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Book Review: Crafted Legal Ambiguity in the South China Sea Arbitration

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BOOK REVIEW

CRAFTED LEGAL AMBIGUITY IN THE SOUTH CHINA SEA ARBITRATION

THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION.
By NUS Centre for International Law (S. Jayakumar et al.
eds.). Cheltenham, U.K.: Edward Elgar Publishing. 2018. Pp.
xx, 336. \$150.00 (Hardcover). \$40.00 (eBook).

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I. INTRODUCTION

Mankind uses the seas for a variety of reasons. The brackish water provides sustenance in the form of seafood, aids in regulating the climate, and acts as a highway for boating. A vast sea such as the South China Sea would seemingly be able to support the needs of all the surrounding countries without fail if there was cooperation between those who wish to use its resources. Even if the South China Sea was able to provide for all those who have claim to it, it is unlikely that the countries who stake a claim to it and the vast resource lying within its depths would share the entirety in common. This unwillingness to share and feelings of righteous exclusion resulted in a lengthy arbitration between the Philippines and China, commonly known as the South China Sea Arbitration.² This Review details the circumstances surrounding these claims as well as the results from the aforementioned arbitration as told by the NUS Centre for International Law in its book *The South China Sea Arbitration: The Legal Dimension*.

II. HISTORICAL BACKGROUND

The South China Sea is the largest sea in Southeast Asia and holds considerable value in many forms. The location of the South China Sea allows for travel between the Pacific Ocean and the Indian Ocean. Its location is also home to a significant amount of natural resources including

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2. NUS CTR. FOR INT'L LAW, THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION 12 (S. Jayakumar et al. eds. 2018).

detached shoals.³ This value is likely why China, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei all try to assert some sort of claim to it.⁴ While the Philippines, Malaysia, and Vietnam confined their current claims to their own respective mainlands, China has not.⁵ In fact, other than China laying claim to the South China Sea there is not much else that is certain about its claims. China has a history of having more obscure claims.⁶ Some may see this obscurity as intentional in order to prevent others from rebutting the basis of these claims and to allow China the ability to modify these claims at will.⁷

III. ANALYSIS

The ownership of certain maritime features in the South China Sea has been in dispute for a longtime;⁸ however, this dispute came to a head when the Philippines initiated a United Nations Convention on the Law of the Sea (UNCLOS) proceeding against China on January 22, 2013.⁹ China's interference with Filipino fishermen is the stated reason for the Philippines starting the proceeding.¹⁰ China claims that it has control over the area through its sovereignty, and therefore, its inference was within its rights.¹¹ UNCLOS acts as a universal legal order for issues concerning maritime entitlement.¹² Nearly all of the coastal states in East and Southeast Asia are parties to the proceedings.¹³ Despite the Philippines initiating the

3. *Id.* at 1, 3.

4. *Id.* at 1.

5. *Id.* at 7. The Philippines abandoned their excessive claims in 2009 which was before the proceedings at issue. *Id.* at 5. Prior to 2009, the Philippines claimed territorial borders up to the three treaty limits established by the 1898 Treaty of Paris, the Cession Treaty of 1900 and the 1930 Treaty of Washington. *Id.* at 5 & n.18. By establishing archipelagic baselines, the Philippines's claims were no longer in conflict with UNCLOS. *Id.* at 5.

6. *See id.* at 7, 29, 104 n.14, 115.

7. *Id.* at 7

8. *See id.* at 5 n.18-24.

9. *Id.* at 12.

10. *Id.* at 9. This proceeding was compulsory arbitration under the Annex VII of the UNCLOS.

11. *Id.* at 7, 9. The Scarborough Shoals where the Filipino fishermen were fishing is within the exclusive economic zone (EEZ) of the Philippines. *Id.* at 9. Coastal states using their continental land as a baseline are able to claim twelve nautical miles for their territorial sea and two hundred nautical miles for their EEZs. *Id.* at 4. Countries may receive an extended continental shelf if they qualify under Article 76. *Id.* at 4 & n.11.

12. *Id.* at 3-4.

13. *Id.* at 4. Both Cambodia and the Democratic People's Republic of Korea are not parties to UNCLOS. *Id.* at 4.

proceeding against China, China firmly chose to criticize the ruling rather than participate.¹⁴

Despite being a party to UNCLOS, China may be within its rights to not participate in the proceeding and to not accept its ruling.¹⁵ While UNCLOS does have a compulsory dispute settlement provision, the provision does not include certain categories of disputes such as those concerning rights and jurisdiction of fisheries and marine research.¹⁶ The dispute at hand falls into the categorical exceptions because it involves conflicting sovereignty claims over an “island” as well as a dispute over delimitation of maritime boundaries and historical titles.¹⁷ The Philippines characterized the issue as one about maritime entitlements in order for the Arbitral Tribunal to have jurisdiction.¹⁸

One particular maritime feature lying within the South China Sea is the Spratly Islands, which is of special interest to these coastal states.¹⁹ The Spratly Islands have the most complex situation due to the number and basis of the claims.²⁰ While the name of Spratly Islands describes the feature as islands, they may not fall under the Article 121 definition of island under the UNCLOS.²¹ Instead, the Spratly ‘Islands’ may be

14. *Id.* at 1.

15. *See id.* at 10.

16. *Id.* at 10-11. Interpretations of or the applicability of an UNCLOS provision are matters which the counterparties must settle through the compulsory dispute provision. *Id.* at 10. It is through the agreement to be a member of UNCLOS that their consent to the findings is presumed. *Id.* at 10. This compulsory dispute provision seems at odds with the intent behind making UNCLOS deliberately ambiguous. *Id.* at 290. China claimed that it was relying upon the language in UNCLOS Article 298 that makes claims based upon historic bays and titles as being “optionally excludable.” *Id.* at 103-104. This historic bays and title exception is later read narrowly as only being for “claims of a non-sovereignty-based nature.” *Id.* at 109.

