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JUDICIALIZATION IN AND AROUND THE SOUTH CHINA SEA

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Abstract

This article examines why international legal dispute settlement procedures are traditionally less frequently resorted to in Southeast Asia, compared to other regions. It also analyzes why and how, since the beginning of this century, international legal cases, both judicial and arbitral, have been consistently used for settling maritime disputes in and around the South China Sea. Then, it presents prescriptive suggestions for further use of judicial and arbitral procedures. The method of analysis is based upon the examination and scrutiny of factual materials, including relevant international cases regarding the region, as well as interviews engaged by the author with officials and experts in the region. Universal trends and experience of judicial procedures will be deductively analyzed. The article first summarizes conditions and characteristics in the Asian region, particularly Southeast Asia, where the South China Sea is located. It, secondly, examines the factual basis for international legal cases involving the region, especially from the viewpoint as to how relevant States decided to resort to legal processes, as well as how judgments and awards affect ex post relations between parties. Finally, the article will examine more universal dimensions for the use of judicial or arbitral procedures, particularly factors and elements which encourage the State to resort to such procedures.

Keywords*: dispute settlement, legal methods of resolution, maritime demarcation, South China Sea, territorial disputes*

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I. INTRODUCTION

This article examines why international legal dispute settlement procedures are traditionally less frequently resorted to in Southeast Asia, as compared to other regions. It also analyzes why and how, since the beginning of this century, international legal cases, both judicial and arbitral, have been consistently used for settling maritime disputes in and around the South China Sea. This article presents prescriptive suggestions for further use of judicial and arbitral procedures, on the assumption that legally-binding clear-cut settlements can bring about positive outcomes for international disputes and discrepancies.

The method of analysis is based upon the examination and scrutiny of factual materials, including relevant international cases regarding the region,

as well as interviews engaged by the author with officials and experts in the region. Universal trends and experience of judicial procedures will be deductively analyzed. Their application to the region will be examined, where traditional reticence remains on legal dispute settlement.

Southeast Asia has recorded relatively fewer numbers in using international third-party judicial processes, compared to other regions, as a general trend. Rough estimates based upon the record of the International Court of Justice (ICJ) reveals that cases initiated by States in the Southeast Asia region in 1947 to 2020 account for four, including the 1962 and 2013 Preah Vihear Temple cases (counted as one), as well as two territorial cases regarding islands (2002 Ligitan Sipadan and 2008 Pedra Branca cases), and the 2014 Seizure and Detention of Certain Documents and Data case (provisional measure) instituted by Timor-Leste against Australia.[1] The scarcity of such cases in the region was notable in the last century. This is, however, followed by the steady increase of litigation cases in the region. On the same calculating formula, Europe has 37, Africa 18, Latin America 24, and Pacific Oceania six.[2] North America has nine, and Middle East nine.[3]

Along with ICJ cases, Southeast Asian countries instituted cases under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) with a variety of usages.[4] These are the Permanent Court of Arbitration (PCA) case for Malaysia/Singapore Land Reclamation in and around the Strait of Johor in 2005 (Land Reclamation Case), the PCA case for the South China Sea legal issues between Singapore and the People's Republic of China in 2016 (South China Sea arbitration), as well as then compulsory conciliation for Timor maritime demarcation in 2018 (Timor Sea Conciliation).[5] Meanwhile, a PCA case was instituted by Singapore and Malaysia through a submission agreement in the matter of Railway Land arbitration, leading to the award in

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[1] International Court of Justice, "List of All Cases," accessed 15 May 2023, https://www.icj-cij.org/en/list-of-all-cases. International Court of Justice, The International Court of Justice: Handbook (United Nations, 2014), 63. Temple of Preah Vihear, ICJ Reports 1961, at 6. Sovereignty over Pulau Ligitan and Pulau Sipadan, ICJ Reports 2002, 625. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, ICJ Reports 2008, 12. Questions relating to the Seizure and Detention of Certain Documents and Data, Provisional Measures, ICJ Reports 2014, 147.

[2] *Ibid.*

[3] *Ibid.*

[4] United Nations Convention on the Law of the Sea (UNCLOS), opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 14 November 1994).

[5] Land Reclamation by Singapore in and around the Straits of Johor (2005), Reports of International Arbitral Awards (RIAA), XXVII, 135. The South China Sea Arbitration, PCA 2013-1. Timor Sea Conciliation, PCA 2016-10.

