1. *The South China Sea Arbitration:* laying the groundwork

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I. INTRODUCTION

The South China Sea is the largest sea in Southeast Asia bordered by six Southeast Asian states (Malaysia, Brunei, the Philippines, Indonesia, Singapore and Vietnam), China and Taiwan. It contains critical sea lanes of communication between the Pacific Ocean and the Indian Ocean and is reported to contain a vast amount of natural resources. The South China Sea is also the stage for one of the most complex disputes of contemporary times, involving China, Taiwan and four of their Southeast Asian neighbours (the Philippines, Vietnam, Malaysia and Brunei).¹ The disputes have existed for decades and have periodically erupted, exacerbating tensions and challenging regional peace and security.

On 22 January 2013, in a move that took the international community by surprise, the Philippines initiated compulsory arbitration against China under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) with regard to their disputes in the South China Sea. The Award on Jurisdiction and Admissibility issued on 29 October 2015 and the Final Award issued on 12 July 2016 have been the most anticipated decisions from an international tribunal in the law of the sea, since the entry into force of UNCLOS in 1994. The decisions of the Arbitral Tribunal have been mired in controversy, not least because of China's non-participation in the proceedings and subsequent rejection and strong criticism of the Awards as null and void. From a scholarly perspective, reaction to the legal reasoning of the Arbitral Tribunal has similarly been the subject of much debate. For some scholars, both Awards shed light on important but previously unclear legal issues and consequently represent

¹ An overview of these disputes will be given in Section II of this chapter.

significant and welcome developments in the law of the sea that can only strengthen the peaceful order of the oceans. Other scholars question the Arbitral Tribunal's legal reasoning and cast doubt on the contribution that the Awards have made to the development of the law of the sea under the UNCLOS regime.

Regardless of one's position on the arbitral process and its outcome, the Awards have the potential to transform the legal landscape underpinning the South China Sea disputes. It is therefore vital that the significant findings of the Awards and the implications of the Awards for the South China Sea disputes in particular and the law of the sea in general be examined and discussed. To this end, the Centre for International Law, continuing its tradition of contributing to scholarly discussion on the South China Sea disputes,² brought together a group of distinguished law of the sea experts on 5–6 January 2017 to discuss key aspects of the Awards. The issues discussed range from jurisdictional issues, historic rights, and the status and entitlement of features in the South China Sea, to the protection of the marine environment. This examination of the Awards from different (and sometimes opposing) lenses facilitates a greater understanding of the legal implications of the Awards and their contribution to the development of the law of the sea.

The following sections provide the background and context necessary to understand the true import of the Awards.

II. THE SOUTH CHINA SEA DISPUTES: AN OVERVIEW

From a legal perspective, there are three related but distinct aspects to the South China Sea disputes: the sovereignty disputes, the maritime entitlement disputes, and the maritime delimitation disputes. These will be elaborated on in the following sections.

Sovereignty Disputes

One of the core disputes between China, Taiwan, the Philippines, Vietnam, Malaysia and Brunei (the claimants) is the competing sovereignty claims

² This book is the third book on the South China Sea disputes in the NUS Centre for International Law Series published by Edward Elgar Publishing. The first book is *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (2013). The second is *The South China Sea Disputes and Law of the Sea* (2014).

over maritime features³ scattered throughout the South China Sea, aptly described as a ‘labyrinth of detached shoals’.⁴ The most complicated disputes are over the Spratly Islands, as they involve the greatest number of claimants and maritime features. It has been said that there are over ‘600 reefs, islets, shoals and rocky protrusions’ in the Spratly Islands,⁵ although estimates have varied greatly over the years.⁶ The sovereignty claims are based on an intricate combination of historical discovery and usage, cession by colonial powers, and effective occupation.⁷ The ultimate victor in the territorial sovereignty disputes will be likely determined by customary international law principles on territorial acquisition, developed by international courts and tribunals. However, these sovereignty disputes can be submitted to an international court or tribunal only if both parties agree, a prospect that has always been highly unlikely given that the claimants have much at stake.

Maritime Entitlement Disputes

The second core aspect of the South China Sea disputes relates to maritime entitlement in the South China Sea, an issue governed by UNCLOS.

³ There are five groups of features in the South China Sea: the Pratas Islands (claimed by China and Taiwan), the Paracel Islands (claimed by China, Taiwan and Vietnam), Macclesfield Bank (claimed by China and Taiwan), Scarborough Shoal (claimed by China, Taiwan and the Philippines) and the Spratly Islands (claimed by China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei).

⁴ AG Findlay, *Indian Archipelago and China Directory* (3rd edn, Richard Holmes Laurie 1889) vi.

