INTRODUCTION TO SYMPOSIUM ON THE SOUTH CHINA SEA ARBITRATION

*Laurence Boisson de Chazournes**

July 12, 2016 is a date that will remain etched in the history of international adjudication. On that date, the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea[1] (hereinafter, the Convention or UNCLOS) delivered the much awaited Award, *In the Matter of the South China Sea Arbitration*, between the Republic of the Philippines and the People's Republic of China.[2] On October 29, 2015, it had given an Award on Jurisdiction and Admissibility Issues,[3] reserving some of the jurisdictional issues to the merits phase.

The Tribunal having defeated all arguments and positions advanced by or attributed to China, the Award was an undeniable judicial victory for the Philippines. Nonetheless, amidst the attention unsurprisingly attracted by the Award, the Philippines initiated diplomacy and refrained from overblown statements and from flaunting this victory. China, on its side, had already voiced its rejection of the Award, by declaring it "null and void" in a 2015 statement.[4] As China did not participate in the proceedings, the Tribunal referred primarily to a position paper issued by China in 2014, but it also looked at such official statements and communications as it deemed useful to elucidate China's arguments and positions.

To accompany Lucy Reed and Kenneth Wong's commentary on the Award in the October 2016 issue of the *American Journal of International Law*, AJIL Unbound invited a select group of experts to comment on some of the prominent issues addressed by the Tribunal.[5]

In her contribution "Jurisdiction of the Arbitral Tribunal in *Philippines v. China* under UNCLOS and the Absence of China," Kate Parlett reviews and discusses the exceptions that have been raised by China to contest the Tribunal's jurisdiction.[6] She also takes stock of how the Tribunal addressed these jurisdictional obstacles, particularly by demonstrating that the dispute, for the Tribunal, was not a territorial sovereignty dispute or even a maritime delimitation dispute. Lastly, she examines the legal and practical consequences of China's nonappearance.

* *Professor of the Faculty of Law of the University of Geneva and Member of the AJIL Board of Editors.*

Originally published online 12 December 2016.

[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397.

[2] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (July 12, 2016) [hereinafter Final Award].

[3] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015).

[4] Ministry of Foreign Affairs of the People's Republic of China, Statement on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (Oct. 30, 2015). *See* Final Award, *supra* note 2, at para. 166.

[5] *See* Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AJIL (forthcoming 2016).

[6] Kate Parlett, *Jurisdiction of the Arbitral Tribunal in* Philippines v. China *under UNCLOS and in the Absence of China*, 110 AJIL UNBOUND 266 (2016).

In her essay "Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS," Lori Damrosch focuses on the military activities exception under Article 298(1)(b) of the Convention.[7] After retracing the rationale for the inclusion of this exception in the Convention, the author looks at the existing state practice on the matter, including a comparison with Article 36(2) of the ICJ Statute and the military activities exception thereunder. As to the Award, she argues that, on balance, the Tribunal articulated "a sound approach to the military activities exception, entailing valid legal criteria and objective factual determinations."[8] Although China had not explicitly invoked the military activities exception, the Tribunal found that it covered certain activities involving a face-off between armed forces of the two sides. On the other hand, China's construction of installations and artificial islands was not considered "military activities." Based on the Tribunal's use of China official characterization of its activities, the author draws some conclusions as to the availability of the military exceptions to the United States in the event of their ratification of the Convention.

Nilufer Oral discusses a further cornerstone of the Award, namely, the legal characterization of maritime features in the South China Sea, in her contribution entitled: "'Rocks,' 'Islands'? Sailing Towards Legal Clarity in the Turbulent South China Sea."[9] The author argues that the Award has successfully clarified several of the Convention's provisions on the legal characterization of maritime features and their respective entitlements. Such provisions have long been debated and met with divergent scholarly interpretation, particularly concerning the interpretation of the international law criteria relevant to the classification of these maritime features. According to her, the Award on these points will have major implications for future disputes in the South China Sea, including for the neighboring East China Sea.

In his contribution "The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations," Makane Mbengue offers an appraisal of the Award through an environmental prism.[10] Compared to previous decisions touching upon the protection of the marine environment, the Award, according to the author, is highly receptive to environmental concerns. He traces this receptivity at two levels of the decision. First, in terms of judicial policy, the Tribunal proved to be particularly courageous in its approach to the notion and aspects of due diligence. Second, interest in the environment can also be seen at the level of judicial process, and more precisely in how the Tribunal dealt with the use of external expertise. While some important steps forward were taken at both levels, the author voices some regret that the Tribunal did not offer a more protective understanding of certain issues.

In his contribution entitled "The South China Sea Arbitration Decision: The Need for Clarification," Thomas J. Schoenbaum offers a critical appraisal of the legal position and judicial policy adopted by the Tribunal vis-à-vis China.[11] To illustrate his criticism, he takes up the nine dash line issue, and points to an inconsistency between the Tribunal's reasoning that historic rights claimed by China are superseded by UNCLOS and its recognition of the existence of Filipino and Chinese traditional fishing rights based on historical practice around Scarborough Shoal. Schoenbaum grants that the Award clarified some important issues concerning the contemporary law of the sea. But he ultimately strikes a critical note in that the Tribunal "should have made an effort to fashion an Award that would not only call upon the parties to negotiate their differences in the South China Sea, but would provide incentives to start such a negotiation," in particu-

[7] Lori Fisler Damrosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, 110 AJIL UNBOUND 273 (2016).

[8] *Id.* at 273.

[9] Nilufer Oral, *"Rocks" or "Islands"? Sailing Towards Legal Clarity in the Turbulent South China Sea*, 110 AJIL UNBOUND 279 (2016).

[10] Makane Moïse Mbengue, *The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations*, 110 AJIL UNBOUND 285 (2016).

[11] Thomas J. Schoenbaum, *The South China Sea Arbitration Decision: The Need for Clarification*, 110 AJIL UNBOUND 290 (2016).

lar by leaving open the possibility that the nine-dash line may be the basis for China to assert nonexclusive, historic/habitual rights as specified in UNCLOS.[12]

As the panoply of themes addressed in these contributions shows, the Award deserves the wealth of attention that it has received thus far and will no doubt continue to receive in future. Although not specific to the present symposium, "AJIL Unbound" is nonetheless a fitting title. The "bound/unbound" dichotomy neatly captures an aspect of the Award and, one could say, of the role of Arbitral Tribunals confronted with cases as procedurally complex and substantively multilayered as the South China Sea Arbitration. For if it is true that the horizons of arbitral tribunals are in many ways bound by their contingencies, it is also true that more and more arbitral tribunals are making inroads into the larger fields of international law. To which pole of the dichotomy they will stick—bound or unbound—is a question that the present Award urgently poses.

[12] *Id.* at 291.