. 181.

"formed the very subject matter of the decision".<sup>120</sup> Further, in each of those cases "the lawfulness of activities by third States was in question, whereas here none of the Philippines' claims entail allegations of unlawful conduct by Vietnam or other third States".<sup>121</sup>

Third-party activities were decided not to form the 'very subject matter of the decision' of the Arbitral Tribunal in this case. A court is 'not necessarily prevented from adjudicating when the judgement it is asked to give might affect the legal interests of the state which is not a party to the case' if the decision would not amount to a direct determination on the lawfulness of third party actions.<sup>122</sup> However, Kaye notes an authoritative line of judicial decision-making in the law of the sea cases, not excluding but instead circumscribing jurisdiction where third parties rights would be affected. He argues that a more subtle approach that circumscribed jurisdiction would have been true to the fundamental principle and line of authority upholding the prerequisite of sovereign consent to jurisdiction in arbitrations.<sup>123</sup>

In this case, the rights of third parties were heavily impacted by the judgement and the lawfulness of their activities was drawn into serious doubt. The Arbitral Tribunal did decide that several

<sup>120</sup> Ibid, citing *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* ICJ Reports 1954, p. 19 at p. 32.

<sup>121</sup> Ibid, para. 181.

<sup>122</sup> *East Timor case (Portugal v Australia)* para. 34, citing *Certain Phosphates Lands in Nauru case (Nauru v Australia)* ICJ Reports 1992, p. 261, para. 55. Similarly, in the *Land and Maritime Boundary Case (Cameroon v Nigeria)*, the court held that it was able to rule.

<sup>123</sup> Stuart Kaye 'Jurisdiction in the South China Sea Arbitration: Application of the *Monetary Gold* Principle' in S. Jayakumar, Koh T., Beckman R., Davenport T., and Phan H.D. *The South China Sea Arbitration: The Legal Dimension* Edward Elgar 2018, 45, pp. 50-52.

disputed features were low tide elevations, that sovereignty was impossible for low tide elevations, and that construction of artificial islands on them within 200 nautical miles of the Philippine coast was illegal. Vietnam is believed to have reclaimed 'just over 120 acres of new land' for 10 existing islets in the South China Sea, Malaysia has reclaimed land at Swallow Reef, and Taiwan at Itu Aba Island.<sup>124</sup> Each claims sovereign rights over various other maritime features in the Spratly Islands. Philippine Submission 6 referred to Namyt and Sin Cowe, both occupied by Vietnam. In its Final Award, the Arbitral Tribunal concluded that China's construction activity at Mischief Reef in the Spratly Islands was illegal as it was conducted on a low tide elevation on the Philippine seabed.<sup>125</sup> This indicates that construction by third party States of other artificial islands on low tide elevations on the Philippine seabed could also be regarded as illegal. Similarly, the finding that none of the high tide features or rocks in the Spratly Islands is an island, including those claimed by third party States, means that none of them generate an EEZ. Thus, the merits findings had dramatic implications for third-party claims to EEZ entitlements in the South China Sea and did directly implicate the lawfulness of the activities of third parties such as Malaysia, Taiwan and Vietnam in the Spratly Islands area. Further, it decided that naturally occurring high tide maritime features such as Itu Aba Island in the Spratly Islands region did not generate EEZs, thereby directly affecting Taiwan's third party legal interests in relation to their maritime zone claims there. These issues were central to the matter decided and their maritime claims were directly affected.

Consequently, the Arbitral Tribunal should have addressed in

<sup>124</sup> Mostly at Spratly Island, Southwest Cay, Sin Cowe Island, and West Reef and, recently, at Ladd Reef: Centre for Strategic and International Studies Asia Maritime Transparency Initiative <https://amti.csis.org/island-tracker/>

<sup>125</sup> Final Award para. 1025.

more subtle detail whether to circumscribe aspects of its jurisdiction upon affected third party States. It can be supposed that the Tribunal's decision on the lawfulness of third-party State activities was principally facilitated by the absence of objection or intervention by the affected third-party observers themselves. Their willingness to allow the Arbitral Tribunal to decide on these matters suggests that they did not wish to draw the Arbitral Tribunal's attention to their claims. Conversely, by declining to address directly the impacts of its determination on third party interests, the Tribunal avoided addressing the prudence of its admitting these aspects of the case. This pragmatic approach ignores jurisprudence on direct effects on third parties and demonstrates assertiveness rather than discretion in the use of judicial power.

