

*Historic Rights and the ‘Nine-Dash Line’ in Relation to UNCLOS in the Light of the Award in the Philippines v. China Arbitration (2016) concerning the Supposed Historic Claims of China in the South China Sea: What now Remains of the Doctrine?*

By

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## **A. Introduction**

Some three years ago , I wrote a critique on the Chinese historic claim in the South China Sea for the Haikou (China) conference in 2013; that is to say, on the supposed Chinese claim (based on its nine-dash line’ of 1947/ maps) to historic rights in the South China Sea (hereafter ‘SCS’). This was just as the arbitral proceedings in the case of *Philippines v. China* were in their early stages. This paper was subsequently published in book form<sup>1</sup> ; and contains my initial thinking on the supposed Chinese historic claim; which views are to some degree ( I am pleased to see) reflected in the arbitral award on the Merits on June 2016. At that (pre-2016) time not only was the exact nature of the Chinese claim to historic rights in

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<sup>1</sup>See C.R.Symmons, “Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal”,191 in S,Wu, M. Valencia & N.Hong (eds.), *UN Convention on the Law of the Sea and the South China Sea*(Ashgate,2015). In my previous book, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Nijhoff (2008)) I belaboured the shortcomings of the customary international law doctrine on historic waters as I found it.

this SCS area unclear<sup>2</sup> (a matter much referred to in the Philippine pleadings and arbitral Tribunal's comments<sup>3</sup> in the *Philippines v. China* arbitral case) – even, perhaps deliberately ambiguous ;<sup>4</sup> but so also were the customary law rules relating to the doctrine, most particularly, its relationship with UNCLOS itself<sup>5</sup> .

On this aspect of the case - the matter of *historic maritime claims*<sup>6</sup> - I welcome the findings of the Tribunal . For the basic reason that at last the question of historic maritime rights in the contemporary law of the sea, having arisen for adjudication in a very direct fashion, has received a detailed consideration from an international adjudicative body *in the context of UNCLOS* : rather than in a non-UNCLOS-based context; as was done, for example, by the ICJ on the particular facts of the *Gulf of Fonseca* case<sup>7</sup> .

Thus I consider that the Tribunal has aptly clarified the past vague and inter-changeable terminology of the meanings of terms

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<sup>2</sup> See eg P.Dutton, "An Analysis of China's Claim to Historic Rights in the [SCS]" in Yann-huei Song & Keyuan Zou (eds.), *Major Law and Policy Issues in the [SCS]*, Routledge (2016), 64, (China's claim "somewhat ambiguous", sometimes claiming "sovereignty" but at other times a "less encompassing historic claim" that appears more "akin to jurisdiction within the u-shaped line").

<sup>3</sup> See PCA Case No.2013-19, *Philippines v. China* , Award on Merits, 12 July 2016, at para 180 ("the resolution of the Parties' dispute in relation to Submissions No.1 and 2 is complicated by some ambiguity in China's position", as "China has never expressly clarified the nature or scope of its claimed historic rights"); and Ted McDorman, in *Proceedings ,Public International Law Colloquium on Maritime Disputes Settlement, Hong Kong* (2016)(Chinese Society of International Law/Hong Kong International Arbitration Centre(2016),(hereafter *Proceedings (Hong Kong)*), at 316-322..

<sup>4</sup> See my reference in Wu et al, above n.1, at 217,n.152.

<sup>5</sup> For a recent assessment of this ,see T.McDorman ,above n.3 at 319-322.

<sup>6</sup> See, eg., my chapter "Historic Waters and Historic Rights in the South China Sea", in S.Wu, M.Valencia & N.Hong (eds), *UN Convention on the Law of the Sea and the South China Sea*, above n.1, 191. My recent paper on the same theme delivered at the South China Sea Institute at Xiamen University in 2016 was written before the Tribunal in *Philippines v China* had made its award on the merits. Accordingly, the present version has been radically re-written to take account of this development.

<sup>7</sup> *El Salvador v. Honduras* [1990] ICJ Reports, 116.

bandied about in past State practice<sup>8</sup>, ICJ caselaw and international documentation, relating to historic claims at sea (eg.in *Tunisia v Libya*)<sup>9</sup> - such as 'historic rights' and 'historic title' - and has also clarified the inter-relationship and interaction of this doctrine with UNCLOS; and, in so doing, has clearly and (mostly convincingly<sup>10</sup>) demonstrated the dominance of UNCLOS' treaty regime in respect of such essentially customary international law issues (as are potentially preserved in UNCLOS' preamble<sup>11</sup>). Albeit this initially came about in the narrower context of the arbitral Tribunal having to decide whether the Chinese supposed historic maritime claim in the SCS was caught by one of the 'optional exceptions' to the

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<sup>8</sup> See, eg., F. Dupuy & P.M. Dupuy, "A Legal Analysis of China's Historic Claims in the [SCS], 107 *AJIL* (2013), 124 ("the term 'historic rights' (sometimes confusingly used in this context in combination with the germane notion such as historic waters and historic title) has often been imbued with a certain degree of confusion and controversy in international law"). See also T. McDorman, "The Law of the Sea Convention and the U-Shaped Line: Some Comments" in *Arbitration Concerning the South China Sea: Philippines Versus China*, by S. Wu and Keyuan Zou (eds.), Routledge (2016), at 150 (terminology on historic waters is "often blurred" and used "interchangeably and haphazardly"; so making it "difficult to assess in the abstract what may be being claimed by a State" (citing here the *Eritrea/Yemen* arbitral Award). They add (id at p.151) that neither the 1958 conventions or UNCLOS provide any "indication of when historic claims to waters exist, such as historic bays, nor the consequences of the waters being historic"; including the meaning of 'historic title'.

<sup>9</sup> [1982] ICJ Reports, 18. In this case the ICJ seems to use the expressions 'historic rights' and 'historic title' interchangeably, though the Tribunal in the *Philippines v. China Arbitration* (above n.3 at para.224) cites the case as supporting its interpretative decision on the meaning of 'historic title'.

<sup>10</sup> See eg, below for references to areas of the Award on the Merits where criticism might be made: fns.10, 47, and 84 and accompanying text.

<sup>11</sup> Strangely, perhaps, the Tribunal never once makes direct reference to the part of the UNCLOS Preamble which affirms that "matters not regulated by this convention continue to be governed by the rules and principles of general international law"; though it does cite it in another context; namely the desire of UNCLOS to "settle... all issues relating to the law of the sea": see below n.84. The Chinese official position has been (see the statement of the Director General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs (May 12, 2016) (as quoted in the Merits, above n.3, at para.200) that UNCLOS "does not cover all aspects of the law of the sea". See also recent commentary on this issue by A. Chircop, below n.47, in *Proceedings (Hong Kong)* above n.3, at 355.

arbitral Tribunal's jurisdiction under Art.298 of UNCLOS: which, relevant to this topic, refers (in para.1(i)(a)) to "historic bays or titles" being optionally excludable from compulsory arbitration (as China indeed explicitly claimed by a declaration on 25 August 2006<sup>12</sup>).

As the Tribunal indicated, in the light of China's non-specific indication of the nature of its historic claims, it necessarily fell to the Tribunal to "ascertain on the basis of [its] conduct whether China's claim amounts to 'historic title'"<sup>13</sup>; and in this connection, whether China had asserted "rights in areas beyond maximum entitlements that could be claimed [under UNCLOS]" . It found in the affirmative that China's " assertions indicate[d] a claim to rights arising independently of the Convention"<sup>14</sup>. Thus looking particularly at China's petroleum exploration activities in the SCS (and China's "frequent references to historic rights without further specification"), the Tribunal concluded that China did claim "rights to petroleum resources and fisheries within the 'nine-dash-line' on the basis of historic rights existing independently [of UNCLOS]"<sup>15</sup>.

