

THE LEGAL CONSEQUENCES OF CHINA'S OBJECTION AGAINST PCA'S AWARDS ON INTERNATIONAL LAW

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Abstract

South China Sea (SCS) dispute has been running for so long. The claimant states keeps endeavoring various resolutions to settle that dispute, either through reconciliation by their own choice or under several compulsory procedures provided by UNCLOS 1982 (Convention). Considering the content of UNCLOS 1982, one of the claimant states, Philippines, brought the dispute to PCA unilaterally against China which objected the jurisdiction along with its final award through official government statements and verbal notes. China was found violating International Law based on the principle of *Pacta Sunt Servanda*. Nine Dash Lines claimed based on Historic Rights are still retained by China. The procedures should lead to a permanent resolution by International Community to avoid any possible armed conflicts, including the likelihood that Historic Rights turned into Customary International Law.

Keywords

South China Sea Arbitration, Nine Dash Lines, Historic Rights, Arbitration Award Rejection, Customary International Law

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Introduction

South China Sea (SCS) is a maritim territory surrounded by China, Taiwan, Philippines, Indonesia, Vietnam, Malaysia, and Brunei Darussalam. It has many maritime features within, such as small islands, coral reef, low tide or plains below the surface. In 1947, China published *Map of South China Sea Islands*, begun with *Map of Chinese Islands in the South China Sea (Zhongguo Nanhai Daoyu Tu)* in 1935 by Kuomintang regime. After Communist took over the power, China established *Nine Dash Lines/NDL* surrounding the territory of SCS in their official map in 1953. On 7th May 2009, the permanent delegation of China in United Nation sent a letter about the Contention Base enclosed with a map of *NDL* to the Secretary General of United Nation, and it made its surrounding states took action to make sure their authority. This far, there are five *Claimant States* in SCS, including China, Philippines, Taiwan, Brunei Darussalam, Malaysia, and Vietnam. Aside from Vietnam, those five countries have ratified *UNCLOS 1982*.

One of those claims is the overlapping claims by China and Philippines in some parts of *Spratly Islands*, including *Scarborough Shoal*. On 22nd January 2013, Philippines filed the dispute to *Permanent Court of Arbitration (PCA)* based on *UNCLOS 1982*. Hence, PCA established *Award on Jurisdiction and Admissibility* on 29th October 2015 and *Final Award* on 12th June 2016. From the beginning, China did not recognize the court jurisdiction and objected the award. This objection by China impacted on the development of International Law in terms of state compliance and Customary International Law (CIL).

Research Method

This study used *Statute approach*, *Conceptual approach* and *Case approach*. The case approach was conducted by examining some court-filed cases related to the studied issue which had persistent legal power. In this present study, the author took the *Preah Vihear Case* other ICJ's cases because of its relation to the research problem on the consequences of arbitral rejection.

Discussion

The Submission of Claim and Objection by China

The tension between China and Philippines in SCS has happened since 2011. As the result, based on *UNCLOS 1982*, on 22nd January 2013, Philippines unilaterally filed a case of SCS dispute to PCA. In this arbitration the Philippines seeks rulings in respect of three inter-related matters (Arbitration, 2015) Declarations that China's claims based on "historic rights" are inconsistent with the Convention and therefore invalid, determinations certain maritime features claimed by both China and the Philippines are properly characterized as islands, rocks, low tide elevations, or submerged banks, and declarations that China has violated the Convention by interfering with the exercise of the Philippines' sovereign rights and freedoms under the Convention and through construction and fishing activities that have harmed the marine environment.

Philippines realizes that China established a declaration on 25th August 2006 expressing the objection on the procedures of dispute settlement mentioned in CHAPTER XV Section 2, not asking the court to define the borders of sovereignty and maritime territory of both countries, but solely the interpretation of a convention. China decided to object the court jurisdiction.

Toward China's objection, the court does some efforts to assure its jurisdiction, as follow.

1. Inviting the engaged parties to express their arguments in relation to the jurisdiction.
2. Seeking for evidence related to the claim filed by Philippines, such as geographical and hydrographical data, historical and anthropological data, and other technical data, as well as considering any suggestions from experts.
3. Asking for responses to each of the disputing parties on the other claim by conducting question and answer (i.e., Q&A) session.
4. Taking into account every statement of China public officials, such as *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Release of the Transcript of the Oral Hearing on Jurisdiction by the South China Sea Arbitral Tribunal Established at the Request of the Philippines tanggal 24 Agustus 2015, Ministry of Foreign Affairs, People's Republic of China, Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines tanggal 30 Oktober 2015, and Ministry of Foreign Affairs, People's Republic of China.*
5. Taking into account the communication between China ambassador and tribunal members in Dutch.
6. Always providing spaces for China to participate in arbitration whenever and to any stages it will be.