## 9. Sovereign resistance against judicial expansion

China responded fiercely to the Arbitral Tribunal judgements against it. The PRC rejected the preliminary judgement on jurisdiction and admissibility and also rejected the Arbitral Tribunal's final judgement on the merits.<sup>126</sup> It denounced the Tribunal as illegitimate, and its arbitrators as biased.<sup>127</sup> Accordingly,

<sup>126</sup> 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, 30 October 2015, available at <<http://www.china-embassy.org/eng/zgyw/t1310474.htm>>.

<sup>127</sup> E.g. Foreign Policy, Beijing: Japanese Judge Means South China Sea Tribunal is Biased (2016) available at <<http://foreignpolicy.com/2016/06/21/beijing-japanese-judge-means-south-china-sea-tribunal-is-biased-china-philippines-maritime-claims/>>. The Japanese President of the Permanent Court of Arbitration was required to step in to appoint arbitrators in the absence of Chinese participation in appointments. The members of the Arbitral Tribunal were all international lawyers of high standing: Judge Thomas A Mensah (Presiding Arbitrator), Judge Jean-Pierre Cot, Judge Stanislav Pawlak, Prof Alfred H.A. Soons, and Judge Rüdiger Wolfrum.



China will disregard the Arbitral Tribunal's decision concerning its own maritime activities in the South China Sea, and in relation to its future dealings with the Philippines or other regional littoral countries.

In its Position Paper, China had noted that the balance of State interests in Part XV of the Law of the Sea Convention, between what is subject to compulsory binding dispute resolution and what is not, had been a critical factor in the decision of many States to become parties to the Convention.<sup>128</sup> This position rejects a 'living constitution' notion of the agreed Convention package and holds a hint that China might withdraw from the Convention if its perception of that balance in Part XV is changed fundamentally by expansion of the limits of compulsory binding jurisdiction.

There has been a significant amount of other criticism of the Arbitral Tribunal's judgement by international law scholars.<sup>129</sup> In light of commonly uniform legal scholarly support for judicial mandate expansions in public international law, the criticisms of aspects of its assertions of jurisdiction is unusual and a surprise. A small part of the academic criticism might reflect the PRC's influence over some quarters of academe. For example, the *Chinese Journal of International Law* symposium on the arbitral decision judgement is a sharply worded rebuttal of the judgement.<sup>130</sup> However, for the most part the criticism indicates independently and genuinely identified problems in the reasoning of the judgement in respect of both some adventurous assertions of jurisdiction, and some substantive findings of law in the merits phase.<sup>131</sup>

<sup>128</sup> China Position Paper, paras. 77-78.

<sup>129</sup> E.g. Wolmesley n 42, Pemmaraju n 44, etc.

<sup>130</sup> Chinese Society of International Law 'The South China Sea Arbitration Awards: A Critical Study' 2018 *Chinese Journal of International Law* 2018, 207-748.

One of the risks posed by overly adventurous judicial bodies is pushback against them by sovereign States. Posner suggests that the International Court of Justice (ICJ) has been in relative decline since the 1960s, when changes in constituent States of the United Nations altered the ICJ's political composition and its judicial mission. For example, increasing use of advisory opinions in the ICJ have served political agendas and been conducive to judicial activism.<sup>132</sup> He notes consequent decline during the 1970s in ICJ contentious cases relative the number of State members, cessation of major States initiating cases, and disregard of its judgements.<sup>133</sup> During the 1980s, both France and the USA denied dispute resolution jurisdiction that the ICJ held was compulsory.<sup>134</sup> Several developed countries have formally reserved against aspects of its jurisdiction since then.

In the law of the sea, since China's denial of the jurisdiction

<sup>131</sup> The judgement on the merits seems to be teleological, in that it is designed to solve a series of political problems arising from competing maritime claims in the South China Sea: - by characterising all the maritime features as rocks instead of islands, the scope of claims is reduced and so is the competition between them.

<sup>132</sup> The Permanent International Court of Justice, predecessor to the ICJ, declined to give advice on grounds that the advisory procedure was being used to the avoid the need for State consent to procedures for judicial settlement of a dispute; see: *Status of Eastern Carelia* [1923] PCIJ Reports Series B, No. 5. The ICJ has never declined to give advice in situations of political conflict; see: *Western Sahara* (Advisory Opinion), [1974] ICJ Reports 12; *Legality of the use of nuclear weapons in armed conflict* (Advisory Opinion), [1996] ICJ Reports 66; *Legal consequences of the construction of a wall in the occupied Palestinian territory* (Advisory Opinion), [2004] ICJ Reports 136; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 403.

<sup>133</sup> Posner 135-149.