⁵ *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Memorial of the Philippines (30 March 2014) PCA 2013-19, Vol I, 79, para 2.12.

⁶ For example, Clive Schofield observes that it has been suggested that there are 400–500 features, whereas others suggest a more modest range between 150 and 180. See Clive Schofield, ‘What’s at Stake in the South China Sea? Geographical and Geopolitical Considerations’ in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar Publishing 2013) 11, 20–21.

⁷ For a more detailed discussion of the competing sovereignty claims, see, among others, Christopher C Joyner, ‘The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy and Geopolitics in the South China Sea’ (1998) 13 *International Journal of Marine and Coastal Law* 193; Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (Kluwer Law International 2000); Stein Tønnesson, ‘An International History of the Dispute in the South China Sea’ (Working Paper, East Asian Institute, National University of Singapore 2001); and Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (Yale University Press 2014).

UNCLOS was adopted after nine arduous years of contentious negotiations and was intended to establish a universal legal order for the oceans to replace the chaotic and uncertain legal regime that previously characterised uses of the ocean.⁸ UNCLOS is now almost universally accepted, with 168 parties including the European Union.⁹ All of the coastal states in East Asia and Southeast Asia are parties except Cambodia and the Democratic People's Republic of Korea.

UNCLOS gives coastal states the right to claim from baselines¹⁰ drawn along their continental land territory, a 12 NM territorial sea and a 200 NM exclusive economic zone (EEZ). UNCLOS recognises that each coastal state has inherent rights over its continental shelf up to a distance of 200 NM or an extended continental shelf beyond 200 NM, depending on whether the continental shelf meets certain geological and geomorphological requirements.¹¹ Article 121 of UNCLOS provides that an 'island' is defined as 'a naturally formed area of land, surrounded by water, which is *above water at high tide*',¹² and is entitled to all maritime zones afforded to land territory,¹³ unless the island is considered a rock, 'which cannot sustain human habitation or economic life of [its] own', in which case, it is entitled to only a 12 NM territorial sea.¹⁴ This is in contrast to a low-tide elevation, which is defined in Article 13 as 'a naturally formed area of land which is surrounded by and above water at low tide but *submerged at high tide*'.¹⁵ UNCLOS provides that, unlike islands, low-tide elevations are not entitled to maritime zones of their own, although, if located within the 12 NM territorial sea, they can be used as a baseline for measuring the breadth of the territorial sea.¹⁶

All the Southeast Asian claimants have made claims to a 200 NM EEZ and continental shelf from their mainland and/or their archipelago. The

⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). As at 15 January 2014, UNCLOS has 166 parties (including the European Union), with Niger being the latest to accede to the Convention on 7 August 2013.

⁹ United Nations Treaties Collection, Status of Treaties Deposited with the Secretary-General. Status as of 3 January 2017 <<http://treaties.un.org/pages/ParticipationStatus.aspx>> accessed 3 January 2017.

¹⁰ UNCLOS lays out certain rules for drawing baselines. The standard rule is the low-water line along the coast (art 5) but in certain exceptional cases, states can draw straight baselines (see arts 7 and 47).

¹¹ UNCLOS (n 8) art 76.

¹² *ibid* art 121(1) (emphasis added).

¹³ *ibid* art 121(2).

¹⁴ *ibid* art 121(3).

¹⁵ *ibid* art 13(1) (emphasis added).

¹⁶ *ibid* arts 13(1), 13(2).

Philippines proclaimed archipelagic baselines around its archipelago in 2009,¹⁷ finally abandoning its excessive maritime claims and making its claim consistent with UNCLOS.¹⁸ The Philippines' claims conformed to the rights afforded to it under UNCLOS, under the country's 2009 archipelagic baselines legislation, coupled with its previously enacted continental shelf legislation¹⁹ and EEZ legislation that claimed a 200 NM EEZ from its baselines.²⁰ Similarly, Brunei,²¹ Malaysia²² and Vietnam²³ have each claimed a 200 NM EEZ and continental shelf from its baselines drawn around their mainland coasts, pursuant to UNCLOS.²⁴ In addition,

¹⁷ See Republic Act No 9522 (Philippines) 10 March 2009.

¹⁸ The Philippines previously claimed that the territorial borders around the Philippines were provided by the treaty limits established by two international treaties between the United States and Spain (the 1898 Treaty of Paris, the Cession Treaty of 1900) and one treaty between the United States and Great Britain (1930 Treaty of Washington), which form a rectangle around the main archipelago of the Philippines. In 1961 the Philippines enacted straight baseline legislation, which provided that all waters within the baselines are considered inland or internal waters of the Philippines, and that all the waters from the baselines to the international treaty limits form part of the territorial sea of the Philippines. See Republic Act No 3046 (Philippines) 17 June 1961; Robert Beckman and Tara Davenport, 'CLCS Submission and Claims in the South China Sea' in Tran Troung Thuy (ed), *The South China Sea: Towards a Region of Peace, Security and Cooperation* (The Gioi Publishers 2011) 197.

