

Asia's Troubled Waters: The South China Sea Dispute

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Asia-Pacific Research, September 20, 2018

Region: [China](#), [South-East Asia](#)

Theme: [Defence](#), [Justice](#)

The never ending disputes over a semi-enclosed sea, the South-China Sea (SCS) was culminated in the consensus between the Philippines and China in bringing the case before the Permanent Court of Arbitration (PCA). While the PCA under the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) ruled in favor of the Philippines and declare that China's nine-dash line claims are illegal, China has asserted that they will not obey the final award of the PCA. This paper seeks to analyze legal implications upon China's refusal on PCA's award to Indonesia's border security over the waters around Natuna Islands. It further proposed what should be done by Indonesia in anticipating both legal as well as political consequences of such assertive reaction taken by China.

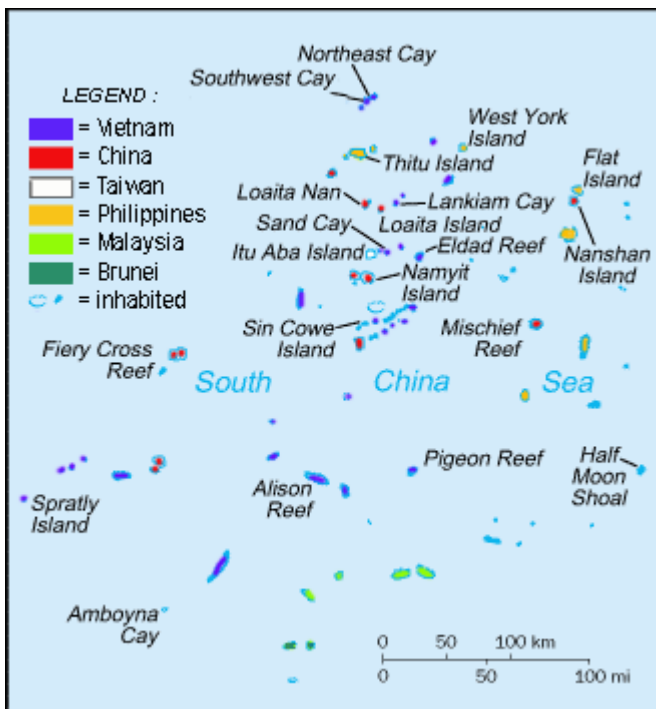
*Prior to the PCA's award, Indonesian President, **Mr. Joko Widodo**, commented on the matter of the SCS disputes saying that while Indonesia is located considerably near to the SCS, yet Indonesia does not have a direct interest in the SCS. However, recent development shows different position. During President Jokowi's visit to Natuna Islands recently, it was reminded that in 1996 China has recognized Natuna's waters as Indonesia's Exclusive Economic Zone (EEZ).*

This paper argued that while the SCS disputes so far does not have direct impact on Indonesia, yet, some areas of Indonesia's EEZ in Natuna Islands overlap with the China's nine-dash line. Since China has declared to refuse the award of PCA, Indonesia should make further legal and policy framework in implementing its sovereign rights over its EEZ in Natuna Islands. In addition to this strong political assertion should also be taken in anticipating china's movement in the SCS through its nine-dash line claim.

1. Introduction

Coastal State's claim over the ocean has been accommodated by the 1982 Law of the Sea Convention (LOSC) though a quid pro quo arrangement, that is something for something. While Coastal States are given certain degree of sovereignty over their surrounding oceans, yet other states interests should also be respected, which include rights of navigation as well as ocean resources usage rights. While such arrangement can be seen as a 'package-deals' offered by the LOSC, however, in practice things would never be as easy as it could be. Complication arising from LOSC's arrangement varies from geographical condition of both the coastal state and the ocean itself, to broader interests of other states, in this case user maritime states. In addition to this, the problem of maritime delimitation between adjacent states poses another problem.

A never-ended problem related to maritime delimitation as well as access to ocean resources, has been the issue of South-China Sea (SCS). The SCS is a semi-enclosed sea which is surrounded by at least eight States; China, Vietnam, Malaysia, Singapore, Indonesia, Brunei, the Philippines and Taiwan. Such geographic location has made SCS surrounded by the land territory of many states and thus the sovereignty as well as sovereign rights of the surrounding states upon the SCS became complicated. In addition to this, the SCS area consists of four islands, which include Pratas, Macclesfield Bank, Paracels and Spratlys. Upon such geographical complexion, China declared its claim upon the SCS based on its map known as the nine-dashed lines which encircle almost the entire SCS and within which China claims are China's historical waters over which it has sovereignty. On the other hand, other littoral states are also claiming sovereignty over small islands in the SCS, namely, Vietnam claims the Spratly Island, while the Philippines and Brunei claims the Kalayan Island Group (KIG).