2014.[6]

In the 2016 South China Sea arbitration, a politically and militarily less resourced State used the legally binding dispute settlement process in order to counter military land occupation and maritime intrusion engaged by a larger and more resourced State.[7] This was proof of the effective use of arbitral process as a legally binding third-party settlement, as a fair and equitable method for States with different strengths and resources. It had analogous characteristics with the 1962 and 2013 Preah Vihear Temple cases, where military occupation was held back by the submission from the relatively less resourced State.[8]

Against these factual backgrounds, the article first summarizes conditions and characteristics in the Asian region, particularly Southeast Asia, where the South China Sea is located. This will be a basis for examining perspectives for further use of international legal procedures. Secondly, it examines the factual basis for international legal cases involving the region, especially from the viewpoint as to how relevant States decided to resort to legal processes, as well as how judgments and awards affect ex-post relations between parties. Finally, the article will examine more universal dimensions for the use of judicial or arbitral procedures, particularly factors and elements which encourage the State to resort to such procedures. This is expected to promote more use of legal procedures as a constructive tool for dispute settlement in the region.

II. GEOGRAPHICAL AND POLITICAL CONDITIONS IN AND AROUND THE SOUTH CHINA SEA

This section examines the contexts and backgrounds regarding disputes and their resolutions in Southeast Asia, focusing upon maritime and land areas in and around the South China Sea.

A. GEOGRAPHICAL CHARACTERISTICS IN AND AROUND THE SOUTH CHINA SEA

Southeast Asia has distinguished geographical characteristics, composed of the South China Sea in its center as a semi-enclosed sea, encircled by the continent and peninsulas from the north and west, as well as by various sizes and forms of islands from the east and west.[9] Islands to the east and west

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[6] Railway Land Arbitration, PCA 2012-01.
[7] PCA, South China Sea.
[8] ICJ, Preah Vihear.
[9] UNCLOS, art.122.

are composed of relatively large islands, generally forming the main islands of each State, such as Luzon, Borneo, Java, and Sumatra, as well as groups of relatively small islands, creating archipelagic features. (Table 1 describes schematically the geographical formations of and around the South China Sea).

The complexity of geographical allocations in the South China Sea can inherently cause territorial and maritime demarcation disputes. However, its size with the diameter more than 400 nautical miles could result in a relatively simple demarcation solution.[10] If maritime zone demarcations, particularly for exclusive economic zones (EEZs), are measured from adjacent continental States, following the recent trend of international jurisprudence, the South China Sea will hold a high-sea spot in its center.[11] This will ensure the freedom of navigation and overflight in the Sea.

The South China Sea and surrounding waters have narrow "outlets" connected to the outer oceans.[12] Such narrow outlets act as chokepoints in maritime lines of transport and communications, with commercial and strategic importance.[13] Chokepoints grant distinctive status to States encompassing high-staked straits and transit ports within their territories. Such States include Indonesia, Malaysia, and Singapore, acting as vocal promoters of a stable maritime order in the region.

There are six main chokepoints for the South China Sea, with commercially and strategically distinct relevance.[14] They are located in a clockwise manner from the north, as follows: (Table 2 plots these chokepoints on the schematic description of areas in and around the South China Sea.)

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[10] Ian Storey and Cheng-yi Lin, eds., The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions (Singapore: Yusof Ishak Institute, 2016), 21. Clive Schofield, "What's at Stake in the South China Sea?" in Beyond Territorial Disputes in the South China Sea, Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, and Leonardo Bernard, eds. (Cheltenham: Edward Elgar, University of Wollongong, 2013), 12. UNCLOS, arts. 57 et 67.

[11] Robert C. Beckman and Leonardo Bernard, "Disputed Area in the South China Sea," in The South China Sea, A Crucible of Regional Cooperation or Conflict-Making Sovereignty Claims, C. J. Jenner and Truong Thuy, eds., (New York: Cambridge University Press, 2016), 202. UNCLOS, art. 87.

[12] UNCLOS, art.122.

[13] United States Energy Information Administration, "The South China Sea is an important world energy trade route, Major Crude Oil Trade Flows in the South China Sea (2011)," Today in Energy, 4 April 2013, accessed 15 May 2023, https://www.eia.gov/todayinenergy/detail.php?id=10671#:~:text=Almost%20a%20third%20of%20global,Gulf%20suppliers%20and%20Asian%20consumers.

[14] *Ibid.*

(I) Taiwan Strait: The north end of the South China Sea faces Taiwan, a potential flash point in the region. In the case of an emergency related to Taiwan, the northern part of the South China Sea will become a frontline as well as a logistic supporting zone, together with the sea facing the east side of Taiwan.

(II) Luzon Strait: This strait, composed of the Bashi, Balintang, and Babuyan Channels, is an entry/way-out between Taiwan and the Philippines, forming another potential frontline facing Taiwan, as well as an access point to the North Pacific. For Chinese navy vessels stationed in Hainan, the Luzon Strait can become an essential outlet to the North Pacific and beyond.