The way the Tribunal went on to deal with this general historic rights issue was to my mind methodical, logical and essentially legally acceptable, especially considering the above-mentioned

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<sup>12</sup> UN Treaty Series, [https://treaties.un.org/pages./viewDetails111.aspx?See, eg., Donald Rothwell, "Land and Maritime Disputes and UNCLOS" in \*Proceedings \(Hong Kong\)\* above n.3, at 66; and C. Symmons, "The 'Historic Titles' Optional Exception to Compulsory Jurisdiction in Art.298 of Annex VII of UNCLOS in the Settlement of Disputes Procedures as Decided by the Arbitral Decision in \*Philippines v China\* \(2016\)" in \*Proceedings \( Hong Kong\)\* id., 359,361..](https://treaties.un.org/pages./viewDetails111.aspx?See, eg., Donald Rothwell, 'Land and Maritime Disputes and UNCLOS' in Proceedings (Hong Kong) above n.3, at 66; and C. Symmons, 'The 'Historic Titles' Optional Exception to Compulsory Jurisdiction in Art.298 of Annex VII of UNCLOS in the Settlement of Disputes Procedures as Decided by the Arbitral Decision in Philippines v China (2016)' in Proceedings ( Hong Kong) id., 359,361..)

<sup>13</sup> Merits, at para.206.As the Tribunal duly noted (id.,at para.227) , China had not been consistent in its terminology describing its historic claims in the SCS: see T.McDorman, *Proceedings (Hong Kong)* above n.3 at,317.

<sup>14</sup> Merits, id .at para.207.

<sup>15</sup> Id., at para.211.

ambiguity of the Chinese claim to historic rights<sup>16</sup>. The clarification of this aspect of international law came about in the following ways.

### **B. China's historic claims involved disputes "concerning the interpretation of application" of UNCLOS.**

The Tribunal determined (having raised and considered the historic claim issue *sua sponte* in conjunction with the merits<sup>17</sup>) that contrary to what China more generally had claimed in its 'Position Paper' of December 7, 2014, the question of historic claims *did* involve a dispute relating to (as required for application in Art.298) "the interpretation or application" of UNCLOS because of " [its] interaction with UNCLOS"<sup>18</sup>.

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<sup>16</sup> See eg., the Philippines' Memorial that the Chinese law (as, eg., in its 1998 Law of the EEZ and Continental Shelf) offered no explanation as to the nature of the 'historic rights' claimed (Memorial, pp.74-80, para.4.28); also (id., at para.4.32) that a Chinese demarche of June 21 2011 to the Philippines' embassy in Beijing asserting "China also has 'historical rights' in the SCS which were (allegedly) "acknowledged under UNCLOS"; and which could not be "denied and must be respected" .In July 2011 China also sent a note to the Philippines protesting at the Philippines offering of licensing blocks in Area 3 & 4, allegedly situate in waters "of which China has "historic titles, including sovereign rights and jurisdiction".The Philippines' Memorial (para.82) further stated that on September 15 2011 allegedly China's reliance of 'historic rights' was made clearer by the Chinese Foreign Ministry statements that UNCLOS "does not restrain or deny a country's right which is formed in history and abidingly held" .

<sup>17</sup> See Award on Merits, above n.3. On this aspect, see, eg. C Symmons below n 27 at 362; and S.Talmon, "Objections not Assessing an 'Exclusively Preliminary Character in the [SCS] Arbitration", vol.3 *Jnl of Territorial and Maritime Studies* (2016),88,104.

<sup>18</sup> This question was unclear before; see, eg., R.Beckman, "The UN Convention of the law of the Sea and the Maritime Dispute in the [SCS]", 107 *AJIL* (2013),142, 161. See also the several references on the Merits: eg., at para.170, referring to the *Award on Jurisdiction* concerning the "interaction of China's claimed historic rights with the provisions of [UNCLOS]"; and where (id) the Tribunal recalled its dictum there to the effect that a dispute "concerning the interaction of [UNCLOS] with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by [UNCLOS]" is unequivocally a dispute concerning the interpretation and application of [UNCLOS]"..

As the Tribunal elaborated at the jurisdictional stage of the Award<sup>19</sup>:

Nor is the existence of a dispute concerning the interpretation and application of [UNCLOS] vitiated by the fact that China's claimed entitlements appear to be based on an understanding of historic rights existing independently of, and allegedly preserved by the Convention...This is accordingly not a dispute about the existence of specific historic rights. But rather about historic rights in the framework of the Convention.

As confirmed at the Merits stage (2016), such rights were thus intrinsically affected by the UNCLOS regime's stipulations; as the question of whether rights *arising under another instrument or body of law* (here customary international law) were or were not preserved by UNCLOS was said to be "unequivocally" such a dispute<sup>20</sup>. This was an important finding because Chinese legal commentators<sup>21</sup> have invariably argued that China's maritime

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<sup>19</sup>PCA Case No.2013-19, Philippines v. China, Award on Jurisdiction and Admissibility, 29 October, 2015, para.168.

<sup>20</sup> Award Merits, above n.3, at para.170 where the Tribunal restated this issue conjunctively by referring to "interpretation *and* application" of UNCLOS (emphasis added). Accordingly, the Tribunal found that the issue of historic rights is now not only a matter where UNCLOS is *definitionally* relevant, but also as to the *substantive survival of such rights* under the UNCLOS regime.

<sup>21</sup>See Award, above n.3, at para.164 (in the Tribunal's view "the Philippine's submissions No.1 and 2 reflect[ed] a dispute concerning the source of maritime entitlements in the [SCS] and the interaction of China's claimed 'historic rights' with the provisions of [UNCLOS]"; and above n.18.. See also, eg., recently, above n.10, and K. Zou & X. Liu, "The legal status of the U-shaped line in the South China Sea: implications for sovereignty, sovereign rights and maritime jurisdiction" (2015) *Chinese Jnl of International Law*, at 69 & 70 ("It is worth noting that historic rights do not conflict with the provisions of [UNCLOS], and are confirmed by general international law"); similar statements occur in more recent assessments: "The U-shaped line and historic rights in the Philippines v. China case", in S.Wu & K.Zou (eds), *Arbitration concerning the South China Sea*, Routledge (2016), 127, at 138/9; and K. Zou, op. cit. below n. 34 at 330 ("It is obvious

historic rights claims are *contained in customary international law outside the ambit of, and unaffected by, UNCLOS*, as implicitly indicated by its preamble relating to matters not covered in the Convention<sup>22</sup>; added to the fact that China's supposed claim antedated UNCLOS<sup>23</sup>. It has also been the case that the argument has been raised by Chinese commentators that *if* the nine-dashed line was to be considered by the Tribunal as a historic "maritime claim", then in that case the Tribunal could not adjudicate on it as it was "excluded" by the Chinese declaration<sup>24</sup>. This view is now shown to be an unjustified speculation in the Award on the Merits (2016).

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that the LOSC deliberately avoid [sic] the issue of 'historic rights' or 'historic waters' and leaves it to be governed by customary international law as reaffirmed by its preamble". .

<sup>22</sup> See above n.10 and below n.,49; and, eg, the recent publication by the Chinese Society of International law in 2016 entitled "The Tribunal's Award in the 'South China Sea Arbitration' Initiated by the Philippines is Null and Void", at 54/55, ("...it can safely be asserted that [historic rights] originated from and are governed by general international law... and rules of customary international law regarding 'historic rights' operate in parallel with the UNCLOS"); also Z Gao & BB Jia, "The Nine-Dash Line in the [SCS]:History, Status and Implications", 107 AJIL 98,123/4. ;and S.Talmon & B-B Jia,(eds.) *The [SCS] Arbitration: A Chinese Perspective*, Hart Publishing (2014), at 53, who allege (overstatingly and somewhat paradoxically in terms of terminology) that questions even of 'historic title' are not covered by Art.298 because any such disputes are outside the compulsory jurisdiction under Pt. XV of UNCLOS. For they argue that the reference to 'historic titles' in Art.298 "does not mean that all disputes involving 'historic titles' are generally within the jurisdiction of UNCLOS tribunals" as this type of jurisdiction is (allegedly) "limited to the extent that the topic of 'historic titles' is dealt with [in UNCLOS] and is indeed limited merely "to the interpretation of Art.15 UNCLOS"; so that otherwise "the question of historic titles continues to be governed by the rules and principles of customary international law". Such a narrow interpretational view is now shown to be wholly incorrect.

