Problematic Expansion on Jurisdiction: Some Observation on the South China Sea Arbitration

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Following its jurisdictional decision in October 2015, the arbitral tribunal constituted under Annex VII to the UNCLOS issued its final award on July 12, 2016 in the South China Sea Arbitration case. It found overwhelmingly in favor of the Philippines. This article comments on two of the flaws regarding the issue of jurisdiction arising from both preliminary and final awards of the case. It firstly calls into question the inconsistent standard adopted in identifying jurisdictional obstacles, and finds a pro-jurisdictional bias in the Tribunal’s awards. It further analyses the fallacious approach of fragmenting the maritime delimitation disputes, and suggests the legal conundrum of status and entitlement of maritime features related to Sino-Philippine sea boundary delimitation should not constitute a separate dispute subject to legal proceedings. By purposefully downplaying jurisdictional obstacles and exercising powers on false disputes, the tribunal raises doubts to its legitimacy.

Keywords
UNCLOS, Annex VII, Arbitral Tribunal, Jurisdiction, South China Sea, Maritime Delimitation

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1. Introduction

The South China Sea issue has brought to the fore the serious disputes in this region, including multi-level contestations among the coastal States. At the core are the territorial disputes among China (mainland and Taiwan), the Philippines, Vietnam, Malaysia and Brunei over certain maritime features, and the maritime delimitation disputes arising from overlapping maritime claims among Indonesia and those aforementioned five States. The outer layer of the South China Sea issue is characterized as conflicting claims over rights of fishing and exploitation of hydrocarbon resources, and different views on certain concepts such as “freedom of navigation” and ‘scientific research.’

China has been maintaining that disputes concerning territorial sovereignty and maritime delimitation should be peacefully resolved through negotiations between countries directly concerned. Its declaration was filed on August 25, 2006 pursuant to Article 298(1) of the UNCLOS in order to exclude specified categories of disputes, particularly concerning sea boundary delimitations from compulsory procedures under the UNCLOS. This is in line with the consistent position of China. In this context, a default rule was applied to unilaterally initiate the arbitral proceedings against China and to establish an ad hoc tribunal (hereafter the Tribunal) under Annex VII of the UNCLOS.

Consistent with its long-standing policy, China chose not to participate in this arbitration. On December 7, 2014, China released a Position Paper articulating in detail China’s position and the justification thereof, and the rationale for the Tribunal’s lack of jurisdiction. Treating China’s Position Paper as effectively constituting a plea concerning its jurisdiction, the Tribunal convened a hearing on jurisdiction

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1. China has occupied 8 features, Vietnam, 29 features, the Philippines, 8 features, Malaysia, 5 features.
2. Shicun Wu, Competing Claims over the South China Sea Islands and the Way Forward: A Chinese Perspective on the Philippine-China Arbitration Case, in Arbitration concerning the South China Sea 14-5 (Shicun Wu & Keyuan Zou eds., 2016).
3. See, e.g., Joint Statement between the PRC and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation on August 10, 1995, and multiple other similar statements between the two countries thereafter. See also China’s proposal of a “dual track approach” on the 2014 China-ASEAN Ministerial Meeting.
4. As neither China nor the Philippines have chosen any particular means under Article 287(1), as a default rule, the two parties have accepted arbitration in accordance with Annex VII of the UNCLOS. See UNCLOS art. 287(1), (3) & (5).