SYMPOSIUM ON THE SOUTH CHINA SEA ARBITRATION

JURISDICTION OF THE ARBITRAL TRIBUNAL IN *PHILIPPINES V. CHINA* UNDER UNCLOS AND IN THE ABSENCE OF CHINA

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It is not uncommon for decisions of international tribunals to be reported in the pages of the *Washington Post* or feature on the *BBC News* website. It is rather less common for awards to feature on the giant screens of New York's Times Square. But less than two weeks after the Arbitral Tribunal under Annex VII to the United Nations Convention on the Law of the Sea issued its Award in *Philippines v. China*,[1] a three-minute video featuring China's position was broadcast repeatedly on the screen better known for broadcasting New Year's Eve festivities than argumentation on the competence of international tribunals. The video asserted that China's "indisputable sovereignty over [the South China Sea islands] has sufficient historic and legal basis" and that "the Arbitral Tribunal vainly attempted to deny China's territorial sovereignty and maritime rights and interests in the South China Sea." It further stated that "China did not participate in the illegal South China Sea arbitration, nor accepts the Award so as to defend the solemnity of international law."[2] This latter statement goes to the very heart of the Arbitral Tribunal's jurisdiction under the 1982 United Nations Convention on the Law of the Sea (the Convention)[3] and its competence to decide the case despite China's nonparticipation in the proceedings.

Compulsory dispute settlement under the Convention

The scope of the Arbitral Tribunal's jurisdiction was not without controversy. The Convention, to which both the Philippines and China are party, contains comprehensive compulsory provisions on dispute settlement, subject only to limited exclusions, including optional exceptions for boundary delimitations and for military activities.[4] Part XV provides that "any dispute concerning the interpretation or application of this Convention shall," in certain circumstances, be submitted to a court or tribunal having jurisdiction under the

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[1] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (July 12, 2016) [hereinafter Final Award]. The same Tribunal issued an Award on Jurisdiction and Admissibility in 2015: The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015) [hereinafter Award on Jurisdiction].

[2] The video is available at China Review Studio, *The South China Sea*, YOUTUBE.

[3] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3 [hereinafter UNCLOS].

[4] *See* UNCLOS, *supra* note 3, arts. 298(1)(a)(i) and 298(2)(b). The relevance of the optional exception for military activities is discussed in 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).

Convention.[5] Here that "court or tribunal" was an arbitral tribunal constituted in accordance with Annex VII.[6] Under the Convention, an award of an Annex VII tribunal is "final and without appeal" and "shall be complied with by the parties to the dispute."[7]

The Legal and Practical Consequences of China's Nonappearance

As Reed and Wong have noted, China declined to appear or participate in the proceedings.[8] Although it did not submit any written pleadings, it did publish a "Position Paper . . . on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" in December 2014 (the 2014 Position Paper).[9] That Paper was followed by six letters, over the course of the proceedings, from Chinese ambassadors to members of the Tribunal, some of which made reference to public statements of the Chinese Ministry of Foreign Affairs and other public statements and materials.[10]

Nonappearance by a party to dispute settlement proceedings under the Convention is not a bar to the proceedings, or to the issuance of a final, binding award. Article 288(4) provides that in the event of a dispute as to jurisdiction, the matter shall be decided by the tribunal.[11] Article 9 of Annex VII also explicitly provides that if one of the parties does not appear, the other may request the tribunal to continue proceedings and make its award.[12] The Philippines having requested that the proceedings continue, the Tribunal did so, confirming that "China remains a party to the arbitration, with the ensuing rights and obligations, including that it will be bound under international law by any decision of the Tribunal."[13]

This was not the first occasion when a state has declined to participate in dispute settlement proceedings: for example, the United States famously chose not to appear before the ICJ in the merits and compensation phases of the *Military and Paramilitary Case* brought by Nicaragua in the 1980s, while Russia recently refused to appear in proceedings under the Convention concerning the Arctic Sunrise, a vessel operated by Greenpeace International. In both cases, the court or tribunal issued a decision on the merits, noting that the defaulting party was legally bound by the decision, despite its failure to appear.[14]