Consideration of Verdict Law

China and Philippines are two internal parties of UNCLOS 1982. Based on the principle of *Pacta Sunt Servanda*, any provision in UNCLOS 1982 binds both parties. Article 26 *Vienna Convention on the Law of Treaties* 1969 mentions, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". They should follow the content of agreement they made. The objection by China in some occasions is analyzed by the court and then matched to the existing provision in the convention. As the result, on 12th July 2016, PCA defined (Arbitration, The South China Sea Arbitration Award, 2016):

1. The claim of Historic Rights, or another right of having sovereignty or jurisdiction in SCS which belongs to NDL area is against UNCLOS 1982 and not causing any legal consequence to China maritime territory as set based on the convention.
2. None of the reclaimed island in *Spratly* Islands provides rights to China, as no maritime feature in *Spratly* Islands is called island based on the provision of convention.
3. The action of China Patrol Ship that blocked the activity of *M/V Veritas Voyager* between 1st and 2nd March 2011 is found against Article 77 UNCLOS 1982, since it was in the Continental Shelf of *Reed Bank*. The application of Moratorium 2012 by China on fish catching in SCS, including in Philippines' EEZ, and without restricting the moratorium for China-flag fishing vessels is found against Article 56 UNCLOS 1982. No attempt for stopping fish catching by China-flag fishing vessels in *Mischief Reef* and *Second Thomas Shoal* on May 2013 seems not respecting Philippines' EEZ and against Article 58 (3) UNCLOS 1982. The failure on preventing the activity of fishing vessels that danger rare species in *Mischief Reef* and *Second Thomas Shoal*, as well as in another maritime feature in *Spratly* Islands is found against Article 192 and 145 (5) UNCLOS 1982. The action of China ships in *Scarborough Shoal* which carry on a risk of crashes and danger Philippines' ships along with the crew is found against Article 4 of the convention.
4. The development in *Cuarteron Reef*, *Fiery Cross Reef*, *Gaven Reef (North)*, *Johnson Reef*, *Hughes Reef*, *Subi Reef* dan *Mischief Reef* is found against Article 192, 194 (1), 194 (5), 197, 123, and 206 UNCLOS 1982. The activities of dredging, the development of artificial islands, and constructions in SCS make the dispute between both countries worse.

PCA does not ignore the facts that China has revealed, which may be useful as the base to claim an area. "Over the history, Chinese fishermen have resided on *Taiping Dao* for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock." (Arbitration, the South China Sea Arbitration Award, 2016). China fishermen in *Taiping Dao* or *Itu Aba* Island are recognized. However, UNCLOS 1982 does not recognize the existence of Historic Right. If only the *Historic Right* is set under the convention, the proposed historical evidence may not immediately show that China controls the area. At one time, an area may be occupied by a society from different states, Thus, it is possible that another state may have a history over the maritime feature.

Objection against the Award of International Body

Objections that ever happened

China's objection against the award from international legal body is not the first happened in the world. The dispute between Cambodia and Thailand fighting over *Preah Vihear* temple is one of the former examples. Cambodia recognized that the temple was in their territory based on the map from *Mixed Delimitation Commission*,

while Thailand claimed that the map was not valid, therefore, the temple was in their territory (ICJ, 1962). The conflict began in 1954. Finally, on 6th October 1959, Cambodia filed the case to ICJ. On 15th June 1962, ICJ decided that the map established by *Mixed Delimitation Commission* was valid, thus taking it as the basis to define the position of *Preah Vihear* temple, and Thailand should take back all of their troops from that temple and giving back all things they had moved. Thailand objected the award and kept placing their military personal in *Preah Vihear* temple. As the consequence, a military incident between both countries happened and caused many people died.

