

Legal Implications of an Arbitration Award under the 1982 Convention on the Law of the Sea, Case Study of the South China Sea Arbitration

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Abstract

The southern part of China Sea has been the site of one of the most important maritime disputes in five decades. Tensions are so high that some predict World War III will breakout in the region. The Philippines's referral for arbitration in respect of some of its disputes with China resulted in the issuing of a 2016 arbitration award. The legal and political significance of this Award has caused debates among scholars. The legality of the Award and the validity of the court's arguments in various positions are among the topics of these discussions. In this study, our main question is that how much this award has contributed to resolve and to clarify the legal aspects of the maritime disputes between the parties. Our secondary question is the impact of this Award on regional and international peace. The findings of this study indicate that the arbitral tribunal's approach has a significant impact on understanding the concept of "historical rights" as well as the explanation and interpretation of marine environmental protection provisions in the 1982 Convention on the Law of the Sea. In the tribunal's view, by joining the Convention on the Law of the Sea, the rules concerning maritime zones, except in rare cases, override the historical rights of States. It also played an important role in defining and explaining various maritime features; including islands, rocks, and low-tide elevations. However, the effect of the award on reducing tensions in the southern part of China Sea, Chinese government policies and Regional peace is in doubt.

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1. Introduction

The South China Sea is a semi-enclosed sea located in the western Pacific Ocean and covers an area of 3.5 square kilometers. Coastal countries include China, Vietnam, Philippines, Malaysia, Brunei, Singapore and Indonesia. The South China Sea is a very important maritime route, and in addition to oil and gas reserves, it has a privileged position in terms of fisheries and biodiversity (Tanaka, 2019) from the middle of the twentieth century, disputes between the coastal states over sovereignty began and gradually intensified. These disputes sometimes led to military conflicts between the countries. With China's rapid economic growth in recent decades, the country has gained more political and economic power in the region and the world, and this has exacerbated disputes.

Disputes in the South China Sea are one of the most acute territorial disputes of modern times. (Heinrich Raditio, 2019). These disputes of various dimensions: disputes over islands and rocks, disputes over sovereign rights in the watershed, including the boundaries of the exclusive economic zone and the continental shelf, and the issue of free shipping rights. The latter has become increasingly important in the confrontation between China's sovereign claims and the US Maritime Freedom Program (Khezri, 2012). The US entry into the arena as a defense of maritime freedom, which is mostly done to counter China, has added to the complexity of the issue.

All claimants in the South China Sea emphasize the historical facts about the islands of this sea and try to substantiate their claims by proving that there is a long and uninterrupted period of national control over them. (Beckman, 2013) For example, they insist that their citizens have fished around the islands or used the islands as shelters during storms. Beijing in particular has spent a lot of money on archeological research to find evidence of the Chinese's long-term exclusive use of the islands and rocks of this sea (Mirski, 2014).

In the post-1994 period, China sought to pursue geopolitical goals with greater confidence, due to the increase in its military and economic power. For example, in the first half of 2011, China took drastic measures against fishing and exploration activities by Vietnam and the Philippines, which



further strained relations with Hanoi and Manila (Abbaszadeh and Ramezani, 2017).

The Philippines' initiative to sue China over disputes between the parties to the South China Sea was one of the most important advances in the law of the sea in general and the disputes over the South China Sea in particular since the entry into force of the 1982 Convention on the Law of the Sea (Rothwell, 2015).

The Philippines petition called for arbitration in three main cases. First, the tribunal ruled that the rights and obligations of the parties in relation to the waters, bed and maritime features³ of the South China Sea are governed by the Convention on the Law of the Sea, and that China's alleged historic waters enclosed by a nine-dash line are inconsistent with the Convention and therefore it is invalid. The second is for the tribunal to determine whether some of the maritime features described as islands, rocks and low-tide elevations in accordance with the Convention on the Law of the Sea. The Philippines focused specifically on Scarborough shoal and 8 maritime features on the Spratly Islands. Finally, the tribunal declares that China has violated the Convention on the Law of the Sea by disturbing the exercise of freedoms and sovereign rights of the Philippines under the Convention, as well as by harming the marine environment through construction and fishing activities.