<sup>23</sup> See eg., "Spotlight: China's Historical Rights within Dotted Line not Deniable" (Chinese People's Daily 24,5,2016) which claimed that UNCLOS "does not govern historical rights and leaves them to... customary law, being before the "birth of the UNCLOS".

<sup>24</sup> See M.S.Gau, in N. Hong, S.Wu & M.Valencia , "Case Study on the Application of Pt.XV of UNCLOS to the Annex VII in the Arbitration Case concerning the [SCS] Disputes between China and the Philippines", at 335; and above n.....

It is interesting to note in the latter connection, however, that Chinese official statements prior, and subsequent to <sup>25</sup> the Tribunal's decision on the merits in June 2016 have not – explicitly at least - mentioned the 'historic titles' exception contained in the Chinese declaration under Art.298, concentrating instead on the "delimitation" of maritime zones aspect as there mentioned<sup>26</sup>. This in itself may indicate a perceived weakness by China concerning its claimed historic claims in the SCS.

### **C. Clarification of the Various Types of 'Historic claims' under the Law of the Sea**

The Tribunal has clarified, as stated above, that the terminology which was previously vague and interchangeably used<sup>27</sup>; and, indeed, which in the past included descriptions which did not even contain the epithet 'historic' <sup>28</sup> concerning previous historic maritime claims: as it went on to consider the "nature" of the

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<sup>25</sup> See, eg., the Chinese White Paper issued by the State Information Office of the PRC (July 13,2016) entitled "China Adheres to the Position of Settling through Negotiation the Relevant Disputes between China and the Philippines in the [SCS]", where para 130 merely refers in general terms to all the potentially-relevant optional exceptions in Art.298; and only emphasises the 'delimitation' exception.

<sup>26</sup> See, eg., Ted McDorman, "The 2016 *South China Sea Arbitration*: Comments on the Nine-Dash Line and Historic Rights" in *Proceedings (Hong Kong)* above n.3, at 312,315; and Symmons in Wu et al., above n.6 at 191.

<sup>27</sup> See Symmons, id. at 195.

<sup>28</sup> Symmons, id..This is also evident in the terminology of similar concepts in the text of UNCLOS: eg., in Arts (51(1) ("traditional fishing rights" and in Art. 62 (3) (rights of fishing which have been "habitually" exercised in an area of seas).It is implicit from the Award in *Philippines v China* that the rules relating to 'traditional fishing rights' not only share the same rules as historic rights more generally (Merits Award, above n.3, at ,eg, paras. 775, and 779 of the Award ("long and uninterrupted fishing...")); so that principles to be applied are analogous to exercise of historic rights applied in Arts 51(1) and 62(3) of UNCLOS (id., at para.783).But see below n.....

Chinese claims in the SCS, and the “scope” of the Art.298 ‘historic titles’ exception<sup>29</sup> .

It is now clear, as the Tribunal commented<sup>30</sup> , that there is “a cognisable usage amongst the various terms for rights deriving from historical processes”; and that the term “‘historic rights’ is general in nature and can describe any rights which a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances ..., but may equally include more limited rights, such a fishing rights...”

In other words, as I myself have suggested in past writings<sup>31</sup> , the term ‘historic rights’ may have a broad meaning covering *both* historic claims to *sovereignty* (ie.,claims to historic bays and historic waters) *and also non-sovereign* rights; but *also a narrower meaning* taking in *only* the latter more limited (generally) *non-exclusive and non-sovereignty-based* rights. The latter interpretation was supported by comments of the arbitral tribunal in *Eritrea v Yemen*. These, whilst not distinguishing between historic rights and historic title, nonetheless indicated that the notion of ‘historic rights’ implied “something falling short of sovereignty”.<sup>32</sup> Indeed, this was one of the past-perceived main differences between a claim to ‘historic rights’ (in the narrow sense) and ‘historic waters.’ The latter type of historic claim must now clearly

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<sup>29</sup> Id., at a 206 (“It necessarily falls to the Tribunal to ascertain ,on the basis of conduct, whether China’s claim amounts to ‘historic title’”). Indeed, somewhat generously, the Tribunal decided that (despite China’s ambiguous terminology) the “absence of a claim to historic title [could] be inferred from China’s use of the broader and less-specific term, as historic title constitutes one form of historic right” (Award Merits, above n.3, at para.228).

<sup>30</sup> Award Merits, id. at para.225.

<sup>31</sup> Eg., in op.cit. above n.1 at 4/5.

<sup>32</sup> See Gao & Jia, above n.22, at 122.

must imply a claim of sovereignty over the waters in question whilst the former does not<sup>33</sup>.

The Tribunal in *Philippines v China* also more generally affirmed, in later considering China's historic rights claim, that the traditional three-strand customary rules applicable to establishment of historic waters also notionally apply to 'historic rights' claims of a *non-sovereign nature*<sup>34</sup>; and that "historic rights are( as seen) ,in most instances, *exceptional rights*".<sup>35</sup> This 'exceptionality'

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<sup>33</sup> See Symmons above n. 1, at 194/4 where possible other differences are also discussed.

<sup>34</sup> Above n.4, at para.265. As laid out in the UN *Memorandum on the Juridical Regime of Historic Bays, Including Historic Bays* (cited Award Merits above n.3,at para.265).Prior to this the matter was somewhat undetermined: see Symmons, op.cit above n.1, at 4, where I merely speculated that "the process in this case is the same for claims to rights short of sovereignty". In other words, a claim to mere 'historic rights' is usually, and in general terms, (but see para. 270) not *an exclusive* claim to rights (see Award para.270), and does not involve an intention to exclude foreign states from exploiting natural resources in the same claimed area, as discussed in *Tunisia v Libya*: see L. Bernard, "The Right to Fish and International Law in the [SCS]", *Jnl of Political Risk* (2016),....There seems to be no warrant for the recent assertion by K. Zou (in "The Applicability of the Concept of Historic Rights in Contemporary International Law" (*Proceedings (Hong Kong)* above n.3, at 326),that since "the term 'historic rights' contains an element of non-exclusiveness, the criteria for its establishment must be more lenient than those applicable to 'historic title' or 'historic waters'".

<sup>35</sup>Emphasis added. See Award Merits, at para.268: "[Historic rights] accord a right that a State would not otherwise hold, were it not for the operation of the historical process giving rise to the right and the acquiescence of other State in the process". The corollary of this is (id.) that the "exercise of freedoms permitted under international law cannot give rise to a historic right" as that would "involve nothing that would call for the acquiescence of other States and can only represent the use of what international law already freely permits": see id., at para.270, where the Tribunal stated that evidence pointing even to "very extensive" navigation and fishing in the SCS would be "insufficient" to form the emergence of a "historic right"; and that in order to show such it would be "necessary to show that China had engaged in "activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right" ; so that (id.) "[i]n practice, in order to establish historic rights in the [SCS], it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources and that those States had acquiesced in such restrictions".As the Tribunal went on to find (id.), China had taken no such actions beyond the territorial sea.Indeed (id) with respect to non-living resources of the seabed, the Tribunal did no "even see how such regulation would be theoretically possible" (see further below n.54).It follows (see my conclusions, below n.105 and accompanying text,

consideration, however,<sup>36</sup> received relatively little further elaboration from the Tribunal where it laconically referred to the requirements relevant to the case.

### *'Historic Title'*

Before an any more general interpretative exercise, the Tribunal had to interpret, more specifically, the important phrase '(historic) *title*' (or (historic) *'titles*' as the phrase appears in Art.298 of UNCLOS) in the context of the UNCLOS optional 'exceptions'.

In the latter regard, after looking at the legislative history of the term as it existed pre-UNCLOS (there being no definition of the phrase as such in UNCLOS<sup>37</sup>) - particularly how UNCLOS inherited the term 'title' from the insertion into the 1958 Territorial Sea Convention (taken from the *Anglo-Norwegian Fisheries case* 1951<sup>38</sup>) and its verbatim transposition into Art.15 of UNCLOS - the Tribunal found the term accorded with the only other "direct usage" of the phrase (albeit in the singular) in UNCLOS: namely, in Art. 15 concerning territorial sea delimitation<sup>39</sup>. Thus it concluded that the phrase was intended to be "a reference to *claims of sovereignty* over maritime areas derived from historical

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that there is little scope today for a State claiming non-sovereignty-based rights beyond its *juridically*-based zones of jurisdiction.