China's Objection against PCA

China objects the jurisdiction of PCA due to several reasons, as follow. (China, 2014):

1. The core problem is about the territorial sovereignty over several features of maritime in South China Sea which beyond the scope of UNCLOS 1982.
2. China and Philippines have dealt to use a bilateral instrument and *Declaration on the Conduct of Parties in the South China Sea* to seek for the solution through negotiation.
3. Although the result of arbitration is related to the interpretation or implementation of convention, the subject is an integral part of maritime border between both countries; Thus, based on UNCLOS 1982, it is in the scope of declaration in 2006, and excepting the dispute that relates to the maritime borders from the procedures of obligatory dispute settlement.
4. As the consequence, PCA actually has no jurisdiction on that dispute.

PCA argues that the court has jurisdiction to any dispute *as long as* it relates to the interpretation and implementation of the convention. Article 288(1) of UNCLOS 1982 mentions, "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." Cases will be out of the scope of convention or out of its jurisdiction when the award defines the sovereignty of Philippines over its claim in prior to the case filed, or when the claim ultimately aims to improve its position in the dispute of sovereignty (Arbitration, Award on Jurisdiction and Admissibility, 2015). The award to be established only relates to the interpretation, and thus, defining the sovereignty of both countries over the disputed object is not necessary. In *Position Paper*, it states: "The preamble of the Convention proclaims 'the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans'. It is apparent that 'due regard for the sovereignty of all States' is the prerequisite for the application of the Convention to determine maritime rights of the States Parties". Both PCA's conviction and China's argument contain the value of truth with different perspectives. However, the award may influence the territorial borders, and thus, the court may not ignore such argument. The award on the status of maritime feature filed by Philippines may carry on different rights, whether in the form of referent islands to define the base line or only the coral. Based on Article 281 UNCLOS

1982, China assumes that both countries have dealt to take a settlement in their own way, through *Declaration on the Conduct of Parties in the South China Sea* in 2002 (DoC). China assumes that, through this declaration, Philippines agree to commit negotiation for having the settlement. On the other hand, the court finds nothing as the binding rule. It stated that *DoC was not intended to be a legally binding agreement with respect to dispute resolution*. It was only an agreement to design the *Code of Conduct* (CoC) to reach the stability and security for SCS.

Overall, it notes that PCA has jurisdiction over the dispute filed by Philippines, and China's objection due to several reasons they express through *Position paper* and public statement has no valid legal base.

Objection against PCA's Awards

On 12th July 2016, China's Minister of Foreign Affairs stated their objection against PCA's Awards (Huaxi, 2016). The ambassador of China for South Africa stated, "*the Arbitral Tribunal is not representative, authoritative and credible and it cannot represent International Law and its award is certainly null and void*" (Swaine). Yang Jiechi, an official staff of China, on 14th July 2016, stated, "*If you look at the composition of the Arbitral Tribunal, most of the arbitrators were appointed by Shunji Yanai, the then President of the International Tribunal for the Law of the Sea and a right-wing Japanese intent on ridding Japan of post-war arrangements.*" (The south china sea issue, Yang Jiechi Gives Interview to State Media on the So-called Award by the Arbitral Tribunal for the South China Sea Arbitration, 2016). Yang Jiechi argued that Shunji Yanai was Japanese, thus, his impartiality on selecting an arbitrator was questioned. Between 1930 and 1940, China and Japan had a conflict on the governance of SCS. Whereas, looking into Article 3(e) Appendix VII, Shunji Yanai is, as the President ITLOS, authorized by UNCLOS 1982 to determine the arbitrator.

The ambassador of China for South Africa also stated, "*hired the judges.*" *The composition of the tribunal is a result of political manipulation. The composition of the tribunal is quite weird: four of the five arbitrators are from Europe, the fifth one is a permanent resident in Europe, and all of them are lack of basic understanding of Asian culture and the South China Sea issue.*" (Swaine). China claimed that the composition of arbitrator that consists of 4 European people had no understanding on Asian culture and SCS. Furthermore, they presumed that Philippines had paid judges to go with them. This accusation is either right or wrong. The background of arbitrators who come from Europe is seen as their lack, since it was assumed that they did not understand the substance of the problem. On the other hand, given that they were not Asian, the conflict of interest between them can be avoided.

On 13rd July 2016, China's vice minister of foreign affairs stated, "*.....one witness once mentioned in his writings that at least 12 ocean terrains can be classified as islands in Nansha Qundao, so 200 nautical miles of exclusive economic zone can be claimed*". However, when stood as the witness in the Arbitral Tribunal, he withdrew his previous view and said that

"none of them are islands". (China M. o., 2016). If this statement can be proved, China may have chances to do so in court.

