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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DOI: http://dx.doi.org/10.14330/jeail.2016.9.2.07

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,[1] 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.'[2]

China has been maintaining that disputes concerning territorial sovereignty and maritime delimitation should be peacefully resolved through negotiations between countries directly concerned.[3] 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.[4]

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.[5] Treating China's Position Paper as effectively constituting a plea concerning its jurisdiction, the Tribunal convened a hearing on jurisdiction

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).

5 PRC Ministry of Foreign Affairs, 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, Dec. 7, 2014, *available at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (last visited on Oct. 29, 2016).

thereafter. On October 29, 2015, the Tribunal found Jurisdiction and Admissibility on 14 (out of 15) submissions of the Philippines and then rendered a final Award on July 12, 2016 which ruled sweepingly in favor of Manila.[6]

Although China's non-appearance *per se* may not constitute a bar to the proceedings, it left the Tribunal a duty to consider on its own initiatives all rules of international law that may be relevant to ascertain its jurisdiction.[7] However, as illustrated in the following paragraphs, this duty was not properly fulfilled. By purposely adopting a double standard in characterizing the dispute and fragmenting the maritime delimitation dispute between China and the Philippines, the Tribunal regrettably expanded its competence and empowered itself to touch upon the issues of major significance even if they had been explicitly and admittedly excluded from any compulsory procedures provided for in Section 2 of Part XV of the UNCLOS.

2. The Pro-Jurisdictional Bias in the Identification and Characterization of the Dispute

Section 2 of Part XV of the UNCLOS delineates the threshold of compulsory procedures controlling binding decisions in the compromissory clause of Article 286, which provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 286 sets out at least three conditions for applying compulsory procedures: first, the submitted dispute is concerning the interpretation or application of the UNCLOS; second, the submitted dispute is not one of the matters limited or

6 The Tribunal declared jurisdiction and admissibility in Submissions Nos.1, 2, 3, 4. 5, 6, 7, 8, 9, 10, 11, 12, 13 & 14(d). It supported the Philippines' claims therein.

7 The rights of the non-appearing party are safeguarded by the arbitral tribunal's obligation under Article 9 of the UNCLOS Annex VII to 'satisfy itself' *propriomotu.* Therefore, the tribunal has jurisdiction over the dispute and the claim is well founded in fact and law. *See* UNCLOS annex VII, art.9. *See also* Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998, I.C.J. 450, ¶¶ 37 & 38 (Dec. 4), *available at* http://www.icj-cij.org/docket/files/96/7533.pdf; Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974, I.C.J. 180-1, ¶ 16 (July 25), *available at* http://www.icj-cij.org/docket/files/56/6001.pdf (all last visited on Oct. 14, 2016).

excluded in Section 3 of Part XV, in particular, Articles 297 and 298; and, third, no settlement has been reached by recourse to the consensual means in section 1.[8] Clearly, the nature of the dispute has significant jurisdictional implications. When analyzing the question of jurisdiction in the *South China Sea Arbitration*, two folds of examination should be considered. One is whether the parties' disputes should be characterized as ones concerning the interpretation or application of the UNCLOS, or be more properly identified as disputes concerning territorial sovereignty over the submitted maritime features? This requirement is contained in the jurisdictional clause in Article 288(1) of the UNCLOS. The other is whether the parties' disputes belong to those concerning the maritime boundary delimitation which fall within the excluded matters covered by China's 2006 declaration under Article 298. This question requires interpretation of Article 298(1)(a) of the UNCLOS.

If carefully reading Articles 286, 288(1) and 298(1)(a), a common wording, 'concerning,' is seen. Articles 286 and 288(1) vest compulsory jurisdiction in courts or tribunals provided for in Article 287(1) with regard to "disputes *concerning* the interpretation or application of this Convention," while Article 298(1)(a) restricts the jurisdiction by providing that a State may declare that it does not accept compulsory procedures with respect to "disputes *concerning* the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, …" [Emphasis added] The term, 'concerning' used in these provisions, when interpreted in good faith with the ordinary meaning given to them in their context and in the light of its object and purpose as specified in Article 31 of the Vienna Convention on the Law of the Treaties, suggests the disputes, either included or excluded, a broader scope than merely "the interpretation or application of this Convention," "the interpretation or application of Articles 15, 74 and 83" or "sea boundary delimitations."[9]As has been found in a couple of recent cases, a pro-jurisdiction bias was also typified by

[8] Article 279 of the UNCLOS calls for States Parties to settle disputes by peaceful means as laid down in Article 33, paragraph 1 of the UN Charter. The compromissory clause of Article 286 of the UNCLOS, by prescribing this condition, prioritizes the resolution by these aforementioned means.