¹⁹ The Philippines made its first continental shelf claim in 1949 of '[a]ll natural deposits or occurrences of petroleum or natural gas in public and/or private lands in the Philippines, whether found in, on or under ... submerged lands within the territorial waters or on the continental shelf ...' (Republic Act No 387 (Philippines) 18 June 1949, art 3). Presidential Proclamation No 370 of 1968 also asserted the Philippines' exclusive jurisdiction and control over the continental shelf (Republic of the Philippines, Proclamation No 370 (Philippines) 20 March 1968).

²⁰ Presidential Decree No 1599 (Philippines) 11 June 1978.

²¹ Declaration on the Exclusive Economic Zone (Brunei) 21 July 1993; Royal Continental Shelf Proclamation 1954 No S 41 (Brunei) 30 June 1954.

²² See Exclusive Economic Zone Act 1984 (Malaysia) Act No 311, 24 December 1984; Continental Shelf Act 1966 (Malaysia) Act No 57, 28 July 1966 (as amended by Act No 83, 1 August 1972).

²³ Socialist Republic of Viet Nam, 'Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977' <www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf> accessed 26 October 2017.

²⁴ Vietnam claimed straight baselines in 1977 and implemented them in 1982, which has been protested as not being permitted under Article 7 of UNCLOS by the United States and Thailand: see Schofield (n 6) 14–15. Malaysia is also said to have claimed straight baselines. This has been inferred from an examination of official maps such as its 1979 *Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia*. See Schofield (n 6) 16–17.

Malaysia and Vietnam have made a joint submission to the Commission on the Limits of the Continental Shelf (CLCS) claiming an extended continental shelf in the southern part of the South China Sea. Vietnam has made a submission to the CLCS for an area southeast of the Paracel Islands.²⁵ Brunei has not made a submission to the CLCS but has submitted preliminary information on the outer limits of its continental shelf in the South China Sea.²⁶ The Philippines has not made a submission to the CLCS in respect of the South China Sea but has done so in relation to the Benham Rise region in the Pacific, where it also reserved its rights to make other submissions for other areas of continental shelf beyond 200 NM.²⁷

There has been a great deal of uncertainty as to the status of features in the Spratly Islands, namely whether they are *islands*, which are above water at high tide (governed by Article 121 of UNCLOS), or *low-tide elevations*, which are submerged at high tide but above water at low tide (governed by Article 13 of UNCLOS), and whether the islands are entitled to the full suite of maritime zones under UNCLOS or are rocks entitled to only a 12 NM territorial sea under Article 121 of UNCLOS.²⁸ Moreover, prior to 2009, it was not clear whether the Southeast Asian claimants also claimed a 200 NM EEZ or continental shelf from the features they claimed in the Spratly Islands.²⁹ However, by the time of the initiation of the arbitral

²⁵ United Nations Division for Ocean Affairs and Law of the Sea, 'Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Socialist Republic of Viet Nam' <www.un.org/depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm> accessed 26 October 2017.

²⁶ Brunei Darussalam, 'Preliminary Submission Concerning the Outer Limits of its Continental Shelf', Preliminary Submission to the Secretary-General (12 May 2009) <www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn_2009preliminaryinformation.pdf> accessed 26 October 2017.

²⁷ Republic of the Philippines, 'A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea' (8 April 2009) <www.un.org/depts/los/clcs_new/submissions_files/phl22_09/phl_esummary.pdf> accessed 26 October 2017.

²⁸ Schofield (n 6) 20–22.

²⁹ For example, with regard to the Philippines, its Presidential Decree No 1596 of 1978 formally declared the features in the Kalayaan Island Group (KIG) to be subject to the sovereignty of the Philippines and stated that 'the sea-bed, sub-soil, continental margin and air space shall belong and be subject to the sovereignty of the Philippines', which would imply it is claiming a continental shelf from the KIG. See Presidential Decree No 1596 (Philippines) 11 June 1978. It has also been argued that the Philippines' 1978 EEZ legislation can be interpreted to be claiming an EEZ around the KIG, as it states that the 'exclusive economic zone shall extend

proceedings in 2013 by the Philippines, it was clear that the Philippines, Malaysia and Vietnam had taken the position that the disputed features in the Spratly Islands, which qualified as high-tide features, were entitled to, at the most, a 12 NM territorial sea,³⁰ and that their claims to an EEZ/continental shelf in the South China Sea would be confined to maritime zones claimed from their mainland.³¹