<sup>36</sup> See below...

<sup>37</sup> There is little textual help in the Convention itself except that it might be arguable that use of the word "or" between 'historic waters' and 'titles' is used here in a conjunctive sense to take in 'non-sovereign' historic claims. However a conjunctive interpretation of the word 'or' is feasible here, as historic bays are not the only sort of historic waters that may be claimed in international customary law.

<sup>38</sup> [1951] ICJ Reports, 116, 130, where (para. 221) the verbal usage referred to an "area of sea exceptionally claimed as internal waters (or, possibly, as territorial sea)". See Award Merits above n.3, at para. 217 *et seq.* an para 221.

<sup>39</sup> Award Merits, above n.3, at para. 226.

circumstances”<sup>40</sup>, as indeed the UN Secretariat *Memorandum on Historic Waters* of 1962 had previously indicated.<sup>41</sup>

This determination accorded with the Philippines’ pleadings in the arbitral case that the phrase had a “specific meaning” under UNCLOS, pertaining only to “near-shore areas of seas that are susceptible to a claim to sovereignty as such”<sup>42</sup>. It accords also with this writer’s past more general views, that in the modern law of the sea a State cannot make an historic claim to an expansive EEZ-type regime or to a continental shelf of a non-judicial nature<sup>43</sup>; most particularly in such zones owned by other States.

So, in effect, the term ‘title’ now takes in only ‘sovereign rights’ historically claimed: ie., effectively only claims to *historic waters*<sup>44</sup>; and so is limited in application to near-coastal zones at that. Prior to this determination such an interpretation was merely speculative<sup>45</sup>. Notably, then, the term does not take in *non-*

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<sup>40</sup> Id at para.....This finding has been criticised by some commentators since: eg., Allen Yu in “Who is Really Overstepping the Bounds of International Law in the [SCS] Dispute?”, November 18, 2015 (an “unprecedented and remarkable result”).

<sup>41</sup> Id at para.222.

<sup>42</sup> See Award Merits, above n.3, at para.193, where there is reference by the Tribunal to the Philippines’ emphasis on such extensive claims being unacceptable (“international law prior to the adoption of [UNCLOS] did not accept “assertions of historic rights over such a vast area, as China now claims”). Additionally, the Philippines argued that such allegedly extensive historic claims had been “promptly” objected to in the SCS (para.199).

<sup>43</sup> See, eg., generally Symmons, “Rights and Jurisdiction over Resources and Obligations of Coastal States: Validity of Historic Rights Claims” in T.T.Thuy & L.T.Trang (eds.), *Power, Law and Maritime Order in the South China Sea*, Lexington Books (2015), 145-167.

<sup>44</sup> As the Tribunal concluded (id, at para.225), the term ‘historic titles’ “is used specifically to refer to historic sovereignty to land or maritime areas”.

<sup>45</sup> As in my own interpretations and that of others: see, eg., The Brookings Institution’s (Centre for East Asia Policy Studies) East Asia Policy Paper (of May 2016) entitled “Limits of Law in the South China Sea”, at 12, commenting that the phrase ‘historic title’ is “unclear, and appears in UNCLOS only in Arts 15 and 298; but that nonetheless, there is no indication there that “anything so open-ended as ‘historic rights’ ... was preserved by UNCLOS, whose central purpose was precisely to create international law that would codify, modify and regularise a wide variety of .... practices of nations in the seas”. Thus it interprets (id.) China’s exclusion relating to ‘historic titles’ under Art 298 as not stopping

*sovereign* historic claims: as there is “nowhere” any mention in UNCLOS of a “broad and unspecified category of possible claims to historic rights falling short of sovereignty”<sup>46</sup> or “a constellation of historic rights short of title”<sup>47</sup>. This may be seen as somewhat of an overstatement in that UNCLOS (albeit without using the epithet ‘historic’) does refer to similar concepts in Art.62(3) (see below) and ‘traditional fishing rights’ in Art.51 concerning such continuing rights in the archipelagic waters of another State<sup>48</sup> (Thus the term has this same meaning (ie.,comprehending historic waters only) *in both Arts.15 and 298* ;which is an incidentally-important finding to dispel previous ambiguity as to the meaning in the former article<sup>49</sup>). Accordingly such *more limited* historic claims cannot be excluded from compulsory jurisdiction under Art.298.This is an acceptable interpretation if only because, in treaty law, exceptions generally should, as a general rule, be narrowly interpreted<sup>50</sup>.

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the Tribunal from assessing a claim to ‘historic rights’ ; as such rights are “not historic bays or titles” but “something different”. See further below n.56.

<sup>46</sup> Above n.3, at para. 226..

<sup>47</sup> Id., at para. 228: Such as ‘non-exclusive’ fishery rights, where no claims were made to exclude other fishermen from an area of seas : see eg., L. Bernard, “The Right to Fish and International Law in the South China Seas”, 4 *Jnl of Political Risk* (January(2016),.....

<sup>48</sup> This article is later referred to by the Tribunal (at para.804) as “expressly” protecting “traditional fishing rights”. Aldo Chircop, “Gidel’s Safety Valve:the Anglo-Norwegian Case , 1951 and the Doctrine of Historic Waters Revisited” in *Proceedings (Hong Kong)* above n.3, at 340, 347,fn.33 comments that such rights as mentioned in Art.51 “may be characterised as akin to historic rights”.See also above n.28.

<sup>49</sup> Cf R. Beckman, “UNCLOS XV and the South China Sea”, in S.Jayakumar, T Koh & R.Beckman (eds.),*The South China Sea Disputes and the Law of the Sea*, Edward Elgar (2014), 229,247.T Mc Dorman (id at 152) comments that the reference to ‘historic titles’ in Art 298 must have a “broader meaning” than that in Art. 15 of UNCLOS, which is a “separate category of dispute from which a State can exempt itself from compulsory third party adjudication”; relied on, more extensively, by K. Zou and Xichang Liu, in “The U-Shaped Line and Historic Rights in the *Philippines v China* Case”,127 to (at 145) [CHECK] to exempt “historic rights” as well .Only the former viewpoint is now borne out only in part by the Tribunal’s decision in *Philippines v China*.

<sup>50</sup>See, eg.,Genevieve Bastid Burdeau, “Preconditions, Limitations and Exceptions to the Applicability of Compulsory Dispute Settlement Methods under UNCLOS” in *Proceedings*

In so doing, the Tribunal noted the ambiguous wording in Art.298(1)(a) in the English-version of UNCLOS: which the Philippines interpreted as applying the ‘titles’ exception *only in a delimitation situation* as referred to in the words preceding it<sup>51</sup>; but this interpretation was rightly rejected by the Tribunal on looking at the clearer ‘other-language’ UNCLOS versions<sup>52</sup>. Accordingly, here a “broader exception” was found. Any narrower viewpoint would in any case have entailed applying the ‘titles’ exception to situations *already separately excepted* in Arts.15,74 and 83 (the delimitation provisions).

In the light of its finding on the meaning of “titles” in Art.298, the Tribunal found that China *did not make such a claim in the SCS*; as the Tribunal did not consider China’s claim there within the ‘nine-dash-line’ to be “equivalent to its territorial sea or internal waters”.<sup>53</sup> Added to the fact that the Tribunal considered China’s commitment “to respect both freedom of navigation and overflight to establish that China [did] not consider the area within the ‘nine-dash line’ to be equivalent to its territorial sea or internal waters”<sup>54</sup>.Accordingly, as mere ‘historic rights’ were not covered

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(*Hong Kong*) above n.3, at 292,302, referring to Art.298 exceptions (“As exceptions provided by the UNCLOS, and not drafted by the states parties, they have to be construed narrowly and uniformly”).

<sup>51</sup>Award Merits above n.3,, at para. 191.

<sup>52</sup>Id., at paras.215-216.

<sup>53</sup>Id., at para.213. Most particularly China had “unequivocally stated that it respects freedom of navigation and overflight in the [SCS]<sup>53</sup> and thus did not consider “the sea areas within the ‘nine-dash line’ to be territorial sea or internal waters.