The South China Sea Arbitration Award is important in various political, legal and economic dimensions. From a legal point of view, the decision is interesting to determine the maritime rights of coastal countries and the status of maritime features and the legitimacy of China's actions in the South China Sea, as well as the protection of the marine environment. The question here is to what extent this award has been able to clarify the legal dimensions of the dispute between China and the Philippines and to what extent it has helped settlement the dispute in the South China Sea. Using analytical descriptive method and library data collection, this paper seeks to prove the

³ Maritime features are areas of the sea that have a characteristic sign. these includes: River Mouths ,Bays,Islands,Rocks,Reefs and Atolls,Low-Tide Elevations,Artificial Islands, Installations, and Structures. See : <https://sites.tufts.edu/lawofthesea/chapter-two/>

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hypothesis that the South China Sea arbitration award was successful in explaining and clarifying the legal dimensions of the China-Philippine dispute.

2. Analysis and interpretation

On January 22, 2013, the Philippines filed a lawsuit against China in the Permanent Court of Arbitration. The jurisdiction of the arbitral tribunal was based on Part 15 of the Convention on the Law of the Sea. Both the Chinese government and the Philippines are members of the 1982 Convention on the Law of the Sea. The Philippines ratified the Convention in 1984 and China in 1996 (pca-cpa, 2019). China refused to attend the trial. The issue of China's absence from the proceedings raises the question of whether this absence is an obstacle to the trial. In this case, the tribunal, in accordance with Article 9 of Annex 7 to the Convention, considered itself competent to hear the case (Tanaka, 2016). Any State may, at the time of signing, ratify or accede to the Convention, in an written notice, exclude the jurisdiction of the dispute Resolution Authority in certain cases, including disputes over the delimitation of maritime borders and disputes over historical claims (Talaie, 2011).China's most important argument in rejecting the arbitral tribunal's jurisdiction were: the tribunal has to judge territorial sovereignty, and this is not within the scope of the 1982 Convention on the Law of the Sea;. Even if the subject of the case is related to the implementation of the Convention, it is ultimately part of the delimitation of maritime borders between the two countries, and this issue is an exception to the compulsory procedures for resolving disputes under the 2006 Chinese Declaration (Mirzadeh, 2018).Regarding the argument of China, the tribunal stated: "While there is no doubt that there is disagreement between the parties over the sovereignty of some of the features of the South China Sea, this does not mean that the current claims of the Philippines has also a character of sovereignty"(Award on Jurisdiction and Admissibility, para152).in other words, the Philippines did not ask the tribunal to intervene in matters of sovereignty and, on the contrary, explicitly and repeatedly asked the tribunal to refrain from doing so (Guilfoyle, 2018).

The tribunal appointed experts, especially in the field of maritime security and coral reefs, to compensate the absence of China. In addition, China had the opportunity to present a number of statements on the arbitration process, as well as letters to the arbitrators. The contents of these statements and



letters were taken into account in the arbitration award. The tribunal sought to uphold justice in the trial, so it did not allow itself to easily accept the Philippine arguments, but wanted to both assert its jurisdiction over the dispute and be convinced that the dispute was based on reality and law (French, 2017). One of the characteristics of the South China Sea Arbitration is the variety of issues raised in it. Each of these issues could have been the subject of an independent lawsuit, but their inclusion in this case increased the legal significance of the tribunal's decision. The tribunal's ruling showed that disputes between the parties were the result of fundamental differences in their views on the relevant rights and obligations and the application of the Convention on the Law of the Sea, and not due to their bad faith.

2.1-Historical claim

Perhaps the most unpleasant result of the tribunal ruling for China was the part of the award that ruled against the legality of the nine-dash line, in other words, China's alleged historical rights in the South China Sea.

The 1982 Convention on the Law of the Sea and the 1958 Convention on the Territorial Sea do not provide any definition of historic waters. Rather than, Customary international law specifies three conditions for defining historic waters: the exercise of authority, establishment, and international agreement (Mirabbasi & Keikhosravi ,2019). Proof of each of these conditions requires sufficient evidence, and because the fulfillment of all three conditions is necessary, historical rights in a maritime area are seldom proven to a State.