Certain aspects of China's claims in the South China Sea have been shrouded in arguably deliberate ambiguity. China has claimed a territorial sea, an EEZ and a continental shelf from its territorial sea baselines.³² It has declared its straight territorial sea baselines around its mainland coast. With regard to the offshore features in the South China Sea, China has only declared straight baselines in relation to the Paracels but has not as yet done so in relation to the Spratly Islands, although it has stated that it reserves the right to do so at a later date.³³ China's 1992 legislation on the Territorial Sea and Contiguous Zone³⁴ explicitly claims a 12 NM territorial sea around the Spratly Islands, but its 1998 Exclusive Economic Zone and Continental Shelf Legislation does not expressly assert an EEZ or continental shelf claim from the Spratly Islands.³⁵ Nonetheless, in its 2009 note verbale to the United Nations (UN) in response to the joint CLCS submission by Vietnam and Malaysia, China stated that it had 'indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys *sovereign rights and jurisdiction over the relevant waters* as well as the seabed and subsoil thereof (see attached map)'.³⁶ This

to a distance of 200 nm beyond and from the baselines from which the territorial sea is measured'. See Mark J Valencia, Jon M Van Dyke and Noel A Ludwig, *Sharing the Resources of the South China Sea* (Kluwer Law International 1997) 35. The KIG is not used as basepoints in the Philippines' 2009 Archipelagic Baselines, but it does state that the baseline in the KIG shall be determined as a 'Regime of Islands' under the Republic of the Philippines consistent with Article 121 of UNCLOS. See Republic Act No 9522 (Philippines) 10 March 2009, s 2.

³⁰ See Beckman and Davenport (n 18) 204–5.

³¹ *ibid.*

³² People's Republic of China, Law on the Territorial Sea and Contiguous Zone, 25 February 1992.

³³ People's Republic of China, Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, 15 May 1996.

³⁴ Law on the Territorial Sea and Contiguous Zone (n 32) art 2.

³⁵ People's Republic of China, Exclusive Economic Zone and Continental Shelf Act, 26 June 1998.

³⁶ Permanent Mission of the People's Republic of China to the United Nations, 'Note Verbale to the Secretary-General of the United Nations' (Translation, 7 May 2009) CML/17/2009 (emphasis added). See p. xviii in this book for the map.

language on sovereign rights and jurisdiction is taken directly from the EEZ/continental shelf regime, which could imply that China was claiming an EEZ and continental shelf from the Spratly Islands. China made this explicit two years later when it stated in another note verbale to the UN that under the relevant provisions of UNCLOS, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), 'China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf'.³⁷ Clearly, China is claiming the full suite of maritime zones from the Spratly Islands as a whole.

What then of China's nine-dash line? As is well known, the nine-dash line map was published by the Republic of China in 1948 in the 'Map of the South China Sea Islands'. The nine-dash line initially appeared as 11 interrupted lines drawn in a U-shape around most of the features in the South China Sea and was subsequently modified to nine interrupted lines.³⁸ Between 1948 and 2009, China did not officially clarify the meaning of the nine-dash line or rely on it in a public document. Some commentators have opined that the nine-dash line map represents the limits of the Chinese territorial claim in the whole area, including the features, the sea, the airspace, the seabed and all the resources contained therein, equivalent to a historic waters claim. Others have argued that the nine-dash line map indicates the extent of the area over which China has some form of historic rights, a conclusion that gains support when one considers that China's 1998 EEZ and Continental Shelf Act states that 'the enjoyment of the historic rights of the PRC shall not be in any way affected by the regulations provided in this law'.³⁹ Another less extreme interpretation is that China claims sovereignty over all of the islands inside the nine-dash line.⁴⁰ In its 2009 note verbale to the UN discussed above, China asserted its sovereignty over the Spratly Islands and adjacent waters and its sovereign rights and jurisdiction in relevant

³⁷ Permanent Mission of the People's Republic of China to the United Nations, 'Note Verbale to the Secretary-General of the United Nations' (Translation, 14 April 2011) CML/8/2011.

³⁸ Two of the interrupted lines around the Gulf of Tonkin area were later deleted, hence the emergence of the 'nine-dash line'.

³⁹ Exclusive Economic Zone and Continental Shelf Act (n 35).