<sup>54</sup> Id., at para.213. In addition, the Tribunal, in considering more generally whether China did have “historic *maritime* rights to the living and non-living resources within the ‘nine-dash’ line<sup>54</sup> (beyond juridical limits) indicated that this was in effect difficult to prove *in an exclusionary way* in the light of the ‘exceptional exercise of jurisdiction’ requirement; because it was necessary here to “show that China had *deviated from what was permitted under the freedom of the high seas and that other States had acquiesced in such a right*” (emphasis added).

by the Art. 298 exception, the Tribunal thus found it had jurisdiction to consider the Philippines Submissions 1 and 2<sup>55</sup>, essentially concerning China's *claimed historic rights in the SCS*.

This categorical and briefly-expressed conclusion on the facts does highlight one possible criticism of the Tribunal's award: namely, where a *substantively*-based exception (such as a claim to historical title)- as opposed, for example, to a procedurally-based one - is comprehended by Art 298, it would seem, on principle at least, that an arbitral tribunal should steer a careful path between, on the one extreme, peremptorily dismissing an expressed claim as so qualifying (so giving a declarant State a 'margin of appreciation'<sup>56</sup>), and, on the other, accepting the claim of the respondent State at face value without any proper analysis of it<sup>57</sup>. In the latter regard it would seem that a tribunal cannot accept such a claim as being exempt from its jurisdiction *at face value alone*: otherwise any State might opportunistically conjure up such an exception to foil the jurisdiction of a tribunal<sup>58</sup>. The Tribunal seems, outwardly at least, to have been unconcerned with this

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<sup>55</sup> Id., at para.228.

<sup>56</sup> See R.Beckman, "UNCLOS Part XV and the South China Sea", in Jayakumar *et al* above n.49, 229,244.

<sup>57</sup> As I briefly alluded to in my chapter in Wu et al. (above n.1 at p.234).The point appears to have been taken up by Bernard Oxman in his publication on "The South China Sea Award" ,*University of Miami Legal Studies Research Paper* No.16-41,at 6 fn.15; where he says that the Tribunal did not have the occasion to address whether the historic rights aspect of the optional exceptions applied to "unlawful claims to historic bays or titles"; so that in this regard "it is unclear that the claim be made in good faith would provide an effective solution to the problem".

<sup>58</sup> On the other hand, a tribunal must not "disregard the evident intention of the declarant and to deprive the reservation of its effectiveness" as stated by the ICJ in *Fisheries Jurisdiction* case(Spain v Canada),Jurisdiction of the Court,Judgment.1988 ICJ Reports,(1998),432,460 para.66: discussed recently in "Judicial Practice of the [ICJ] in the Settlement of Territorial and Maritime Disputes and a Few Observations on the Arbitral Awards in the [SCS] case" in *Proceedings (Hong Kong)* above n.3, at16,25.The writer adds (id., at 26) that in deference to the consent of a reserving State, a tribunal should make an interpretation which is in harmony with a 'natural and reasonable' reading of it.

issue, which has in the past troubled this writer. Perhaps this was because the Chinese claim so obviously failed to constitute a claim to 'historic title'. It would seem, however, in principle, that a tribunal, in such an instance is duty-bound to at least look behind the claim to see if at least a *prima facie* instance of historic title arises and that the claim is made in good faith<sup>59</sup>.

#### **D. What Remains of the Doctrine of Historic Rights falling short of title?**

##### ***(a) How is the UNCLOS Regime to be Interpreted as to surviving historic rights?***

In general, as evidenced above on the jurisdictional issue, the Tribunal took a strict interpretative view of the UNCLOS text based on the express/omitted references to 'historic' issues *nominatim*; in finding that, as a general principle, a State cannot effectively resort to general international customary law where its claimed historic jurisdiction conflicts with any *juridical rights* laid down in UNCLOS<sup>60</sup>. As seen, for example, the Tribunal stated, historic rights other than "historic titles" are "nowhere mentioned in [UNCLOS],

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<sup>59</sup> See eg., Bardeau above 50, at 302 ("...it belongs to the tribunal ....to appreciate the scope of its own jurisdiction and whether the subject matter of the dispute *clearly* relates to the exclusion as permitted by Art.298" (emphasis added).

<sup>60</sup> This is a stance taken by the US in its *Limits in the Seas*, No.143,"China: Maritime Claims in the [SCS]" (Washington DC: Bureau of Oceans and Environmental Affairs: US Dept. of State, 5<sup>th</sup> December,2014).;and by the Philippines in the arbitral case: see Award, above n.3, at para.194:"[W]here [UNCLOS] makes no express exception for prior uses or rights those historic rights would not have survived as derogations from the sovereignty, sovereign rights and high seas freedoms of other states":Award Merits, above n.3,at para 194.Most particularly (it alleged) distant water fishing States "failed to obtain recognition in the [EEZ] of historic fishing rights derived from prior high seas fishing";( id.).

as a broad and unspecified category of possible claims falling short of sovereignty”<sup>61</sup>.

This form of thinking has helped clarify the ambiguity surrounding this matter which previously pertained: where some commentators took the view that only historic rights expressly referred to in UNCLOS are still preserved<sup>62</sup>; whilst others took the opposite interpretative view; namely that unless historic maritime rights were expressly abolished by UNCLOS in its text, they still existed (albeit in international customary law)<sup>63</sup>. Yet others ( in which the Tribunal (and perhaps including myself) have taken a more ‘middle-of-the-road’ view accepting that certain *UNCLOS-compatible* historic rights, even if not expressly referred to in the UNCLOS text, might nonetheless exist by necessary implication

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<sup>61</sup> Award Merits, above n.3, at para. 226. See also *id.*, at para.238, where the Tribunal states that :

“[w]here [UNCLOS] expressly permits or preserves other international agreements, Article 311(5) provides that such agreements shall remain unaffected. The Tribunal considers that this provision applies equally to historic rights, which may not strictly take the form of an agreement, are expressly permitted or preserved, such as in Articles 10 and 15, which expressly refer to historic bays and to historic titles”.

<sup>62</sup>The *US Limits in the Seas* (above n.59) is strongly of the view that the Chinese position on historic maritime issues being still governed by the rules and principles of general international law outside UNCLOS (p.21) as “not supported by international law” and misunderstanding the “comprehensive scope of [UNCLOS]”; so that UNCLOS does not permit a State here to resort to ‘general international law’ “as an alternative basis of maritime jurisdiction that conflicts with [UNCLOS]’ express provisions relating to maritime zones”; so that (p.22) historic claims are not permitted unless “UNCLOS textually recognises” them; and that the law of the sea does not permit EEZ/continental shelf entitlements “to be overridden by another State’s maritime claims that are based on history”(id., at 23)

<sup>63</sup> See eg., para 238 of the Award on the Merits above n.3 (“Where [UNCLOS] does not expressly permit or preserve a prior agreement, rule of customary international law or historic right, such prior norms will not be incompatible with [UNCLOS] where their operation does not conflict with any provision of [UNCLOS] or to the extent that [UNCLOS] intended the prior agreements, rules, or rights to continue in operation”.

under what might be called the ‘treaty-compatibility’ test<sup>64</sup>, even if of no longer being of practical value to the claimant<sup>65</sup>.

As far as historic claim *terminology* goes, my view, as seen, is that the Tribunal rightly simplified this by stating that there can today only (effectively at least) be *two* categories of maritime historic rights; namely, on the one hand, sovereign historic rights (taking in historic title), and, on the other, ‘non-sovereign’ historic rights (‘historic rights’ in the narrow sense). Hence there can realistically be no *tertium quid* such as ‘quasi-territorial rights’ as referred to by the ICJ in the *Qatar/Bahrain* case; though the Tribunal in *Philippines v China* did perhaps inject some uncertainty here by indicating that historic rights might theoretically still extend to ‘exclusive’ assertions of rights on the high seas which are not now contained in another State’s EEZ or continental shelf<sup>66</sup>.

