

The South China Sea Arbitration: No, It's Not a PCA Ruling

On July 12, 2016, an award in the arbitration case between the Philippines and China over the South China Sea was announced, which denied China's "historic rights" in the South China Sea. As the award was released by the Permanent Court of Arbitration (PCA) in The Hague, the media reported that the PCA "ruled" the case, describing the award as a "PCA ruling."

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But it is a factual error. The award is not a PCA ruling. It was released by the PCA but made by an arbitral tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS). The PCA served just as the registry or secretariat.

The error is also misleading and undermining the award's implications. China has no legal obligation to use the PCA for dispute settlement. But, as a party to UNCLOS, China has an obligation to accept the compulsory dispute settlement procedures entailing binding decisions at the unilateral request of any party to the dispute. Confusing the final and binding award under UNCLOS with a ruling by the PCA underestimates the challenges China poses to the entire UNCLOS regime.

What is the PCA?

[The PCA](#) was established by the 1899 Hague Conventions for the Pacific Settlement of International Disputes, and its function was expanded by the 1907 Hague Conventions for the Pacific Settlement of International Disputes. Those two Conventions themselves provide an arbitration procedure, and "a PCA ruling" literally means a ruling made by the PCA as a tribunal under the two Hague Conventions. But states have rarely used the Conventions' arbitration procedure and the PCA as a tribunal since the end of World War II. Instead, the International Court of Justice (ICJ) has worked as a primary tribunal for interstate cases.

In essence, the PCA is not a "court" in the general sense but an administrative body with the object of having permanent and readily available means for arbitration. The PCA serves as [the registry](#), rather than as a tribunal, and facilitates arbitration and other dispute resolution proceedings among states, intergovernmental organizations, and private parties.

The PCA's International Bureau provides administrative services to arbitral tribunals held at the PCA as secretariat. [Those 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.

Unlike the ICJ, the PCA is not a UN organization although they are collocated in the Peace Palace in The Hague. The PCA obtained a [permanent observer status](#) in the UN General Assembly in

1993, thereby strengthening communication with the UN. The PCA and the International Tribunal for Law of the Sea (ITLOS) in Hamburg, established by UNCLOS, have agreed to [cooperate for relevant legal and administrative matters](#), particularly those connected with disputes under Annex VII of UNCLOS.

So far, the PCA has acted as registry in all the arbitration cases but one under Annex VII of UNCLOS. [\[1\]](#) The 12 cases arbitrated under the auspices of the PCA include the Arctic Sunrise case (the Netherlands v. the Russian Federation) and the maritime delimitation case (Guyana v. Suriname). The PCA has gained unique experience in dealing with UNCLOS arbitrations.

UNCLOS Compulsory Dispute Settlement Procedures

Part XV of UNCLOS sets forth [rules](#) for the resolution of disputes between State Parties arising out of the interpretation or application of the Convention. States consent to these procedures when they become a party to UNCLOS. Under Article 287(1) of UNCLOS, a State may make a declaration choosing one or more of the following four means for settling such disputes: ITLOS, ICJ, an ad hoc arbitral tribunal in accordance with Annex VII of UNCLOS, or a “special arbitral tribunal” established under Annex VIII of UNCLOS. [\[2\]](#)

Under Article 287(3), arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under Article 287 (1). Article 287 (5) provides that, if the parties have not accepted the same procedure for the settlement of the dispute, arbitration under Annex VII is the default means of dispute settlement.

Pursuant to Article 298, States can declare that they do not accept the compulsory procedures for certain categories of disputes, including disputes concerning: disputes on historic bays or titles; disputes on the provisions in UNCLOS on delimitation of maritime boundaries; and disputes on military activities. If a dispute arises on whether the court or tribunal has no jurisdiction because the dispute falls within one of the exceptions, such dispute shall be resolved by the court or tribunal.

An arbitral tribunal under Annex XII of UNCLOS consists of five arbitrators (Article 3). The State Party instituting the case appoints one arbitrator when it commences proceedings. The other Party then has 30 days to appoint one arbitrator. The two Parties then attempt to agree on the remaining three arbitrators. If the two Parties fail to agree, the President of ITLOS appoints the remaining three. If one Party fails to appoint an arbitrator or cooperate in the appointment of the arbitrators, the other Party can request the President of ITLOS to [appoint](#) the other four arbitrators.

Even if one Party does not appear to defend the case, the other Party may still request tribunal to continue and make an award (Article 9). Absence of a Party or failure to defend the case is not 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.

The award under Annex XII is final and without appeal (Article 11). There is no mechanism by which the court or tribunal can enforce the award. But if a Party fails to implement the award, the other Party can submit the controversy to the court or arbitral tribunal to request a further decision (Article 12).