<sup>134</sup> *Military and paramilitary activities in and against Nicaragua* (*Nicaragua v USA*) [1984] ICJ Reports 392; *Australia and New Zealand v France* (*Nuclear tests' case*) [1973] ICJ Reports 457.

of the Arbitral Tribunal and rejection of its South China Sea judgement in 2016, Russia has denied the jurisdiction of the International Tribunal on the Law of the Sea (ITLOS) although ITLOS held that its jurisdiction was compulsory and an arbitral tribunal delivered a decision on the merits and awarded compensation to the Netherlands.<sup>135</sup> Indeed, ITLOS has been particularly adventurous to pursue a more politically significant role, demonstrating willingness to innovate an advisory jurisdiction despite doubts that it had the legal authority to do so.<sup>136</sup> However, the ITLOS case docket is slim relative to its wide range of members and its compulsory jurisdiction.<sup>137</sup> This suggests that ITLOS does not have the full confidence of States parties to the Law of the Sea Convention.

Apparently, sovereign pushback against global legalism can undermine international law and weaken the interstate order. It risks disrepute, disuse, and disobedience of the judiciary. Paradoxically, tribunals themselves pursuing expanded mandates can generate jurisprudential dysfunctionality, such as by a lack of hierarchy and of precedent, that each lead to inconsistent judgements, and by sectoral fragmentation.<sup>138</sup> To address these problems, more judicial diplomacy is necessary.

<sup>135</sup> *Netherlands v Russia ('Arctic Sunrise' case)*, ITLOS provisional measures (2013) [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Request\\_provisional\\_measures\\_en\\_withtranslations.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf) and arbitral award on the merits (2015) and compensation (2017) <https://pca-cpa.org/en/cases/21/>.

<sup>136</sup> See: Request for an Advisory Opinion Submitted by the Subregional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal), ITLOS Case no. 21, available at <<https://www.itlos.org/cases/list-of-cases/case-no-21/>> .

<sup>137</sup> There are 25 cases on the docket of the International Tribunal on the Law of the Sea (ITLOS) across its 25 year history. See list of cases available at <https://www.itlos.org/cases/list-of-cases/>.

<sup>138</sup> Triggs n 5 at 684; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 101.

Zarbiyev notes that 'the actual power that international judges may enjoy depends on numerous parameters ranging from the environment in which they work to the reception of their decisions'.<sup>139</sup> He considers whether these parameters might be used to craft judicial accountability mechanisms in international law. However, he finds that there are few effective means other than treaty withdrawal,<sup>140</sup> reservation,<sup>141</sup> or derogation.<sup>142</sup> Posner noted that reduced recourse by developed countries to the International Court of Justice as a form of their disengagement.<sup>143</sup> Limited mechanisms of political control might be possible in rare cases, such as appeal to the UN Security Council or through a political review process,<sup>144</sup> or by an overriding treaty action subsequent to a particular judgement.<sup>145</sup> In general, judicial

<sup>139</sup> Fuad Zarbiyev 'Judicial Activism in International Law a Conceptual Framework for Analysis' *Journal of International Dispute Settlement* vol 3 no 2 (2012) pp. 247-278. He identifies these parameters of judicial activism as: The conception of judicial function. The degree of determinacy in the system. The existence of a hierarchically structured judicial system. The prudential doctrines about the relationship between the judicial and political branches. The mechanisms of political control. The legitimating function of legal academics. The nature of the proceedings. Discursive constraints. Social legitimacy considerations.

<sup>140</sup> Bolivia, Ecuador and Venezuela withdrew (in 2007, 2009 and 2012, respectively) from the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID).

<sup>141</sup> Even middle powers with strong strategic interests in international rule of law, such as Australia and Canada, have lodged reservations to the jurisdiction of the ICJ in recent years.

<sup>142</sup> Concerning the European Court of Human Rights, France derogated in 2015 and Westminster was considering derogation in 2017.

<sup>143</sup> Posner, 137ff.

<sup>144</sup> E.g. high level Council of Europe conferences have been held in recent years on reform of the European Court of Human Rights, see: < <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>>

<sup>145</sup> Zarbiyev notes that the most frequently mentioned example of an international judicial decision being overturned through political processes is the reversal of the *Lotus case* (*France v Turkey*, PCIJ [1927]) by the 1952 Brussels Collision Convention and by the 1958 Geneva High Seas Convention.

performance review, national representation, and appointments processes are inefficient tools in international law. Further, due to the lack of elaborate prudential doctrines about the relationship between the judicial and political branches, 'there seems to be no room for the political question doctrine' in contemporary international case law and the related 'margin of appreciation' doctrine is not generally applicable and is substantially limited.<sup>146</sup>

## 10. Consequences for China and ASEAN

China is bound under the LOSC compulsory jurisdiction. As the Arbitral Tribunal was properly constituted and the decision was properly rendered under Annex VII, China is bound by the Tribunal's jurisdiction as a party to the arbitration. Article 296 (1) of the Convention provides that 'any decision rendered by a court or Tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to dispute'. Article 9 of Annex VII expressly addresses the situation of a nonparticipating party, providing that: '[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.' Article 11 of Annex VII, goes on to state that 'the award shall be final and without appeal ... it shall be complied with by the parties to the dispute.'