### (b) *The Dominance of UNCLOS over Non-Sovereign Historic claims*

The Philippines’ Memorial of March 30, 2014, alleged that China’s claims to sovereign rights and jurisdiction and “historic rights”

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<sup>64</sup> Here are many references to such ‘compatibility’ in the Award. See above n.51 and Symmons, in Wu above n.3 at 192,fn.5 on whether historic waters under UNCLOS only include historic *bays*.

<sup>65</sup> See below reference to the areal realities as to where historic rights of potential importance *might still exist*; namely in the EEZ or on the continental shelf of another State. Insofar as such rights may have been exercised by a coastal State *outside its adjacent territorial sea* in an area now comprehended by its EEZ or continental shelf (and not belonging to another State), *such rights are now to be seen as being merged in the supervening juridical regime*.

<sup>66</sup> See below n.86 and accompanying text. The Tribunal indicated (id at para.263) (somewhat strangely as an apparent afterthought) that when considering for the sake of “completeness” which of China’s claims were in fact “in excess of, and incompatible [with UNCLOS]” that in ratifying UNCLOS China “has, in fact, relinquished far less in terms of its claim to historic rights than the foregoing conclusion [ie supercession of its former rights] might initially suggest”. In so saying the Tribunal in fact raised a very misleading sign of hope for China because in the end its surviving rights turned out to be nugatory,

encompassed by the nine-dash line were contrary to UNCLOS and without legal effect to the extent they exceed[ed] the geographical and substantive limits of China's maritime entitlements in the SCS.<sup>67</sup> On the merits the Philippines submitted on this issue that not only did China have no rights in areas beyond those provided for in UNCLOS, but also that "China never had historic rights in the waters of the [SCS]"<sup>68</sup>.

Thus the Tribunal' had to conclude on the *nature* of China's historic claims in the SCS .

*(i)What validity did any Chinese Historic Rights Claim have in the Light of the UNCLOS Provisions ?*

*The 'incompatibility' doctrine:*

Having determined (as seen) that it had jurisdiction on the above-mentioned issue, the Tribunal went on to consider the *merits on the historic rights issue*<sup>69</sup> . In so doing it found, in effect, that the UNCLOS regime had made a deep incision into the former doctrine of historic maritime claims (based on customary law), by establishing a "*comprehensive system of maritime zones*"<sup>70</sup> of a

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<sup>67</sup> These submissions largely followed Philippine's Notification paras 2,11 & 13.The Philippine's submissions on admissibility issues (1-2) dealt with the legality of the u-shaped (nine-dash) line.

<sup>68</sup>Award Merits ,above n.3, at para.18 ( the "most logical way to construe China's language is as an assertion of sovereignty over the islands [of the SCS] and their 'adjacent waters' or territorial seas" involving rights "short of sovereignty"; and that the Philippines also asserted (id para.190),it considered that "China's conduct makes it clear that its claim is not to sovereignty over the entire area of the 'nine-dash-line', insofar as China has repeatedly asserted that it respects freedom of navigation and overflight in the [SCS]" .

<sup>69</sup> Id., at paras.230 *et seq.*

<sup>70</sup>And one which was "capable of encompassing any area of the sea or seabed": id.,at para.231 (emphasis added). This reference by the Tribunal to UNCLOS' *comprehensive* coverage is much repeated; eg., in paras.246,253 (without any provision, eg., for reservations under Art.309: which prohibition was found to be "informative" , id., at para.254). See also id., at paras.253, and 261.

*juridical* nature ; so that – most importantly -to the extent that China’s claim to historic rights extended to “areas that would be considered to form part of the entitlement of the Philippines to an [EEZ] or continental shelf, it would at least be at variance with [UNCLOS]”<sup>71</sup>. This was the first of several references by the Tribunal to the dominance of UNCLOS in the modern-day law of the sea over historic right<sup>72</sup>s.

As the Tribunal had concluded in its Award on Jurisdiction<sup>73</sup> :

China’s claims to sovereign rights and jurisdiction and to ‘historic rights’ with respect to areas [of the SCS] encompassed in the so-called ‘nine-dash-line’ are contrary to the Convention and without legal effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under UNCLOS.

In this consideration of the present day status of mere historic (non-sovereign) rights on the Merits, the Tribunal first examined whether such rights which “may have been established *prior to* [UNCLOS’] entry into force” but being now at variance with it, were still preserved<sup>74</sup>. In deciding this in the negative, the Tribunal made

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<sup>71</sup> Id., at para.232.As the tribunal stated (id., at para.229),”As China has not made a [historic title] claim, the Tribunal need not consider whether there would be any limit to the application of Article 298 to expansive claims of historic title extending well beyond those that may have been anticipated when [UNCLOS] was concluded in 1982”.

<sup>72</sup> As has been commented, the “general willingness [of the Tribunal in the SCS case] to consider historic rights as they relate to UNCLOS may indicate that the tribunal preferred an expansive view of its jurisdiction”: Natalie Klein, “Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions” in *Proceedings (Hong Kong)* above n.3, at 226,237.

<sup>73</sup> Above n.19, at 168.

<sup>74</sup> Id., at para.234 (emphasis added).).

an innovative consideration<sup>75</sup> of Art.311 of UNCLOS ;which in paras.(1) and (2) effectively together provides that UNCLOS trumps *prior treaty rights which are incompatible with UNCLOS*<sup>76</sup> .As the Tribunal stated, it considered that this provision “applies equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement”<sup>77</sup> .It accordingly concluded <sup>78</sup>- particularly taking into account Art 62(3) on past ‘habitual fishing practices’ in another State’s EEZ - that the “notion of sovereign rights “ (*a fortiori* if considered to be “exclusive”) over resources in an EEZ was generally incompatible with another State having UNCLOS-based rights to the same resources” <sup>79</sup> or on such other State’s continental shelf <sup>80</sup>. This is considered further below.

The latter was a very important finding; as some recent commentators have alleged (I would argue wrongly) that the Tribunal had no general authority to “retrospectively extinguish historical rights” of States which were pre-existent before UNCLOS; for example, on the basis that the text of UNCLOS itself “does not

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<sup>75</sup> Innovative because (at para.235, the Tribunal found that this provision (which ostensibly refers *only to treaties*) “applies equally to the interaction of [UNCLOS] with *other norms of international law*, such as historic rights, that did not take the form of an agreement” (emphasis added).This is interesting analogical reasoning in applying a treaty rule to international customary law in this instance and has been criticised by early academic commentators on the award (see fn.69). However (as below) there are more specific reasons why UNCLOS trumps rights at least exercised in the EEZ/continental shelf of another State today: see below n.86 and accompanying text.

<sup>76</sup> Id., at para.238. this viewpoint has been criticised by recent academic commentaries as Art 311 of UNCLOS only ostensibly applies to “other conventions and international agreements” *strictu sensu*.Whilst this is undoubtedly true, one could argue that the spirit of this provision could analogically apply also to prior customary law.

<sup>77</sup> Id., Merits, at para.235.

<sup>78</sup> Id., at para.243.

<sup>79</sup> Id., at para.243.

<sup>80</sup> Id., at para.244.

express an intention to reverse the presumption of non-retroactivity [of treaties]<sup>81</sup>.

Accordingly the Tribunal concluded<sup>82</sup> that not only did UNCLOS not “include any express provisions preserving or protecting historic rights that are at variance “ with UNCLOS (as seen), but that the treaty also “*superceded* any earlier rights and agreements *to the extent of any incompatibility*” – a view, as seen, contested by some commentators<sup>83</sup>.

Thus the Tribunal concluded that China “necessarily” relinquished any historic rights in what it may once have claimed in waters now allocated by UNCLOS forming *EEZs of other States*<sup>84</sup>. In coming to this conclusion, the Tribunal added that “No article in [UNCLOS] expressly provides for or permits the continued existence of historic rights to the living or non-living resources of the [EEZ]”; nor, similarly, to the same resources on the continental shelf, high seas or Area<sup>85</sup>. This viewpoint countered the frequent

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<sup>81</sup> See N. Klein, “South China Sea: UN Law of the Sea Arbitral Tribunal Sinks the Rule of Law”, *Foreign Policy Jnl* (August 20, 2016 (*Asia Pacific News and Analysis, Politics*), 142.

