Department of Political Science

Bachelor's Degree in Politics, Philosophy and Economics

Chair of International Law

The South China Sea dispute: the compatibility of Chinese claims with the United Nations Convention on the Law of the Sea.

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Academic Year 2021/22

Academic Year 2021/22

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Introduction

The South China Sea (SCS) is a semi-closed sea in the in the Pacific Ocean encapsulated within a vast number of sovereign countries ranging from mainland China and Vietnam to the islands of Taiwan, the Philippines, Malaysia, and Brunei[1]. The sea has been the stage of international maritime disputes since the late 19th century and today it is often the centre of military and diplomatic crises between the forementioned States over the control of minor archipelagos. To avoid the occurrence of dangerous military confrontation and in the attempt to peacefully set the ongoing disputes, the Republic of the Philippines decided to resort to the instruments provided by international law of the sea. By Notification and Statement of Claim, in 2013 the Philippines initiated arbitration proceedings against China pursuant to Articles 286 and 287 of the Convention and in accordance with Article 1 of Annex VII of the United Nations Convention on the law of the Sea (UNCLOS or the Convention). An arbitral tribunal (the Tribunal) was appointed and consequently, on July 2016, the Tribunal delivered its ruling over a variety of legal issues concerning the SCS[2].

By analysing multiple sources of international law of the sea, literature, and international courts' jurisprudence, this study will scrutinise Chinese claims in the SCS, trying to assess their compatibility with UNCLOS' legal principles. Notwithstanding the recent Tribunal's award already covering much of the subject matter, recent States' practice may have contributed to the progressive development of international law of the sea outside the UNCLOS' legal framework. Moreover, even though the Tribunal provided an extensive judicial verdict, further investigation on the controversies may shed more light on some of the remaining grey areas. For example, some scholars have argued that the Tribunal's interpretation of historic rights claimed by China in the SCS suffers some shortcomings. The essay will proceed as follow. After having provided a brief and comprehensive geo-historical summary of the SCS, the work will move on to the third chapter discussing the main claims advanced by China in the area as provided by the United States (US) Department of State[3]. First, the PRC contends to be entitled to sovereignty over maritime features in the SCS which

[1] ZOU K., *The South China Sea*, in DONALD ROTHWELL, ALEX OUDE ELFERINK, KAREN SCOTT, AND TIM STEPHENS *The Oxford handbook of the law of the sea*, 2015, pp 627-649.

[2] Award para. 2, "This arbitration concerns disputes between the Parties regarding the legal basis of maritime rights and entitlements in the South China Sea, the status of certain geographic features in the South China Sea, and the lawfulness of certain actions taken by China in the South China Sea."

[3] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

do not classify as "islands" under UNCLOS. Secondly, China intends to use the system of straight baselines within the four groups of forementioned features in order to calculate from where maritime zones ought to be measured. Thirdly, the PRC argues that each group of islands (in Chinese Qundao) generates maritime zones i.e. internal waters, a territorial sea, a contiguous zone, an EEZ, and continental shelf. Lastly, China argues that the islands and features in the SCS belong to its jurisdiction by notion of historic rights which is to say rights deriving from the past use of the SCS by Chinese governments and civil society. In the fourth chapter, a legal evaluation of these claims will be laid out to understand if and to what degree they are in conformity with UNCLOS. In light of the findings conclusions will then be drawn, suggesting new avenues for further research.

Chapter 1
Overview of the SCS: history and current affairs

In the attempt to advance its economic and military interests, China has been building militarized artificial islands while exerting forceful actions against neighbouring States in the SCS[4]. In fact, the area is fundamental for China's economic development and its ascendance to global power[5]. Through effective bilateral diplomacy, the Popular Republic of China (PRC) has been able to use its economic leverage to internally divide the Association of South East Asian Nations (ASEAN) of which most of the above mentioned States are members, and weaken other littoral states' claims. Notwithstanding President's Xi Jinping statements[6], China's access to great powers politics together with the United States' (US) involvement in the area have made the SCS an increasingly unstable region. In the following paragraphs a general overview of the SCS in its geographical, historical, and geopolitical features will be provided.

1.1 The geographic features of the SCS.

The SCS is a semi-enclosed sea embedded in between a large number of South East Asian States i.e. China, Viet Nam, the Philippines, Malaysia, Indonesia, Brunei and Taiwan. This small portion of the Pacific Ocean is punctuated with many islands and coral reefs most of which are submerged at high tide. For example, the Spratly Islands are marked as "dangerous grounds" on navigation charts[7]. The groups of islands and reefs which are being contested the most between the forementioned States are primarily four.[8] The Pratas or Dongsha Qundao is the atoll laying closer to China. South-west of the Pratas there are the Paracel Islands or Xisha Qundao. They consist of about 35 islets and reefs. Its largest feature, Woody Island, is the host of Sansha City, a prefecture-level city established by the Chinese

[4] QUINTOS, M. F. A., *Artificial Islands in the South China Sea and their impact on Regional (In) security*, in 'Center for International Relations and Strategic Studies', *Manila*, *2*, 2015.
[5] ZOU K., *The South China Sea*, in DONALD ROTHWELL, ALEX OUDE ELFERINK, KAREN SCOTT, AND TIM STEPHENS *The Oxford handbook of the law of the sea*, 2015, pp 627-649.
[6] «China resolutely opposes hegemonism and power politics, wishes to maintain friendly relations with its neighbours and jointly nurture lasting peace in the region and absolutely will not seek hegemony or even less, bully the small.» (Xi Jinping, ASEAN 's Summit in Brunei, 2021) www.aljazeera.com/news/2021/11/22/xi-china-will-not-seek-dominance-over-southeast-asia
[7] BECKMAN, R., *The UN Convention on the Law of the Sea and the maritime disputes in the South China Sea*, in 'American Journal of International Law', vol.*107*(1), 2013, pp. 142-163.
[8] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

government in 2012 as the administrative centre for Chinese claimed territories in the SCS[9]. The Paracel are contended by China, Viet Nam, and Taiwan. Third, there are the Spratly Islands or Nansha Qundao which are located on the south-east side of the SCS. They are west of the island of Palawan in the Philippines and northwest of the northern part of the island of Borneo[10]. According to Article 121(1) of UNCLOS, less than forty of Spratly's features can be considered or defined as islands[11]. Viet Nam occupies twenty-five islands in the Spratly but it is not the only one. China, Taiwan, the Philippines, and Malaysia all occupy at least one feature of the Spratly. The fourth disputed archipelago in the SCS is Scarborough Shoal, included in the islets that the Chinese call Zhongsha Qundao, a large atoll with a lagoon of about 150 km2 surrounded by reefs.[12] It is located 124 nm from the Philippines and it is disputed between the former, the PRC, and Taiwan.

Figure 1: EEZs in the SCS. The map also shows the SCS's islands arrangement highlighting who occupies the most prominent features in the area.

[9] China's Ministry of Foreign Affairs acknowledged the establishment of Sansha in June 2012, *see* Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 25, 2012 (June 26, 2012), at www.fmprc.gov.cn/eng/xwfw/s2510/2511/t945654.htm, and local government officials took office in July, *see China Establishes Sansha City*, XINHUANET ENG. NEWS (July 24, 2012), *at* http://news.xinhuanet.com/english/china/2012-07/24/c_131734893.htm.

[10] Ibidem

[11] UNCLOS, art. 121

[12] BECKMAN, R., *The UN Convention on the Law of the Sea and the maritime disputes in the South China Sea*, in 'American Journal of International Law', vol. *107*(1), 2013, pp. 142-163.

1.2 A brief history of the South China Sea: how disputes arose.

The SCS has always been a highly disputed area. In 1895, at the end of the Sino-Japanese war the Japanese Empire got China to reluctantly sign the Treaty of Shimonoseki. With the latter, China ceded most of its possessions to Japan including the island of Formosa (Taiwan). Later in 1937, the Japanese Empire seized control of many of the features in the SCS, landing its maritime forces first on the Pratas Islands and then on the Spratly Islands. During this time, French Indochina forces were also present in the area, securing their control on the Paracel Islands[13].

Contemporary tensions arose following the San Francisco peace treaty between Japan and the US at the end of War World II. By ratifying the agreement, Japan renounced its sovereignty over the formerly controlled islands in the SCS and left a power vacuum.[14] Eventually, States in the region started to assert their claims over minor groups of islands (Qundao) like the Spratly and the Paracel which have been the stage of international frictions since then. For instance, in 1974 China occupied the western portion of the Paracel Islands and seized a Vietnamese garrison resulting in the first permanent occupation by Vietnam of the Spratly Islands. Later in 1988, China and Vietnam's clash on the Johnson Reef marked China's first armed conflict over the Spratly archipelago. The Chinese navy sank three Vietnamese vessels resulting in the death of 74 Vietnamese sailors.[15] The clash between China and the Philippines over Mischief Reef in 1996 triggered a crisis in the Sino-Philippine relations and reinforced US-Philippine ties. In 2002, after six years of negotiations, an ASEAN-China code of conduct came into force[16]. The Declaration on the Conduct of the Parties was a non-binding agreement which provided clear guidelines for maritime behaviours and for conflict resolution[17]. China overcame its doubts, abandoned the previously followed bilateral approach, and embraced a multilateral line of action that had been strongly rejected until then[18].