The nine-dash line, also called the u-shaped line, is the nine dashes that define the area claimed by China in the South China Sea (Figure 1). The distribution of these dashes is not uniform and lacks precise geographical coordinates; they also have different locations on different maps. "China has undeniable sovereignty over the islands of the South China Sea and its waters and also has sovereign rights and jurisdiction over the associated waters and their bed and subsoil. This is a strong position of the Chinese government, which is widely recognized in the international community." the Chinese government, which first drew the line on a map in 1947, said in a 2009 oral memo attached to the nine-dash line. However, the Chinese government has

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not yet made clear its intention on this line. Does this line define national borders or it only clarifies the claim to the islands? (Tanaka, 2017).



Figure 1- Nine-dash line

The tribunal's findings have a broad argument, but are simply based on two basic principles. First, the Convention on the Law of the Sea establishes a comprehensive system of maritime zones that can cover any area of the sea or seabed. Second, China's accession to the Convention on the Law of the Sea will invalidate any historical rights that China may have over living and non-living resources within the nine-dash line according to the boundaries of the maritime zones defined by the Convention. The tribunal does not consider its findings unexpected or exceptional (The South China Sea Arbitration Award, 2016). Indeed, a State that accedes to the Convention on the Law of the Sea recognizes that the area beyond its territorial sea or its exclusive economic zone (if declared) is the high seas, in which all States of the world enjoy the freedoms of the high seas. Therefore, it cannot be a party to the Convention on the one hand and make a claim beyond what is accepted in the Convention on the other. Moreover, a considerable part of the



provisions of the Convention, including those relating to the high seas, appear to have become customary rules.

According to the tribunal, China has never explicitly defined the nature or scope of the historical rights it claims. The concept of historical rights is a key element in examining the legitimacy of China's claims in the South China Sea. Time-based concepts such as historical rights and historical waters are governed by customary international law (Tanaka, 2017). The tribunal emphasized that historical rights are exceptional in most cases. They are rights that a state cannot enjoy in any other way without the historical continuity of their implementation and the recognition of other states by such rights. As a result, the exercise of permitted freedoms in international law cannot lead to a historical right because it involves nothing but the use of what international law has previously allowed freely. Therefore, the tribunal considers the continued application of the claimed right and its acceptance by the affected states as a requirement for the acceptance of the historical right (The South China Sea Arbitration Award, 2016). These requirements regarding China's claims in the South China Sea are not met.

The tribunal was very cautious in explaining this unfortunate outcome to China in the context of the rights and obligations arising from its accession to the Convention on the Law of the Sea. In this regard, the tribunal states: “Accordingly, in the Tribunal’s view, China’s ratification of the Convention in June 1996 did not extinguish historic rights in the waters of the South China Sea. Rather, China relinquished the freedoms of the high seas that it had previously utilized with respect to the living and non-living resources of certain sea areas which the international community had collectively determined to place within the ambit of the exclusive economic zone of other States. At the same time, China gained a greater degree of control over the maritime zones adjacent to and projecting from its coasts and islands. China’s freedom to navigate the South China Sea remains unaffected” (The South China Sea Arbitration Award, 2016). In other words, from the tribunal's point of view, any other country whose citizens in ancient times exploited the areas now called the high seas can make historic claims about them. And such claims are certainly not acceptable under the current international legal order.

2.2 Maritime features

In addition to the nine-dash line, the tribunal ruled in favor of several maritime features. Part 8 of the Convention on the Law of the Sea sets out precisely the legal regime of the islands. According to paragraph 1 of Article 121, the island is a natural land enclosed in water that is in high-tide elevation above the water, and according to paragraph 3 of the same article, rocks without human habitation or economic life cannot have an exclusive economic zone or continental shelf. Low-tide elevations that are not visible in high-tide do not have any maritime zone but can be used to draw the baseline. Rocks can have territorial sea, and islands have the right to an exclusive economic zone (Buszynski, Roberts,2015).The tribunal had to differentiate between different maritime features, especially rock and island. The island must have the capacity for permanent human habitation or livelihood. Although these definitions are legally clear, there is room for debate as to the interpretation of facts and evidence, such as satellite imagery.