<sup>82</sup> Award Merits, above n.3, at para.246 (emphasis added).

<sup>83</sup> See, eg., S.R.Pemmaraju, “The South China Sea Arbitration (the Philippines v. China Case): Assessment of the Award on Jurisdiction and Admissibility” (2016) *Chinese Jnl of International Law* (2016) at para. 54 ; who finds unconvincing the Tribunal’s treatment of the conflict of new historic rights and the rights of the Philippines under UNCLOS; and considers (*id.*) that the Tribunal appeared “to give the provisions of UNCLOS hierarchically a status higher than the general or customary law...). He is yet another commentator who argues (as at para.61) that “disputes over historic titles and rights” is a matter “governed by general international law”.

<sup>85</sup> Award Merits, above n.3, at para.239. See also above n. As the Tribunal stated more broadly:

The system of maritime zones created by [UNCLOS]

was intended to be comprehensive and to cover any area of the sea or seabed. The same intention [for UNCLOS] to provide a complete basis for the rights and duties of the

Chinese assertions that Chinese rights in the SCS were historical rights “acquired in accordance with customary law before...UNCLOS”<sup>86</sup>.

### *The effect of Art.62(3) of UNCLOS*

In coming to its abovementioned ‘incompatibility’ conclusion, the Tribunal necessarily cited, as seen above, Art.62(3) of UNCLOS which addresses the rights of States whose “nationals have habitually fished” in another State’s EEZ. As the Tribunal interpreted this important provision (equating the above phrase as being equivalent of “historic fishing”)<sup>87</sup>:

Under this provision, coastal States are only obliged to permit fishing in the [EEZ] by foreign nationals in the event that the coastal State lacks the capacity to harvest the entire allowable catch. Even then, historic fishing in the area is only one of the criteria to be applied in allocating access, and foreign fishing is subject to the laws and regulation of the coastal State.

On this basis, the Tribunal importantly concluded that “as a matter of the text alone”, UNCLOS is “clear in according coastal rights to the coastal State alone” in this jurisdictional regard; with

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State Parties is apparent in the Preamble...

See T.McDorman, *Proceedings (Hong Kong)*, above n.3, at 322. He adds (id) that the Tribunal’s “support of the primacy of the [LOSC] in the areas of fisheries and continental shelf resources is reassuring and may be an important result in preventing the reopening of fisheries disputes internationally and bilaterally”.

<sup>86</sup> See “Spotlight: China’s Historic Rights within Dotted Line not Deniable.”, *Peoples Daily*, May 24, 2016.

<sup>87</sup> Merit sAward, above n.3, at para.242. This surely is the right interpretation although, as stated above,, the word ‘historic’ as such does not appear here; as the provision does not merely take in habitual practices *falling short of historic claims*; eg., because of lack of acquiescence to the fishing practice.

no ambiguity<sup>88</sup>. So that “[t]he notion of *sovereign rights* over living and non-living resources with another State having historic rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular if such historic rights are considered to be exclusive...”<sup>89</sup>.

It would seem, then, that a plain reading of the Art. 62 provision equally applies to both ‘exclusive’ or ‘non-exclusive’ historic rights claims in another State’s EEZ or on its continental shelf; and that if anything the Tribunal was somewhat understating the important *exclusionary* effect of Art.62(2); which, in my opinion, merely treats any historic fishing claims as *one* of the relevant *considerations* (not ‘rights’) a coastal State may take into account in allocating any surplus catch in its EEZ ; and without needing to give this criterion a necessarily prioritised position over other criteria there mentioned and, indeed, unmentioned (as the phrase “*inter alia*” implies). Indeed, it may be said that this provision, for all its circumlocution, is in practical terms the death knell of any continuing exercise any meaningful claimed historic rights in a post-UNCLOS setting; as it by necessary implication, if not expressly, the UNCLOS regime phases out any such prior claims<sup>90</sup>.

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<sup>88</sup> Id at para.103. The Tribunal bolstered this conclusion by citing the *Gulf of Maine* case (at para.256 and commenting (para.257) that although this was a delimitation case, the ICJ Chamber’s “views on the effect of exclusive fisheries zones, declared as a matter of customary law,... confirm the [Tribunal’s] own interpretation of [UNCLOS]”. The *Fisheries Jurisdiction* cases (1974) were distinguished as involving the “law of the sea as it then was” pre-UNCLOS and only involved claims of rights to access (para.258); as was the *Eritrea/Yemen* arbitration (id at para.250) on the basis that there the arbitral tribunal was there empowered to “go beyond the law on traditional fishing as it would exist under [UNCLOS]”..

<sup>89</sup> Id at para.243.

<sup>90</sup> See eg id at para.246 (UNCLOS “supersedes earlier rights and agreements to the extent of any incompatibility”).

*(ii) General Effect of the Tribunal's Decision on Continuing Existence of Historic Rights*

In sum, the Award on the Merits covers most of the important instances where historic rights might still be claimed in present times; and indeed, the breadth of its decision obviates the need to resort, for interpretative guidance, to any possibly more controversially-cited *generalised* provisions of UNCLOS, such as Art.311, to stymie any claimed historic rights post –UNCLOS<sup>91</sup>.

As the Tribunal (as seen) was to conclude more generally<sup>92</sup> (once again emphasising the ‘comprehensiveness’ of UNCLOS<sup>93</sup>), UNCLOS did not include any express provisions preserving or protecting historic rights that are at variance with [UNCLOS], so superceding earlier rights and agreements to the extent of any incompatibility<sup>94</sup>. Hence came the Tribunal’s conclusion that however long use China’s fishermen may have made of the waters of the SCS, the negotiating history of UNCLOS entailed that it “necessarily follow[ed]... that China also relinquished the rights it may have held in the waters allocated by [UNCLOS] to the [EEZs] of other States”<sup>95</sup>.

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<sup>91</sup> See above n.75.

<sup>92</sup> Id at para.246.

<sup>93</sup> At para.245 (“the system of maritime zones created by [UNCLOS] was intended to be comprehensive and to cover any area of sea or seabed”), as repeated in para.231. The Tribunal bolstered this conclusion (eg at para.254) by stating that in its view “the prohibition on reservations [in UNCLOS] [was] informative of the Convention’s approach to historic rights”. This view was again repeated at para.261 (“the text of [UNCLOS]” comprehensively addressed “the rights of other States within the areas of the [EEZ] and continental shelf, and [left] no space for an assertion of historic rights”). See above n.82. This was one of several allusions to the incompatibility of China’s alleged historic claims with UNCLOS; see eg., id., at para.261.

<sup>95</sup> Id., at para.257. The Tribunal (id.) observed that even if at one time this had given China historic rights and a “privileged position” in this regard, “the acceptance of the [EEZ] as a matter of customary law and China’s adherence to {UNCLOS} altered that situation”. see also para.271 (on ratification of UNCLOS, China “relinquished the freedoms of the high

### (iii) *Post-UNCLOS Historic Rights?*

As a particular matter in this context, the Tribunal considered whether China could have established ‘exceptional rights or jurisdiction’ *since the adoption of UNCLOS*<sup>96</sup>. Here, citing paras.3 and 4 of Art.311 of UNCLOS, the Tribunal found a mere *unilateral act* would not suffice to establish *post-UNCLOS historic rights*; as this would require fulfilment of the usual international rules for proving same (essentially acquiescence, and sufficient passage of time) “to establish beyond doubt the existence of both the right and a general acquiescence”<sup>97</sup>. However, in the SCS instance, there was nothing that “would enable another State to know the nature or extent of the rights claimed”; and since the assertion of the nine-dash-line in May 2009 by China in its note verbale to the UN, “China’s claims have been clearly objected to by other States”<sup>98</sup>.

### E. **My Concluding Thoughts**

The Tribunal did not, of course, pronounce that the ‘nine-dashed’ was *illegal per se*<sup>99</sup>; so that the line still may perform a legal function; and that is as an indicator of the territorial claims of China in the SCS. As has been said, “most legal scholars, including Chinese, are

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seas that it had previously utilised with respect to the living and non-living resources of certain sea areas which the international community had collectively determined to place within the ambit of the [EEZ] of other States”.