Article 9 of Annex VII requires that, where proceedings continue in the absence of a disputing party, the tribunal "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."[15] In order to fulfil this requirement, the Tribunal noted that it requested further written argument from the Philippines on jurisdictional issues and asked questions before and during the hearing on jurisdiction; it also addressed the three issues concerning jurisdiction raised by China in its 2014 Position Paper, as well as considering other possible jurisdictional questions.[16] In respect of the requirement

[5] UNCLOS, *supra* note 3, art. 286.

[6] UNCLOS, *supra* note 3, art. 287.

[7] UNCLOS, *supra* note 3, Annex VII, Article 11.

[8] Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AJIL (forthcoming 2016). *See also*, Final Award, *supra* note 1, at paras. 115-116; Award on Jurisdiction, *supra* note 1, at para. 112.

[9] *See* Award on Jurisdiction, *supra* note 1, at para. 10.

[10] Final Award, *supra* note 1, at para. 127; *see also*, Award on Jurisdiction, *supra* note 1, at para. 121.

[11] UNCLOS, *supra* note 3, art. 288(4).

[12] UNCLOS, *supra* note 3, VII, Article 9.

[13] Final Award, *supra* note 1, at para. 118, relying on UNCLOS, *supra* note 3, art. 296(1) and Annex VIII, art. 11.

[14] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 24 (June 27); Arctic Sunrise (Neth. v. Russ.), PCA Case No. 2014-02, Award on the Merits, para. 10 (Aug. 14, 2015).

[15] UNCLOS, *supra* note 3, Annex VII, art. 9.

[16] Final Award, *supra* note 1, at para. 130; *see also*, Award on Jurisdiction, *supra* note 1, at paras. 119-123.

to satisfy itself that the claim is well founded, the Tribunal "took steps to test the evidence . . . and to augment the record by seeking additional evidence, expert input, and party submissions relevant to questions arising in the merits phase."[17] The Tribunal also outlined the steps that it had taken to ensure procedural fairness to China, including continuing to provide it with all communications, materials, and transcripts, and reiterating that it could elect to participate at any time.[18] In this respect the Tribunal appears to have gone beyond what other international courts have done in cases where a respondent state failed to appear.

The Tribunal's decision to proceed despite China's nonparticipation was undoubtedly the right one; it was mandated by the Convention. And arguably its approach was accepted by China, albeit belatedly. On May 12, 2016, the Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs, in response to questions concerning China's nonparticipation, stated that:

> [W]hether or not China accepts and participates in the arbitral proceedings, the Arbitral Tribunal has the obligation under international law to establish that it does have jurisdiction over the disputes. But from what we have seen, it apparently has failed to fulfil the obligation and the ruling would certainly be invalid.[19]

This statement suggests that its author accepted that the Tribunal had competence—and indeed, an obligation—to decide whether it had jurisdiction, but took issue with the Tribunal's findings on jurisdiction.

The Tribunal's Jurisdiction under the Convention

Turning then to the question of the Tribunal's jurisdiction, there were three main aspects to the Philippines' claims:

(1) The first concerned China's claimed nine-dash line in the South China Sea. The Philippines contested China's maritime entitlements in the South China Sea (Submission 1) and challenged the legality of the nine-dash line (Submission 2).

(2) The second aspect concerned the characterization of certain maritime features as rocks, islands, or low-tide elevations, and their corresponding maritime entitlements (Submissions 3-7). For this aspect of its claim, the Philippines argued that it was not asking the Tribunal to determine who is sovereign over the features, but merely to characterize them and identify their maritime entitlements.

(3) The third aspect involved claims that China had violated various rights of the Philippines by occupying particular features (and by related conduct, including construction and fishing), thereby denying the Philippines its rights under the Convention to resources in maritime areas within its exclusive sovereignty (Submissions 8-10). It also argued that China had violated its obligations to protect and preserve the marine environment (Submissions 11 and 12).