It should be noted that the modification of a low-tide elevation by strengthening or creating an artificial structure does not fundamentally change its original nature. As the tribunal notes, it is not legally possible for man to change the seabed to a low-tide elevation or a low-tide elevation to an island. In the tribunal's view, the Convention on the Law of the Sea stipulates that the status of a maritime feature must be determined on the basis of its original natural conditions prior to the commencement of significant man-made changes (The South China Sea Arbitration Award, 2016). On the issue of determining the extent of the tides, which is essentially a scientific issue, the tribunal relied heavily on historical observations, including notes from the British Royal Navy and the Japanese Navy, as well as information from new Chinese maps. The tribunal was less persuaded by the evidence provided by the Philippines based on satellite images. Acknowledging the value of such images in certain circumstances, the tribunal questioned the definite inference of these images, especially given the moment of recording the images, which is not simultaneous with low-tide or high-tide (The South China Sea Arbitration Award, 2016).

Another important issue here, which is directly related to the lawsuit, is the criteria for being a maritime feature is an island. Article 121 of the Convention refers to human habitation or economic life. The tribunal set aside 5 paragraphs to discuss the same "or" between the two criteria. The fact is that it is rare for a region where there is no economic and livelihood



activity to become a human settlement (The South China Sea Arbitration award, 2016). The tribunal came to a number of important conclusions in view of the purpose and object of the Convention and its preparatory works, as well as the common meanings of the terms: First of all, the status of the low-tide elevations should be determined based on their natural capacity and not on external additions and modifications. Second, a key factor in determining human habitation is the non-transient nature of habitation, that is, a stable human population living on an island where they consider themselves home and have the opportunity to survive. Third, an island with its own economic life must be able to sustain the economic life of its inhabitants, and the tribunal held that in situations where economic activity is entirely dependent on foreign resources or the use of an island restricted to extraction activities without the participation of the inhabitants, such a condition is not met (The South China Sea Arbitration Award, 2016).

As interesting as these findings were, their use in this dispute could have been controversial. The tribunal tried very carefully to apply the island's criteria for rocks and elevations in the Spratly Islands, which are above water at high-tide. Examining the availability of drinking water as well as agricultural exploitation, as well as historical reports on their use for fishing, the tribunal concluded that the rocks lacked the criteria set out in the Convention on the Law of the Sea. The refusal of the permanent presence of fishing groups, especially given that the tribunal had confirmed that some of them had resided for relatively long periods of time, could be very controversial. The tribunal noted that the purpose of the Convention was not to create broad maritime rights for features that have historically played a very small role in human habitat (The South China Sea Arbitration Award, 2016). In fact, the award set a new international standard for the island being a maritime feature in accordance with the purposes of the Convention on the Law of the Sea. Based on this finding and other findings, the tribunal was able to distinguish between rocks and low-tide elevations and islands.

These rulings were more in favor of the Philippines. Most important of all for the Philippines was the conclusion that no maritime feature was identified as an island, especially Mischief Reef and second Thomas shoal, which were highly disputed and identified as low-tide elevation, and were therefore located in the Philippines' exclusive economic zone and Because

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none of the elevations within the 200-mile were claimed by China, the low-tide elevations remained part of the Philippine maritime rights (The South China Sea Arbitration Award , 2016).It remains to be seen whether and to what extent the Tribunal's interpretation will affect States practice .It would be fair to say that the interpretation of the tribunal may be an important step in clarifying the article 121 , although it has been criticized.

2.3 Marine environment

We know that seas have historically had two important functions, one as a way of communication between different regions and societies and the second as a huge reserve of living and non-living resources (Shaw, 2017). Therefore, how to properly preserve and exploit marine resources has always been one of the important concerns of coastal states. In analyzing South China's arbitration award, most of the focus was on the tribunal's rejection of China's nine-dash line, but the fact is that it was also of great environmental importance.