[9] Sienho Yee argued that such terms as 'concerning,' 'relating to' and 'involving' … are all terms that give the word 'dispute' a substantive scope or coverage broader than the content of "the interpretation or application of articles 15, 74 and 83," "sea boundary delimitations" or "historic bays or titles," even if such content is to be given a strict interpretation. He concluded that "the scope of a dispute *concerning or relating to* delimitation is broader than one that deals with only the final drawing of the line of delimitation." *See* Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 Chinese J. Int'l L. 711 (2014). Such interpretation was also echoed in the M/V *Louisa* Case, which, as presented in sub-section 2(A) of this paper, clarified that "the use of the term 'concerning' in the declaration indicated that the declaration does not extend only to articles which expressly contain the word 'arrest' or 'detention.'" *See* The M/V "*Louisa*" Case (Saint Vincent & the Grenadine v. Spain), Judgment, 2013 ITLOS 28, ¶ 83 (May 28), *available at* https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/judgment/C18_Judgment_28_05_13-orig.pdf (last visited on Oct. 14, 2016).

the *South China Sea Arbitration*. It has translated into an expansive construction of jurisdictional mandates and a narrow reading of jurisdictional conditions.

A. An Expansive Construction of Jurisdictional Mandates: Low-Threshold Access

One example of such an expansive reading on the literal meaning of 'concerning' can be found in the ITLOS' opinion in the *Louisa* case.[10] In *Louisa*, Spain argued the jurisdiction of the ITLOS should be limited to the disputes falling under any provision of the UNCLOS which expressly contains the term 'arrest' or 'detention' of vessels. For the reason, Saint Vincent and the Grenadines had made a declaration under Article 287 that "it chooses the International Tribunal for the Law of the Sea…, as the means of settlement of disputes *concerning* the arrest or detention of its vessels."[11] Spain's narrow interpretation of the declaration was not supported. The ITLOS opined:

> The use of the term "*concerning*" in the declaration indicates that the declaration does not extend only to articles which expressly contain the word "arrest" or "detention" but to any provision of the Convention *having a bearing on* the arrest or detention of vessels. This interpretation is reinforced by taking into account the intention of Saint Vincent and the Grenadines … that the declaration … was meant to *cover all claims connected with* the arrest or detention of its vessels…[12]

Another example of flexible construction of jurisdictional authorization arises when a submitted issue contains two or more concurrent disputes with distinct aspects. The arbitral tribunal in *Chagos Marine Protect Area* adopted an evaluating approach in determining whether the mixed disputes submitted by Mauritius should be properly characterized as concerning the interpretation or application of the UNCLOS so that they fell within the scope of the Tribunal's jurisdiction:

10 The M/V "*Louisa*," *id*.

11 Saint Vincent and the Grenadines ratified the UNCLOS on October 1, 1993, and made a declaration under Article 287 of the Convention on November 22, 2010 as follows:

> In accordance with Article 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982, I have the honour to inform you that the Government of Saint Vincent and the Grenadines declares that it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels.

See The M/V "*Louisa*" Case, ¶ 75. [Emphasis added]

12 *Id*. at 40, ¶ 83. [Emphasis added]

> The Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?[13]

This 'primary-ancillary' test in *Chago Marine Protect Area* is essentially in line with the tactic adopted in '*Louisa*,' for the expansive reading of the word 'concerning' helped secure the jurisdiction over matters that were not *per se* "the arrest or detention of its vessels"[14]or the interpretation or application of the Convention.

Without exception, such an expansive interpretation of jurisdictional mandates is also applied in the current *South China Sea* Award. When examining the nature of the Philippines' first two submissions in relation to the validity of China's "nine-dash line" and claims to 'historic rights,' the Tribunal first pointed out that they reflected a dispute concerning the interaction of China's claimed 'historic rights' with the UNCLOS provisions, in particular, a dispute concerning the interaction of the UNCLOS with another instrument or body of law.[15] Without any explanation, the Tribunal then quickly jumped to the conclusion that this type of dispute "is unequivocally a dispute concerning the interpretation and application of the Convention."[16] However, it is not that easy to perceive the 'unequivocal' connection between such interaction of two bodies of law and the interpretation or application of the Convention unless an implied logic that the former is "having a bearing on" the latter.[17] In other words, since the question of whether or not the rights arising under history and customary international law were preserved by the UNCLOS has something to do with the interpretation and application of the exclusive economic zone and continental shelf regime, following the '*Louisa*' rule, the Tribunal held that the Philippine's first two submissions should be identified as disputes concerning the interpretation and application of the Convention,[18] thus the first jurisdictional threshold was satisfied.[19]

13 Annex VII arbitration under the UNCLOS (Mauritius v. U.K.), Award, 2015 P.C.A. 87, ¶ 211 (Mar. 18), *available at* http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf (last visited on Oct. 11, 2016).