However, since 2009 the PRC started adopting more assertive policies in the SCS claiming almost the entirety of the disputed area according to the famous "nine-dash line"

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[13] Council on Foreign Relations. 2022. *Timeline: China's Maritime Disputes*, at www.cfr.org/timeline/chinas-maritime-disputes (Accessed 28 March 2022).
[14] Ibidem
[15] Ibidem
[16] Ibidem
[17] Ibidem
[18] FRAVEL, M. T., *China's strategy in the South China Sea,* in 'Contemporary Southeast Asia', 2011, pp. 292-319.

or jiuduanxian. In 2009, Viet Nam and Malaysia appealed to the Commission On the Limits of the Continental Shelf (CLCS) in a joint submission concerning the outer limit of the continental shelf beyond 200 nautical miles. The day after, the Permanent Mission of the People Republic of China to the United Nations promptly replied with a note verbale to the Secretary-General of the United Nations, clarifying that «China has 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 over the seabed and subsoil thereof. The above position is consistently held by the Chinese Government , and is widely known by the international community»[19]. In 2012, a military standoff with the Philippines at Scarborough Shoal resulted in new tensions followed by the subsequent Chinese takeover of the Shoal[20]. This action is to be considered significant as China forcefully occupied a Shoal that is recognised to be in the Philippines EEZ and that lays just 120nm West from the Philippines island of Luzon.

Notwithstanding the declaration on the conduct of the parties of 2002 preventing parties to appropriate new features, competing States all dedicate themselves to the construction of artificial facilities and buildings on already occupied islands[21]. In 2013, China embarked on an island-building project of massive proportions[22]. In the last years, the PCR has built artificial islands on Johnson South reef , Gaven (Burgos) reef, and Hughes (Kennan) reef. It built military installations and established modern military equipment increasing tensions which culminated in the 2019 Vanguard Bank incident between China and Viet Nam[23].

1.3 Economic and geopolitical issues in the SCS.

As clear from above, the area of the SCS is highly turbulent. A variety of factors exist explaining this situation. First of all, the sea represents a key commercial route for international trade. In 2020, $3.37 trillion of the total world trade passed through this sea[24].

[19] CML/17/2009, Chinese Note Verbale to the UN Secretary-General

[20] GROSSMAN, D., *Military Build Up in the South China Sea*, in 'The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition', 2020, pp. 182-200.

[21] Declaration on the Conduct of the Parties in the South China Sea, 4th November 2002, art. 5

[22] DAVENPORT, T., *Island-building in the South China Sea: Legality and limits,* in 'Asian Journal of International Law', Vol 8(1), 2018 pp. 76-90.

[23] GROSSMAN, D., *Military Build Up in the South China Sea*, in 'The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition', 2020, pp. 182-200.

[24] CHINA POWER TEAM, *"How Much Trade Transits the South China Sea?"*. August 2, 2017. Updated January 25, 2021. https://chinapower.csis.org/much-trade-transits-south-china-sea/, accessed March 21, 2022.

In addition, up to 40% of global liquefied natural gas trade transited through the South China Sea in 2017.[25] Second, the area is rich in natural resources which are fundamental for the development of the countries claiming them. An estimated 7 billion barrels of oil and 900 trillion cubic feet of natural gases are to be exploited in the SCS[26]. Additionally the SCS is very rich in fisheries and most of the littoral States count on its supply of fish to feed a great portion of their population. Last, the SCS covers a strategically fundamental area as it connects the Pacific Ocean to the Indian Ocean trough the Straits of Malacca and of Taiwan[27]. Moreover, the disputed area came to be of even more geostrategic importance as a consequence of the Sino-US competition. To put it in the words of Robert Kaplan, the South China Sea is «the centre of maritime Eurasia» thus it is of the highest significance both for China and for the West and its Indo-Pacific policies[28].

The result is that now a large number of actors with at times conflicting at times coinciding interests is concentrated in this small part of the Pacific Ocean, making the SCS highly tumultuous. Together with the independent and sovereign littoral States present in the area, in the SCS it also operates the regional international organization (RIO) known as ASEAN. Despite Chinese preference for bilateralism, ASEAN and China have long been involved in diplomatic talks and confrontations in order to find compromises to the ongoing disputes. While sometimes ASEAN has proven to be a decisive actor e.g. during the negotiations for the 2002 code of conduct in the SCS, often its decision-making mechanisms based on consensus have hindered the achievement of substantial progresses. The third fundamental actor present in the region is the US and its allies e.g. the United Kingdom (UK), Japan, and Australia. The growing American presence in the SCS is quite recent and it has not contributed to the development of a peaceful regional environment. On the contrary, the recent tensions have aggravated the concerns that the international community already had in relation to the regional stability and security[29].

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[25] BARDEN, J., JONES, K. AND MEHMEDOVIC, K.,. *Almost 40% of global liquefied natural gas trade moves through the South China Sea*, [online] Eia.gov. Available at: <https://www.eia.gov/todayinenergy/detail.php?id=33592#> [Accessed 28 March 2022].
[26] KAPLAN, R. D., *The South China Sea is the future of conflict*, in "Foreign Policy", vol. 76., 2011.
[27] ZOU K., *The South China Sea*, in DONALD ROTHWELL, ALEX OUDE ELFERINK, KAREN SCOTT, AND TIM STEPHENS *The Oxford handbook of the law of the sea*, 2015, pp 627-649.
[28] Ibidem
[29] Ibidem

Chapter 2
Chinese claims and legal implications

Many issues arise with regard to Chinese claims in the SCS. First and foremost, understanding Chinese claims has been particularly challenging because of the lack of a clear and public Chinese official position with regard to the SCS' disputes. In fact, the PRC has rarely publicly provided its stance and legal understanding toward the disputes apart from few exceptions e.g. the 2009 Note Verbale[30]. Also, the absence of Chinese participation to the SCS arbitral award has hindered further explanations of Chinese claims. As mentioned previously, the Tribunal had been called upon by the Philippines under art. 1 Annex VII of the Convention to deliver legal answers to the Philippines' submissions. Given the Chinese absence and to ensure procedural fairness, the Tribunal had to infer Chinese positions from official communications, statements of those associated with the government, or via other indirect means[31]. During the arbitral award, procedural difficulties brought along by such an obstacle were partially alleviated by the publication of China's Position Paper in 2014[32]. Even so, the Chinese position and legal arguments remain opaque. Consequently, this work will present Chinese claims according to evidences provided by official Chinese documents while relying on the Award and other academic sources.

China's claims in the SCS can be summarized as being four[33]. First, the PRC contends sovereignty over maritime features in the SCS. As stated previously, China regards the different groups of islands as its own on the basis of historical use, and feels entitled to exercise jurisdiction over *every* maritime feature within the four groups. Secondly, within the four Quandao, China intends to use the system of straight baselines, instead of the normal baseline method, in order to calculate from where maritime zones ought to be measured. Thirdly, the PRC claims that the four groups of islands in the SCS generate all the maritime zones i.e. internal waters, a territorial sea, a contiguous zone, an EEZ, and continental shelf.

For the sake of clarity, it must be said that the three aforementioned claims are the outcomes of the particular Chinese perspective which consists of treating the archipelagos

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[30] CML/17/2009, Chinese Note Verbale to the UN Secretary-General
[31] Permanent Court of Arbitration, *The South China Sea Arbitration Award,* Case N° 2013-19, 12 July 2016, para. 126
[32] Ivi, para. 128
[33] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

"as a single unit"[34]. Lastly, China argues that the islands and features in the SCS belong to its jurisdiction by notion of historic rights which is to say rights granted by the past use of the SCS by Chinese governments and civil society. Debated at length by the Tribunal, this claim came to be interpreted as the claim over living and non-living resources within the nine-dash line without claiming those waters as part of China's territorial sea[35].