Disregard for the strict and binding nature of obligations under the LOSC is a feature of the PRC's approach over two decades to the rules of the Convention, however, as demonstrated by China's declared baselines that are excessive and inconsistent with Article 7 on straight baselines, the imposition of an East China Sea Air Defence Identification Zone that is inconsistent with the freedom of overflight in Article 58, and ongoing assertions

<sup>146</sup> Zarbiyev 261, citing Yuval Shany 'Towards an General Margin of Appreciation Doctrine in International Law' (2005) 16 European JIL 907.

of historic title to a territorial sea disassociated from land features. Indeed, the LOSC would seem to be deployed merely in a larger Chinese geopolitical strategy of securing control over regional seas. Therefore, China is unlikely to withdraw from the Convention, as it may continue to pursue strategic goals irrespective of the rules while remaining a party.

In light of the Tribunal's dismissal of the very notion of historic territorial seas in the law of the sea and its finding that there were no islands capable of supporting an economic life of their own in the Spratly Islands region, China's claim might be refined to base it upon sovereignty over specific rocks over which it can mount persuasive arguments in favour of sovereign claims. These arguments could be based upon *uti possideti juris* (i.e. successor states adopt the previous states boundaries), postcolonial *effectivités* (i.e. effective control), evidentiary maps, and recognition by third States.<sup>147</sup> However, rocks generate only territorial seas without EEZs.

Unlikely to be satisfied with this limited regional maritime jurisdiction, the PRC might renew bilateral negotiations with regional states. In the conclusions to its Position Paper, China noted that it has already negotiated maritime agreements with Vietnam, Japan, South Korea, and North Korea.<sup>148</sup> Bilateral

<sup>147</sup> Frontier Dispute (*Burkina Faso v Mali*), 1986 ICJ Reports 554 paras. 24 and 63; cited in Emma Kingdon 'A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute' 38 *Boston College International and Comparative Law Review* 129 (2015).

<sup>148</sup> Preliminary Judgement, para. 88: Vietnam - Agreement between the People's Republic Of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Seas 25 December 2000; Japan - Agreement on Fisheries between the People's Republic of China and Japan 11 November 1997; South Korea - Agreement on Fisheries between the Government of the People's Republic of China and the Government of the Republic of Korea 3 August 2000; and North Korea - Agreement between the Government of the People's Republic Of China and the Government of the Democratic People's Republic

negotiations have been preferred by the PRC as the pathway forward in regional maritime relations. China's greater economic and military weight give it a natural advantage in such negotiations, which could be oriented towards favourable terms for maritime delimitations and joint exploitation or development management regimes.

Chinese bilateral negotiations with ASEAN member countries that fail to progress might result in those individual States considering LOSC Part VX compulsory binding dispute resolution. However, without well-established claims to territory to reinforce their own positions, such as the Philippines have to Palawan, the threat of embarrassment might be mutual to China and ASEAN member states. Therefore, they would also be more likely to pursue bilateral agreements with a view to establishing joint exploitation and development zones for marine resources.<sup>149</sup> President Duterte of the Philippines, newly elected shortly after the Arbitral Tribunal's substantive judgement against China on the merits, announced that the Philippines would not press for implementation of the judgement.<sup>150</sup>

The future might see Brunei, Indonesia, Malaysia, the Philippines and Vietnam resort collectively to joint diplomacy to progress a multilateral framework for resolving disputed claims over these waters. Up until now, the 2002 Declaration of the Conduct of

of Korea for Joint Development of Oil Resources at Sea 24 December 2005.

<sup>149</sup> Robert Beckman sets out a series of recommendations for the furtherance of a regime of joint development zones in the region: 'Legal Framework for Joint Development in the South China Sea' in Shicun Wu, Mark Valencia and Nong Hong *UN Convention on the Law of the Sea and the South China Sea* Ashgate 2015, p. 251.

<sup>150</sup> Richerdj Javad Heydarian 'The perils of a Philippines, China joint development area in the South China Sea' 27 April 2018 Asian Maritime Transparency Initiative available at <https://amti.csis.org/perils-philippine-china-joint-development-scs/>.