14 The M/V "*Louisa*" Case, at 26, ¶ 75.

15 Annex VII arbitration under the UNCLOS (Phil. v. China), Award on Jurisdiction and Admissibility, 2015 P.C.A. 66, ¶ 168 (Oct. 29), *available at* https://pcacases.com/web/sendAttach/1506 (last visited on Oct. 14, 2016).

16 *Id*.

17 The ITLOS in The M/V "*Louisa*" interpreted the word 'concerning' as "having a bearing on." *See* The M/V "*Louisa*" case, at 40, ¶ 83. [Emphasis added]

18 *Supra* note 15, at 66, ¶168.

19 As mentioned above, the first jurisdictional threshold is that the submitted matters can be identified as disputes concerning

Through such expansive readings on the literal meaning of the compromissory clause, the *South China Sea* tribunal extended its power to the issues that are governed by another body of law. As explained in subsection (B), this expansive approach is in a striking contrast to the tactics employed in interpreting jurisdictional exceptions.

B. A Narrow Reading of Jurisdictional Exceptions: High-Threshold Barrier

While Article 288(1) grants courts and tribunals jurisdiction on a broad scope of legal disputes, Article 298(1) limits the jurisdictional power by providing a few optional exceptions, including, *inter alia*, a State's right to declare that it does not accept compulsory procedures with respect to "disputes *concerning* the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations.[20] China made use of this optional right on August 25, 2006 and deposited a written declaration with the UN Secretary-General, stating that: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."[21]

The effect of this declaration is an absolute exclusion from compulsory procedures of all claims referred to in Article 298(1)(a)(b) and (c). This exclusion will be applied to "disputes *concerning* … sea boundary delimitations" as in the application of the *South China Sea* case. [Emphasis added] Again, the word such like 'concerning' plays a vital role in shaping the scope of this exclusion. Does Article 298(1)(a) cover anything other than delineating a sea boundary line? Following the logic in aforementioned cases, the question answers itself. Unexpectedly however, the Tribunal negated this common understanding.

In examining the Philippines' submissions on the legal status and entitlements

the interpretation or application of the Convention. The second is that they are not limited or excluded by the provisions of Section 2 of the UNCLOS. After concluding that the first threshold was satisfied in the preliminary award, the Tribunal went on, in the final award, to examine whether these disputes were covered by the exclusion from jurisdiction in Article 298(1)(a)(i) for disputes concerning "historic bays or titles." The Tribunal also denied this possibility, holding it had jurisdiction to consider the Philippines' Submission Nos. 1 and 2. *See* Annex VII arbitration under the UNCLOS (Phil. v. China), Award, 2016 P.C.A. 97, ¶ 229 (July12), *available at* https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf (last visited on Oct. 12, 2016).

20 UNCLOS art. 298(1)(a). [Emphasis added]

21 *UN Division for Ocean Affairs and the Law of the Sea*, 63 L. THE SEA BULL. 14 (2006), *available at* http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin62e.pdf (last visited on Oct. 14, 2016).

of selected maritime features under China's claim and control,[22] the Tribunal initially acknowledged the close tie between entitlement and delimitation because a determination on the legal status and entitlement of relevant insular features would normally be the first step in the process of maritime delimitation.[23] It would be logical if the Tribunal found the legal status and entitlement claims were *concerning* maritime delimitation which was, however, opted out by China and therefore fell out of its jurisdiction. [Emphasis added] On the contrary, in its preliminary award, the Tribunal either intentionally or unintentionally avoided any possible implication of the word 'concerning,' and diverted the subject to a differentiation between 'entitlement' and 'delimitation':

> In these proceedings, the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute *over* maritime boundaries. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary …[24]