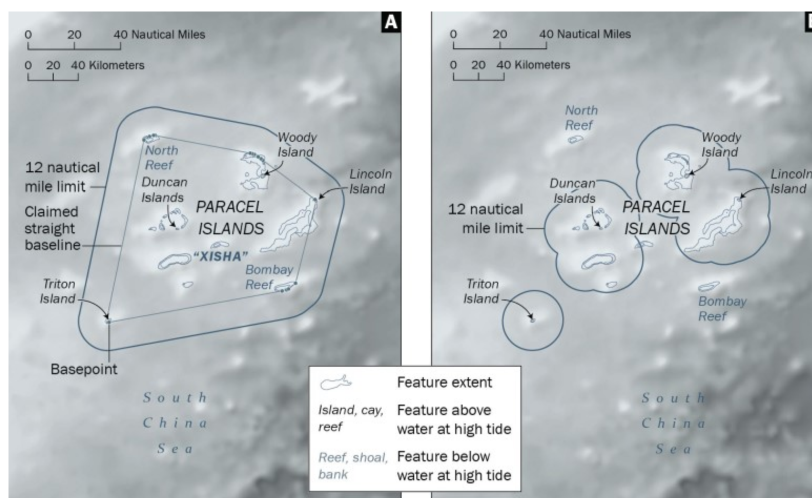

Figure 2: China's legal pretences to treat the islands "as a single unit" for purpose of maritime delimitations (figure A). The map is taken from the study of the US Department of State.

2.1 Sovereignty claims over all the maritime features in the SCS.

The strongest and oldest Chinese claim is that of being sovereign over the four main groups of islands in the SCS. In its official position document released in 2014, the PRC maintained that «China has indisputable sovereignty over the South China Sea Islands (the Dongsha Islands, the Xisha Islands, the Zhongsha Islands and the Nansha Islands) and the adjacent waters»[36]. All these areas are included in the U-shaped line which is known as the 'Chinese traditional maritime boundary line' and appeared for the first time on Chinese maps in December 1914[37].

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34 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 available at: english.www.gov.cn/archive/press_briefing/2014/12/07/content_281475020441708.htm, [last accessed 2nd April 2022].

35 Award para. 214

36 Ibidem

37 ZOU K., *The South China Sea*, in DONALD ROTHWELL, ALEX OUDE ELFERINK, KAREN SCOTT, AND TIM STEPHENS *The Oxford handbook of the law of the sea*, 2015, pp 627-649.

However, not all maritime features are capable of appropriation. The Tribunal was careful to emphasize that it had no jurisdiction over matters of territorial sovereignty[38], yet it discussed thoroughly the legal status of the features in the SCS and the different maritime zones they are capable of generating especially in the Spratly[39]. Four types of maritime features exist as provided by UNCLOS. According to art. 13 of UNCLOS, a "low-tide elevation" (LTE) is a feature that is exposed at low tide but covered with water at high tide. High tide features or islands instead are those which are above water at high tide. The Tribunal distinguishes between two types of high tide features namely, fully entitled islands and simple rocks as provided by art. 121(1) and 121(3) of UNCLOS. The former have the capacity to «sustain human habitation or economic life of [its] own», while the latter do not[40]. Lastly, there are fully submerged features.

Islands are considered as part of the land territory of a State and are thus capable of generating all the maritime zones generated by land territory according to the principle "the land dominates the sea"[41]. Also, islands and rocks can give raise to sovereignty claims and are capable of appropriation. However, rocks only generate a contiguous zone and territorial sea and are deprived of the possibility to generate an EEZ or Continental Shelf[42].

The legal regime of LTE is different. The latter do not generate any maritime zone, however if an LTE is situated within the territorial sea either from the mainland or an island it may be used as the baseline to calculate the breadth of the territorial sea[43]. Submerged features are not entitled to any maritime zone as well. LTE and fully submerged features lying beyond the territorial sea limit cannot be subject of sovereignty of the coastal State. It is worth noticing that the status of these features depends upon their natural state. Alterations of the natural condition will not result in the alteration of the status[44]. As the Convention

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[38] REED L, WONG K., Marine entitlements in the South China Sea: The arbitration between the Philippines and China. American Journal of International Law. 2016 Oct;110(4):746-60.
[38] Award para. 279
[40] Award para. 280
[41] International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany/Netherlands), para. 96, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward".
[42] Art. 121(3), UNCLOS
[43] Art. 13(1), UNCLOS
[44] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

clearly states «[a]rtificial islands, installations and structures do not possess the status of islands»[45].

From careful evaluation, China does not seem to share this view. As it will be noticed below, the PRC claims sovereignty over maritime features derivatively from sovereignty over the whole Qundao. In the position paper of the 7th December 2014, the PRC "objected that in respect of the Nansha Islands, the Philippines selects only a few features and requests the Arbitral Tribunal to decide on their maritime entitlements. This is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole"[46].

According to the Tribunal, this statement could be interpreted in two different ways[47]. On the one hand, China may be arguing that with regard to the capacity of an island to sustain human habitation and economic life of its own, it may be necessary to consider a wider range of features, as small islands' population often sustain their livelihood through the use of inhabitable atolls and small reefs. However, the Tribunal had already agreed with this reasoning in the previous passages of the Award. On the other hand, with the previous statement China could be suggesting that the Spratly Islands «should be enclosed within a system of archipelagic or straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit»[48]. This second position seems to be the more plausible according to different sources[49].

To conclude and clarify, a Chinese perspective suggests that China does not consider these rocks individually but as part of the groups of islands which must be considered in their unity. The Chinese society for International Law maintains that an archipelago must be treated as "a unit" for purposes of sovereignty and maritime entitlements[50]. This means that when sovereignty over a maritime feature or the maritime zones that the feature in question generate is to be determined, it shall be considered the broader groups of features to which

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[45] Art. 60(8), UNCLOS
[46] Award, para. 571
[47] Ibidem para. 572
[48] Ibidem para. 573
[49] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea*
[50] CHINESE SOCIETY OF INTERNATIONAL LAW, "The South China Sea Arbitration Awards: A Critical Study," in 'Chinese J. Int'l L.', 207, 2018, 475

it belongs. Consequently, sovereignty over an archipelago means sovereignty over its single components.

2.2 The method to measure baselines from which maritime zones ought to be calculated.

International law of the sea sets comprehensive rules concerning the baselines which govern the starting point from where maritime zones are to be calculated. Normally, the baseline coincides with « the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State»[51]. Nevertheless, where particular geographic conditions are met, a system of straight baselines connecting "appropriate points" may be employed[52]. Even so, when the method of straight baselines is applicable, further requirements shall be met e.g. the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast[53]. Also, under article 47 of UNCLOS, States defined as archipelagic i.e. constituted wholly by one or more islands may draw straight archipelagic baselines joining the outermost points or islands of the archipelago.

In its 1992 law on the Territorial Sea and Contiguous Zone (1992 Law), China asserts that a straight baseline method should be used in order to determine Chinese baseline[54]. The same reasoning seems to apply also in the case of the Quandao in the SCS. To date, Xisha Qundao is the only group over which the PRC has formally claimed straight baselines[55]. Presupposes exist for the PRC to also apply the same method on the remaining three groups, however this has not been done yet.

2.3 Maritime zones generated by the Qundaos

The PRC argues that each archipelago treated as a single unit generates all the existing maritime zones i.e. internal waters, a territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf. A problem of legal nature arise in this case. Since maritime zones are calculated from a baseline, different baselines i.e. archipelagic, straight, or normal will generate differently measured maritime zones. Officially, the Chinese have only claimed

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[51] Art. 5, UNCLOS
[52] Art. 7, UNCLOS
[53] Ibidem
[54] Law on the Territorial Sea and the Contiguous Zone of 25 February 1992., art. 3
[55] Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996.

straight baselines in the Paracel, thus it is unclear whether or not they wish to employ them also in the other cases. However, in its critical study over the SCS arbitration the Chinese Society for International Law argues that dismembering the archipelagos (as the Tribunal did) without considering them as single units would infringe China's rights. To put it in their words «the Tribunal's approach in effect dismembered China's Nansha Qundao and Zhongsha Qundao, infringing China's sovereignty, territorial integrity and maritime rights and entitlements»[56]. This would seem to suggest that China is willing to calculate maritime zones in the SCS from the straight baselines encircling all the four groups of islands.

2.3.1 Internal waters

Generally, internal waters are defined as all the waters on the landward side of the baseline. By legally considering each of the archipelagos as a whole, the PRC argues that they generate internal waters, meaning the portion of sea laying within the baseline of the archipelago and in-between internal features. According to article 2(1) of UNCLOS, a coastal State enjoys sovereign rights over its internal waters. Since internal waters delimitation depends upon the baseline, officially the Chinese claim to internal waters only apply to the Paracel Islands, where the PRC seeks to employ a straight-baseline method as provided by the 1992 Law.