⁴⁰ For the different interpretations of the nine-dash line, see Zou Keyuan, 'The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands' (1999) 14(1) *International Journal of Marine and Coastal Law* 27, 5.

waters, and attached the nine-dash line map. The attachment of the nine-dash map caused some consternation among the Southeast Asian states. Indonesia, for example, highlighted that there has been ‘no clear explanation as to the legal basis, the method of drawing and the status of those separated dotted lines’.⁴¹

The result is a multitude of competing claims of rights and jurisdiction in the South China Sea from both the mainlands of littoral states and from the offshore features. China, in particular, has been asserting rights and jurisdiction, fishing or issuing oil concessions, or halting the oil exploration and exploitation activities of Southeast Asian states in their EEZ/continental shelf, including Vietnam, the Philippines, Malaysia, Brunei and even Indonesia (traditionally considered a non-claimant state). Indeed, it was China’s actions of effectively blocking Filipino fishermen from fishing in Scarborough Shoal (located in the EEZ of the Philippines) that prompted the Philippines to initiate Annex VII arbitral proceedings in 2013. Presumably, China believes it is entitled to undertake these actions, because of a putative EEZ/continental shelf from the offshore features and/or based on the nine-dash line map.

Maritime Delimitation Disputes

The third aspect of the South China Sea disputes is maritime delimitation. In the normal course of events, overlapping claims would be subject to maritime delimitation, which is also governed by UNCLOS. UNCLOS sets out general principles on maritime delimitation in the territorial sea, EEZ and continental shelf,⁴² to which international courts and tribunals have given legal flesh over the years by adopting a certain methodology in drawing boundaries. Maritime delimitation in the South China Sea can only be done once sovereignty over the features and the corresponding maritime entitlements have been decided, but even then maritime delimitation is not straightforward. If the Spratly Islands or the features in the Spratly Islands are indeed entitled to an EEZ/continental shelf, the issue would then be what effect should be given to the Spratly Islands vis-à-vis maritime delimitation with the coasts of the mainland of other states.

⁴¹ Indonesia’s Note was submitted in response to China’s Note (n 36) on the Joint CLCS Submission of Malaysia and Vietnam. Permanent Mission of the Republic of Indonesia to the United Nations, ‘Note Verbale to the Secretary-General of the United Nations’ (Unofficial translation, 8 July 2010) 480/POL-703/VII/10.

⁴² See UNCLOS (n 8) arts 15, 74, 83.

III. THE *SOUTH CHINA SEA* ARBITRATION

UNCLOS Dispute Settlement

As a preliminary matter, it is necessary to understand the elaborate and complex dispute settlement regime established under UNCLOS. The key element in the dispute settlement regime is provided in Section 2 of Part XV of UNCLOS according to which states parties consent in advance to a system of compulsory procedures that will result in a legally binding decision by an international court or arbitral tribunal. The general rule in the UNCLOS dispute settlement regime is that if a dispute arises between two states parties on the interpretation or application of any provision of UNCLOS, and that dispute cannot be resolved by negotiation, either party to the dispute may unilaterally institute proceedings to have the dispute resolved by an international court or arbitral tribunal.⁴³ The consent of the other party to this procedure for a particular dispute is not required, because the other party effectively gave its consent to these procedures when it became a party to UNCLOS.

There are, however, some conditions, limitations and exceptions to the applicability of UNCLOS compulsory dispute settlement entailing binding decisions. First, the dispute settlement procedures in UNCLOS apply only to disputes concerning the interpretation or application of the provisions of UNCLOS.⁴⁴ As UNCLOS has no provisions setting out how to determine which state has the better sovereignty claim over a disputed island, the dispute settlement regime in UNCLOS cannot be invoked to resolve such disputes. Second, the procedural requirements set out in Section 1 of Part XV must be met before the compulsory procedures entailing binding decisions in Section 2 can be instituted.⁴⁵ This includes an obligation for the parties to exchange views and attempt to resolve their disputes by another peaceful means. Third, UNCLOS provides that states parties may make a formal declaration to the United Nations Secretary-General stating that they do not accept the system of compulsory procedures entailing binding decisions for certain categories of disputes.⁴⁶ The categories include disputes on the provisions on the delimitation of maritime boundaries or provisions involving historic bays or titles, disputes on military activities, and disputes on certain law

⁴³ *ibid* art 286.

⁴⁴ *ibid* art 279.

⁴⁵ *ibid* art 286.

⁴⁶ *ibid* art 298.

enforcement activities.⁴⁷ Fourth, UNCLOS provides that certain disputes relating to the exercise by a coastal state of rights and jurisdiction over fisheries and marine scientific research in its EEZ are not subject to the compulsory binding procedures in Section 2 of Part XV.⁴⁸

Section 2 of Part XV provides that states parties can elect in advance to indicate whether they prefer to have their disputes heard before the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal. When the parties to a dispute have not chosen the same forum or have not indicated a choice, UNCLOS provides that a dispute will be heard by an arbitral tribunal established under Annex VII of UNCLOS.⁴⁹ Article 3 of UNCLOS Annex VII provides for the constitution of the arbitral tribunal, unless the parties otherwise agree. The tribunal is to consist of five members. The party instituting the proceedings appoints one arbitrator when it institutes the proceedings. The other party then has 30 days to appoint its arbitrator. The remaining three arbitrators are to be appointed by agreement between the parties, and one of these three will be the president of the tribunal. The President of ITLOS shall make the necessary appointments if the parties fail to do so.