Here, the Tribunal mysteriously replaced 'concerning' with 'over.' This seems to imply the Tribunal's intention to narrow the scope of the excluded matter stipulated in Article 298(1)(a) down to purely drawing a line. In its final award, however, the Tribunal tried to make up for its previous analytical failure, correcting its 'mistaken' wording in the preliminary award by enclosing the word 'concern' in quotation:

> In brief, a dispute over the source and existence of maritime entitlements does not "*concern*" sea boundary delimitation merely because the existence of overlapping entitlements is a necessary condition for delimitation. While all sea boundary delimitation will *concern* entitlements, the converse is not the case: all disputes over entitlements do not *concern* delimitation. … The exception in Article 298(1)(a)(i) of the Convention does not reach so far as to capture a dispute over the existence of entitlements that may - or may not - ultimately require delimitation.[25]

Such a narrow reading of Article 298(1)(a) is questionable for at least two reasons. First, it is obviously inconsistent with the practice in aforementioned cases,

22 *See* the Philippines' Submissions Nos. 3, 4, 6 & 7, *available at* http://www.pcacases.com/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf (last visited on Oct. 14, 2016).

23 *Supra* note 15, at 61, ¶ 156.

24 *Id.* at ¶¶ 156-157. [Emphasis added]

25 *Supra* note 19, at 85, ¶ 204. [Emphasis added]

especially '*Louisa*.' The *Louisa* tribunal not only extended the declaration to the UNCLOS provisions 'having a bearing on' the arrest or detention of vessels, but also looked into the intent of the declarant. It explained the declaration "was meant to cover all claims *connected with*" the exact wording of the text. [Emphasis added] It is apparent that an entitlement claim, commonly forming the first step in sea boundary delimitation, certainly *is connected with/has a bearing on* maritime delimitation and ought to be identified as part of the disputes *concerning* the sea boundary delimitation. [Emphasis added] Second, it is doubtful whether the Tribunal's narrow interpretation accords with the original intent of this exemption clause. Article 298(1)(a) was a balanced compromise between a general reluctance to allow reservations to the Convention, and an insistence of some delegations on excluding certain categories of disputes from third-party adjudication.[26] Given the sensitivity of the maritime delimitation issue and its inherent connection with an entitlement claim, one question must arise: Is it reasonable to expect that those who had made declarations under Article 298 of the UNCLOS excluding disputes concerning sea boundary delimitations from compulsory procedures would be willing to accept the reality that any implicit question pertaining to the excluded matters may circumvent this exemption? Allowing such a circumvention would go contrary to the original intention of the States Parties whose acceptance of the whole package of the UNCLOS was premised on the full respect of their aspiration embedded in the text of both Article 298(1)(a) and their declarations.

It seems apparent that the Tribunal was applying a double standard to secure its jurisdiction. The pro-jurisdictional bias has led the arbitrators to embrace maximalist protective positions. In turn, it has translated into "lenient entry, stringent exit" strategy,[27] which leaves the legitimacy of the ruling under question.

26 The socialist States indicated that: "They would not accept any formula – nor indeed the whole Convention – if it contained provisions on compulsory procedures entailing binding decisions relation to delimitation disputes." *See* J. Manner Eero, *Settlement of Sea-Boundary Delimitation Disputes according to the Provisions of the 1982 Law of the Sea Convention*, *in* Essays in International Law in Honour of Judge Mudge Manfred Lachs 636-7 (J. Makarczyk ed., 1984); N. Klein, Dispute Settlement in the UN Convention on the Law of the Sea 256 (2005); S. Rosenne & L. Sohn (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary (vol. V) 109 (1989).

27 Shany has described such strategy as 'case selection.' *See* Y. Shany, Questions of Jurisdiction and Admissibility before International Courts 110-5 (2016).

3. The Tribunal's Questionable Approach of Fragmenting A Delimitation Dispute

The legal status of certain maritime features as well as the maritime entitlement generated thereof was one of the core issues challenged by the Philippines. It played an important role in this case. *E.g.*, Submission Nos. 4 & 6 directly relates to the status and entitlement of Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef. Submission No. 7 directly relates to those of Johnson Reef, Cuarter on Reef and Fiery Cross Reef. Furthermore, the Philippines' claims in Submission Nos. 5, 8, 9, 12 & 14 deal with the lawfulness of China's assertion and exercise of rights in relevant areas, depending upon the legal status of certain key features, *inter alia*, Itu Aba. On the surface, this issue appears to concern the interpretation of critical provisions of the UNCLOS, especially Article 121. A more careful deliberation would call for a review over the justiciability of this issue. Can the two parties separate the status and entitlement claim from the maritime delimitation disputes? If the answer was negative, it would activate the exemption clause of Article 298(1)(a) and lead to a refusal to jurisdiction. However, the answer given by the Tribunal was affirmative. The Tribunal supported the Philippines' argument that: "China's contention conflates two different things: (1) entitlement to maritime zones, and (2) delimitation of areas where those zones overlap."[28] In the stage of dispute identification and characterization, the Tribunal adopted a tactic of differentiating the two concepts. The Tribunal held:

> While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. *A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where – for instance – a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention*.[29]

The mere explanation that disputes over maritime delimitation and entitlements

[28] The Philippines v. China, Jurisdictional Hearing Transcript (Day 2), at 40, *available at* https://pcacases.com/web/sendAttach/1400 (last visited on Oct. 14, 2016).

[29] *Supra* note 15, at 61, ¶ 156. This has been reaffirmed in the final award of the South China Sea Arbitration Award. *See supra* note 19, at 59, ¶ 159. [Emphasis added]

could appear in different scenarios is far from adequate to justify the Tribunal's fragmentation exercise; it sliced an inherent part off the delimitation process and dealt with it as an independent dispute.

A. Application of Article 121 in Maritime Delimitation

Both the UNCLOS and customary international law grant islands, regardless of their size, the same status on generating maritime zones as a land territory.[30] But the drafters of the Convention added an exception in Article 121(3) which provides: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The original purpose of Article 121(3) was to prevent tiny, insular features from significantly reducing the international seabed area that belongs to the common heritage of mankind.[31] This is demonstrated by Arvid Pardo's statement in the UN Seabed Committee in 1971:

> If a 200-mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.[32]

Article 121(3) has been playing a prominent role in preventing the encroachment of the international seabed area, as in the *Okinotori Reef* case.[33] In State practice, however, this clause has been more frequently referred to in maritime delimitation. Barbara Kwiatkowska and Alfred Soons believe its delimitation-related role outweighs its role played in the Global Commons:

> In fact, *with a single exception of Okinotorishima, the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations,* … A complex maritime delimitation-related role *took throughout the whole UNCLOS III a clear precedence over the original purpose of Article 121(3)* envisaged by Ambassador Arvid

30 UNCLOS art. 121(2). *See* Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 2001 I.C.J. 97, ¶ 185 (Mar. 16), *available at* http://www.icj-cij.org/docket/files/87/7027.pdf (last visited on Oct. 14, 2016).

31 V. Prescott & C. Schofield, The Maritime Political Boundaries of the World 81-2 (2d ed. 2005).

32 U.N. Doc. A/AC.138/SR.57, at 167.

33 The Okinotori Reef is located approximately 1,082 miles south of Tokyo. The main body of the Okinotori Reef was a lagoon surrounded by coral reefs, without vegetation or inhabited animals. *See* Norimitsu Onishi, *Japan and China Dispute a Pacific Islet*, N. Y. Times, July 10, 2005, at 4, *available at* http://www.nytimes.com/2005/07/10/world/asia/japan-and-china-dispute-a-pacific-islet.html (last visited on Oct.14, 2016); Qiu Jun & Liu Wenhua, *Should the Okinotori Reef Be Entitled to a Continental Shelf?: A Comparative Study on Uninhabited Islands in Extended Continental Shelf Submissions*, 10 China Oceans L. Rev. 233-4 (2009).

Pardo (Malta) in 1967 …[34]

In practice, Article 121(3) was often referred to by one party in a maritime delimitation for the purpose of enlarging its own maritime claim or curtailing that of the other. However, courts or tribunals hearing such cases tended to circumvent this highly controversial issue through a series of systematic rules and methods, and delimited the boundary line following the equity principle. As a matter of fact, even if an island (other than a rock) is in principle entitled to produce full jurisdictional zones, its effect on delimiting the continental shelf or exclusive economic zone depends on the peculiarity of a given situation. As considerations of equity gives islands various effects in determining entitlements to maritime areas, islands may generate full or partial maritime spaces, or none at all.[35]

It is impressive to understand that even an island entitled to full maritime zones under Article 121 may only be given partial effect or no effect at all on delimiting a maritime boundary in accordance with Articles 15, 74 or 83. Why do island status and its effects on delimitation not exactly correspond? It is because sea-boundary delimitation, as a comprehensive framework, requires prudent consideration of a variety of factors. Apart from the presence of islands, other circumstances - length and shape of respective coastlines, the existence of third States, historical circumstances, etc. - also play a crucial role in this whole process.[36]