The Tribunal's jurisdiction was the subject of extensive consideration, resulting in a lengthy Award on Jurisdiction, and further jurisdictional questions joined to the merits were addressed in the Final Award. The intention here is not to provide a comprehensive analysis of all of the jurisdictional issues addressed by the Tribunal, many of which involved technical questions of interpretation of the Convention, but to focus on

[17] Final Award, *supra* note 1, at para. 131

[18] *Id.* at para. 121. Concerning steps to ensure procedural fairness to the Philippines, see *id.* at paras. 123-127.

[19] *Id.* at para. 127, quoting remarks of the Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs (May 12, 2016).

the principal issues. The three matters addressed below were the focus of China's 2014 Position Paper (which the tribunal treated as a plea concerning jurisdiction[20]) and were the most significant of the hurdles to the Tribunal's jurisdiction over the claims made by the Philippines.

A territorial sovereignty dispute, or a dispute under the Convention?

In its 2014 Position Paper, China asserted that the "essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which . . . does not concern the interpretation or application of the Convention.[21] In addressing this issue, the tribunal noted that, in accordance with Article 288 of the Convention, there must be a dispute concerning the interpretation or application of the Convention.[22] It was for the Tribunal to identify and characterize the dispute put before it, on an objective basis.[23] The Tribunal noted that there was an extant dispute over land sovereignty, but stated that it did not automatically follow that the land sovereignty dispute was the dispute before the Tribunal.[24] The Tribunal then stated that it:

> might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal first to render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty.[25]

In applying that two-stage test, the Tribunal:

- noted that the Philippines had not asked the Tribunal to rule on sovereignty and repeatedly requested the Tribunal to refrain from doing so;
- agreed with the Philippines that it was possible to decide whether the maritime features generated maritime entitlements accepting China's case that it is sovereign over them; and
- indicated that it would ensure, in addressing the merits, not to advance or detract from either party's claims to land sovereignty in the South China Sea.[26]

In taking this approach, the Tribunal focused specifically on the submissions as made by the Philippines and declined to view those submissions as stemming from the broader sovereignty dispute between the two states.[27] Thus it was obviously crucial that the Philippines had carefully crafted its submissions to focus on questions of interpretation and application of the Convention. Whether or not a dispute is caught by Part

[20] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Procedural Order No. 4, para. 1.1 (Apr. 21, 2015).

[21] *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*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA sec. I (Dec. 7, 2014) [hereinafter 2014 Position Paper].

[22] Award on Jurisdiction, *supra* note 1, at para. 148.

[23] *Id.* at. para. 150.

[24] *Id.* at. para. 152.

[25] *Id.* at. para. 153.

[26] *Id.* at. para. 153.

[27] This approach might be contrasted with the approach of the Annex VII Tribunal in Chagos Marine Protected Area Arbitration (Mauritius v. Gr. Brit.), PCA Case No. 2011-03, Award (Mar. 18, 2015) which found that the primary dispute underlying some of Mauritius' submissions was a dispute as to territorial sovereignty: see especially *id.* at para. 211.

XV therefore depends not on its underlying substance or real object, but on how the issues are formulated.[28] That arguably would come as a surprise to negotiating parties to the Convention. It also potentially signals an approach to determining the subject-matter of the dispute for jurisdictional purposes that differs from that of the ICJ, which puts emphasis on "the real issue in the case" and "the object of the claim."[29]

Further, in decoupling the question of a feature's maritime entitlement from the question of the identity of the state that benefits from that entitlement, the Tribunal was able to proceed to decide the former without deciding the latter. However, it might be asked whether it is helpful to articulate maritime entitlements when there is uncertainty about to which state those entitlements accrue, particularly given that such entitlements flow from a state's sovereignty over territory and not from the mere fact of the existence of territory.[30] Moreover, it is arguable that in articulating maritime entitlements in this way, a tribunal could exacerbate rather than resolve a dispute, since the recognition of a maritime entitlement could bring the question "whose entitlement" into sharper focus.