The South China Sea Arbitration Proceedings

In January 2013, Manila initiated the arbitral procedures based on Part XV and Annex XII of UNCLOS as neither the Philippines nor China declared preferred dispute settlement measures.

The Philippines emphasized that it did not see a determination of which Party enjoys sovereignty over the islands claimed by both of them because this is beyond the scope of UNCLOS. [The Philippines did not seek a delimitation of any maritime boundaries](#) because China declared it would not accept compulsory dispute settlement over those issues.

The Philippines appointed a member of the Tribunal. As China failed to appoint an arbitrator, the President of ITLOS appointed the remaining four arbitrators. [The Arbitral Tribunal](#) was constituted based on Annex XII of UNCLOS in June 2013.

In July 2013, the Tribunal appointed the PCA as Registry for the arbitral 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."

China adhered to its position of neither accepting nor participating in these arbitral proceedings. It expressed its position in diplomatic notes, in the China's Position Paper of December 2014, and in many public statements. The Chinese Government has also made it clear that these [statements and documents](#) "shall by no means be interpreted as China's participation in the arbitral proceedings in any form."

China's Position Paper explained the reasons for non-acceptance and non-participation as follows. First, the essence of the arbitration is the territorial sovereignty over maritime features in the South China Sea, which is beyond the scope of UNCLOS. Second, by unilaterally initiating the arbitration, the Philippines breaches its obligation under international law to settle their relevant disputes through negotiations. Third, the arbitration deals with maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006, which excludes disputes concerning maritime delimitation from compulsory dispute settlement procedures. China then [condemned](#) the Philippines for "abusing the dispute settlement procedures" under UNCLOS.

Despite China's non-participation, the proceedings went on. In October 2015, the Tribunal issued an Award on Jurisdiction and Admissibility, deciding some issues of jurisdiction and deferring others for further consideration. On July 12, 2016, the Tribunal made the final award. It accepted most of jurisdiction and denied Chinese historic rights in the nine-dash line, clarified the legal status of some features in the South China Sea, concluded that there is no island in the Spratly Islands that can produce an EEZ or continental shelf, and found most of Chinese activities, including law enforcement and marine environmental destruction in the South China Sea unlawful under UNCLOS and other international law. But the Tribunal [concluded](#) it did not have jurisdiction over the lawfulness of Chinese activity in the Second Thomas Shoal as they constitute military activities, over which China declared not to accept compulsory dispute settlement procedures.

The arbitration proceedings were totally in accordance with UNCLOS. Nevertheless, China rejected the Award. China announced [a statement](#) reiterating its historical rights in the "South China Sea Islands" and justified the position as "consistent with relevant international law and practice. China's Vice Foreign Minister Liu Zhenmin even described the Award as a "[piece of paper](#)." Zhenmin even questioned the "procedural justice" of the appointment and the operation of the tribunal, and Chinese media described [Japanese judge Shunji Yanai](#), who appointed four arbitrators as the President of ITLOS, as "rightist and unfriendly to China." despite the fact that the appointment was done by him because of China's non-participation.

The Implications of the Award

The Arbitral Award is not a PCA ruling. It is an UNCLOS ruling. China has a right not to participate in the proceedings. Even without China's participation, the Tribunal considered

China's position and claims, and made sure that the Philippines' claims are well founded in fact and law. On the other hand, China has an obligation to accept the final and binding ruling. Under UNCLOS, China's non-participation is allowed, but non-acceptance is not.

China's rejection of the Award poses a huge challenge to the UNCLOS regime. UNCLOS is a package deal among navigational rights, sovereign rights, and compulsory dispute settlement. As a party to UNCLOS, China accepted the compulsory dispute settlement mechanism while enjoying navigational rights in the world waters and sovereign rights in its EEZs and continental shelf. If the international community accepts China's position, that would lead to the collapse of the package deal and the entire UNCLOS regime.

Again, the Award is not a PCA ruling but an UNCLOS ruling. The urgent question is whether UNCLOS governs the South China Sea or historical claims and power rule the international waters. UNCLOS provides no enforcement measure even if China rejects the ruling. But the Award and its significance will never fade away. Under Article 12 of Annex XII, the Philippines can submit China's non-acceptance to the Arbitral Tribunal to request a further decision. Also, because this is an UNCLOS ruling, the Philippines can raise China's non-acceptance in the UN General Assembly. The Award and the entire arbitral proceedings provide a good example for other South China Sea claimants if they prefer to use the compulsory dispute settlement mechanism.

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[1] ITLOS was chosen as the means of dispute settlement in the Bangladesh v. Myanmar Bay of Bengal Case.

[2] A special arbitral tribunal under Annex III deals with disputes involving scientific or technical matters.