(III) Balabac Strait: This strait between the Philippines and Malaysia can act as another entry/way-out to the North Pacific, partially due to the secluding archipelagic waters established by the Philippines, with archipelagic baselines connecting islands.[15] Thus, the Philippine archipelagic waters act as a shield on the eastern edge of the South China Sea. It is also a way-out to the Lombok Strait southwards, through the Sulu Sea, the Celebes Sea, and the Makassar Strait, providing transport lanes towards Australia.

(IV) Lombok Strait: This strait acts as an outlet for Australia. It is also a port of transit for transport to and from the Indian Ocean, then the Middle East, as a secondary line after the Malacca/Singapore Straits. The Lombok Strait is preferred by large-scale tankers for its ample width and depth, compared to the Sunda Strait.[16]

(V) Sunda Strait: This strait also provides a strategic and commercial point of transit to and from the Indian Ocean, but less preferred to Lombok, due to its relatively shallow depth.[17] It is an alternative route for the Malacca/Singapore and the Lombok Straits.

(VI) Malacca/Singapore Straits: This combination of straits accounts for 80 per cent of the region's crude oil transport, making it the second most important global strait after the Hormuz.[18] Sea lanes and transit ports are concentrated throughout the straits. States in the vicinity, namely Indonesia, Malaysia, and Singapore, have particular interests and stakes in the stability and security of the straits.

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[15] UNCLOS, art.47.

[16] Pratnashree Basu, "The Eastern Corridor and the Law of the Sea," ORF Occasional Papers, November 2020.

[17] *Ibid.*

[18] Martin D. Mitchel, "The South China Sea, A Geographical Analysis," Journal of Geography and Geology 8, no.3 (2016): 1.2.

On top of these straits, the Flores and Banda Seas to the east of Borneo and Sulawesi towards New Guinea may potentially become another outlet, with the future increase of natural resources transport from Papua New Guinea to the region, such as liquefied natural gas and fishery products.

Within the South China Sea, islands and other geographical figures may offer strategic and commercial interests to surrounding States. Hainan Island in the north is China's southern end-post. The Paracel Islands, occupied by China since 1974, are located on the route from Hainan to the center of the South China Sea. The Spratly Islands with overlapping territorial claims are located just on or close to sea lanes for transport and communications, bearing upon navigation and overflight in the South China Sea.

Based upon these geographical characteristics, States in the region can be categorized into several groups, depending upon main interests staked in maritime affairs, with duplications:

a. Continental coastal States, including those with peninsulas, hold preoccupations as coastal States, including inclination towards the seawards extension of continental shelves. Such States include China, Vietnam, Thailand, Myanmar, Cambodia, and Malaysia, with varying intensity;

b. Archipelagic States, with interests and consciousness as island nations, including the Philippines and Indonesia, tend to act as proponents for island nations' interests against the land-dominates-sea principle;

c. Then, there are States with distinctive interests in straits and transit ports, including Malaysia and Singapore, as well as, to a lesser and overlapping extent, Indonesia. Such "strait/transit States" maintain special interests in the freedom of navigation/overflight, as the source of commercial benefits, as well as effective maritime regulations and management for promoting their geographical advantages;

d. In Southeast Asia, there is also a land-locked State, Laos, and States with land-based preoccupations, like Thailand and Myanmar. Such States are, in some cases, linked to the main sea by trans-frontier rivers, like the Mekong River in Indochina, thus sharing coastal States' interests in safe and stable maritime navigation.

These types of States with varying maritime interests with duplications may promote aspirations for stable, predictable, and stable maritime regimes, as a tool to coordinate and settle varying interests. This may create room for a rules-based maritime order as well as peaceful dispute settlement procedures in the region.

B. HISTORICAL AND CULTURAL BACKGROUND IN THE REGION

Southeast Asia is a region of complex historical diversity, composed of Malay, Hindu/Buddhist, and Chinese cultural bases with multi-layered duplications.[19] Malay cultural tradition covers mainly southern areas encompassing islands and peninsulas, like Indonesia, Singapore, and Malaysia. A larger Hindu/Buddhist basis lies in Indochina. Chinese influence has expanded through ethnic Chinese, mainly in Malaysia and Singapore.