A maritime delimitation dispute, or a question of existence of maritime entitlements?

A second issue raised by China in its 2014 Position Paper was to the effect that the subject-matter of the dispute constituted an integral part of maritime delimitation, which fell within the optional exception to jurisdiction.[31] The Tribunal rejected this argument, considering that "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap."[32] It followed that the challenge by the Philippines to the existence and extent of maritime entitlements claimed by China in the South China Sea was "not a dispute over maritime boundaries."[33] However, the Tribunal noted that several of the Philippines' submissions sought a declaration that specific maritime features form part of the Philippines' exclusive economic zone (EEZ) and continental shelf. The Tribunal could only deal with those submissions if it determined that China could not possess any potentially overlapping entitlement in the areas of those maritime features.[34] The Tribunal therefore joined that aspect of the scope of its jurisdiction to the merits.[35]

On the merits, as Reed and Wong have noted, the Tribunal concluded that China's claims to historic rights, or other sovereign rights and jurisdiction, within the so-called "nine-dash line" were inconsistent with the Convention.[36] In addressing the claims concerning the status of certain maritime features, the Tribunal concluded that several of them are "low-tide elevations" which do not generate entitlements to territorial sea, EEZ or continental shelf; while several others were "high-tide features" which are entitled to only a territorial sea and not to an EEZ or continental shelf.[37] It followed from those findings that there was no legal basis for

[28] *See* Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT. & COMP. L.Q. 34, 44-45 (1997).

[29] *See, e.g.*, Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Preliminary Objection, para. 26 (Sept. 24, 2015), and references therein.

[30] *See* Natalie Klein, *Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions* 15 CHINESE J. INT'L L. 403, para. 18 (2016).

[31] 2014 Position Paper, *supra* note 21, at sec. I. China made a declaration under Article 298 on 25 August 2006, purporting to exclude all categories of disputes under Article 298(1)(a)-(c) of the Convention from the procedures under Part XV, Section 2.

[32] Award on Jurisdiction, *supra* note 1, at para. 156.

[33] *Id.* at. para. 157; see also paras. 398-411.

[34] *Id.* at. para. 157.

[35] *Id.* at. paras. 393-396.

[36] Reed & Wong, *supra* note 8; *see also*, Final Award, *supra* note 1, at paras. 261-278

[37] Reed & Wong, *supra* note 8; *see also*, Final Award, *supra* note 1, at paras. 643-648.

any entitlement by China to maritime zones in the areas claimed by the Philippines. Consequently, no maritime delimitation was required, and the Tribunal was not intruding into areas covered by the maritime delimitation exception.[38]

The Tribunal's decoupling of the existence of entitlements from the identity of the beneficiary of those entitlements, noted above, also guided the Tribunal's conclusion that it need not delimit any maritime boundaries to decide the submissions before it. Thus, the Tribunal's conclusion on the maritime boundary objection is open to the same critique as its conclusion on the sovereignty issue, noted above: given that maritime entitlements flow from sovereignty over territory and not from the fact of territory itself, should those entitlements be articulated without knowing the state that benefits from that entitlement?

Had China and the Philippines agreed to settle disputes through negotiation?

The third point raised by China in its 2014 Position Paper was to the effect that the parties had agreed to settle their disputes by negotiation, to the exclusion of Part XV procedures under the Convention.[39] Article 280 preserves the right of States Parties to agree at any time to settle a dispute between them by peaceful means of their own choosing,[40] and pursuant to Article 281, the Convention's compulsory dispute-settlement procedures apply only where no settlement has been reached by any other agreed peaceful means and provided that the agreement does not exclude any further procedure.[41]

