

Analysis of the Settlement of South China Sea Disputes by the International Arbitration Tribunal

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ABSTRACT

The settlement of South China Sea disputes by the International Arbitration Board is a complex challenge. The South China Sea is a strategic area disputed by several countries in Southeast Asia. International Arbitration Bodies play an important role in handling these disputes. Arbitration proceedings began in 2013 and a decision was announced in 2016. Although the decree is legally binding, its implementation still faces political and diplomatic challenges. Cooperation between the countries involved is necessary to achieve an effective solution.

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Introduction

An international relationship includes a state between countries, a state with individuals, or a country with an organization. Relationships often find points of difference that give rise to disputes between them. When this happens, international law plays an important role in its resolution. The function of international law is to provide a way for the parties to the dispute to resolve their disputes in accordance with international law.

An international dispute is a dispute between subjects of international law about any fact, law, or policy in which claims are made. Or the party rejects, opposes or denies it otherwise. There are several ways of resolving disputes which are categorized into two, namely peaceful settlement and forced settlement. Peaceful settlement can be through arbitration, this method has long been known in international law.

Based on *International Law Commission* Arbitrase is “a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.”

The rules on the enforcement of foreign (International) Arbitration awards in Indonesia are Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution listed in Articles 65-69 Chapter VI. The provision is in principle in accordance with the 1958 New York Convention (Adi, 2020).

The advantages in dispute resolution through arbitration, namely:

1. The parties have freedom in choosing their judges (arbitrators).
2. The parties have the freedom to determine the procedural law or the terms of how an award will be issued.
3. The nature of the arbitral award shall in principle be final and binding.

4. It is possible for arbitral proceedings to be held confidentially if the parties so wish.
5. The parties themselves determine the purpose or duties of the arbitral body.

In addition to the existing advantages, dispute resolution through International Arbitration has disadvantages, namely:

1. Lack of commitment in submitting disputes to international arbitration bodies.
2. Implementation rather than a decided judgment is relatively difficult.

The South China Sea Arbitration (*The Republic of The Philippines v. The People's Republic of China*) is one of the disputes brought before an international arbitration body. The dispute concerns competing claims between countries in Southeast Asia including Vietnam, the Philippines, Malaysia and Brunei and East Asians including China and Vietnam over the Spratly and Paracels islands and territorial waters 12 nautical miles off the surrounding coastline.

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International Arbitration Tribunal

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PRESS RELEASE

THE SOUTH CHINA SEA ARBITRATION
(THE REPUBLIC OF THE PHILIPPINES V. THE PEOPLE'S REPUBLIC OF CHINA)

The Hague, 12 July 2016

The Tribunal Renders Its Award

A unanimous [Award](#) has been issued today by the Tribunal constituted under [Annex VII](#) to the [United Nations Convention on the Law of the Sea](#) (the “[Convention](#)”) in the arbitration instituted by the Republic of the Philippines against the People’s Republic of China.

This arbitration concerned the role of historic rights and the source of maritime entitlements in the South China Sea, the status of certain maritime features and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by China that were alleged by the Philippines to violate the Convention. In light of limitations on compulsory dispute settlement under the Convention, the Tribunal has emphasized that it does not rule on any question of sovereignty over land territory and does not delimit any boundary between the Parties.

China has repeatedly stated that “it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines.” Annex VII, however, provides that the “[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.” Annex VII also provides that, in the event that a party does not participate in the proceedings, a 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.” Accordingly, throughout these proceedings, the Tribunal has taken steps to test the accuracy of the Philippines’ claims, including by requesting further written submissions from the Philippines, by questioning the Philippines both prior to and during two hearings, by appointing independent experts to report to the Tribunal on technical matters, and by obtaining historical evidence concerning features in the South China Sea and providing it to the Parties for comment.

China has also made clear—through the publication of a Position Paper in December 2014 and in other official statements—that, in its view, the Tribunal lacks jurisdiction in this matter. [Article 288](#) of the Convention provides that: “In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.” Accordingly, the Tribunal convened a hearing on jurisdiction and admissibility in July 2015 and rendered an [Award on Jurisdiction and Admissibility](#) on 29 October 2015, deciding some issues of jurisdiction and deferring others for further consideration. The Tribunal then convened a hearing on the merits from 24 to 30 November 2015.

The Award of today’s date addresses the issues of jurisdiction not decided in the Award on Jurisdiction and Admissibility and the merits of the Philippines’ claims over which the Tribunal has jurisdiction. The Award is final and binding, as set out in [Article 296](#) of the Convention and [Article 11 of Annex VII](#).