2.3.2 Territorial sea and Contiguous Zone

In its 1992 law the PRC asserts a 12nm territorial sea[57]. This claim of sovereignty which also applies to the airspace and to the seabed and subsoil below is of course permitted under international law. UNCLOS recites that «The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil»[58]. However, China claims the 12-mile territorial sea from the four archipelagos in the SCS, apparently resorting to a system of straight baselines. Also, by means of the 1992 Law and the new

[56] CHINESE SOCIETY OF INTERNATIONAL LAW, "The South China Sea Arbitration Awards: A Critical Study," in 'Chinese J. Int'l L.', 207, 2018, 475

[57] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

[58] Art. 2 para. 1 and 2

Maritime Traffic Safety Law, China has further restricted the right of innocent passage which other States enjoy in the territorial seas of other countries under art. 17 of UNCLOS[59].

The PRC has also asserted a 12nm contiguous zone namely, the area of sea contiguous and extending seaward of the territorial sea[60]. Within these contiguous zones China asserts a wide range of powers for the prevention and punishment of infringements of its security. The US department considers these actions unlawful as they exceed the rights that a coastal state enjoys within its contiguous zone as set by art. 33 of UNCLOS[61].

2.3.3 EEZ and Continental Shelf

Contrary to the previous maritime zones, the EEZ and Continental Shelf claimed by the PRC are governed by a controversial 1998 Exclusive Economic Zone and Continental Shelf Act (1998 Law). In the latter China asserts an EEZ and a Continental Shelf a claim which is in line with international law. However, China claims an EEZ and a Continental Shelf "based on Nanhai Zhudao" (the Chinese name for the SCS)[62]. This seems to suggest that the PRC is willing to measure its continental shelf starting from the four mentioned Qundaos, as they precise "including Zhongsha Qundao and Nansha Qundao"[63].

2.3.4 Historic rights

Lastly, China claims to be entitled to the forementioned revindications and to additional rights by means of its historical relation with the SCS. In the context of the 2016 Arbitration, the PRC has clearly stated that China enjoys historic rights over most of the SCS by means of its historic authority over and use of the various archipelagos and reefs[64].

The term Nan Hai (southern sea in Chinese) has been widely known for a long time in China. Its first appearance can be found in the classic poetry book *Shi Jing,* a publication of the Spring and Autumn Period (475–221 BC)[65]. Between 1405 and 1433, official voyages under the supervision of the Min emperor Yong Lee were undergone to spread knowledge

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[59] Ibidem
[60] ZOU K., *The South China Sea*, in DONALD ROTHWELL, ALEX OUDE ELFERINK, KAREN SCOTT, AND TIM STEPHENS *The Oxford handbook of the law of the sea*, 2015, pp 627-649.
[61] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*
[62] Ibidem
[63] Ibidem
[64] Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea, July 12, 2016
[65] ZHIGUO GAO, & BING BING JIA., *The Nine-Dash Line in the South China Sea: History, Status, and Implications,* in 'the American Journal of International Law', *107*(1), 2013, pp. 98–124.

about the empire in the area. Since then, the SCS has been the centre of the maritime trade routes the Chinese empire relied on to commerce as far as the Mediterranean Sea[66]. It must also be noted that China is the sole littoral state whose presence and use of the SCS's islands can be defined as "timelessness"[67]. Moreover, neither Viet Nam nor the Philippines have raised competing claims to the Chinese ones for centuries. Actually, Viet Nam even endorsed the PRC's position until the late 1960s[68].

Deliberating on the nine-dash line and on historic rights, the Tribunal has found that the PRC, while claiming most of the resources enclosed within the line, does not consider these waters as part of its territorial sea[69]. Thus, the nine-dash line does not represent a sovereignty claim to a territorial sea or internal waters. China's behaviour toward freedom of navigation in the SCS would seem to support this understanding of the facts. However, Zhiguo Gao and Bing Bing Jia seem to suggest the opposite when stating «the nine-dash line is in the nature of a potential maritime boundary between China and opposite states and that within the line, China claims sovereignty over the island groups under international law»[70].

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[66] Ibidem
[67] Ibidem
[68] Ibidem
[69] KOPELA S., *Historic titles and historic rights in the Law of the Sea in the light of the South China Sea arbitration*, in 'Ocean Development & International Law', 2017, pp. 181-207. "On the basis of China's conduct, the Tribunal understands that China claims rights to the living and non-living resources within the 'nine-dash line', but (apart from the territorial sea generated by any islands) does not consider that those waters form part of its territorial sea or internal waters."
[70] United States Department of State, 2022. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No. 150 People's Republic of China: Maritime Claims in the South China Sea.*

Chapter 3

Juridical evaluation and legal analysis of Chinese claims in the SCS

The following section will seek to analyse the compatibility of Chinese claims in the SCS with UNCLOS. It will first consider in details the 2016 arbitration and the ruling of the Tribunal concerning baselines, maritime delimitations, and maritime entitlements in the SCS. For the sake of brevity, this work will mainly focus on the territorial aspect of the dispute i.e. leaving out the Tribunal's ruling concerning the lawfulness of Chinese activities in the SCS and environmental aspects. Secondly, it will point out to some matters that have not been completely clarified by the Tribunal and on the possible implications of these gaps. For example, some scholars have highlighted how the Tribunal's approach in dismissing the PRC's claim of historic rights might be problematic[71]. The Tribunal had indeed taken a tough stance with respect to the legality of Chinese claims and activities in the SCS, agreeing with the Philippines on all the fourteen submissions but one, which had been declared inadmissible in the award on jurisdiction. While the legal implications of the Tribunal's ruling are profound for the regime of peace and stability in the SCS, they seem to have had little impact on Chinese behaviour in the South Pacific which now appears to be even more assertive than it used to. In fact, recently China has engaged in a bilateral security agreement with the Salomon Islands which has increased the US concerns over Chinese naval presence in those strategically important waters[72].

3.1 The international Award: the ruling of the Tribunal.

In January 2013 the Republic of the Philippines (the Philippines) initiated arbitral proceedings against the PRC by Notification and Statement of Claim pursuant to section 2 of Part XV and Annex VII to UNCLOS[73]. According to the latter, disputes concerning the interpretation or application of the Convention shall be set by judicial means among which States parties are free to choose their preferred one e.g. International Tribunal for the Law of the Sea or the International Court of Justice. This must be specified by means of written

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[71] KOPELA S., *Historic titles and historic rights in the Law of the Sea in the light of the South China Sea arbitration*, in 'Ocean Development & International Law', 2017, pp. 181-207.
[72] ZONGYUAN ZOE LIU, *What the China-Solomon Islands Pact Means for the U.S. and South Pacific*, in 'Council on Foreign Relations', www.cfr.org/in-brief/china-solomon-islands-security-pact-us-south-pacific , May 4th 2022, (last accessed May 13 2022)
[73] PCA Case N° 2013-19, *Award on Jurisdiction and Admissibility*, 29 October 2015.

declaration when signing, ratifying or acceding to the Convention or at any time thereafter[74]. Since neither the Philippines nor China had made such a declaration, they «shall be deemed to have accepted arbitration in accordance with Annex VII»[75]. The PRC promptly replied that given the lack of jurisdiction of the Tribunal over matters of sovereignty, it would neither participate nor accept the result of the arbitration[76]. However, China's non-participation has not affected procedural fairness as the Tribunal had taken all the necessary measures «to safeguard the procedural rights of China»[77]. Among others, the Tribunal «has (a) ensured that all communications and materials in this arbitration have been promptly delivered, both electronically and physically, to the Ambassador of China to the Netherlands in The Hague; (b) granted China adequate and equal time to submit written responses to the pleadings submitted by the Philippines; (c) invited China to comment on procedural steps taken throughout the proceedings; (d) provided China with adequate notice of hearings; (e) promptly provided China with copies of transcripts of the Hearing on Jurisdiction and all documents submitted in the course of the hearing; (f) invited China to comment on anything said during the Hearing on Jurisdiction or in post-hearing written comments»[78].

The Philippines have addressed the Tribunal with fourteen submissions. In its award on jurisdiction the Tribunal declared all the submissions to be admissible made exception for the last one concerning disputes over Chinese military and paramilitary activities[79]. Submissions no. 1 and 2 challenged the Chinese claim to the nine-dash line as laid on the basis of historic rights. Submissions 3 to 7 concerned the status of maritime features in the SCS while the remaining ones questioned the lawfulness of certain Chinese activities in the SCS and in the maritime features therein.

3.1.1 Submissions No. 1 and 2: Chinese historic rights in the SCS and the nine-dash line.

The Philippines' submission no. 1 and 2 questioned the legality of the nine-dash line arguing that China's maritime entitlements may not extend beyond the limits provided for and by the Convention[80] and that the claim to historic rights within the nine-dash line is

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[74] UNCLOS Annex VII, *Arbitration*; UNCLOS part XV, S*ettlement of Disputes*, art. 287(1).
[75] Art 287(3), UNCLOS.
[76] Award para. 116
[77] Ibidem, para. 112
[78] PCA Case N° 2013-19, *Award on Jurisdiction and Admissibility*, 29 October 2015, para. 117
[79] REED L, WONG K*., Marine entitlements in the South China Sea: The arbitration between the Philippines and China,* in 'American Journal of International Law'. 2016 Oct;110(4):746-60.
[80] Award para. 169: a) "China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention")";

contrary to UNCLOS[81]. The Philippines argued that international law does not permit this type of expansive claims and even if China had possessed historic rights in the SCS, these rights were extinguished once UNCLOS was ratified. Secondly, the Philippines argued that China did not meet the relevant criteria for having established historic rights.