Overall, the Convention on the Law of the Sea has opened a new arena for the protection and preservation of the marine environment. Advanced provisions of the Convention in this regard, set out in part 12, make the Convention on the Law of the Sea the strongest comprehensive environmental treaty at present (Sohn et al., 2014).States have a responsibility to protect the marine environment. States must take all necessary measures to ensure that activities under their control or jurisdiction do not cause pollution of the marine environment. Coastal states shall enact laws to prevent, reduce or control marine environmental pollution and illegal fishing in the areas under their jurisdiction. The responsibility for violating the laws and regulations of the coastal state and compensating for the damage caused by the pollution of the marine environment and the illegal fishing of living resources by foreign ships rests with the flag states (Salehi, 2014). With this background, we can have a better understanding of the Tribunal's ruling on the marine environment.

The Philippines' environmental complaints include China's disregard for the sovereign rights of the Philippines over the non-living resources of the continental shelf and the living resources of the exclusive economic zone by interfering in the Philippine lawful activities; China's Excessive damage to coral reefs by land reclamation activities and the creation of artificial islands



and the lack of due diligence to prevent harmful fishing practices and the mass fishing of endangered species by Chinese ships (French, 2017).

Regarding artificial construction activities, the tribunal stated that the independent experts appointed by the tribunal have explicitly concluded that recent constructions have affected the reefs on an unprecedented scale (The South China Sea Arbitration Award, 2016).

Illegal fishing leads to illicit trade, the destruction of marine living resources, and the imbalance of states' interests in the international law of the sea. Illegal fishing has targeted national and regional efforts for sustainable fisheries management and safeguarding the economic interests of beneficiary States. Illegal fishing is a major concern for governments that do not have sufficient technical tools to control and prevent overfishing. While the provisions of the Convention on the Law of the Sea do not explicitly define illegal fishing, each state has its own interests in defining it (Salehi, 2016). This was one of the key issues in the Philippines submissions.

The tribunal acknowledged that it is not always easy to make a due diligence for illegal fishermen, but in this particular case it emphasized that the evidence led to the conclusion that although Chinese fishing vessels have not been indeed supported by the government, but they have been coordinated and organized by it. In other words, the tribunal not only found it inappropriate, but also pointed to something close to collusion between fishermen and the government. While acknowledging the existence of laws to prevent harmful fishing practices, including the 1989 China Wildlife Act, the tribunal concluded that there was no evidence that China had taken the necessary steps to enforce these laws. As for the construction of artificial islands on the reefs and the low-tide elevations by China, the lack of due diligence was directly attributable to it. According to experts, the tribunal issued one of its strongest verdicts in this regard. The tribunal ruled that the construction of artificial islands would cause long-term and destructive damage to the marine environment, in violation of Articles 192 and 194 of the Convention. The tribunal also found that China had failed to follow the proper and necessary procedure for assessing the effects of such activities under Article 206 (The South China Sea Arbitration Award, 2016). It has been confirmed by the International Court of Justice in the case of *Pulp Mills* an obligation to conduct an environmental impact assessment under general

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international law (Pulp Mills on the River Uruguay, 2010). In the Convention on the Law of the Sea, the obligations to conduct environmental impact assessment and monitoring are stipulated in Articles 204, 205 and 206. A country that has not done an environmental impact assessment cannot argue that the damage is unpredictable and does not see itself as violating a commitment to due diligence.

Recalling the recent judgment of the International Court of Justice in the construction of a road case (ICJ reports, 2015), the tribunal stressed that a government must prove beyond a mere insistence on the existence of environmental effects assessment. Relying on China's environmental law, the tribunal sought to determine how the government failed to comply with its domestic requirements (The South China Sea Arbitration Award, 2016). The Tribunal therefore admitted that it could not conclude conclusively that China had prepared the environmental impact assessment, but it also could not conclusively recognize that China had failed to do so.

Regarding another the Philippine claim that China had escalated disputes during the arbitration period, the tribunal found that China had taken steps to aggravate the dispute between the two countries through its destructive environmental measures. In some cases, irreparable damage was done to marine life. In Mischief Reef China has effectively put everyone on the brink of a major artificial island, and in practice it is not possible to restore Mischief to its original state, and in fact, enforcing the tribunal's decision is very difficult for both parties. Despite evidence of such misconduct on the part of China, the tribunal refused to accept the Philippine request for a statement on China's future conduct, emphasizing that the tribunal's decision clearly defines the duties and responsibilities of each state. (South China Sea Arbitration Award, 2016).