Historic Rights and the ‘Nine-Dash Line’: The Tribunal found that it has jurisdiction to consider the Parties’ dispute concerning historic rights and the source of maritime entitlements in the South China Sea. On the merits, the Tribunal concluded that the Convention comprehensively allocates rights to maritime areas and that protections for pre-existing rights to resources were considered, but not adopted in the Convention. Accordingly, the Tribunal concluded that, to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in the Convention. The Tribunal also noted that, although

Chinese navigators and fishermen, as well as those of other States, had historically made use of the *islands* in the South China Sea, there was no evidence that China had historically exercised exclusive control over the *waters* or their resources. The Tribunal concluded that there was no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line'.

Status of Features: The Tribunal next considered entitlements to maritime areas and the status of features. The Tribunal first undertook an evaluation of whether certain reefs claimed by China are above water at high tide. Features that are above water at high tide generate an entitlement to at least a 12 nautical mile territorial sea, whereas features that are submerged at high tide do not. The Tribunal noted that the reefs have been heavily modified by land reclamation and construction, recalled that the Convention classifies features on their natural condition, and relied on historical materials in evaluating the features. The Tribunal then considered whether any of the features claimed by China could generate maritime zones beyond 12 nautical miles. Under the Convention, islands generate an exclusive economic zone of 200 nautical miles and a continental shelf, but "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The Tribunal concluded that this provision depends upon the objective capacity of a feature, in its natural condition, to sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature. The Tribunal noted that the current presence of official personnel on many of the features is dependent on outside support and not reflective of the capacity of the features. The Tribunal found historical evidence to be more relevant and noted that the Spratly Islands were historically used by small groups of fishermen and that several Japanese fishing and guano mining enterprises were attempted. The Tribunal concluded that such transient use does not constitute inhabitation by a stable community and that all of the historical economic activity had been extractive. Accordingly, the Tribunal concluded that none of the Spratly Islands is capable of generating extended maritime zones. The Tribunal also held that the Spratly Islands cannot generate maritime zones collectively as a unit. Having found that none of the features claimed by China was capable of generating an exclusive economic zone, the Tribunal found that it could—without delimiting a boundary—declare that certain sea areas are within the exclusive economic zone of the Philippines, because those areas are not overlapped by any possible entitlement of China.

Lawfulness of Chinese Actions: The Tribunal next considered the lawfulness of Chinese actions in the South China Sea. Having found that certain areas are within the exclusive economic zone of the Philippines, the Tribunal found that China had violated the Philippines' sovereign rights in its exclusive economic zone by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in the zone. The Tribunal also held that fishermen from the Philippines (like those from China) had traditional fishing rights at Scarborough Shoal and that China had interfered with these rights in restricting access. The Tribunal further held that Chinese law enforcement vessels had unlawfully created a serious risk of collision when they physically obstructed Philippine vessels.

Harm to Marine Environment: The Tribunal considered the effect on the marine environment of China's recent large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands and found that China had caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species. The Tribunal also found that Chinese authorities were aware that Chinese fishermen have harvested endangered sea turtles, coral, and giant clams on a substantial scale in the South China Sea (using methods that inflict severe damage on the coral reef environment) and had not fulfilled their obligations to stop such activities.

Aggravation of Dispute: Finally, the Tribunal considered whether China's actions since the commencement of the arbitration had aggravated the dispute between the Parties. The Tribunal found that it lacked jurisdiction to consider the implications of a stand-off between Philippine marines and Chinese naval and law enforcement vessels at Second Thomas Shoal, holding that this dispute involved military activities and was therefore excluded from compulsory settlement. The Tribunal found, however, that China's recent large-scale land reclamation and construction of artificial islands was incompatible with the obligations on a State during dispute resolution proceedings, insofar as China has inflicted irreparable harm to the marine environment, built a large artificial island in the Philippines' exclusive economic zone, and destroyed evidence of the natural condition of features in the South China Sea that formed part of the Parties' dispute.

An expanded summary of the Tribunal's decisions is set out below.

Analysis of the Settlement of South China Sea Disputes by the International Arbitration Tribunal

The Tribunal was constituted on 21 June 2013 pursuant to the procedure set out in Annex VII of the Convention to decide the dispute presented by the Philippines. The Tribunal is composed of Judge Thomas A. Mensah of Ghana, Judge Jean-Pierre Cot of France, Judge Stanislaw Pawlak of Poland, Professor Alfred H.A. Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany. Judge Thomas A. Mensah serves as President of the Tribunal. The Permanent Court of Arbitration acts as the Registry in the proceedings.

