The Arbitral Tribunal's Decision on the South China Sea

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The arbitration proceeding on the South China Sea held in the Permanent Court of Arbitration (PCA), The Hague, is one of the issues that got the attention of the world. Unlike previous cases on law of the sea – for example, maritime boundary delimitation or prompt release of vessels – this case involves a region where tensions has been high recently, and where the parties involved are developing countries: the Philippines, with a GDP of USD 272 billion; and China, a nuclear power with a GDP of USD 9.4 trillion that has the biggest military budget after the USA, as well as a permanent member of the UN Security Council with a veto power.

The pro and cons on the jurisdiction of the arbitral tribunal, the merits of the case and the prediction of the outcome of the case continue to develop, especially that the day of the decision looms closer. It is hard to guess or predict the decision of the arbitral tribunal.

Prediction on the decision of the tribunal

The decision of the arbitration tribunal is important for Indonesia, as one of the countries in the region who want peace, and not continuing escalation of conflict. Furthermore, the decision would have implications that can affect Indonesia's interests. In this context, this writing tries to provide an *educated guess* on the decision of the tribunal.

First, when the decision would be rendered. The arbitration process was initiated on January 2013; the decision on jurisdiction was rendered on October 2015; and the oral hearing was conducted on November 2015. Based on this timeline, it was predicted that the decision would be rendered around June-July 2016. Considering June has just ended and that the summer break will start on mid-July 2016, it is likely that the decision would come out on 10-15 July 2016 (*editor's note: this article was written before the tribunal announced that the decision will be issued on 12 July 2016*).

Second, the process of rendering a decision in an arbitration proceeding can be distinguished from those of the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS), both of which rendered their decisions in a court hearing. An arbitration tribunal will issue its decision in writing directly to the parties, before making it available to the public via the website of the PCA.

Third, the elaboration of the judges' argument. In its decision on jurisdiction, the tribunal made it clear that jurisdiction over some of the Philippines claims would be dealt together with the merits. Considering this, we can expect a comprehensive legal argument from the tribunal on the issue of outstanding jurisdiction, which would beef up the decision into 300-500 pages long.

Fourth, the merits. This is very difficult to predict, but looking at the Philippines' claims, there are several things that we can expect. If we deconstruct the Philippines' claims, there are three general claims and fifteen specific claims. We cannot discuss the fifteen specific claims in detail in this

editorial, but it is important to know the three general claims: (a) that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by UNCLOS 1982 and that China's claims based on its so-called 'nine-dash line' are inconsistent with UNCLOS 1982 and therefore invalid; (b) whether, based on Article 121 UNCLOS, certain maritime features claimed by both China and the Philippines are properly characterised as islands, rocks, low tide elevations, or submerged banks, and if such features can generate maritime zones beyond 12 nautical miles; (c) that China's claims based on 'historic rights' encompassed within its 'nine-dash line' contradicts UNCLOS 1982 and thus do not have any legitimacy.

The tribunal of course would clearly state that the rights and obligations of the disputed parties and all parties to UNCLOS 1982 regarding maritime zones, continental shelf and various maritime features like islands, rocks and reefs, are based on UNCLOS 1982. This would be a restatement of the principles of international law of the sea.

The arbitral tribunal is also likely to provide interpretation of Article 121(3) of UNCLOS, which states that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". This is because there is no clear definition of what constitute a 'rock'. Professor Hasjim Djalal suggested that an island is not a rock as provided by Article 121(3) if it has a population of at least 50 people, fresh water, enough land for agriculture, and enough area for fishing. However, such definition is only an academic suggestion which is not legally binding to states. The tribunal's definition on Article 121(3) would provide legal certainty on the issue.

The arbitral tribunal would also explain and elaborate on historic rights and their relationship with UNCLOS 1982, which does not explicitly mention the term. This is important to provide legal certainty in international law of the sea. The tribunal is most likely to give a legal verdict on the legality of the nine-dash line, the legality of map in state-to-state disputes and its relationship with UNCLOS. It is important to pay attention to the tribunal's view on the status of the nine-dash line as a basis for maritime claims; and whether the tribunal would strongly declare that this claim is invalid or whether to do so indirectly.

Effect on Indonesia

Fifth, effect on Indonesia. Indonesia is not a party to the arbitration proceeding nor has Indonesia have any sovereignty dispute in the South China Sea. The decision of the arbitral tribunal is only binding to the parties in dispute. However, if the decision give any interpretation of UNCLOS articles, whether regarding the South China Sea or otherwise, this would have an effect on Indonesia.

The decision will give a new dimension on the management of disputes in the South China Sea. Meanwhile, the tribunal's interpretation of Article 121(3) would have a wide implication for Indonesia, an archipelagic state that still has outstanding maritime boundaries to be negotiated. Palau, for example, still uses Helen Reef, a chain of reef in the Pacific, as a basis for its 200 nautical miles claim. If the tribunal found that such features can only generate a 12 nautical miles territorial sea, this would confirm and support Indonesia's EEZ claim in the Pacific. This interpretation of Article 121(3) would be referred by states in their maritime boundary negotiations, which would lead to a precedent.

Sixth, the effect to Indonesia's strategical environment. The decision would lead to the polarisation of positions that if unmanaged could threaten ASEAN's unity and centrality. The fact that the UK voted to leave the EU proof that such thing is not a fantasy or just an academic discussion and that it could be replicated on ASEAN. As a founder and the biggest state in ASEAN that has been leading not by domination but with the principle of *tut wuri handayani* (to lead from behind and not through domination), Indonesia need to play a leadership role to maintain the unity and centrality of ASEAN.

These prediction could be totally right or totally wrong, but as a state party to UNCLOS, Indonesia must be consistent with UNCLOS and not putting forward any illogical maritime claims. Indonesia's maritime power lies not only with its navy, but also its compliance on international law. After all, the concept of archipelagic state was not born from a military expansion, but from the strength of pen and arguments of Indonesia's diplomats.

The outcome of this arbitration proceeding would have a positive effect on the study of international law in Indonesia and should be a must read not only for law students but also the officials who enforces law of the sea.