These different historical backgrounds, however, share common features, including the weak spatial territorial conception, and, accordingly, the importance attached to personal-based administrative control.[20] Traditionally, Malay sub-regions were composed of scattered local kingdoms, later sultanates, with administration focusing upon persons as subordinates, rather than territorial domination.[21] Hindu tradition focused upon kings and its direct linkage with divinity, rather than subjects.[22] The king's influence was like expanding circle with diminishing effects, thus territorial nexus was not consciously recognized.[23] Chinese perspectives on inter-State relations were historically based upon the tributary system, with indirect control from metropolitan China upon local suzerains.[24]

With the progress of Western colonization in the region from around the 16th century onwards, these traditional bases were gradually converted into territorial-based administrative management, with the incipient port-to-port control towards the expansion of hinterlands, then growing into spatial territorial control by colonial administrative institutions.[25] In the course of that process, local territorial control was sometimes acquired by military coercion, and by treaties or contracts with local sultanates in some other cases.[26]

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[19] Katherine Hui-Yi Tseng, Rethinking South China Sea Dispute (New York: Oxford University Press, 2017), 52.

[20] *Ibid.* This aspect was raised and examined in the ICJ 2008 Pedra Branca case between Malaysia and Singapore. The Court generally disqualified pre-colonial and colonial administrative authorities as evidence and basis for spatial territorial control.

[21] Tseng, Rethinking South China Sea, i.

[22] Harry J. Benda, "The Structure of Southeast Asian History," Journal of Southeast Asian History 3, no.3 (1962):106.

[23] Robert Heine-Geldern, "Conception of State and Kingship in Southeast Asia," Data Paper, no.18 (Cornell University, 1956), 6.

[24] Tseng, Rethinking South China Sea, 101.

[25] Guy J. Pauker, F. H. Golay, and C. H. Enloe, Diversity and Development in Southeast Asia (New York: McGraw-Hill, 1977), 54.

[26] J. M. Pluvier, Southeast Asia from Colonialism to Independence (New York: Oxford University Press, 1974), 14.

Colonial boundary demarcations were not necessarily compatible with ethnic or cultural distributions, as in the cases of Borneo and New Guinea. Administrative districts within a colony were generally corresponding to cultural boundaries, though lacking precisions in some case, like in Indochina and Malaysia/Singapore with complex colonial administrative arrangements.[27] This is the background for the region's vague and unclear demarcations and their legal bases, prone to territorial disputes amongst inheritor States, after their independence later in the 20th century.

C. SECURITY AND POLITICAL ELEMENTS IN DISPUTES IN THE REGION

Southeast Asia is historically full of potential conflicts and disputes, originating from its colonial divisions as well as political and ethnic diversities.[28] Since their independence after the Second World War, most States have been making consistent efforts to avoid military conflicts, seeking for peace and stability in the region, with the experience of wars which took place in the region as an arena and one-off military conflicts as well as internal civil strife.

In 1967, five countries in the region belonging to the capitalist camp, at that time, formed the Association of Southeast Asian Nations (ASEAN) as a loose inter-governmental group.[29] ASEAN later expanded to cover the whole Southeast Asia region, growing into an institutional basis for regional policy coordination.[30] At its foundation, ASEAN perceived two regional security issues as serious disruptive factors in the way of peace building in the region: namely the Philippines' territorial claim to the Sarawak region in the north of Borneo, as well as low-intensity insurgencies within Indonesia allegedly engaged by Malaysia and Singapore.[31]

Along with the Vietnam War (-1975) and its expansion to larger Indochina, ASEAN's stance towards these potentially explosive security problems was manifested by the proclaimed principle of non-intervention, refraining from interfering with internal security issues and bilateral military conflicts.[32] The non-intervention principle originally derived from the Non-Alignment

[27] ICJ, Pedra Branca.
[28] Pauker, Diversity and Development, 10.
[29] Chong Ja Ian, "ASEAN's Non-Intervention and the Myanmar Conundrum," ASEAN Focus (Jakarta, 2021): 6.
[30] Marty Natalegawa, Does ASEAN Matters? A View From Within (Singapore: ISEAS Publishing, 2018), 239.
[31] Chong, "Non-intervention," 2.
[32] Charter of the Association of Southeast Asian Nations, 2624 UNTS 223 (entered into force 15 December 2008), art. 2.

Movement, stemming intervention by external powers, then converted to an intra-regional principle.[33] ASEAN chose to advance region-wide economic construction as its main task in an attempt to pursue stability in the region. ASEAN has had, from its onset, a limited mandate, not being involved with settlement of territorial and maritime demarcation disputes amongst States in the region.[34]

This lack of regional institutional dispute settlement mechanism may allegedly have become one factor in favor of several States' resort to third-party judicial or arbitral dispute settlement procedures.[35] Prior to ASEAN's foundation, there occurred an early judicial case involving States in the region, as the 1962 ICJ Preah Vihear case between Cambodia and Thailand.[36] The resort to judicial settlement was presumably motivated by the lack of any form of regional institutional framework for amicable dispute settlement.[37]

The increase of legal cases, especially maritime territorial disputes, in the current century may have been promoted by ASEAN's hesitancy about bilateral disputes and discrepancies. However, if one sees ASEAN's current progress of institutionalization and community-building endeavors in a steady and irreversible manner, confidence built amongst decision-makers and officials fostered by ASEAN integration have been contributing to peaceful dispute settlement including judicial and arbitral procedures.