<sup>96</sup>Id., at para.273 *et seq.*

<sup>97</sup>Id., at para.275.

<sup>98</sup> Id. See also id. at para.199 (when finally China did make clear in May 2009 that it claims historic rights in the maritime areas within the ‘nine-dash line’, the Philippines [submitted] that this was promptly objected to by other littoral States of the [SCS]).

<sup>99</sup>It indeed emphasised (at para.272) that “historic rights to land” in the SCS remained “unaffected by [its] decision”.

aware that the line can only indicate a claim to the islands within it and their adjacent waters...”<sup>100</sup>

This was also the interpretation of the Chinese historic claim by the Philippines in the case

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Besides confirming that the question of historic maritime claims do concern disputes relating to the “interpretation or application” of UNCLOS for the purpose of the third-party settlement procedures laid out in Annex VII of UNCLOS (even if not consequentially affecting, more generally, the case of historic title aspects still *reliant on customary international law, such as historic waters*<sup>102</sup>), the Tribunal has, in so doing, incidentally clarified the meaning of various formerly interchangeably-used terms relating to historic maritime claims (as used in customary international law) : such as ‘historic rights’ (which now can be seen to have both a broad and narrow meaning, as seen above). This is in itself a welcome development in a formerly arcane and obscure area of international law.

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<sup>100</sup> S.Tonnesson, “The South China Sea: Law Trumps Power” 55 *Asia Survey*,455,463.This is also this writer’s conclusion: see Wu et al (eds),above n.1, at 233.

<sup>101</sup> It also, of course, has relevance beyond the disputants: see Ted McDorman, in *Proceedings (Hong Kong)* above n.3, at 316/7 (“it is evident that the Tribunal sought to clarify [the historic issues] on a broader level than just as between the disputing Parties”).

<sup>102</sup> See the views of T McDorman, “Rights and Jurisdiction over Resources in the [SCS] and the ‘Nine-Dash Line’” in S.Jayakumar, T.Koh & R.Beckman, *The South China Sea Disputes and Law of the Sea*,Edward Elgar Publishing (2014),(above n.49), 144, at 152 (historic waters not being regulated under UNCLOS are under the Preamble still governed by the rules and principles of general international law”.)

The Tribunal has also, as seen, (as was its primary task in this regard in the arbitration) clarified the meaning of historic “titles” concerning *optional exceptions from compulsory arbitration under Art.298* (and consequentially, the meaning of ‘historic title’ in Art.15 concerning delimitation of the territorial sea). This determination thus confines the scope of the historic ‘*title*’ exception (twice-mentioned in UNCLOS ) to sovereignty-based/exclusive jurisdictional aspects of historic claims; in other words to ‘*historic waters*’ as exemplified particularly by ‘historic bays’ mentioned in Art.10(6) of UNCLOS. This effectively – and in a practical sense<sup>103</sup> - entails that it is only in the latter type of instances that any *customary rules can now meaningfully exist separably and independently from the UNCLOS treaty regime* :such as still evidencing the rules relating to proof of historic waters.

In all other instances, the Tribunal has emphasised how UNCLOS has now realistically superceded and extinguished mere ‘*non-sovereign*’ (and *non-exclusive*) historic claims or made them redundant; effectively (as seen) leaving only claims to *historic waters* (and the rules relating thereto) outside the large incision which UNCLOS can be seen to have made to the former customary law regime in this area of the law of the sea. This entails – as the Tribunal went on to show – that any lesser historic rights’ of a non-sovereign and ‘non-exceptional’<sup>104</sup> nature are today of little practical legal value to claimants because of their supercession by

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<sup>103</sup> As outside the EEZ/continental shelf any exercise of fishing etc of other States are unlikely to be seen today in historical perspective *as exclusionary of other States* (as has been in fact the case in the SCS where China has not been the only past fishing nation); added to the fact that such practices are also unlikely to be “exceptional” (see above n ) . So that they basically constitute an example simply of the past freedoms of the high seas (see above n...); and thus need no ‘historic epithet’ to justify them. See also below n.106.

<sup>104</sup> See Merits Award, above n.3, at para.246: where, as seen, UNCLOS was found not include any express provisions preserving or protecting historic rights that were at variance with its regime.

the comprehensively laid-out juridical rights in UNCLOS<sup>105</sup>; either insofar as they may now fall within the EEZs, or continental shelves of other States<sup>106</sup>; or, if in the past exercised outside the territorial sea of then-adjacent claimant state, may now be seen as being merged into the **juridical regimes** of such States' EEZs or continental shelves; so they no longer need an historical basis of claim ; and/or also because they may simply now be seen as reflective of a former (non-exclusive) exercise of a juridical right on the high seas under the doctrine of freedom of the high seas<sup>107</sup>.

Perhaps the only controversial finding by the Tribunal, within the *ambit of historic rights generally*, concerned its determination that *traditional fishing rights* may still survive under the UNCLOS regime in another State's territorial sea because of their express retention under Art.2(3) of UNCLOS. This is anomalous in the case in hand, particularly as Art.56(2) of UNCLOS has a similar reference to third party rights having to be respected by the coastal State in its EEZ.<sup>108</sup>; and it might seem logically strange that third party

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<sup>105</sup> Ironically, perhaps, the Tribunal did uphold the concept of traditional fishing rights under the current law of the sea in *the territorial sea* of other States, as claimed by the Philippines in their Submission No.10, Merits above n.4, p.299 *et seq.* See below n.107 and accompanying text.

<sup>106</sup> See above nn.84, 102.

<sup>107</sup> Such former rights thus do not need the 'historic' in historical retrospect. As the Tribunal put it (at para.271): China has "relinquished *the freedoms of the high seas* which it has previously utilised with respect to the living and non-living resources which the international community had collectively determined to place within the [EEZ] of other States" (emphasis added). Also the Tribunal (see above n.12), in emphasising that historic rights are "in most instances , exceptional rights" (id, at para.268), stated that it followed that "the exercise of freedoms [of the high seas] permitted under international law cannot give rise to a historic right" as it "involves nothing that would call for the acquiescence of other States and can only represent what international law already freely permits". Ted McDorman (*Proceedings ( Hong Kong )* , above n.3, at 325, rightly comments on the "difficulty of asserting historic rights regarding activities that prior to the [UNCLOS] were captured by freedom of the high seas".

<sup>108</sup> As was indeed pleaded by Mauritius in the *Mauritius v UK arbitration* (see para.409 of Decision); to the effect that its fishery rights in the EEZ of the Chagos archipelago were

historic rights in the more sovereign area of another State should lead to greater rights for a third State; whereas such third party-claimed rights in areas of lesser coastal State sovereignty (*viz.*, EEZs and continental shelves) should lead to no vested rights for third States. The Tribunal was not unaware of this apparent anomaly, but brushed it aside very brusquely and briefly<sup>109</sup>.

It may be noted, for example, that this very argument was made by Mauritius in its pleadings in the *Mauritius v UK* arbitration<sup>110</sup>. The retention of such historic fishing rights in the territorial sea of another State may have, however, a separable explanation from that based on historic rights *per se*; and that on the doctrine of *voisinage* which has been applied to other such situations in the world on the basis of mutually-agreed rights of cross-boundary fishing on a basis of strict reciprocity between immediately neighbouring States<sup>111</sup>.

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not limited to preferential rights, but entailed that a coastal state had 'due regard' for the rights of other states in their EEZs.

<sup>109</sup> Award, above n..., at paras. 800/801, merely saying that the "law reflects the particular circumstances if the creation of the [EEZ]". In so doing it expressly disagrees (id at para.803) with the contrary decision in the *Eritrea/Yemen* case.

<sup>110</sup> See Award, at para.409.

<sup>111</sup> As indeed, for example, between the two jurisdictions in the island of Ireland; discussed in Symmons, *Ireland and the Law of the Sea*, 2<sup>nd</sup> ed..... A similar situation pertained in the territorial sea regimes in the *Eritrea/Yemen* situation; where indeed in Annex 2, p.382, reference is made to a draft 1994 Eritrea-Yemen agreement whereunder both states agreed to mutually permit fishermen of the two States to fish not only in the territorial waters of the two states but also in their EEZs.