Based on the principle of *Pacta Sunt Servanda*, China has an obligation to follow the PCA's awards. With no exception, every state engaged in an agreement should obey the content within. "State responsibility emerges as the consequence of the principle of state equality and sovereignty in international law (Femmy Asdiana, 2018). The litigation process and the consideration on the resolution should be implemented based on the regulation of the convention. Another perspective, if any, such as the substance of dispute, whether or not related to the issue of sovereignty, the consistency of sanction, and the arbitrator's impartiality, in fact, China is not capable to prove it. Thus, China's objection against PCA's award is found violating international law.

International Response

Since the objection by China, the respond from states across the world is different from those in previous international crime. The invasion by Iraq to Kuwait caused an international reaction in the form of a multinational aggression from America, Britain, France, and Arabian States in 2003, up to fall of Saddam Husein regime. The joint force aggression by America, Britain, and France to Syiriah in 2018 is a reaction to the violation on international law in due to the utilization of chemical weapons by the regime of President Bashar Al-Assad. Furthermore, although the violation is still an assumption, no accurate evidence that may support that.

The Consequence Emerged

1. Incidents in post-award.

- a. On July 2016, there was an objection from Vietnam's immigration official against Chinese Pasport that mentions a map with NDL.
- b. On August 2017, *USS John S McCain* got a warning 10 times from China's Frigate when it sailed in 6 Nm far from *Mischief Reef* which was the part of *Spratly* islands.
- c. *USS Antietam* and *USS Higgins* went through the maritime territory next to *Xisha* Islands in SCS on 25th May 2017. China responded to this action by carrying out a number of ships and planes to do identification and verification before driving them away.

2. Reinforcing "powerful state with impunity"

China's objection against PCA's award reinforces a paradigm that big countries tend to violate international law. for instance, USA and its allies attacked Yugoslavia on 24th March 1999 without having a mandate from the Security Council. In 1989, USA carried out almost 28 thousand armies to invade Panama. The President of Panama, General Manuel Antonio Noriega, was arrested, tried, and

imprisoned in America. This action, however, had no sanction from international council although clearly found violating international law, as they invaded an independent country. It is a proof showing that big countries tend to have impunity.

3. The Possibility of Armed Conflict

A military conference in a disputed area carries on a big potential of armed conflict. The quarrel between two military troops in fully equipped by weapons at sea may trigger a confrontation. An armed conflict that ever happened in SCS was between Vietnam and China. It happened at *Crescent* cluster in Paracel Island in 1974, and at *Johnson Reef* in 1988 (Fravel, 2014).

4. The Binding Power of Arbitration Falls Off

This dispute of SCS is filed by Philippines to the arbitration based on UNCLOS 1982. PCA convention-based award that cannot be executed may affect its binding power over the upcoming cases. The conduct of international community to respond to this matter may become a reference for both disputing parties in the next future by considering the good side that may bring advantages to each other.

Dispute Settlement

1. The Limitation of Arbitration based on UNCLOS 1982.

a. Article 9 Appendix VII.

An alternative settlement that derives from a mutual consent, an agreement from both disputing parties, indeed, needs to be organized in prior to the trial session. They agree to accept the award as the final result with binding power (Purba, 2013), as they have dealt since it began, they have a moral responsibility to follow the award. Since the beginning, China did not recognize the jurisdiction of the court. Indeed, China is the member of UNCLOS 1982, and they agreed to have dispute settlement through arbitration. The problem arose when a dispute happened and one of the disputing parties did not recognize the jurisdiction of the arbitration. Until the final resolution established, the settlement through arbitration was based on a written only provision applied generally in arbitration. Hence, it is clear that, in order to file a dispute to the court of arbitration, it absolutely needs an agreement from the disputing parties. The ratification of UNCLOS 1982 marked the agreement on dispute settlement as set in Appendix VII. The agreement was made in prior to the dispute. After Philippines filed the dispute to the court, the agreement of both parties was still necessary to assure the implementation of the later resolution.

b. Article 296(2).

Article 296(2) mentions that the resolution through arbitration only binds the engaged parties. When the resolution through arbitration only binds the

engaged parties, this may effect on the absence of legal assurance. PCA's award on 12th July 2016 only binds China and Philippines. What if someday Vietnam files a similar claim to the arbitration against China and results in diferrent resolution on 12th July 2016? The resolution through arbitration at that moment may have different result from the current one.