ASEAN has formed layered consultation frameworks at all levels of States, including leaders, ministers, senior officials, working-levels, as well as experts and technical levels.[38] Officials and stakeholders routinely interact in various areas at all levels. The ASEAN Secretariat in Jakarta with approximately 400 personnel has become a gathering site for member States' seconded officials.[39] In order to resort to litigation tolerated by the contestant, confidence amongst States is crucially required, with long-lasting relations and transactions. ASEAN has been successfully fostering such confidence amongst States in the region.

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[33] Toru Yano, Japan Southeast Asia Policy (Tokyo: Simul International, 1978), 76.
[34] Chong, "Non-intervention," 2.
[35] Nicole Jenne, "Managing Territorial Disputes in Southeast Asia," Journal of Current Southeast Asia Affair 3 (2017): 35.
[36] ICJ, Preah Vihear.
[37] Jenne, "Managing Territorial Disputes," 38.
[38] Natalegawa, ASEAN Matters, 241.
[39] ASEAN Charter, art.11.

III. JUDICIAL AND ARBITRAL CASES IN AND AROUND THE SOUTH CHINA SEA

This section examines judicial or arbitral cases, concerning the Southeast Asia region, thereby analyzing general trends and conditions for accepting compulsory third-party dispute settlement procedures in the region. It first looks into the ICJ Temple of Preah Vihear cases (1962 and 2013), as a unique pioneering example treating land boundaries. The other cases relate maritime disputes, including territorial sovereignty on islands as well as maritime demarcation. The section is to explore the backgrounds for the recent increase of judicial and arbitral cases regarding maritime disputes in the region.

A. THE TEMPLE OF PREAH VIHEAR CASES (1962/2013)

1. BACKGROUNDS FOR THE RESORT TO JUDICIAL PROCEDURES

The Temple of Preah Vihear case in 1962 ("Preah Vihear I") was unique, as it was an early judicial dispute settlement case initiated by a newly independent State in the region. It settled a military conflict deriving from territorial sovereignty contestations.[40] The case dealt with the attribution of a Buddhist temple and its immediate surrounding area on borders between Cambodia and Thailand. The temple area had been originally owned by Thailand.[41]

The Preah Vihear I was settled without engagement by international or regional organisations or frameworks.[42] The United Nations (UN) was not involved, and ASEAN did not yet exist.[43] Following Thai's military occupation over the area in 1958, bilateral consultations took place without solutions.[44] Cambodia resorted to the ICJ in 1959.[45] A governmental official in a relevant State reflected that the ICJ had been the sole possible tool for Cambodia, which was obliged to use a third-party procedure.[46]

Thailand submitted preliminary objections against the court's jurisdiction by denying the effect of its 1950 and 1957 compulsory jurisdiction declarations, which Thailand claimed void following the disbanding of the Permanent Court of Justice in 1946.[47] The 1950 declaration had referred to the 1929 and 1940 compulsory jurisdiction declarations.[48] The court did not accept the Thailand's

[40] ICJ, Preah Vihear.
[41] *Ibid.*, Separate Opinion of Sir Gerald Fitzmaurice.
[42] Chong, "Non-Intervention,"2
[43] *Ibid*.
[44] ICJ, Preah Vihear, at 8.
[45] Application, Pleadings (1959).
[46] Interview with a governmental official, 20 February 2021 (file with the author).
[47] Preliminary Objections of the Government of Thailand (1960).
[48] *Ibid.*.

argument by defining Thailand's intention in the 1950 declaration to commit to the ICJ.[49] This objection by Thailand seems not to have been seriously engaged, since clear commitment was made by Thailand to the international court in 1950 when the PCIJ had been disbanded.[50]

Thailand was apparently confident about its substantive basis for territorial ownership as provided under the 1904 Treaty. This self-confidence was a main impetus for this early judicial case.[51] The first application by Cambodia was scarce in justifications, compared to the Thailand's counter-memoir, which resorted to treaty provisions and subsequent effective administrative functions by the Thai authorities.[52] Cambodia's first submission mainly was based upon the 1907 Treaty of boundary demarcation which addressed the remaining lands. This was denied by the court as a legitimate basis for replacing the 1904 Treaty.[53]