Also, the evasive manner of international adjudication should be further explained in relation to the status and entitlement of islands in the areas to be delimited. When adjudicating disputes on maritime delimitation, the ICJ provided: the Court shall "find its objective justification in considerations lying not outside but *within the rules*."[37] However, given "the considerable and unresolved controversy as to the exact meaning and scope of the principle" embodied in Article 121(3),

[34] B. Kwiatkowska & A. Soons, *Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3)*, The Global Community - Y.B. Int'l L. & Jurisprudence 114-5 (2011). *See also* Yee, *supra* note 9, at 721. [Emphasis added]

[35] B. Kwiatkowska & A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own*, 21 Neth. Y.B. Int'l L. 139-81 (1990), *available at* http://dx.doi.org/10.1017/S0167676800002087 (last visited on Oct. 12, 2016).

[36] Yoshifumi Tanaka categorized the relevant circumstances into two groups: 'geographical' and 'non-geographical' factors. The former include, *inter alia*, configurations of coasts, presence of islands, baselines, presence of third States, while the latter include, *inter alia*, economic factors, historic rights, security considerations, navigation, environmental and cultural factors. *See* Yoshifumi Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation 151 (2006).

[37] North Sea Continental Shelf Cases (F.R.G. v. Den. / F.R.G. v. Neth.), Judgment, 1969 I.C.J. 48, ¶ 88 (Feb. 20), *available at* http://www.icj-cij.org/docket/files/51/5535.pdf (last visited on Oct. 14, 2016). [Emphasis added]

"whether it is at all capable of generating such a norm" is open to serious doubt.[38] To this extent, it is not surprising that so far the overwhelming majority of cases, except *South China Sea*, have been reluctant to apply Article 121(3) and preferred to leave this conundrum ambiguous as it is.[39] The reluctance and evasive manner are a fair reaction to the lack of a clear-cut applicable rule on the definition of 'rock' and the unambiguous duty to adjudicate "within the rules." It would explain why any mandatory rule has not developed with regard to the effects of islands in maritime delimitation disputes, but instead a common practice has established to treat islands as 'special' or 'relevant' circumstances to be considered in each act of delimitation.[40]

B. The Justiciability of Entitlement Claim in Overlapping Areas

As mentioned above, in *South China Sea*, the entitlement claim in overlapping areas was held a distinct issue from maritime delimitation as an independent dispute. The only exceptional scenario the Tribunal inferred is the situation of an isolated small maritime feature, located in the middle of the open sea and far away from the mainland. This reasoning, however, is simply not tenable, because it would be preposterous to separate the issue of legal status and entitlement of features which is inherent to a delimitation dispute from the maritime delimitation process only because the former could occur in another situation. Nonetheless, this reminds us of the necessity to explore the most fundamental question: Can the legal status and entitlement issue in *South China Sea* be adjudicated before a court or a tribunal? It negates this justiciability test for the following reasons:

First, an entitlement claim and a delimitation dispute are mutually dependent and interactive. For one thing, an equitable solution on delimitation requires a fair consideration of possible effects arising from relevant maritime features, while ascertaining the entitlements of the parties commonly comes from the comprehensive process of maritime delimitation. The delimitation of the EEZ or the continental shelf usually proceeds in three steps: (1) identifying basepoints, relevant

38 *Supra* note 35, at180.

39 In *Maritime Delimitation in the Black Sea*, *e.g.*, the ICJ Observed that Serpents' Island is situated approximately 20 nautical miles to the east of Ukraine's mainland coast, and that any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast. The ICJ concluded that the presence of Serpents' Island did not call for an adjustment of the provisional equidistance line, so that the Court needed not to consider whether Serpents' Island falls under paragraph 2 or 3 of Article 121 of the UNCLOS. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 122-3, ¶ 187 (Feb. 3), *available at* http://www.icj-cij.org/docket/files/132/14987.pdf (last visited on Oct. 14, 2016).