One of the important points in the tribunal decision-making process has been the opinion of experts. For example, the report of independent experts has been an important reason for the tribunal to report on the adverse effects of the harvest of Giant clam. The tribunal also referred to experts' report on the impact of Chinese construction on the coral reefs. The effective use of experts in this arbitral tribunal is at odds with that of the International Court of Justice, which rarely allows the use of experts. (Tanaka, 2018). The use of experts in the South China Sea arbitration case has played an important role in assessing impacts of some activities raised in the case.



3. Reaction of the parties

The tribunal ruled in favor of the Philippines, and China, which did not participate in the proceedings from the outset, also rejected the result. At the same time, the Philippine president downplayed the importance of the victory in a reconciliation policy, reducing international pressure on China to abide by the arbitral award, despite its binding nature. However, observers hoped that over time, China would adapt its behavior and claims to the nature of the award in order to maintain its credibility and political image. More than three years after the tribunal's ruling, and despite Manila's milder policy toward Beijing, there are no clear signs of China's commitment to arbitration. A general survey found that China has complied with only two of the court's findings on arbitration: one on the destruction of the marine environment caused by the construction of artificial islands, and the other on the prohibition of Filipino nationals from traditional fishing in Scarborough shoal and elsewhere. China continues its previous policies (Amti.csis, 2019). In the latest event in 3 July 2020, the Philippine Foreign Minister said that if China's military exercises in the South China Sea take place in the disputed area, it will face a strong reaction from the Philippines. (Yahoo, 2020).

4. Conclusion

The dispute over the South China Sea is important in many ways, especially in terms of the number of parties involved and the US confrontational presence in the sea. The Philippines' use of the dispute resolution mechanism under the 1982 Convention on the Law of the Sea was a turning point in the developments of the Southeast Asian region, especially in legal terms. In its 500-page award, the arbitral tribunal (albeit without the presence of China) had a significant impact on the interpretation of the provisions of the Convention and the determination of the legal aspects of the dispute. The award reaffirmed the status of the Convention on the Law of the Sea as the constitution of the oceans. The Convention governing the rights and duties of Member States under international law of the sea.

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Although the tribunal did not comment on sovereignty issues, recognizing some maritime features as a low-tide elevation made it impossible to acquire it as part of the territory. These features are outside the territorial sea of China, and if they were known as an island, they could have established Chinese sovereignty over them; determining them as the low-tide elevation practically ruled out the possibility of claiming sovereignty over them. In this regard, we can cite the judgment of the International Court of Justice in the case of Qatar against Bahrain, where the Court noted that "without a doubt, every country has sovereignty over the low-tide elevations within its territorial sea, Just as it has complete sovereignty over the bed and subsoil of its territorial sea "(ICJ reports, 2001).

The tribunal's approach to the issue of historical rights requires special attention. The tribunal downplays the role of the historical element in its award when it seeks to ascertain China's alleged historical rights in the South China Sea. Given that the study of the constructive elements of historical rights is not without its difficulties, this is also due to the fact that the rules related to these elements are not quite clear. The tribunal's approach seems to be useful in preventing future disputes over historical evidence. This award is also important in keeping governments accountable for environmental damage, and may have provided a benchmark for other courts.

Non-acceptance of the arbitral tribunal's decision, despite its binding nature, by China could increase tensions in the region. However, a fundamental compromise with Beijing over the South China Sea seems unlikely given the strong anti-Chinese sentiment of the Filipinos. The direction of China's future policies in this regard, as well as the rivalry between the United States and China in the South China Sea, is very important. Continued tensions may lead to a military confrontation.

However the South China Sea Arbitration is an innovative move to strengthen international maritime cooperation. The arbitral tribunal has shown well that it is in line with the objectivist approach that seeks to protect the interests of the international community. Finally, the South China Sea Arbitration Award is a rich, complex, and the coherent decision that requires further research and scrutiny; for example the impacts of this award on the development of international legal order in the oceans, as well the unilateral expansion of national jurisdiction, and integrity of UNCLOS.



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