The Temple of Preah Vihear case in 2013 ("Preah Vihear II") was also a unique case where Cambodia resorted to the request for the interpretation of the 1962 Preah Vihear I judgment. Its aim was, equally to Preah Viear I, to eliminate Thailand's military occupation following Cambodia's inscription of the Temple and its surrounding areas for a UNESCO World Heritage in 2008.[54]

Its difference from Preah Vihear I was the engagement of the United Nations Security Council and ASEAN, following the military conflict.[55] The Chair of the Security Council issued a statement on 14 February 2011 following the Council meeting calling for permanent ceasefire and expressing support for ASEAN's mediation role.[56] The ASEAN Foreign Ministers' meeting on 22 February 2011 decided the dispatch of the Indonesian Foreign Minister as special envoy to the two countries and the dispute areas for reconciliation.[57] A government official in the region accounted that the Cambodian government ultimately chose the resort to the ICJ, because it considered the dispute to be not "ASEAN matters", thus seeking for third party settlement.[58]

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[49] *Ibid.*, Preliminary Objections Judgment (1961).
[50] ICJ, Preah Vihear, at 6.
[51] Ibid, at 4. Counter Memorial of the Royal Government of Thailand (1961).
[52] *Ibid.*, Merits, at 27.
[53] *Ibid.*, Merits, at 14.
[54] Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (2013), ICJ Reports 2013, 281, at 293.
[55] *Ibid.*, at 294.
[56] "Security Council urges permanent ceasefire after recent Thai-Cambodia clashes," UN News, 14 February 2011, accessed 15 May 2023, https://news.un.org/en/story/2011/02/366652.
[57] ASEAN Secretariat, ASEAN welcomes Cambodia-Thai firm commitment to avoid further clashes (Jakarta, 22 February 2011).
[58] Interview with a governmental official, 20 February 2021 (file with the author).

The involvement by the UN Security Council and ASEAN elevated the transparency of the issue, contributing to the constructive handling as well as enforcement of the ICJ judgment. This was an example of combined endeavors towards dispute resolutions, including political and judicial frameworks. Whether this precedent offers encouragement for third-party dispute settlement in the region remains to be seen. However, the case has been studied and analyzed by decision-makers and practitioners in the region as a successfully-settled case.

2. PREAH VIHEAR I: ACQUIESCENCE AS A "TREATY SETTLEMENT" AND SUBSEQUENT CONDUCTS

The distinctive feature of the Preah Vihear I judgment was the denial of the 1904 Boundary Treaty provision, which had assigned the "watershed line" as border, by Thailand's subsequent conducts, including failure to protest.[59] The court attached importance to the diplomatic communication in 1908 from the French authorities to the Thai Minister, as head of mission in Paris, including maps completed by French members of the 1907 Mix Commission, as requested by Thailand due to its lack of topographic expertise.[60]

The map, alias the "Annex I map", drew dotted lines as boundary north to the geographical cliff line, separating mountain hill regions from Cambodian plains, thus positioning the temple in the French territory.[61] The Thai act of receiving the map with appreciation as well as its request for further copies for their internal references, was evaluated by the court as acquiescence, meaning tacit recognition, thus a form of consent, as formulated subsequently in the ICJ Gulf of Maine judgment.[62]

As was elaborated in the Thai memorial, the country had no intention to accept a border other than the "watershed lines" under the 1904 Treaty, claiming an error in perception at the timing of its reception.[63] It is presumed that French officials did not mention nor pointed out the new borderline drawn in the map, anticipating reactions or lack of reaction by its Thai counterpart. This might have been regarded as "skillful inducement" in positive terms, or a "diplomatic sneaky plot" in maximally negative terms.

The accumulation of jurisprudence on acquiescence indicates the need for designating it as consent, consisting of the knowledge of presented facts

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[59] ICJ, Preah Vihear, at 16.
[60] *Ibid.*, at 17.
[61] *Ibid.*, at 18.
[62] Gulf of Maine, ICJ Reports 1984, 246, at 305.
[63] ICJ, Preah Vihear, at 22.

(in this case, the map with the new borderlines); a certain level of duty or expectation to react as "called for under the circumstances; and a certain duration of time as deadline for protest.[64]

There has been an argument whether the court resorted to the Anglo-American concept of "estoppel" in this case.[65] Amongst diversity of conceptual categories of "estoppel" in the common law tradition, "estoppel in representation" as procedural rule and "promissory estoppel" require the reliance in good faith on the side of party exposed to the other's representation or promise, causing damage inflicted on the former party or, otherwise, advantages for the latter party engaged in the first action or conduct.[66]

The court used this reasoning in an incomplete manner, while using the term of "preclusion" as associated concept for estoppel[67] It set out Thailand's advantage as stability and durability by the fixed border as well as saving its administrative burden in remote periphery areas.[68] This is a fictitious argument. The loss of territory was a significant disadvantage for Thailand. The logic by the court was thus acquiescence without requiring clear detrimental reliance by the French side.