In the jurisdiction section, after having analysed China's historical conducts in the SCS, the Tribunal asserted that China's behaviour seems to suggest that the PRC does not consider the waters enclosed in the nine-dash line as part of its territorial sea or internal waters. China's claim to the waters enclosed by the nine-dash line is not a claim to an historic title and consequently is not a claim of sovereignty. Differently, by analysing China's past behaviour with respect to the SCS «the Tribunal understands that China claims rights to the living and non-living resources within the nine-dash line»[82]. The evidences that encouraged this view are mainly a notice of open blocks for petroleum exploration adjunct to the western edge of the nine-dash line by the China National Offshore Oil Cooperation, and strong Chinese objections to the Philippines award of petroleum blocs within the nine-dash line[83]. Simultaneously, Chinese officials and spokesmen have always defended the freedom of navigation and overflight in the SCS in their official and unofficial speeches. A part from right of innocent passage, these freedoms do not exist in coastal states' territorial waters and this seems to suggest the scope of China's claimed historic rights. By claiming "historic rights short of sovereignty", the disputed nine-dash line does not fall under the optional exception to jurisdiction under article 298 of UNCLOS. Thus, the Tribunal had jurisdiction over the matter.

Having clarified this important premise and turning to the merits of the Philippines' submissions, the Tribunal affirmed that the two submissions raised three related issues. First, it had to be understood whether or not the Convention allows the continuation of practices which are "at variance" with the Convention and which had been established prior to the ratification of the Convention[84]. The relation between the Convention and other international agreements or international norms is regulated by article 311 and it often

[81] Ibidem: b) "China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to the maritime areas of the South China Sea encompassed by the so called "nine dash line" are contrary to the Convention (…)"
[82] Award para. 232
[83] TANAKA, Y., *Reflections on Historic Rights in the South China Sea Arbitration (Merits),* in 'The International Journal of Marine and Coastal Law', 2017, *32*(3), 458-483.
[84] Award para. 234(a)

emerges in other articles[85]. Article 311(2) is clear in stating "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements *compatible* with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

Taking into account these provisions as well as the historical reasons and aims behind the drafting of the Convention, the Tribunal ruled that Chinese claims to historic rights over living and non-living resources within the nine-dash line are not in conformity with UNCLOS for the Convention does not include any express provision preserving historic rights at variance[86] with its text and it also did not passively intend the continued operation of such rights where they existed[87]. In the event of any incompatibility between the Convention's provisions and rights arising from previous agreements, the latter are superseded[88]. According to the Tribunal, the Convention is unambiguous in stating that rights and obligations arising by agreements ratified prior to UNCLOS shall retain their validity only if they are compatible with the Convention.

Also, given the sensitivity of the subject matter, the Tribunal more exhaustively argued that any historic right encompassing the EEZ and Continental Shelf of another State is superseded by UNCLOS. The reference is clearly to Scarborough Shoal which lays in the EEZ of the Philippines but is occupied by China as encompassed by the nine-dash line (see Figure 1). In fact, the precise aim of the Convention was to establish a *comprehensive* regime of EEZs and Continental Shelves i.e. without overlapping entitlement originating a number of rights for developing States; a regime of which China had been a great supporter during the negotiation phases of the Convention[89]. These rights are exclusive, meaning that the coastal State alone is entitled to the exploitation of living and non-living resources in its EEZ and Continental Shelf. Where historic rights that a State may once have had are claimed over an area that now forms part of the EEZ or Continental Shelf of another State, these are

[85] See art. 293(1) "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law *not incompatible* with this Convention."
[86] In a state of conflict
[87] Award para. 239
[88] Award para. 246
[89] Award para. 251 "China actively positioned itself as one of the foremost defenders of the rights of developing States and was resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had historically fished in those waters."

superseded by UNCLOS. Even though these evidences were surely enough to answer the Philippines submissions no. 1 and 2, the Tribunal went further.

The second point that was tackled in the arbitration with respect to historic rights in the SCS is whether China enjoyed these rights prior to the Convention's entrance into force[90]. The Tribunal acknowledged the Chinese historical presence and use of the SCS, however it could not find any evidence suggesting that China regulated and controlled fishing beyond the limits of its territorial sea, left aside the exploitation of the seabed which would have been unfeasible in a more distant past. Instead, according to the Tribunal, the ratification and adoption of the Convention positively affected China's position as with UNCLOS the PRC finally gained effective control over its territorial sea while relinquishing only some of the few freedoms granted by the regime of the high seas existing before the Convention's entrance into force[91].

Lastly, the Tribunal expressed itself on whether China has acquired rights and jurisdiction at variance with UNCLOS since the conclusion of the Convention. According to the Tribunal this does not seem be the case. Even though article 311(3) permits States to derogate through common agreement some provisions of the Convention, no acquiescence existed regarding Chinese claims as since they had been asserted openly in 2009 other States have repeatedly objected them.

In conclusion, maritime entitlements may not extend beyond the limits imposed by UNCLOS. With regard to the Philippines' submission no. 2 which is inextricably tied to the former, China's claims to historic rights in the waters encompassed by the nine-dash line are contrary to the Convention and without lawful effects since they exceed the geographical limits of China's maritime entitlements provided by the Convention. The Tribunal could not find any evidence of the existence of these rights prior to the entrance into force of the Convention. Even if those rights existed, these have been superseded by the entrance into force of the Convention. Moreover, China had not acquired special rights at odds with UNCLOS after the entrance into force of the Convention. The oppositive attitude of the other littoral states toward Chinese claims confirmed the lack of any acquiescence concerning Chinese behaviour in the SCS.

[90] Award para. 234(b)
[91] Award para. 271

3.1.2 Submissions No. 4 and 6: low-tide and high-tide elevations.

In submissions No. 4 and 6 the Tribunal has been called upon to express itself over the status of certain maritime features in the SCS and over the source of the maritime entitlements that the latter generate "for purposes of the Convention"[92]. In submissions No. 4 the Philippines held that "Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise". Philippines' Submission No. 6 claims the status of low-tide elevations also for Gaven Reef and McKennan Reef, however it also pointed out that because of their position within 12 nm from other high-tide features these two features could be used to extend the baseline of the territorial sea of the high tide features in proximity pursuant to article 13(1) of UNCLOS.

Since the question of whether maritime features are above or below water at high-tide is also implicated in the Philippines submissions No. 3 and 7, the Tribunal proceeded by examining the status as above or below water at high-tide of all the ten maritime features cited within the Philippines submissions. According to article 13(1) of UNCLOS a low-tide elevation is "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". The status of a maritime feature as low-tide must thus be ascertained on the basis of its natural condition. Moreover, despite article 13(2) does not explicitly states that a low-tide elevation does not generate an EEZ or Continental Shelf, the Tribunal ruled that such a restriction must be necessarily implied by UNCLOS following automatically from the operation of articles 57 and 76[93].

The Tribunal moved then to a careful analysis of the disputed features to decide upon their status as high or low tide elevations. To do so, it resorted to several instruments such as satellite imagery, nautical surveying and sailing directions. Based on a large number of evidences the Tribunal found and concluded that Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) are high-tide elevations. On the contrary, Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal are only low-tide elevations[94]. Also, the Tribunal recorded that

[92] Award para. 281
[93] Award para. 308
[94] REED L, WONG K., *Marine entitlements in the South China Sea: The arbitration between the Philippines and China,* in 'American Journal of International Law'. 2016 Oct;110(4):746-60.

Hughes Reef, Gaven Reef (South) and Subi Reef lie within 12nm of the high-tide features of respectively McKennan Reef, Gaven Reef (North), and Sandy Cay. Having set clear boundaries between features that are to be considered low-tide elevations and those which are instead high-tide ones, the Tribunal then assessed which high-tide features shall have the status of rocks or fully-entitled islands by operation of article 121 of UNCLOS.

3.1.3 Submissions No. 3 and 7: rocks or fully-entitled islands?

As mentioned above, the Tribunal moved next to the assessment of the status of the high-tide features outlined in the previous section. In their submission no. 3 and 7 the Philippines argued that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef do not generate any entitlement to an EEZ and a Continental Shelf. Maintaining these claims amounted to ask the Tribunal to deny these features the status of fully-entitled islands as set under article 121 of the Convention[95].