2. The Attempt of Dispute Settlement

Considering the limitation of the convention, it needs the participation from all of the Claimant States to, once again, bring the dispute into the arbitration so that the resolution may apply to all of them. The reason of objection against the jurisdiction is discussed to reach a resolution. It needs an international support to force China to be willing to accept the jurisdiction. If, someday, a disavowal comes from China toward the arbitration's resolution, it will be easier for ASEAN to take action and provide a statement to international community, since 4 ASEAN countries have engaged as the disputing parties and thus, having the similar position.

Another alternative settlement is by filing the case to International Tribunal on the Law of the Sea (ITLOS). Rather than arbitration, ITLOS has higher binding power as it cooperates with the United Nation signed by the Secretary General of UN and the president of ITLOS on 18th December 1997 in New York. Through UN General Council Resolution No. A/RES/51/204, UN takes ITLOS as the observer which allows it to participate in General Conuncil Session. With this participation in General Council Session, ITLOS has an opportunity to express its interest. Suppose that there is disobedience by the disputing parties against the resolution, it will be easier to seek for UN attention, especially when it may possibly danger international security and peacefulness.

If China agrees to send the dispute under the primary procedures of UNCLOS 1982, it will be better to file the case to ICJ. ICJ is UN's primary body which has more binding power rather than arbitration.

The Possibility of Claiming *Nine Dash Lines* as Customary International Law

Nine Dash Lines as Historic Rights

China uses term *Historic Rights* to claim NDL in SCS. It was firstly published on 26th June 1998 by *The Standing Committee of the National People's Congress* when establishing the regulation of EEZ and Continent Base. However, International Law hs not defined it yet. "*There is no established definition of the term under international law*" (Zou, 2001). China relies the claim on their activities in SCS since 2000. Since the first time found, the existing islands in that area have already been named, explored, and exploited in sustainable, peaceful, and effective way (China T. P., 2014). '*South China Sea*' attached to the maritime area does not indicate that China has governed it since long time ago. The name of an ocean does not definitely imply that it belongs to a state due to their similar name. *Indian Ocean* may not be claimed as one that belongs to India. *Mexico Bay* does not means that it belongs to the souvereignty of Mexico.

For China, there is nothing wrong with NDL. China is not the first one claiming an area which location is far from its mainland. Jia Qingguo, a professor in *Beijing University's School of International Studies*, argues that what a state commits to do is only following what Western countries have done. For instance, United States has an authority in Guam, France has islands in South Pasific (Malik, 2013). UNCLOS 1982, as an international agreement which applies as International Maritime Law, does not recognize the term *Historic Rights*.

Nine Dash Lines and Customary International Law

Based on Article 38(1)(b) *Statuta ICJ*, one of international legal sources is Customary International law. It derives from the states' practices through their conduct and behavior for encountering a problem. The enactment of this custom law is due to similar and constant practices with no resistance from any countries (Shaw, 2016). The objection against PCA's award and the reaction from many countries around the world, which is relatively silent, shows that China still implements the NDL. The claim on a territory based on historic rights is still likely to be CIL.

To see whether the claim of NDL may turn to be Customary International Law, it needs to see 4 elements of CIL based on Article 38(1)(b) *Statuta IJC*, as follow.

1. *Opinio Juris Sive Nicessitatis*.

Toward the resolution on Nikaragua case on 27th June 1986, ICJ mentioned, "*In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelfcases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."*" (ICJ, Case Concerning Military And Paramilitary Activities In And Against Nicaragua, 1986). To enact a Customary International law, it not only needs many practices by many countries, but also *opinio juris sive necessitates*. As a process of enacting a law, *opinio juris* is a state's behavior to do what they believe as law. The reaction from other countries to such action is taken into account whether or not the action turns into law. "In general, when states seem to agree on another state's behavior without giving any protest, it should assume that such behavior is considered legal" (Shaw, 2016). *Opinio Juris* also refers to a belief that a state's legal activity is obligatory. Countries see an applied regulation as a correct one with binding power. If the other countries do not follow the rule, it is considered as violation against the law.