40 Yoshifumi Tanaka classified the "presence of island" into the relevant circumstances based on case law and State practice. *See* Tanaka, *supra* note 36, at 151. *See also supra* note 35, at 143.

coasts and areas;[41] (2) a construction of a provisional delimitation line and possible adjustment given relevant circumstances so as to achieve an equitable solution; and (3) a disproportionality test on the effect of the line in case the parties' respective shares of the relevant areas are markedly disproportionate to their respective relevant coasts.[42] The existence of an island or groups of islands has been regarded as special or pertinent circumstances to be taken into consideration before finalizing a maritime boundary. Kwiatkowska and Soons also noted that an entitlement issue forms an inherent part of a maritime delimitation:

> The definition of rocks and their entitlement to maritime spaces, like the definition and entitlement of islands in general, *forms an inherent part of maritime boundary delimitation* between opposite/adjacent States and, as State practice clearly evidences, *these issues will not give rise to controversies unless such delimitation is in dispute*.[43]

In addition, defining an island or rock is contingent with the context of maritime delimitation where competing claims between opposite or adjacent States exist, like the case between China and the Philippines. State (judicial) practices have long endured the considerable confusion and controversy as to the exact scope and meaning of Article 121(3). It seems to have explained the reasonableness of keeping this provision ambiguous. Any definition or interpretation of the rocks-principle rightly remains a matter for application of equity to maritime boundary delimitation in which islands are involved.[44] An isolation of the legal status and entitlement issue

41 The role of relevant coasts can have two different, but closely related legal aspects regarding the delimitation of the continental shelf and the EEZ. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line. *See* Maritime Delimitation in the Black Sea, *supra* note 39, at 89, ¶ 78. *See also* Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 94, ¶ 178 (Mar. 16), *available at* http://www.icj-cij.org/docket/files/87/7027.pdf (last visited on Oct. 14, 2016); Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 674-86, ¶¶141-166 (Nov. 19), *available at* http://www.icj-cij.org/docket/files/124/17164.pdf (last visited on Oct. 14, 2016).

42 *See* Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.), Judgment, 1982 I.C.J. 94-5, ¶ 222 (Jan. 20); Case concerning the Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 50-1, ¶¶ 68 & 71 (June 3); Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), Judgment, 1993 I.C.J. 60 ¶ 51 (June 13); Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), *id*. 58, ¶ 230; Territorial and Maritime Dispute (Nicar. v. Colom.), *id*. 75-6, ¶¶ 190-193; Annex VII Arbitration under UNCLOS Award on the Maritime Delimitation (Barb. v. Trin. & Tobago), 2006 P.C.A., 73-4, ¶ 242 (Apr. 11).

43 *Supra* note 35, at 181. [Emphasis added]

44 Kwiatkowska and Soons states:

from its soil on relevant maritime delimitation disputes will lead to an arbitrary decision which is not only ineffective but also inoperative in solving differences.[45]

Second, a court or a tribunal is not judicially able to delineate the maximum limit of a contesting State. When there exists overlapping areas between two neighboring States, the two interested parties would commonly carry out consultation, negotiation or arrangements of other forms in order to reach a compromised plan that can accommodate their needs. Under normal circumstances, the parties may gradually modify or adjust their maritime claims in these interim arrangements before reaching a final agreement. This is a highly autonomous process which accords closely with political ends so that the parties might not entirely follow the exact rule in the UNCLOS or other treaty. Although both parties sometimes, based on mutual consent, resort to the compulsory procedures provided for in the UNCLOS Part XV,[46] it does not grant a court or a tribunal express or implied power to interfere with the decision-making that ought to be carried out bilaterally between the States directly concerned. In other words, no court can make the final decision on a party's maximum limit of maritime claim. Before, the two States used to enter into provisional arrangements or official negotiation relating to the delimitation, much less an *ad hoc* arbitral tribunal unilaterally initiated. The reason is clear and simple: Entitlements that one party could have earned out of reciprocity in the process of bilateral negotiation are very likely to be ruled out by third-party adjudication if solely based on the ambiguous provision of Article 121(3).[47]

Third, the Tribunal set up a clear-cut and even unprecedentedly high standard for the long-debated principle on 'rocks.' As illustrated in the above paragraphs, the 'intolerably imprecise' provision of Article 121(3) appears to be "a perfect recipe for confusion and conflict,"[48] and barely leaves any explicit rule to follow. It is dubious whether a court or a tribunal can justify its enforcement over the status and entitlement claim of an island deeply rooted in an overlapping geographic framework. Worse still, the Philippines' status and entitlement claim involves

> If Article 121, paragraph 3 has any role to play, it would seem to consist in signaling the necessity of giving the question of 'rock' careful consideration, with the implementation of the rocks-principle rightly remaining in most cases a matter for application of equity to maritime boundary delimitation in which islands are involved.
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> *See id*.