In the Philippines' view all of the high-tide features in the Spratly were to be considered rocks by art. 121 of UNCLOS[96]. The Philippines denoted how the result of such finding by the Tribunal could play a major role in the creation of a stable and peaceful environment in the SCS, as the legal categorization of these features as rocks which generate a maximum territorial sea of 12 nm would reduce China's incentives to flex its muscles over these minuscule pieces of land.

As the Tribunal considered that the scope and application of art 121(3) had not been fully and clearly established by then, it deemed necessary to provide its interpretation of the article. After a careful analysis of some textual elements and of the travaux préparatoires for the drafting of the Convention, the Tribunal came to some important conclusions. Firstly, the status of a feature as fully-entitled island or rock must be determined upon its natural condition. Artificial elements or constructions added through time do not and cannot change the feature's status. Secondly, a fully-entitled island must be able to sustain human habitation of non-transient character which is to say sedentary. Thirdly, an island must be able to sustain

[95]Article 121: Regime of islands:
1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.
[96] Award para. 408

economic life of its own. While this proposition goes "hand in hand" with the former, the Tribunal argued that the two are disjunctive i.e. the presence of one suffices for the feature to be accounted as fully-entitled island. Fourthly, in the Tribunal's view article 121 (3) must be understood as being concerned with the *capacity* of a feature to sustain habitation or economic activity, and not with the actual historical or contemporary presence of these characteristics. Also, agreeing with the Philippines the forementioned capacity had to be ascertained on a case by case basis. Lastly, these considerations must take into account the potential of a group of small islands to be home to a community or to collectively sustain economic life even if not individually. To assess these criteria the Tribunal relied on the historical use to which these features had been put.

The subsequent application of article 121 led the Tribunal to the following conclusions. The high-tide features presented in the Philippines submissions namely, Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) are considered rocks for the purpose of article 121. Such a ruling assumed special importance for its political implications. Scarborough Shoal which lays within the Philippines' EEZ had been the stage of constant tensions between the Philippines and China, as Chinese ships have often denied Philippines fishermen and vessels access to the waters of the sandbank[97].

In the context of Chinese sovereignty claims over the Spratly Islands as a whole (Nansha Qundao), the Tribunal quickly ruled out the chance possibly advanced by China to measure maritime zones according to archipelagic baselines. The Tribunal then applied its understanding of article 121 to the other high-tide features in the Spratly Islands. It found that the main and largest six features in the Spratly Islands (Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay) did not meet the relevant criteria for being considered fully entitled islands. They could neither sustain economic life of their own nor they had ever displayed signs of human stable habitation[98]. By consequence the same conclusions could surely be upheld with regard to smaller and less significant features in the Spratly. None of the features in the Spratly Islands can be classified as a fully entitled island and in turn none of these features generated any EEZ or Continental Shelf.

[97] OXMAN, B.H., *The South China Sea Arbitration Award.,* in 'U. Miami Int'l & Comp. L. Rev.', *24*, 2016, p.235.
[98] Award para. 625

To sum up, the Tribunal has ruled that by application of article 121, Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef (North) are considered rocks. Further, the Tribunal has dismissed the claim advanced by China to consider the Spratly Islands or Nansha Qundao as a whole for the purpose of drawing archipelagic baselines, given the non-archipelagic nature of China as a country. Lastly, none of the rocks within the Spratly shall be entitled to the status of fully-entitled island insofar as none of them in their natural state has the capacity to neither sustain economic life of its own nor to sustain human habitation. As a legal consequence, none of the forementioned feature can generate other maritime entitlements than a 12nm territorial sea.

3.1.4 Summary of the ruling with respect to China's claims.

The PRC had extensive sovereignty claims in the SCS. It claimed sovereignty over the four main groups of islands and their adjacent waters. However, not all maritime features are capable of appropriation. For instance, as explained in chapter three, LTE cannot be subject to sovereignty claims. The Tribunal found that Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal belong to this group. Belonging to the Spratly group, the first four are currently under Chinese occupation and control. Second Thomas Shoal is instead occupied by the Philippines. Ultimately, by reason of their status as LTE these features cannot generate a 12nm territorial sea, notwithstanding an EEZ or Continental Shelf.

China also claimed a particular measurement method of the baselines to be employed in its SCS possession. With its 1992 Law, the PRC asserted that a system of straight baselines should be used when measuring the breadth of maritime zones. Regarding the Xisha/Paracel Islands China has publicly declared that a system of straight baselines applies. While no such statement has been made in relation to the other groups, scholars think that the idea behind this Chinese claim is to enclose the islands in its possession (the Qundaos) within a system of archipelagic baselines[99]. This reasoning is supported by continuous Chinese statements arguing that China detains sovereignty over these groups of islands "as a whole". However, the possibility of employing a system of archipelagic baselines has been overruled by the Tribunal, as China does not possess the attributes for being considered an archipelagic state.

[99] See figure 2, p. 9

Further, China has claimed that each of the four Quandao over which it exercises historic rights generates internal waters, a territorial sea, an EEZ and a Continental Shelf. Despite this reasoning relies on wrongful legal assumptions, namely that of employing archipelagic baselines, the Tribunal has ruled out even the remote possibility that any high-tide feature in the Spratly is capable of generating any maritime zone but a territorial sea. In the Spratly, Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef and Gaven Reef (North) all under Chinese occupation are high-tide features which do not possess the requisites to be considered fully-entitled islands. Thus, they do not generate neither an EEZ nor a Continental Shelf. Also, in deciding the status of major high-tide features in the Spratly archipelago, the Tribunal found that none of them could bear the status of an island. As a result, no maritime feature in the Spratly is capable of generating an EEZ or a Continental Shelf since the features in the archipelago are mainly rocks.

The fourth Chinese claim is that to the nine-dash line encompassing a vast portion of the SCS. China argues that within the stated area, it is the holder of historic rights given its past relation with the SCS. In the Tribunal understanding the notion of historic rights does not amount to a claim of sovereignty over the entire area of the nine-dash line but rather to a claim of rights over living and non-living resources within the cow tongue. Even in this case, the Tribunal had been clear in ruling that such a claim is at variance with the Convention and that by operation of article 311 which regulates the interaction between UNCLOS and other bodies of law, the claim to maritime entitlements within the nine-dash line is unlawful insofar it extends beyond the limits permitted by the Convention. The claim to historic rights is also unlawful in the sense that where rights that have existed are at variance with the Convention they are superseded by the treaty and cease their operation. Historic rights in the nine-dash line are at variance with the Convention as they apply beyond the geographical limits allow by the Convention itself.

The Tribunal had thus resisted every Chinese claims, declaring them all unlawful without entering the merits of territorial sovereignty. Regardless, China has first declared that the Tribunal lacked jurisdiction to decide over matters of territorial sovereignty and later it has extensively criticized the tribunal approach which according to the PRC had failed in taking into account the specific Chinese perspective. Despite the authoritativeness of the appointed body some scholars have raised legal objections to the Tribunal's work too. These will be analysed in the following section.

3.2 Objections to the Award.

As anticipated in the previous section, numerous critiques were raised to the Tribunal's work. Despite most of these criticisms come from Chinese state affiliated sources, nonpartisan authors have also shown reservations with regard to some of the Tribunal's legal interpretations of the Convention[100]. This section will analyse the main objections that were moved to the Tribunal's reasonings starting with issues of admissibility. Since the jurisdictional caveats questioning the Tribunal's jurisdiction concerning the present disputes have little to do with the aim of the present work, they will be analysed rather briefly. Despite that, matters of admissibility may implicitly provide useful insights concerning the merits and thus are deemed worth of evaluation. The subsequent section will present instead alternative readings of the Convention that could possibly overturn what has been defined by some a "one-sided ruling"[101].

Many scholars have called into question the Tribunal's award on jurisdiction, arguing that the Tribunal lacked the necessary competences to rule over the dispute. The Chinese Society for International Law has extensively discussed matters of jurisdiction in the critical study which was released soon after the Tribunal's award on jurisdiction had been published[102]. In this regard, the debated issue concerns the Tribunal's interpretation and application of article 298 of the Convention. According to the Chinese Society of International Law, the Tribunal has erred in not recognizing the boundary delimitation nature of the dispute. Article 298(1)(a)(i) states that when acceding to the treaty, states parties may exclude certain disputes from being subject to compulsory settlement being these, "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles", and China has explicitly done so through its 2006 Declaration[103]. Articles 15, 74 and 83 refer to the delimitation of respectively the territorial sea, the EEZ and the Continental Shelf of States with opposite or adjacent coasts. Whether or not China and the Philippines may be considered States with opposite coasts is outside the scope of the present work, yet it seems to many highly improbable. Further, it was argued that even ruling over the status of the submitted features involves,

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[100] See YEE, S., 2014, WHOMERSLEY, 2016, SCHOENBAUM, T. J., 2016., KOPELA S., 2017, XINMIN, M. A., 2018.
[101] SCHOENBAUM, T. J., *The South China Sea arbitration decision: The need for clarification,* in 'American Journal of International Law', *110*, 2016, 290-295.
[102] CHINESE SOCIETY OF INTERNATIONAL LAW, "The South China Sea Arbitration Awards: A Critical Study," in 'Chinese J. Int'l L.', 207, 2018, 475
[103] WHOMERSLEY, C., *The South China Sea: the award of the tribunal in the case brought by Philippines against China—a critique,* in 'Chinese Journal of International Law', *15*(2), 2016, pp. 239-264.

albeit partially, the application of articles 74 and 83[104]. Again, this would make the case to fall under the scope of article 298 and thus preventing the Tribunal from exercise jurisdiction.