17. *See id.* at 10.

18. *Id.* at 12. The tribunal must find that the claim upon which the proceeding is predicated is sound in fact and in law as well as the tribunal must possess jurisdiction over the subject of the claim due to China’s refusal to participate. *Id.* at 11-12.

19. *Id.* at 3. The Spratly Islands are composed of hundreds of reefs, shoals, etc. *Id.*

20. *Id.* The claimants base their sovereignty claims over the Spratly Islands on history and “effective occupation.” *Id.*

21. *Id.* at 4, 19. “A naturally formed area of land, surrounded by water, which is above water at high tide.” United Nations Convention on the Law of the Sea art. 121(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS (entered into force Nov. 16, 1994)]. However, if the island “cannot sustain human habitation or economic life of [its] own”, then it is a rock granted only the twelve nautical miles of territorial sea. UNCLOS, *supra*, art. 121 (3).

considered “low-tide elevations” for the purpose of the UNCLOS proceeding.²²

The South China Sea Arbitration: The Legal Dimension discusses three main points: jurisdiction and procedure, status of features and maritime entitlements, and the marine environment.²³ The NUS Centre for International Law further separates the issues surrounding the South China Sea disputes into three categories: sovereignty, maritime settlement, and maritime delimitation.²⁴ While UNCLOS proceedings can settle sovereignty claims, they are unlikely.²⁵ Maritime settlement issues concerns how UNCLOS determines each coastal countries’ maritime zones. Maritime delimitation occurs when there are overlapping claims.²⁶

The Arbitral Tribunal in its Final Award made a few decisions. First, it declared that the historical claims were a part of a dispute related to the interpretation of UNCLOS.²⁷ As such, the tribunal further developed the term “historic rights” and determined that the term had both a narrow and broad meaning under UNCLOS.²⁸ Then, the tribunal found the historical claims of the Chinese to be incompatible with UNCLOS, so UNCLOS superseded those claims.²⁹ Finally, the tribunal clarified that there is no need for historical rights contained within a high seas area seeing as those rights are merely indicative of exercises of a juridical right through the doctrine of freedom while on the high seas.³⁰

22. *Id.* at 4. UNCLOS does not grant maritime zones to low tide elevations. *Id.*

23. *Id.* at 16.

24. *Id.* at 3.

25. *Id.* The only way for an international tribunal to settle sovereignty claims is if all parties subject themselves to the proceedings, which could result in the permanent loss of their claim to the resources and other benefits associated with it. *Id.*

26. *Id.* at 9.

27. *Id.* at 125.

28. *Id.* The historic rights exception is only for sovereignty-based claims while UNCLOS extinguishes historic rights for non-sovereignty based, non-exclusive claims. *Id.* at 125-26. *See Id.* at 103-104.

29. *Id.* at 123. This notion of incompatibility is due to the idea that one state cannot have sovereignty rights over resources while another state has historic rights over the same resources. *Id.* at 120, 123. UNCLOS does not have any express provision that authorizes this incompatibility. *Id.* at 122-23.

30. *Id.* at 126-27. These claims of historic rights on the high seas assume that the area is outside of the exclusive economic zone of another state. *Id.* at 127 n.117. Also, international law permits such rights on the high sea without the state having to possess historic rights. *Id.*

IV. EVALUATION

The NUS Centre for International Law (the “Centre”) displays extensive knowledge about the proceedings, the influence of the proceedings on UNCLOS, and the interest of the international community. However, the Centre would have benefited from elaborating on the history behind the respective claims of all the countries that had a stake in the arbitration. Despite the fact that the Centre spends time discussing the unusual happenings behind China’s claim, the claims of the other countries are barely touched upon. While its focus is likely due to the complexity and suggested duplicity of China’s claims as well as the result of the Centre narrowing in on where the Centre’s interest lie in discussing this proceeding, a more robust treatment of each country’s claims would provide a more solid foundation for the dispute.³¹

While the book presents itself as more of a neutral, scholarly read, it is by no means impartial. The tone of the book suggests distaste for the actions of China. The Centre seems to disparage China’s lack of participation in the proceeding even though China, as discussed previously, has a right to not participate in arbitration concerning fisheries and sovereignty claims.³² The Centre readily accepts the tribunal’s position that the arbitration is based upon the interpretation of UNCLOS and not a dispute over sovereign authority. The eager assent to this characterization without taking the time to fully elaborate on any justification for this characterization is a key misstep for the Centre.³³

V. CONCLUSION

Overall, *The South China Sea Arbitration: The Legal Dimension* provides a thorough analysis into the South China Sea arbitration proceedings. While the Centre could be more neutral in the telling of the proceedings and could deliver a more nuanced history of the other countries’ claims, the Centre does give great insight into the workings of UNCLOS and what it means to be a party to an arbitral tribunal

31. *The South China Sea Arbitration: The Legal Dimension* is the Centre’s third book on the South China Sea disputes, so the two prior books may go into more detail about the claims of the other countries. *Id.* at 2 n.2.

32. *See id.* at 3, 10-11.

33. *But see id.* at 22, 105. While the Arbitral Tribunal characterize the dispute as not “about the existence of historic rights but rather a dispute about the historic rights in the framework of the Convention,” this dispute effectively decides whether or not another body of law is preserved by the Convention. *Id.* at 105-106 & 105 n.18. *See id.* at 120 & 120 n.88.

proceeding. The NUS Centre for International Law gives an extensive analysis of the arbitration proceeding and the important mark it leaves on UNCLOS jurisprudence.