Further information about the case may be found at www.pcacases.com/web/view/7, including the Award on Jurisdiction and Admissibility, the Rules of Procedure, earlier Press Releases, hearing transcripts, and photographs. Procedural Orders, submissions by the Philippines, and reports by the Tribunal's experts will be made available in due course, as will unofficial Chinese translations of the Tribunal's Awards.

Background to the Permanent Court of Arbitration

The [Permanent Court of Arbitration](#) (PCA) is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 121 Member States. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA's International Bureau is currently administering 8 interstate disputes, 73 investor-State arbitrations, and 34 cases arising under contracts involving a State or other public entity. The PCA has administered [12 cases](#) initiated by States under Annex VII to the United Nations Convention on the Law of the Sea.

In July 2013, the Tribunal in the *South China Sea Arbitration* appointed the PCA to serve as Registry for the proceedings. The Tribunal's [Rules of Procedure](#) provide that the PCA shall "maintain an archive of the arbitral proceedings and provide appropriate registry services as directed by the Arbitral Tribunal." Such services include assisting with the identification and appointment of experts; publishing information about the arbitration and issuing press releases; organizing the hearings at the Peace Palace in The Hague; and the financial management of the case, which involves holding a deposit for expenses in the arbitration, such as to pay arbitrator fees, experts, technical support, court reporters etc. The Registry also serves as the channel of communications amongst the Parties and the Tribunal and observer States.



Photograph: Hearing in session, July 2015, Peace Palace, The Hague. Clockwise from top left: Registrar and PCA Senior Legal Counsel Judith Levine; Judge Stanislaw Pawlak; Professor Alfred H. A. Soons; Judge Thomas A. Mensah (Presiding Arbitrator); Judge Jean-Pierre Cot; Judge Rüdiger Wolfrum; PCA Senior Legal Counsel Garth Schofield; former Secretary for Foreign Affairs of the Philippines, Mr. Albert F. Del Rosario; former Solicitor General Mr. Florin T. Hilbay, Counsel for the Philippines; Mr. Paul S. Reichler; Professor Philippe Sands; Professor Bernard H. Oxman; Professor Alan E. Boyle; Mr. Lawrence H. Martin.

Definition of Dispute Resolution

Dispute is a situation where there is one party who feels aggrieved by the other party, so it is conveyed to the second party but this situation shows a difference of opinion so that it arises which is called a Dispute (Felson, 2017). With this dispute, both parties want to reach a favorable agreement by making a settlement of the case.

Definition of International Arbitration Body

Article 1 Paragraph 1 of Law Number 30 of 1999 states that arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute (UU No.30 1999, n.d.). Thus, the International Arbitration Board is a non-litigation law enforcement tool that resolves disputes through neutral third parties. Until now there have been several international arbitration bodies established under international treaties or conventions, including:

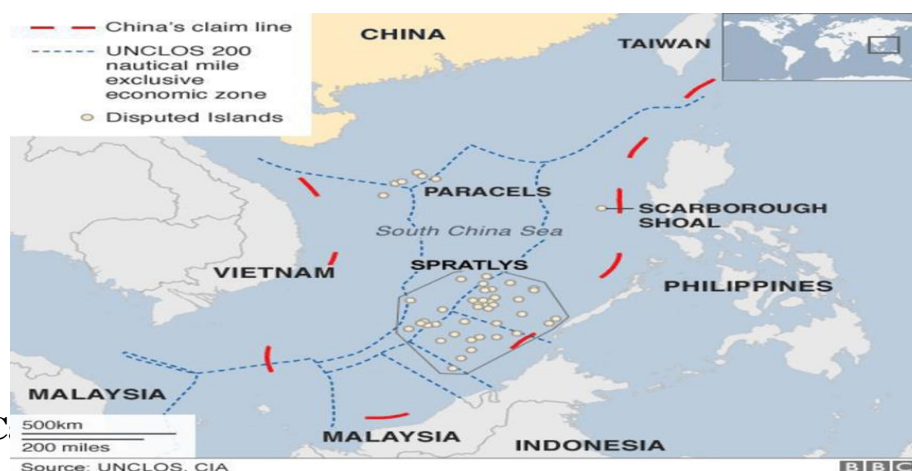
- The Court of the International Chamber of Commerce (ICC), established after World War 1 in 1919, is based in Paris.
- Convention on The Recognition and Enforcement of Foreign Arbitral Award atau The 1958 New York Convention (Konvensi New York) yang ditandatangani pada tanggal 10 juni 1958.
- The International Centre of Settlement of Investment Dispute (ICSID) yang didirikan pada tanggal 16 Februari 1968.
- Arbitration United Nations Commission on International Trade law, established by resolution 31/98 of the United Nations General Assembly on 15 December 1976.