Spratly Islands military settlements (Source: Public Domain)

While the overlapping claims remain, in May 2009 China submit a claim before the United Nations, claiming several islands, which include Spratly, Scarborough Shoal, Paracel and others to be included within its territory based on the nine-dashed lines map, combined with occasional references to "historic waters." In April 2012, the Philippines Navy caught eight Chinas' fishing vessels in Scarborough Shoal waters, that is 220 km off-shore Philippines. It should be bear in mind that the Scarborough Shoal is claimed by several states, namely China, the Philippines and Taiwan. In January 2013 the Philippines submit its objection to the China's nine-dashed lines to the Permanent Court of Arbitration demanding the cancelation of the nine-dashed line map proposed by China. Permanent Court Arbitration (PCA) resulted on the illegitimate China's claim, China has asserted that they will not participate on the proceeding and neither obeys the final award of the PCA.

This paper seeks to analyze legal implications upon China's refusal on PCA's award to Indonesia's border security over the waters around Natuna Islands. It further proposed what should be done by Indonesia in anticipating both legal as well as political consequences of such assertive reaction taken by China.

2. The Philippines vs. China before the Permanent Court of International Arbitration

While conflict between affected littoral states over the South-China Sea remains, in 2013 the Philippines brought the case before the Permanent Court of Arbitration. The disputes concerned was on the legal basis of maritime rights and entitlements in the South-China Sea, the status of certain geographic features in the South-China Sea and the lawfulness of certain actions taken by China in the South-China Sea.[1] In brief, basically there are 4 (four) claim submitted by the Philippines before the PCA.[2] Firstly, the Philippines seek advice from the PCA to solve existing disputes over the SCS regarding the rights to occupy the SCS. More specifically, asking PCA to declare that the rights to occupy the SCS should be based on the 1982 Law of the Sea Convention (LOSC) rather than based on 'historic rights'. Secondly, the Philippines seek advice from PCA to solve maritime delimitation disputes over the Scarborough Shoal and certain resources in Spratly Islands, which has been claimed by both Philippines and China. Thirdly, the Philippines asking the PCA to solve matter related to the validity of China's claim over the SCS. The Philippines required PCA to deliver award that China has conducted wrong doing upon their actions, as follows:

1. Intervening Philippines' rights in accordance with the LOSC with regard to fishing, navigation and other natural resources exploration and exploitation as well as the establishment of artificial islands;
2. Has failed to save ocean environment by giving support to China's fishermen, who has caught the endangered species as well as the use of non-environmental friendly fishing method which lead to the destruction of coral reef ecosystem in the SCS; and
3. Causing the damage on marine environment by the establishment of artificial islands as well as reclamation in the area of seven coral reef areas in Spratly Islands.

Fourth, that China has worsened the dispute by limiting Philippines' access to Marine Detachment in Second Thomas Shoal.

The SCS case between the Philippines and China, in fact involves various legal aspect. However, crucial aspect that worth to be discussed is the concept of 'historical rights' which has been used as legal basis by China in claiming its sovereignty over the SCS. As this turn out, PCA only used the LOSC as valid legal basis in deciding the case. PCA further stated that:

"This arbitration concerned the role of historic rights and the Sumber 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"[3].

In its decision, PCA was unanimously giving award to the Philippines and declared that "the Tribunal concluded that, to the extent China had historic rights to reSumbers 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[4]. While the award

clearly stated that 'historical rights' were incompatible with LOSC, it is interesting to find out the origin of 'historic claim' as well as analyzing whether the term 'historic rights' and 'historic waters' ever exist within both LOSC and other customary international law of the sea.



Figure 1: China's nine-dashed lines covering vast majority of the SCS areas

3. Legal Implication on China's refusal upon PCA Award

Upon PCA award, Chinese Government insists on the position that it will not obey PCA Award due its absence during the trial. This position was stated clearly by China through diplomatic notes titled "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 Philippines" dated 7th December submitted before the court and Netherlands Government. In sum, the diplomatic notes declared as follows:

"It is the view of China that the Arbitral Tribunal manifestly has no jurisdiction over this arbitration, unilaterally initiated by the Philippines, with regard to disputes between China and the Philippines in the South China Sea.

Firstly, the essence of the subject-matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea, which is beyond the scope of the Convention and is consequently not concerned with the interpretation or application of the Convention.

Secondly, there is an agreement between China and the Philippines to settle their disputes in the South China Sea by negotiations, as embodied in bilateral instruments and the DOC. Thus the unilateral initiation of the present arbitration by the Philippines has clearly violated international law.

Thirdly, even assuming that the subject-matter of the arbitration did concern the interpretation or application of the Convention, it has been excluded by the 2006 declaration filed by China under Article 298 of the Convention, due to its being an integral part of the dispute of maritime delimitation between the two States.

Fourthly, China has never accepted any compulsory procedures of the Convention with regard to the Philippines' claims for arbitration. The Arbitral Tribunal shall fully respect the right of the States Parties to the Convention to choose the means of dispute settlement of their own accord, and exercise its competence to decide on its jurisdiction within the confines of the Convention. The initiation of the present arbitration by the Philippines is an abuse of the compulsory dispute settlement procedures under the Convention. There is a solid basis in international law for China's rejection of and non-participation in the present arbitration.

Furthermore, China added more statement "[t]his shall by no means be interpreted as China's participation in the arbitral proceeding in any form." Upon such situation, Article 288 of the LOSC and Article 9 of LOSC's Annex VII provide:

a. 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.

b. Article 9 of Annex VII to the Convention provides that "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral 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."