China relied on the ASEAN Declaration of Conduct of Parties in the South China Sea signed in 2002 (the DOC), which provided that the parties "undertake to resolve their territorial and jurisdictional disputes by peaceful means . . . through friendly consultations and negotiations by sovereign states directly concerned."[42] After examining the terms of the DOC and the circumstances of its adoption, the Tribunal concluded that the DOC was not a legally binding agreement with respect to dispute resolution and therefore did not operate to exclude the Convention's dispute-settlement procedures.[43] But even if it had been binding, the tribunal considered that the DOC would not fall within Article 281, including because it did not contain a "clear statement of exclusion of further procedures."[44] The Tribunal thus disagreed with earlier authority (that of the majority of the Annex VII Tribunal in *Southern Bluefin Tuna*) that an implicit exclusion of other dispute settlement procedures is sufficient for Article 281.[45] The tribunal further considered that, for the purposes of Article 281, the statement must explicitly exclude *Part XV procedures*—that there be an "'opting out' of Part XV procedures."[46] In support of this interpretation, the Tribunal emphasized that dispute settlement was intended to be an "integral part and an essential element of the Convention," and therefore parties must clearly express an intention to "remove a pivotal part of the Convention."[47]

[38] Final Award, *supra* note 1, at paras. 628-633. For similar reasons, the Tribunal found that the exceptions in Article 297(3)(a) and Article 298(1)(b) did not present any obstacle to its jurisdiction: see *id.* at paras. 694-695, 733-734, 1024-1025.

[39] 2014 Position Paper, *supra* note 21, at sec. I.

[40] UNCLOS, *supra* note 3, art. 280.

[41] UNCLOS, *supra* note 3, art. 281(1).

[42] China-ASEAN Declaration on the Conduct of Parties in the South China Sea para. 4 (Nov. 4, 2002 (the DOC), quoted in Award on Jurisdiction, *supra* note 1, at para. 198.

[43] Award on Jurisdiction, *supra* note 1, at paras. 212-218.

[44] *Id.* at para. 223.

[45] *Id.* at para. para 223; cf. Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Award on Jurisdiction and Admissibility, 23 RIAA 1, 43, para. 57 (Aug. 4, 2000).

[46] Award on Jurisdiction, *supra* note 1, at para. 224.

[47] Award on Jurisdiction, *supra* note 1, at para 225.

The Tribunal also examined several joint statements, as well as multilateral treaties,[48] but concluded that they were not agreements to settle disputes within the scope of Article 281(1).[49]

The provisions of the Convention set a high threshold to avoid the application of compulsory dispute-settlement procedures, reflecting the importance given to effective enforcement by negotiating parties to the Convention. That threshold was plainly not met by the DOC, given its non-binding status. Moreover, the tribunal's alternative finding to the effect that Article 281 requires an explicit "opting-out" from Part XV procedures sets a very high bar, and one that is unlikely to be met by any of the relevant treaties, other agreements, or declarations that might constitute valid agreements to determine disputes in another forum.[50] Article 281 appears intended to resolve conflicts of jurisdiction between those other agreed forums and Part XV, but the Tribunal's interpretation of Article 281 has the potential to create, rather than to avoid, such conflicts.

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The jurisdictional issues confronting the Tribunal in the South China Sea Arbitration were both technically complex and legally challenging. The Convention obliged the Tribunal to decide whether it had jurisdiction despite China's nonappearance in the proceedings. Even if its conclusions are open to criticism, the Tribunal's thorough treatment of the existence and scope of its jurisdiction discharged this obligation. It remains to be seen whether the Tribunal's approach to the separability of issues of territorial sovereignty and maritime delimitation from issues of the existence of maritime entitlements under the Convention will encourage other states to submit claims under the Convention in circumstances where there are extant or underlying disputes over sovereignty and boundaries. It is highly unlikely to discourage them.

[48] In particular the Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1025 UNTS 319 and the Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79.

[49] Award on Jurisdiction, *supra* note 1, at paras. 241-248, 265-269, and 281-289.

[50] *See* Klein, *supra* note 30, at para 11.