Research methods

The Research Method used in writing this paper is a normative research method. Normative legal research or library research is research that examines the study of documents, using various secondary data such as laws and regulations, court decisions, and legal theory. This type of normative research uses qualitative analysis, namely by explaining existing data with words or statements instead of numbers. In the inventory of legal materials should be distinguished legal and primary materials. What is used in this method is secondary material which includes text books (law books) that contain theories and concepts about law (Widnyana, 2013).

Results and Discussion

Analyzes



Position C

In 2013, the Philippines filed an objection to China's claims and activities in the South China Sea with the United Nations Convention on the Law of the Sea 1982. in The Hague, Netherlands. The Philippines accuses China of interfering in its territory by fishing and reclaiming it to build artificial islands. The Philippines argues that China's claims in South China Sea territorial waters marked with a "nine-dash-line" contradict Philippine territorial sovereignty and international law of the sea. It wasn't until 2016 that the Hague-based International Court of Arbitration ruled that China had violated Philippine sovereignty in the South China Sea. The United Nations Court of Arbitration has ruled that China has no legal basis to claim territorial waters in the South China Sea. But the Chinese government did not accept the ruling. This dispute caused many disputes and debates, not only between China and the Philippines, but also debates including Vietnam, Brunei Darussalam, Malaysia, and Indonesia, but for Indonesia focused on the case of Natuna Island only (Saputra, 2016). In addition, as an example of the struggle for territory in the South China Sea other than the Philippines with China, namely, on the weekend of September 12, 2019, this tension was felt by Malaysia when a United States ship approached the island claimed by China (Spratly islands). As China considers the action a challenge, the United States considers the area to be in waters used for free exercise to navigate. So that nearby Malaysia also continues to encourage non-militarization to prepare for conflict tensions in the South China Sea.

Issues

1. Is China violating the sovereignty of the Philippine state and damaging the marine environment?
2. How was this conflict resolved by the Arbitration Court of the United Nations Convention on the Law of the sea 1982 (UNCLOS)?

Facts

1. The South China Sea is a water area of about 3.5 million km² surrounded by countries such as China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan. Several countries have overlapping territorial claims and compete with each other to claim natural resources such as oil, natural gas, and fish.
2. China has built artificial islands in the South China Sea and reclaimed several coral islands.
3. In 2013, the Philippines filed an objection to China's claims and activities in the South China Sea with the United Nations Convention on the Law of the Sea 1982 (UNCLOS) Arbitration Court.
4. On September 12, 2019, a U.S. ship approached a Chinese-claimed island, the Spratly Islands.

Basic Rules

1. United Nations Convention on the Law of the Sea 1982 (UNCLOS)
2. ASEAN Declaration on Joint Conduite in the South China Sea (DOC)

Analysis

In International Law of the Sea, land elements are divided into several namely:

- Island

In order to be said to be an island, a land in the middle of the sea must be able to "support human habitat or economic life independently". If a country owns an island, it is entitled to an exclusive economic zone (EEZ), which is the right to use natural resources (including fishing or exploring), within a distance of only 200 nautical miles.

- Compose

Land elements as rocks above sea level at high tide, regardless of magnitude. A country that owns a reef is entitled to an area within 12 nautical miles of the reef.

- Reef

Land elements can only be seen when the sea water recedes. Countries that control reefs do not have rights to natural resources (SDA) contained in the vicinity.

Thus, in the ruling issued by the Arbitration Court also stated that China's island reclamation in these territorial waters does not give any rights to the Chinese government. China controls some coral reefs in the South China Sea and has retaken them as islands, later giving them ports and airstrips. On the other hand, artificial islands are not recognized as islands in the international law of the sea. Thus, China has violated the Philippines' sovereign rights.

Conclusion

The South China Sea dispute case handled by the Court was registered unilaterally by the government of the Republic of the Philippines to test the validity of China's claims, among others, based on the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Where the "nine dash line" contradicts Philippine territorial sovereignty and international law of the sea, China loses out on its claims to the South China Sea.

The judges at this Court based the ruling on the United Nations Convention on the Law of the Sea 1982 (UNCLOS) which has been signed by the governments of China and the Philippines. China is losing its claim to the South China Sea. The Arbitral Court also stated that the severe damage to the coral reef environment was caused by China. Thus, in accordance with International Law and the UN law of the sea which is used as a reference for the ASEAN international arbitration court requests a peaceful resolution and stability in the South China Sea region.

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