The logic underpinning all these legal arguments is that the Tribunal had failed (purposedly or not) in identifying the "real" issue as being one of territorial sovereignty and boundary delimitation. The Philippines submissions would thus have been schemed to hide the sovereignty or delimitative nature to make it appear as a free-standing entitlement claim over which the Tribunal could freely deliberate[105]. The status of features is in a deep and intimate connection with maritime delimitation and ruling over the former only, could create distorted results[106].

Notwithstanding the above critiques which are of little help in assessing the compatibility of Chinese claims with UNCLOS, additional and more substantive disagreements were also displayed with regards to the merits of the case. The main object of criticisms has been the incompatibility of the nine-dash line and Chinese historic rights in the SCS with international law of the sea. Many scholars argue that the Tribunal had not sufficiently taken into account the role played by general international law while assessing the legality of Chinese claims. In the Award, the interaction of the Convention and other international norms is understood as set by article 311 of UNCLOS. Despite article 311 solely refers to the relation between UNCLOS and other international agreements, the Tribunal had been quick in arguing that the same article also regulate the relation between the Convention and general international law[107]. In doing so, the Tribunal confers the Convention a higher status with respect to customary international law, even though the grounds for such a decision cannot be found in UNCLOS[108]. According to these scholars, international jurisprudence and state practice seem to point in another direction when talking about historic rights. Hence, UNCLOS' silence concerning historic rights would delegate their regulation to general international law. Yet, the Tribunal recognized the importance of customary international law for the development of the case and it discussed it at length with

[104] Ibidem

[105] YEE, S., *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections,* in 'Chinese Journal of International Law', 13(4), 2014, pp. 663-739.

[106] WHOMERSLEY, C., *The South China Sea: the award of the tribunal in the case brought by Philippines against China—a critique,* in 'Chinese Journal of International Law', *15*(2), 2016, pp. 239-264.

[107] Award para 235. "The Tribunal considers 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."

[108] XINMIN, M. A., *Merits award relating to historic rights in the South China Sea Arbitration: An appraisal,* in 'Asian Journal of International Law', *8*(1), 2018, pp. 12-23.

the precise aim to avoid confusion[109]. However, it was argued that confusion was created rather than dismantled.

As acknowledged by international jurisprudence, historic rights short of sovereignty may fall within two distinct categories[110]. First, exclusive quasi-territorial rights with a zonal impact deriving from the exercise of exclusive sovereign rights (short of sovereignty) e.g. exclusive fishing rights or exploitation of resources. International tribunals have never accepted the existence of this type of rights due to lack of evidences, however they have never precluded their existence. On the contrary, nonexclusive historic rights refer to activities performed in a nonexclusive way. An example of these rights can be traditional fishing rights. Lacking a territorial character nonexclusive historic rights could be recognized in the maritime zones of another state. In the SCS arbitration, it was made a clear distinction between artisanal fishing rights exercised in the territorial sea and the ones exercised in the EEZ instead. It was maintained that the introduction of the EEZ regime abolished the keeping of artisanal fishing rights in this area. This legal argument was in line with that of the Court in the *Gulf of Maine* case in which the introduction by Canada and the United States of exclusive fisheries zones emptied of legal value the US claims of historic usage over the waters that had become part of Canada's EEZ. However, it was noticed how in *Eritrea v Yemen*, the Court followed a contrary approach, affirming that traditional fishing rights continued to exist regardless of different maritime zones[111]. Assessed by the Tribunal, it was argued that in *Eritrea v Yemen* the Court was not bound to apply only the Convention and rules of law not incompatible with it and this is why it reached a different conclusion. Nevertheless this statement seems unconvincing and weak[112]. If these views were correct, they would leave some space open for further legal consideration of the notion of historic rights and their application in the law of the sea, or at least for further clarification.

Following a similar path, some scholars have gone beyond the simple objection and have instead provided new avenues for resolution. Following the Tribunal's outlawing of the nine-dash line and Chinese historic claims, Schoenbaum defined the ruling "incorrect and

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[109] Award para 255
[110] KOPELA S., *Historic titles and historic rights in the Law of the Sea in the light of the South China Sea arbitration*, in 'Ocean Development & International Law' , 2017, pp. 181-207.
[111] Ibidem
[112] Ibidem

unwise"[113]. Instead, the author proposed a different approach to the one taken by the Tribunal. Echoing what has been discussed in the previous section, he argued that the Tribunal should have left open the possibility for China to use the nine-dash line as the basis for asserting nonexclusive historical fishing rights. This option is also provided by the Convention in article 62(3) and could have benefited greatly the future of the SCS by promoting negotiations among other littoral states that could eventually encompass matters of sovereignty over features in the SCS as well. The Tribunal had been too quick in dismissing the possibility of historic rights being preserved as suggested by customary law and UNCLOS itself while being erroneous in rendering a ruling that seems inconsistent with prior Courts' jurisprudence[114]. It may be stated that this argument while it could be legally correct, it is teleologically short sighted and naïve. First of all, China's assertions in the SCS seem far too aggressive to justify its possible satisfaction with accepting the preservation of traditional fishing rights. The use of maritime militia by the PRC to back its operations in the SCS would confirm this statement[115]. Secondly, past experience suggest that China's willingness to compromise and negotiate, at least multilaterally, is lower than one may expect. Also, China enjoys a greater bargaining power than all the other littoral States combined given its economic size and military assets[116]. Notwithstanding these geopolitical factors, logic appears to point contrary to the former argument too. Allowing States to claim nonexclusive historic rights in the SCS could create massive chaos given that all the coastal states encircling the SCS have a relation with the former which is possibly as profound as the Chinese one.

To sum up, the Tribunal ruling was not free from objections. Many argued that the Tribunal lacked the jurisdiction to rule over the case since this fell under the scope of optional exception to jurisdiction set out in article 298 of UNCLOS[117]. The dispute indirectly involved the delimitation of maritime zones of States having adjacent coasts. However, classifying China and the Philippines as adjacent coastal States seems ambitious. Historic rights claimed by China had been declared superseded being at variance with the Convention but according to many, general international law suggests otherwise. It was denoted how nonexclusive

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[113] SCHOENBAUM, T. J., *The South China Sea arbitration decision: The need for clarification.* In "American Journal of International Law", *110*, 2016, pp. 290-295.
[114] Ibidem
[115] ERIN HALE, 19 Nov 2021, *China uses maritime militia to assert claim on South China Sea,* in www.aljazeera.com/news/2021/11/19/china-supports-maritime-militia-to-assert-south-china-sea-claim, (last accessed 14th May 2022)
[116] LOWY INSTITUTE, Asia Power Index 2021, https://power.lowyinstitute.org/data/military-capability/asian-military-posture/naval-deployment/, (14th May 2022)
[117] See supra notes 104 and 107

fishing rights based on historic usage were not declared unlawful by the Court in *Eritrea v Yemen*. Lastly, while different resolutive legal options had been proposed, they do not appear to be well founded.

Conclusions

The present essay has discussed several aspects of the maritime disputes which have affected the SCS for years now. It first reviewed the geopolitical standing of the main actors involved, especially China. Undoubtedly, in the last decade, China has gained the status of great power alongside everything that comes with it. Whether or not China will maintain the rank heavily depends first on its ability to control and exert a dominant position over its region[118]. As a result of Chinese empowerment, the SCS has quickly become the stage of the PRC's maritime power projection. Together with a long history of fishing and colonization which commonly affects all the littoral states in the area, these elements have conferred the SCS chaotic features, rendering it an area where imperial ambitions, desire for economic gains and the commercial goal of controlling a key international trade route have come together, creating a bomb of tensions whose possible explosion is worrying. The militarization process that is taking place on the SCS islands is now the praxis, pursued equally by all the littoral states. The cumbersome Chinese presence has annoyed confining states that far from passively suffering Chinese actions in what they consider their territory have challenged the PRC behaviours. Most prominently, Viet Nam and the Philippines have tried to counter China's expansive claims. To defend their rights the two have first resorted to the political forum provided by ASEAN to enter into negotiations with the PRC. However, this approach has not given birth to effective results and it has temporarily, if not definitely, been dropped.