45 The dramatic reaction of Colombia to the 2012 ICJ judgment in Territorial and Maritime Dispute between Nicaragua and Colombia, i.e., withdrawing its acceptance of ICJ's jurisdiction, warned all courts and tribunals to take a more prudent approach. *See* Yee, *supra* note 9, at 684.

46 UNCLOS art. 74(2).

47 Natalie Klein confirmed this view. She maintained: "A decision by a court or tribunal on this specific issue denies States the full benefit of a right granted under the Convention." *See* Klein, *supra* note 26, at 276.

48 E. Brown, The International Law of the Sea: Introductory Manual (vol.1) 151 (1994).

a package of conundrums, including, *inter alia*, territorial disputes over these contested features, the status of the Spratly Islands as a single geographic unit, the indispensable third party theory, etc. which exponentially exaggerate the complexity of the issue in question. Under these circumstances, the Tribunal in *South China Sea* not only recklessly decided to exercise its power, but also attempted to fulfill its ambition of reshuffling the maritime order by means of establishing an unparalleled threshold for "fully entitled island."[49] This hasty move can jeopardize the legitimacy of the award as well as the integrity and authority of the UNCLOS.

It thus calls for a more prudent examination on the question of justifiability. In our context, Judge Petrén's separate opinion in *Western Sahara Advisory Opinion* seems especially apposite. When considering the application of the self-determination principle in the face of two conflicting pre-colonial territorial claims, he commented:

> It seems however that questions of this kind are not yet considered ripe for submission to the Court. The reason is doubtless the fact that the wide variety of geographical and other data which must be taken into account in questions of decolonization have not yet allowed of the establishment of a sufficiently developed body of rules and practice to cover all the situations which may give rise to problems. In other words, although its guiding principles have emerged, the law of decolonization does not yet constitute a complete body of doctrine and practice. It is thus natural that political forces should be constantly at work rendering more precise and complete the content of that law in specific cases like that of Western Sahara...[50]

Last but not least, there is a paradox throughout this case. Assuming China agrees to comply with the award, the rulings and findings on the legal status and entitlement of maritime features will consequently serve as a premise for the future negotiation between China and the Philippines on maritime delimitation. It ironically proves that the two issues are deeply entangled so that they would consequently repudiate the alleged precondition and foundation of the award in question. This partially

[49] The Tribunal narrowly interpreted Article 121(3)'s key terms, such as 'human habitation' and "economic life of their own," and designated the largest and least rock-like of Spratlys, Itu Aba, as a rock, thereby depriving all the high-tide features in the Spratly Islands of the possibilities of generating EEZs and continental shelves. *See* Annex VII arbitration under the UNCLOS (Phil. v. China), Award, 2016 P.C.A. pt. VI(c), ¶¶ 385-648 (July 12). This ruling is likely to cause collateral damage to other countries as well, since few maritime features which have been characterized as fully entitled islands can actually meet the standard set up in this case.

[50] Western Sahara, Advisory Opinion, 1975 I.C.J. 110 (Oct. 16) (separate opinion by Judge Petrén), *available at* http://www.icj-cij.org/docket/files/61/6209.pdf (last visited on Oct. 14, 2016). *See also* A. Carty, *The South China Sea Disputes Are Not Yet Justiciable*, *in* Arbitration concerning the South China Sea: Philippines versus China 49 (Shicun Wu & Keyuan Zou eds., 2016).

explains China's "non-participation, non-recognition, non-acceptance and non-compliance" position on this case. As for China, it is essentially a legal trap that would put it in an unjust and embarrassing situation at any cost.

4. Conclusion

The *South China Sea Arbitration* was an unprecedentedly complex case. It brought together most complicated questions in the field of international adjudication, *inter alia*, mixed disputes involving competing territorial claims, rock principle, the correlation between an entitlement claim of relevant features and the dispute of maritime delimitation, the exemption situations of historic title, maritime delimitation and military activities, the issue of indispensable third party, etc. Here, the Philippines made full use of tactic for packaging and splitting unactionable core disputes into issues concerning the application and interpretation of the UNCLOS. However, the Tribunal's biased construction of both jurisdictional and substantive provisions is causing more worries of abusing not only legal process but also judicial discretion. Such an advanced law-making impulse comes at the expense of the consistency and legitimacy of international jurisprudence. It will finally impair the integrity and authority of international law.