The court seemingly considered that its reasoning based upon acquiescence was insufficient. It thus presented at least six subsequent conducts as supplementary evidence for Thai recognition, following the 1908 diplomatic communication.[69] These are the use of a map based upon Annex I map by the Thai Commission of Transcription in 1909; the Thai Prince's visit to the area received by a French resident with hoisting a French flag in 1930; Thai survey of the region using the Annex I map in 1934-1935; the production of a map by the Siamese Royal Survey Department including a map putting the temple on the Cambodian side in 1937; the meeting of the French-Siamese Conciliation Commission in 1947 where the Thai side had no mentioning of Preah Vihear; and the sending of French note verbales for clarification in 1949 and 1954

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64 Etienne Henry, "Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law," Melbourne Journal of International Law 18, no.2 (2017). Sophia Loperla, "The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunal," Australian Year Book of International Law 29 (2011): 87.

65 Anthony D'Amato, "Consent, Estoppel, and Reasonableness," Virginia Journal of International Law 10 (1969):1. Alexander Ovchar, "Estoppel in the Jurisprudence of the ICJ," Bond Law Review 21 (2009). Christopher Brown, "A Comparative and Critical Assessment of Estoppel in International Law," University of Miami Law Review 50 (1996): 380.

66 *Ibid*.

67 ICJ, Preah Vihear, at 23.

68 *Ibid.*, at 34.

69 *Ibid.*, at 27.

with no reply by Thailand.[70]

Amongst these, the Thai Prince's visit to the area in 1930 was considered to be a reliable example of implied recognition. However, as the Thai side suggested in its counter-memoir, the French flag may have been hoisted surrounding the French resident's private domicile as a private action.[71] The court did not accept Thai taxation engagement presented with affidavits as complete administrative functions.

Lessons from these factual evaluations and reasonings, particularly for States in the region with similar border demarcation disputes, were as follows: first, the status of a treaty could be displaced by subsequent conducts or unconscious inaction by a party, as designated as a "treaty settlement"; and second, in the court process, there should be a need to collect and present facts and evidence of territorial administrative functions, or the lack of them by the other party.

States in the region with colonial administrative histories as well as sporadic state functions in border areas at early periods may have considered these requirements as a burden, given their administrative capacities. States prefer predictability and certainty, minimizing its risk-taking, in the process of dispute settlement, particularly, for territorial demarcation cases. These were presumably elements for States in the region in scarcely choosing dispute settlement methods towards the end of last century following the Preah Vihear I case.

3. PREAH VIHEAR II: REQUEST FOR INTERPRETATION AS A JURISDICITIONAL PATHWAY

The Preah Vihear II case was initiated by Cambodia's request for the interpretation of the Preah Vihear I judgement, under article 60 of the Statute of the International Court of Justice.[72] Thailand's compulsory jurisdiction declaration had lapsed, and the ICJ has a strictly limited appeal procedure.[73] Thus, Cambodia used the pathway of interpretation, seeking the withdrawal of Thai military and police forces from the surrounding area of the Preah Vihear Temple.

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[70] *Ibid.*, at 31.
[71] *Ibid.*, at 30.
[72] Statute of the International Court of Justice, 33 UNTS 993 (entered into force 24 October 1945), art. 60.
[73] *Ibid.*, art. 61.

The scope of interpretation shall be limited to terms and phrases in the operative parts of the previous judgment.[74] The court shall not deliberate upon subsequent practice and facts. Nonetheless, the objective of the Cambodia's application was to ensure the withdrawal of the Thai forces from the area, treating the imminent and present conflict on the ground. The interpretation request does not require a newly-updated jurisdiction declaration, and there is no time-limit for its application. It could become a convenient tool to circumvent jurisdictional and admissibility barriers in the ICJ judicial process.[75]

The Cambodian side used the following two logics to achieve a solution within strict limits in the interpretation appeal: First, it presented the argument on the meaning of the term "vicinity of the Preah Vihear" as the scope of the Thai forces' obligation for withdrawal.[76] The court did not touch upon the legal status of the Annex I map itself, as not included in the operative part of the Preah Vihear I judgement. The reasoning of that judgment, however, designated the map as a "treaty settlement," thus granted eventually legally binding status.[77] Here, the court followed its self-imposed formal limits to the scope of interpretation judgments.