China's capability to be present in SCS cannot be counterbalanced by the other Claimant States. This far, United States is the only one that tries to be present in SCS by utilizing the principle of *Freedom of Navigation*. China's capability to maintain their marine to be present in SCS is bigger than United States, as China has several military bases they build by reclaiming the maritime feature. Those military bases are useful as a logistic base that supports their marines, making them able to stay in SCS for longer time rather than United States. The dominance of China's military in SCS makes them able to control the sea. When the other Claimant States' marines are present in SCS and an escalation happens, each of the parties decides to refrain from making any assault, as it may reveal a claim of aggression. The attempt to refrain requires them to be able to stay in the sea for long time, and it absolutely needs a quite big logistic support. China is the only one with such capability. In a longer period, China may take control over SCS, and it indicates as if the Claimant States accept the condition that China controls SCS.

Few statements from states leaders toward the claim of NDL may give an opportunity for a peaceful and sustainable practice. Being silent by a state indicates that they agree to what is being applied. ICJ sees Thailand's silence on a map that *Mixed Boundary Commission* sent as their acceptance on the truth of the map, "If they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced (ICJ, Case Concerning The Temple Of Preah Vihear, Judgment, 1962).

Thailand had chance to do so, as like in a negotiation at *Treaties of Friendship, Commerce and Navigation* between France and Thailand in 1925 and 1937. However, they did not do so. Hence, it was assumed that Thailand accepted the map. ICJ also attached another proverb "*Qzri tacet consentire videtur si loqui debuisset ac potuisset*"; silence means acceptance. No statement from other countries to respond to China's objection indicates that they accept China's claim on NDL. Another respond from Claimant States that tend to give no reaction on China's objection against PCA's award indicates that they recognize the truth of NDL claim. If such condition keeps running, China's claim on Historic Rights may satisfy the terms of *Opinio Juris Sive Necessitatis*.

2. Duration

To enact a Customary International Law, no fixed period of time it takes to be applied and recognized as an applied international law. It depends on the condition. Jurisprudence in France argues that it takes about 40 years long, while the doctrine of Germany argues that it needs 30 years long (Parisi, 2000). In Norway case, ICJ mentions, "*The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it.*" No protest from Britain against 60-year long action is seen as an acceptance of what Norway did. ICJ sees that 60 years is quite enough to show the Norwegian practice as a law. Logically,

the more the practice runs, the stronger the indication that shows an acceptance from international community.

China's claim in SCS based on Historic Rights firstly evoked in 1933. In 2013, Philippines began to file the case to the arbitration. Hence, the claim of Historic Rights has been running for 80 years long when it was filed to the court. In terms of duration, NDL claim has been qualified as Customary International Law.

3. *Uniformity.*

The states' uniform conduct is necessary in the process of making CIL. Although it runs in recursive way and in long-term period of time, it may not be recognized as Customary International Law if it has no similar pattern within. ICJ in Nicaragua Case mentions, "*In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.*" (ICJ, Case Concerning Military And Paramilitary Activities In And Against Nicaragua, 1986). The conduct of a state is recognized as CIL when it is consistent with particular rules, otherwise, it is only seen as a violation against the existing law.

China's military aggression in the sea was aimed to protect their fishing vessels. The marine incident between Philippines and China in SCS was due to the similar reason. If there is a state making claim for historic rights, the pattern of showing power in a claimed area is most likely to be complied. The uniformity of China's claim for Historic Rights is seen when another state does the similar claim as well.

4. *Generality*

CIL derives from many practices of international states. In addition to uniformity, as the *North Sea Continental Shelf Case*, ICJ also mentions that the practice of the state should be extensive (ICJ, *North Sea Continental Shelf Cases*, Judgment, 1986). The states' capability to present their marines depends on the power they have. By 2018, there is no state following the conduct of China. The element of generality is not yet reached to make the claim of historic rights turn into Customary International Law.

After having the analysis using the elements of CIL, the claim of Historic Rights, it only needs the elements of *Opinio Juris Sive Necessitatis* and *duration*. The element of *uniformity* is reached when it finds a similar claim from another state. However, the element of *generality* is not reached; making *uniformity* is neither reached as well. China's claim based on Historic Rights in SCS does not meet the elements of Customary International Law.

Conclusion

China objected PCA's award established on 12th June 2016 about the dispute of SCS. Following the principle of *Pacta Sunt Servanda*, China's objection against the awards is

found violating International Law. The claim of NDL based on its Historic Rights does not meet the qualification as Customary International Law.

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