If one of the parties to the dispute believes that the court or tribunal has no jurisdiction to hear the dispute for any of the above reasons, it can raise an objection to the jurisdiction of the tribunal. It is the court or arbitral tribunal that finally decides whether it has jurisdiction, not the state that is challenging jurisdiction. This is consistent with the general principle of law known as the doctrine of *competence de la competence*, whereby a court or arbitral tribunal must have the power to determine its own jurisdiction, so that the procedures of peaceful dispute resolution cannot be unilaterally blocked each time a party raises a challenge to the jurisdiction of that tribunal.

To prevent a state party from unilaterally frustrating the peaceful dispute resolution procedures of UNCLOS, Article 9 of Annex VII provides that if one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and make an award. Before making an award, the arbitral tribunal must satisfy itself that two requirements have been met. First, it must be satisfied that it has jurisdiction over the dispute. Second, it must be satisfied that the claim is well founded in fact and in

⁴⁷ China made an Article 298 Declaration on 25 August 2006 excluding the compulsory procedures in Section 2 of Part XV for all of the categories of disputes listed in Article 298.

⁴⁸ UNCLOS (n 8) art 297.

⁴⁹ *ibid* art 287.

law. If the arbitral tribunal decides that these two requirements are met, it can issue an award, and the award will be binding on the state that has elected not to appear. The decision rendered by a court or tribunal having jurisdiction is final and must be complied with by all the parties to the dispute.⁵⁰

The South China Sea Arbitral Process

On 22 January 2013, the Philippines initiated compulsory arbitration against China under Annex VII of UNCLOS. The Philippines characterised its claims as one of maritime entitlement and denied any connection to disputed sovereignty over the Spratly Islands or delimitation.⁵¹ The Philippines claimed that: (i) China's claims based on 'historic rights' encompassed within its nine-dash line were inconsistent with UNCLOS; (ii) certain features occupied by China were either low-tide elevations not subject to sovereignty claims and incapable of generating maritime zones, or rocks entitled to only a 12 NM territorial sea; (iii) China had interfered with the exercise of the Philippines' sovereign rights and freedoms in its EEZ including carrying out fishing activities and land reclamation activities, which harmed the marine environment; and (iv) certain actions by China during the arbitral dispute constituted an aggravation of the dispute.

The Philippines appointed Rüdiger Wolfrum, a judge (at that time) on ITLOS, to serve as its arbitrator. On 19 February 2013, China presented the Philippines with a diplomatic note in which it described its position on the South China Sea issues and rejected the Philippines' Notification and Statement of Claim.⁵² Thereafter China's policy was one of non-appearance and non-participation in the case.

Article 3 of Annex VII provides that if the other party fails to appoint its arbitrator or if the two parties cannot agree on the remaining three arbitrators, the party initiating the case may request the President of ITLOS to make the remaining appointments from the List of Arbitrators nominated by states parties in accordance with Article 2 of Annex VII. The ITLOS President appointed Stanislaw Pawlak of Poland (current judge of ITLOS) as China's arbitrator and Jean-Pierre Cot of France

⁵⁰ *ibid* art 296.

⁵¹ *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Award (12 July 2016) PCA 2013-19 (Final Award) paras 7–9.

⁵² *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Press Release (27 August 2013) <www.pcacases.com/web/sendAttach/227> accessed 2 November 2017.

(current judge of ITLOS), Professor Alfred Soons of the Netherlands and Thomas Mensah of Ghana (former President of ITLOS) as the three other arbitrators.

On 12 July 2013, the Arbitral Tribunal appointed the Permanent Court of Arbitration (PCA) as Registry for the case.⁵³ On 27 August 2013, the Arbitral Tribunal issued Procedural Order Number 1, adopting Rules of Procedure as provided in Article 5 of Annex VII, and fixing 30 March 2014 as the date for the Philippines to submit its Memorial and 15 December 2014 as the date for China to submit a Counter-Memorial. The Philippines submitted its Memorial on 30 March 2014. Notably, although China continued to assert its non-participation in the proceedings, on 7 December 2014 the Ministry of Foreign Affairs of China published a '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',⁵⁴ setting out the position of the Chinese Government on why the Arbitral Tribunal had no jurisdiction in the case. As a result of this, the Arbitral Tribunal requested the Philippines to make a supplemental written submission. The Arbitral Tribunal also decided to treat China's communications, including its Position Paper, as constituting objections to its jurisdiction. The Arbitral Tribunal then decided to bifurcate the case and hold a separate hearing on jurisdiction and admissibility,⁵⁵ which gave China another opportunity to formally present its views on jurisdiction to the Arbitral Tribunal. China did not, however, participate in the oral hearings.