Parties in the South China Sea and similar aspirational commitments to design mutually acceptable solutions with ASEAN member States served no function except as part of a tactical stalling game. Throughout the decades of ineffective multilateral negotiations, ASEAN countries and China each sought to change the facts on the water to their individual advantages where they could, through land reclamation, building fortifications and construction of artificial islands. However, China's rapid industrialisation in the past two decades enabled it to greatly accelerate its efforts and surge ahead in recent years to win this game, building a new military and geopolitical reality in the South China Sea.

Now, in the wake of the Arbitral Tribunal's decision, ASEAN countries might perceive that new alternatives arise: First, to reformulate their own maritime claims in light of the legal clarity provided by the Arbitral Tribunal as to the characterisation of maritime features in the South China Sea. Second, to leverage the weight of international law in collective bargaining that compensates for their bilateral disadvantages. Third, to propose a collective model framework for subregional joint exploitation and development zones in the South China Sea that would better accommodate their individual coastal interests. Thus, the changed legal environment might catalyse a revised approach to collective negotiations. Fourth, to breathe fresh life into the 2002 Declaration of Conduct in order to develop a regional code of conduct.

## 11. Conclusion

The Arbitral Tribunal's vigour in its assertions of jurisdiction belied weaknesses in its mandate over some matters pleaded by the 15 Philippine submissions. These weaknesses apparent in the Arbitral Tribunal's assertion of jurisdiction occur in its:

(1) Deciding matters that indirectly determined sovereignty over land (where sovereign title was beyond the Arbitral Tribunal's mandate), i.e. whether certain maritime features were 'rocks' that could be sovereign land, as compared to low-tide elevations over which can be only territorial waters;

(2) Selecting Chinese political statements and instances of maritime conduct that reinforced the Tribunal's finding that China was not claiming full sovereignty within the 'nine-dash line', rather than addressing contrary instances that would support a Chinese sui generis historic waters title claim (and inhibit the Tribunal's jurisdiction);

(3) Declining to seek independent expert evidence for characterising Chinese activities as non-military activities (beyond the Tribunal's jurisdiction) although such advice was sought in relation to other matters supporting its jurisdiction; and

(4) Deciding on submissions that directly affected the legal rights of third parties, i.e. island building by Malaysia, Taiwan and Vietnam within the area of the Philippine claim to Scarborough Reef (rather than considering these inadmissible). Nevertheless, because those States participated as observers and made no objections, the Tribunal might have proceeded because they acquiesced to the Tribunal's jurisdiction.

Using the three categories of jurisdictional objection set out in section 5 above for analysis, the Arbitral Tribunal's careful disaggregating of jurisdictional issues in its judgement outlined a more powerful case for its jurisdiction than against for the issues it decided, other than those described in the paragraph above.

(1) The Tribunal correctly found that preliminary conditions to its jurisdiction were met: a dispute existed; there was no failure to exchange views, or abuse of process, or lack of good faith.

(2) The Philippine submission on Chinese law enforcement activities conducted in its coastal waters without its permission was justiciable, so long as the activity was not within the territorial waters of a high tide rock claimed by China. It would make no sense to decline jurisdiction under the Convention in every inane instance that sovereignty is asserted.

(3) Except for the caveat on judging the legality of third party island building activities on low tide elevations in Scarborough Reef, the case was admissible, as no other compulsory binding dispute resolution agreements applied.

The weaknesses in some of the findings on jurisdiction give a strong sense of the Arbitral Tribunal's purpose, i.e. to use legal authority, to fulfil a judicial mission, to make international law, to construct a global legal order. It is a striking example of global legalism. Yet, the judgement will be largely disregarded by China because geopolitical realities in the South China Sea mean that other arrangements must be accommodated. A 'perception of unfairness' in the Tribunal's assertion of jurisdiction might even undermine the authority of the 'landmark rulings of the judgement itself'.<sup>151</sup> The Philippines v China arbitral judgement and global legalism are quixotic.

Judicialising of international relations is likely to continue gathering momentum in the near future, nevertheless. There are no finely tuned and effective tools for guiding the ideological inclinations and overseeing the professionalism of an independent standing international judiciary. In law of the sea, binding compulsory dispute resolution adds force to the momentum of global legalism, which will sail onwards into tempestuous waters.

<sup>151</sup> Thomas J. Schoenbaun 'The South China Arbitration Decision: The Need for Clarification' *American Journal of International Law* 2016, p. 290. Also: Pemmaraju, n. 37 above.