The paper has then moved on to identifying and defying the most four important Chinese claims in the SCS. China's actions in the SCS are not groundless but are instead driven by specific claims of historical and legal nature. Firstly, the PRC claimed and still claims sovereignty over living and non-living resources within the area encompassed by the nine-dash line[119]. Secondly, China claims to be sovereign over the four Qundaos that are present in the region, being these the Pratas Islands, the Paracel Islands, the Spratly Islands, and Scarborough Shoal. Even if Qundaos are formed by a myriad of islets, underwater reefs and insignificant rocks, China maintains that each group shall be treated as a single unit for purposes of territorial sovereignty and maritime delimitation. In short, when the maritime zones that a feature generate is to be determined, it shall be considered the broader groups

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[118] KAPLAN, R. D., *The South China Sea is the future of conflict*, in "Foreign Policy", vol. 76., 2011.

[119] See figure 1, p. 5

of features to which it belongs, as it was a single bigger island. It is from this legal reasoning that the last two other major Chinese claims derive. Considering a group of islands as a single feature, the PRC claims that each Qundao shall be enclosed within a system of straight baselines. In its 1992 Law, China asserts to employ a method of straight baselines to calculate the breadth of its territorial sea, and the same legal text seeks to apply this method to the Paracel Islands. As stated above, this indicates that the features composing a Qundao would be enclosed within straight baselines with the waters laying in between reefs being considered internal waters[120]. To date, it is still not clear whether China aims at using a system of straight baselines even in the other Qundaos, however, its past behaviour would suggest so. Lastly, the Chinese maintain that each Qundao generates a series of maritime zones, including a territorial sea, a contiguous zone, an EEZ, and a Continental Shelf.

In 2012, strong on its pretences China initiated a standoff with the Philippines at Scarborough Shoal. The crisis lasted months and resulted in a de facto transfer of power and jurisdiction over the Shoal from the Philippines to Chinese authority. After the umpteenth failure of acting through ASEAN, the Philippines decided to resort to international arbitration. Being China and the Philippines both State parties to the Convention, by Notification and Statement of Claim, in 2013 the latter initiated arbitration proceedings against China pursuant to Articles 286 and 287 of UNCLOS and under Article 1 of Annex VII of the same treaty. In July 2016, the appointed Tribunal delivered its ruling over the interpretation and application of the Convention concerning the Philippines' fourteen submissions. For the sake of brevity and matters of interest, this work has focused solely on Submissions no 1, 2, 3, 4, 6, and 7.

Chapter three has extensively discussed the Tribunal's decisions and the objections that have been moved to it with regard to the formerly mentioned Chinese claims. The Tribunal reached the following conclusions concerning historic rights and the nine-dash line (Submissions no 1 and 2). The dotted line describing the Chinese scope of claimed historic rights over living and non-living resources was to be considered unlawful for UNCLOS insofar as it exceeded the geographic scope set forth by the Convention. UNCLOS aimed at creating a comprehensive frame of EEZs, free from any interference or overlap to the advantage of the group of developing States of which China was part. Even if China was

[120] See figure 2, p. 9

found to hold historic rights, these were superseded by the entry into force of the Convention which did not intend the continuation of practices at variance with its text.

As far as it concerns maritime delimitation matters and the Chinese interpretation of the islands as "a single unit", the Tribunal also ruled out the possibility of employing a system of straight baselines encircling the Qundaos. According to article 47 of the Convention, upon several strict conditions, an archipelagic state may draw straight baselines «joining the outermost points of the outermost islands»[121]. China is no archipelagic State being mostly formed of continental land. Further, as to the Spratly Islands or Nansha Qundao, the Tribunal reached the important conclusion that none of the features within it classifies as a fully-entitled island; a final blow to the Chinese claim to a territorial sea, an EEZ and a continental shelf originated by the Qundaos. Since only a fully-entitled island can generate these maritime zones, and since no single feature in the Spratly Islands classifies as such, none of the maritime features in the Spratly Islands can generate any maritime area which extends further than a territorial sea.

However, many have noticed that the Tribunal was quick in dismissing historic rights and believe that general international law would suggest a different reading. For example, non-exclusive fishing rights, a special type of historic rights, were recognised as existing by the ICJ in *Eritrea v Yemen*. The Arbitral Tribunal admitted them too, however arguing that traditional non-exclusive fishing rights can be exercised and maintained in a coastal state's territorial sea but not in the EEZ. According to some scholars, this solution seemingly lacks solid legal grounds and would thus leave open the possibility for the recognition of Chinese non-exclusive historical fishing rights within the nine-dash line which could positively affect the ongoing dispute. Even if such an alternative interpretation of legal norms could change some aspects of the present dispute, it can be maintained that the most important and expansive Chinese claims are at odds with UNCLOS and do not conform to the standards of international law of the sea which came into effect with the adoption and ratification of the Convention. Chinese expansive claims are unlawful under international law of the sea and infringe other littoral states' rights.

Unfortunately for the future of the SCS, China has resolutely opposed the decision of the Tribunal cracking the expectations on possible peaceful resolution of the disputes. Notwithstanding the ruling, China has continued its operations of military nature and

[121] Art. 47, UNCLOS.

maintained aggressive behaviour in the area. These actions are of huge concern for the international community which is well aware that the disputes yield the potential of becoming something more, as clear from the words of President Xi Jinping who in discussing the ruling of the Tribunal said «The Chinese people do not believe in fallacy nor are we afraid of evil forces. Chinese people do not make trouble, but we are not cowards when involved in trouble. No foreign country should expect us to swallow the bitter fruit of damage to our sovereignty, security and development interests»[122].

[122] *President Xi Jinping delivers keynote speech to celebrate the 95th anniversary of the founding of the Communist Party of China* Beijing, July 1, 2016, China Daily, available at https://www.chinadaily.com.cn/world/2016-07/06/content_25989430.htm (last accessed, 28th May 2022)

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Riassunto in italiano

Il presente elaborato mira ad analizzare le pretese territoriali cinesi nel Mar Cinese Meridionale con una particolare attenzione ai risvolti giuridici della questione. Lo scopo della tesi è quello di analizzare le pretese cinesi e la loro conformità con il diritto internazionale del mare come codificato dalla Convenzioni delle Nazioni Unite sul diritto del mare. Per fare ciò sono state utilizzate numerosi fonti a partire dall'arbitrato internazionale tra la Repubblica delle Filippine e la Repubblica Popolare Cinese, ma anche fonti esterne come riviste accademiche ed articoli di giornale.

Il primo capitolo passa in rassegna le peculiarità storiche e geopolitiche dell'area, mettendo in luce la rivalità tra i principali stati litorali coinvolti. Tra questi figurano la Cina, di gran lunga l'attore più ingombrante in vista delle sue capacità economico militari, ma anche le Filippine ed il Vietnam che negli anni passati hanno cercato di ostacolare l'espansionismo navale cinese nell'area, tramite azioni diplomatiche e legali.

Il secondo capitolo delinea le principali pretese legali cinesi. Secondo lo United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, queste possono essere considerate quattro. In primis, la Cina rivendica sovranità territoriale sulle isole presenti nella linea dei nove punti. In secondo luogo la Cina pretende di poter utilizzare le linee rette di base per poter calcolare le zone marittime generate da ogni singolo gruppo di isole. La Repubblica Popolare vorrebbe racchiudere ogni Qundao in queste linee rette di base considerando gli arcipelaghi come un singola entità marittima. Come conseguenza del punto precedente, la Cina pretende che a partire dalle linee rette di base racchiudenti i quattro arcipelaghi, questi generino una serie di zone marittime. Queste sono le seguenti: acque interne, ovvero le acque comprese tra le isole, acque territoriali, che si estendono per 12 miglia nautiche, una zona economica esclusiva di 200 miglia nautiche e una piattaforma continentale. La Cina inoltre reclama diritti storici nel Mar Cinese Meridionale. Secondo la Repubblica Popolare Cinese infatti la linea dei nove punti non è altro che il riflesso geografico del suo rapporto storico con questa porzione di oceano.

L'ultimo capitolo analizza la sentenza emessa dal Tribunale internazionale, convocato nel 2013 dalle Repubblica delle Filippine ai sensi degli articoli 286 e 287 di UNCLOS in accordo con l'articolo 1 dell'Allegato VII della sopradetta Convenzione.

La conclusione ribadisce infine quanto specificato in precedenza ovvero che le pretese cinesi non sono conformi alla convenzione delle Nazioni Unite sul diritto del mare.