On 29 October 2015, the Arbitral Tribunal issued its Award on Jurisdiction and Admissibility, in which it addressed the issues of jurisdiction raised in China's Position Paper, as well as other issues of jurisdiction that members of the Arbitral Tribunal had requested the Philippines to address in its supplemental written submission and in the oral hearings. In late November 2015, oral hearings were held on the merits and the remaining issues of jurisdiction. On 12 July 2016, the Arbitral Tribunal issued its Final Award.

⁵³ Final Award (n 51) para 31.

⁵⁴ Ministry of Foreign Affairs of the People's Republic of China, '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) <www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 17 October 2017 (Position Paper).

⁵⁵ *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Award on Jurisdiction and Admissibility (29 October 2015) PCA 2013-19, para 284.

The Awards: A Brief Overview

In the Award on Jurisdiction and Admissibility, the Arbitral Tribunal unanimously found that the Philippines' submissions reflect disputes with China concerning the interpretation or application of UNCLOS. The Arbitral Tribunal unanimously rejected the arguments China made in its Position Paper that the dispute was about sovereignty over the islands in the South China Sea. The Arbitral Tribunal held that the preconditions to the exercise of the Tribunal's jurisdiction were met, as the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea does not constitute an agreement precluding the Tribunal's jurisdiction and that the parties had exchanged views regarding the settlement of their dispute. Further, the Arbitral Tribunal found that there is no indispensable third party to the proceedings that would bar its jurisdiction. With regard to the exceptions and limitations set out in Articles 297 and 298 of UNCLOS, the Arbitral Tribunal considered whether these limitations and exceptions were, in some cases, linked to the merits of the claims. Accordingly, the Arbitral Tribunal concluded that it had jurisdiction with respect to seven of the Philippines' Submissions, but its jurisdiction with respect to seven other Submissions needed to be considered in conjunction with the merits.

The Final Award, in many ways, was a resounding victory for the Philippines. First, with regard to the Philippines' claim on historic rights and the nine-dash line, the Arbitral Tribunal found that UNCLOS comprehensively allocates rights to maritime areas and that protections for pre-existing rights to resources are considered but not adopted. Thus, to the extent that China might have had historic rights to resources in the waters of the South China Sea, such rights are extinguished to the extent that they are incompatible with the EEZ regime under UNCLOS. Although the fishermen of China and other states had historically made use of the islands, there is no evidence that China had exercised exclusive control over the waters or their resources. There is therefore no legal basis for China to claim historic rights to resources within the sea areas falling within the nine-dash line.

Second, with regard to the status of features, the Arbitral Tribunal made a factual determination on whether certain selected features are above water at high tide and thus are *islands* capable of being subject to sovereignty claims and generating maritime zones, or below water at high tide and thus are *low-tide elevations*, incapable of being subject to sovereignty claims and generating no maritime zones. The Arbitral Tribunal then addressed the issue of whether the features that they determined are islands entitled to the full suite of maritime zones under

Article 121(2) or rocks entitled to only a 12 NM territorial sea under Article 121(3). This required an interpretation of Article 121(3) and the meaning of the clause ‘cannot sustain human habitation or an economic life of their own’, the first time that an international court or tribunal has undertaken this exercise. The Arbitral Tribunal concluded that this provision depends upon the objective capacity of a feature, in its natural condition, to sustain either a stable community of people or an economic activity that is not dependent on external resources or is purely extractive in nature. In this regard, the Arbitral Tribunal found that the Spratly Islands were historically used by small groups of fishermen and that the set-up of several Japanese fishing and guano enterprises was attempted, but these extractive activities do not constitute inhabitation by a stable community. On this basis, the Arbitral Tribunal concluded that none of the islands (features above water at high tide) in the Spratly Islands (not just the features that were the subject of the Philippines’ proceedings) are fully entitled islands. Therefore all are entitled to only a 12 NM territorial sea. Further, the Spratly Islands cannot generate maritime zones as a unit. Because each island is entitled to only a 12 NM territorial sea, the Arbitral Tribunal found that it could, without delimiting a boundary, declare that certain areas are within the EEZ of the Philippines, as those areas are not overlapped by any possible entitlement of China.