It is clearly stated that in the situation whether the arbitral have competence in deciding certain case, the authority to decide is the arbitral itself and not the parties. In addition to this, in the absence of one party in the dispute, another party have the right to ask the arbitral to continue the proceeding. Thus, it is submitted that the absence of one party cannot prevent the proceeding to be continued. On the awards on jurisdiction, PCA considered the application of Article 281 and 282 of the LOSC, which allow a state to apply other dispute resolution method outside the LOSC, if the parties agreed to. Article 281 and 282 of the LOSC read:

"If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

PCA considered the application of Article 281 dan 282 upon the following documents to find out whether both parties have agreed on other dispute resolution method; (a) the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea (the "DOC"), (b) a series of joint statements issued by the Philippines and China referring to the resolution of disputes through negotiations, (c) the Treaty of Amity and Cooperation in Southeast Asia,

and (d) the Convention on Biological Diversity (the “CBD”) .

Nevertheless, PCA refused China’s argument which stated that the Document of Conduct (DOC) agreed between ASEAN and China was a political agreement and did not intended to be a binding agreement which is applicable in disputes resolution method. Since the DOC is silent on the binding settlement mechanism, and does not exclude any other dispute resolution method, it is argued that PCA can decide based on Article 281 and 282 of the LOSC. PCA also finds out the same conclusion relating to Joint Statement mentioned in China Diplomatic Notes. In relation to the Treaty of Amity and Cooperation in Southeast Asia and the CBD, PCA declared that while both agreements bind parties in the disputes resolution chosen by the parties, there is no binding mechanism within the agreement whatsoever. To conclude, there is nowhere in those agreements prevent the Philippines to bring the case before the PCA.

As this turn out, PCA reward the Philippines and declared that China’s Claim over the SCS with its nine-dashed lines as illegal and found China to be guilty of conducting illegal maritime activities inside the Philippines’ exclusive economic zone. Upon such award, as stated, China refused to apply the award in any cases. Furthermore, instead of moving away from the disputed area, Chinese military and non-military vessels have regularly undertaken activities to strengthen their de facto control of the area. China seems to undertaken the passive assertiveness over the area and avoiding assertive action which could lead to incident, while also expanding its movement in the SCS. This condition brings several legal implications to the neighboring adjacent states surrounding the SCS, especially to ASEAN’s member states. This includes an increase of China’s maritime power within the South Asia region, which also effect the South-East Region.

In addition to this, it is assumes that China will strengthen its domestic law in claiming several areas in the SCS. This way, a potent disputes may arise between China and other claimant states, in particular ASEAN’s member states.

China aggressive response to the PCA’s award might also bring further legal implication for less affected state like Indonesia. While the SCS dispute does not directly affected Indonesia at the moment, however, it might affected in the near future. As an archipelagic state, Indonesia is entitled to draw archipelagic baselines connecting the outermost point of its outermost islands. Despite the fact that Indonesia does not claim any of the disputed islands located in the SCS, Indonesia has an outer island group, the Natuna Islands, which are adjacent to the SCS.

These Islands are used as Indonesian basepoints. Due to Indonesia’s sovereignty over the Natuna Islands, consequently Indonesia has the rights over certain areas of waters measures from Natuna’s baselines in accordance with international law. From this baselines Indonesia also entitles various maritime zones established by the LOSC. This results in the fact that Indonesia has to share such ocean with neighboring states which are also claimant states in the SCS dispute, namely Malaysia and Vietnam. While agreement has been reached over delineating the continental shelf between states, Exclusive Economic Zones (EEZ) delimitation remains unsolved. If China strengthen its nine-dashed line claim and keep asserting its military power within the area, it is possible that China and Indonesia involve in a disagreement on maritime delimitation around Natuna Islands.

4. Conclusion

Prior to the PCA's award, Indonesian President, Mr. Joko Widodo, commented on the matter of the SCS disputes saying that while Indonesia is located considerably near to the SCS, yet Indonesia does not have a direct interest in the SCS. However, recent development shows different position. During President Jokowi's visit to Natuna Islands recently, it was reminded that in 1996 China has recognized Natuna's waters as Indonesia's Exclusive Economic Zone (EEZ).

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Notes

1. See further PCA Case Number 2013-19 in the Matter of the South-China Sea Arbitration before the Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Philippines and the People Republic of China, available on-line at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>, accessed on 4 May 2017 at 9:56 am.
2. Read further Kristiyanto, Kristiyanto, Puspitawati, Dhiana dan Ardiansyah, Agis, *Konsep Historical Rights dalam Sengketa Laut Tiongkok Selatan berdasarkan Putusan PCA Case Number 2013-19 in the Matter of the South China Sea Arbitration between the Philippines and China*, Final Essay, Law Faculty, Brawijaya University, 2017.
3. Press Release Permanent Court of Arbitration tertanggal 12 July 2016 which giving unanimous award to the Philippines over the SCS disputes.
4. Referes to the LOSC. See further <http://thedi diplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/>, accessed on 30 November 2016.

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