Third, with regard to the lawfulness of China’s actions in the South China Sea, the Arbitral Tribunal found that China had violated the Philippines’ sovereign rights in its EEZ by interfering with Philippine fishing and oil and gas exploration, constructing artificial islands, and failing to prevent Chinese fishermen from fishing in the zone. Notably, the Arbitral Tribunal also held that fishermen from the Philippines, as well as China, also had traditional fishing rights at Scarborough Shoal and that China had interfered with those rights in restricting access. In addition, the Arbitral Tribunal found that China had breached its obligations to protect the marine environment in the South China Sea through its land-reclamation activities on seven features in the Spratly Islands and for failing to prevent the actions of its nationals who harvested endangered species on a substantial scale in the South China Sea.

Fourth, the Arbitral Tribunal found that China’s large-scale land reclamation activities are incompatible with the obligations of states during dispute resolution proceedings, although the Tribunal was aware that it lacked jurisdiction to consider whether the activities of Chinese naval and law enforcement vessels in Second Thomas Shoal were an aggravation of the dispute between the parties, because military activities are excluded by Article 298 from compulsory dispute settlement.

IV. STRUCTURE OF THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION

The Award on Jurisdiction and Admissibility and the Final Award are lengthy documents, with more than 700 pages covering a wide range of issues relating to law of the sea. Constraints of time and space have meant that not every issue can be comprehensively examined in this volume, but the Editors have identified key aspects of the Final Award for discussion. The book is divided into three main parts and examines three groups of issues: (i) jurisdiction and procedure; (ii) status of features and maritime entitlements; and (iii) marine environment. In Part I on jurisdiction and procedure, Robert Beckman in Chapter 2 examines the Award on Jurisdiction and Admissibility, analyses China's objections to the Arbitral Tribunal's jurisdiction and discusses whether the objections are warranted. In Chapter 3 Stuart Kaye looks at the principle of the indispensability of third parties and discusses how the Arbitral Tribunal chose to deal with the potential maritime jurisdiction of features of other states and decided not to apply the indispensable third party rule to restrict its jurisdiction over certain aspects of the Final Award. In Chapter 4 Tara Davenport discusses the procedural aspects of the case, in light of Chinese critiques that the conduct of the arbitration undermined the procedural legitimacy of the Final Award.

Part II of the book explores the Arbitral Tribunal's findings on the status of offshore features and maritime entitlements. In Chapter 5 Clive Symmons analyses the Arbitral Tribunal's findings on the nine-dash line and the implications for historic rights under UNCLOS. In Chapter 6 Youna Lyons et al discuss the methodology employed by the Arbitral Tribunal in determining whether a feature is a low-tide elevation within Article 13 or a high-tide feature within Article 121(1) of UNCLOS, whether such methodology should be applied to the remaining Spratly Island features not discussed by the Arbitral Tribunal, and what this means for the development of international law on this issue. Chapter 7 by Erik Franckx and Chapter 8 by Myron Nordquist offer two different perspectives on the Arbitral Tribunal's interpretation and application of Article 121(3) on whether a feature is a rock incapable of sustaining human habitation or an economic life of its own. In Chapter 9 J Ashley Roach examines the issues relating to artificial islands. Part III contains Chapter 10 by Nilüfer Oral and Chapter 11 by J Ashley Roach, which discuss from different angles the implications of the Final Award for the protection of the marine environment. The book ends with a concluding chapter on the implication of the case for the South China Sea disputes and dispute settlement under UNCLOS.

In order to provide readers with a better understanding of the South China Sea disputes as well as the respective claims of the Philippines and China, the Editors have included four maps of the South China Sea produced in the course of the South China Sea arbitral proceedings, and extracted from the Award on Jurisdiction and Admissibility and the Final Award. These include: (i) the map used by the Arbitral Tribunal to show the geography of the South China Sea; (ii) China's map of the South China Sea attached to China's Notes Verbales to the United Nations Secretary-General Nos CML/17/2009 and CML/18/2009 showing the nine-dash line; (iii) the Philippines' map of the 'Northern Sector of the South China Sea' included in its Memorial; and (iv) the Philippines' map of 'China's Maximum Potential Entitlements under UNCLOS Compared to its Nine-Dash Line Claim in the Southern Sector' included in its Memorial. Chapter 6 'Determining High-tide Features (or Islands) in the South China Sea under Article 121(1): A Legal and Oceanography Perspective' and Chapter 8 'UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: A Correct Interpretation?' also include figures and maps on the determination of high-tide features, the possible maritime zones based on the Final Award, and the potential overlapping areas between the EEZs of Vietnam, the Philippines and Malaysia with the EEZ of Itu Aba if Itu Aba is classified as a fully entitled island under Article 121.

The views expressed in each chapter are those of the contributors and do not reflect those of the Editors, the Centre for International Law or the National University of Singapore. We believe the robust discussion in each chapter is an invaluable contribution to the ongoing discussion on the *South China Sea Arbitration*.