The court presented relatively weak logic and reasons for geographical interpretation: it proclaimed that the inclusion of the promontory of Preah Vihear in the "vicinity of Preah Vihear" as part of "natural understanding."[78] The international courts and tribunals should not presuppose the existence of "natural understanding," given the diversity and complexity of commonly understood facts and values.

Second, the court designated the scope of "vicinity of Preah Vihear" as geographical spots including the area where the Thai police detachment were stationed, following the Preah Vihear I judgment which required the withdrawal.[79] This is a tautological reverse logic. The court ordered the withdrawal of the Thai forces from a certain geographical scope. This "certain geographical scope" is where the Thai forces stationed. That is a circular logic avoiding the designation of a "geographical scope."

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[74] ICJ Reports 2013, at 307.

[75] Michelle Barnett, "Cambodia v Thailand," Brooklyn Journal of International Law 38 (2012): 271. Alexandra C. Traviss, "Temple of Preah Vihear: Lessons on Provisional Measures," Chicago Journal of International Law 13 (2012): 320.

[76] ICJ Reports 2013, at 331.

[77] *Ibid.*, 309. The court stated that it "feels bound" by the Annex I map, in an un-legalistic manner; Merits, 77.

[78] Merits, para. 89.

[79] *Ibid.*, para. 88.

The court also followed the Cambodian issue-setting by judging that the Thai obligation was "general and continuing."[80] Therefore, the Thai forces stationed in 2013 should be subject to the withdrawal obligation under the 1962 judgment. Thailand stationed their forces in their self-imposed "Council of Ministers" line after the 1962 judgment. The court designated this stationing as "continuing action" rather than newly-taken separate enforcement measures. Cambodia effectively used the logic within the scope of the interpretation procedure.

This successful handling by Cambodia presented a lesson for States in the region and beyond, as an effective use of tools and paths in the judicial procedures, in order to achieve a solution to issues at hand. The elimination or circumvention of jurisdictional barriers has become a core task for legal counsel even more significantly, in resorting to third party dispute settlement procedures. This was seen in the 2016 South China Sea arbitration case, as examined later in this article.[81]

B. THE LIGITAN AND SIPADAN CASE (2002)

1. BACKGROUND AND MOTIVATION FOR JUDICIAL APPLICATION

After a long interval, two maritime States in the Southeast Asia region, Indonesia as an archipelagic State, on one hand, and Malaysia as a peninsula State straddling international straits and transit routes, on the other, applied for an ICJ litigation process by a mutually-agreed special agreement in 1997.[82] This was based upon a top-down decision by political leaders from the two States.[83]

The case concerned the territorial attribution of two islands, Ligitan and Sipadan, located in maritime border areas between the two States. According to governmental officials in one of the parties, the both parties retrospectively had an intention to avoid the escalation of territorial disputes, with the importance attached to the stability and certainty of border delimitation.[84] Indonesia and Malaysia had engaged in military insurgency conflicts in early periods of their post-independence era.[85] In the late 1990s, the both States had a clear priority upon economic nation-building as well as stable bilateral and

[80] *Ibid.*, at 287.
[81] Infra, D.
[82] ICJ, Ligitan and Sipadan; Marcel Hendrapati, "Implication of the ICJ Decision respecting Sipadan Ligitan case towards basepoints and maritime delimitation," International Journal of Sciences: Basic and Applied Research 14, no.1 (2014): 374.
[83] ICJ, Ligitan and Sipadan, para.1.
[84] Interview with a governmental official, 15 January 2021 (file with the author).
[85] Natalegawa, Does ASEAN Matter?, 241.

regional relations enabling their economic growth.[86]

Diplomatic negotiations through joint working groups established in 1991 did not produce results, thus leading to the resort to a third-party dispute settlement procedure.[87] Decision by a government to resort to judicial litigation naturally needs a certain level of self-confidence in obtaining a judgement in its favor. According to governmental experts in both parties, Indonesia had a special emphasis upon the application of the 1891 Convention between Britain and the Netherlands, the parties' colonial predecessors, as a basis for boundary demarcation.[88] Indonesia's logic and arguments concentrated upon the interpretation of relevant articles in the 1891 Convention for their justification.[89]

Malaysia denied the Convention as a basis for demarcation.[90] It also denied a geographic coverage of the two islands by colonial contracts concluded by the Netherlands and local sultanates.[91] Malaysia focused upon factual evidence for effective territorial occupation of the two islands in pre- and post-1891 Convention periods.[92] Relevant experts recalled their surprise by insufficient preparations by Indonesia in presenting evidence for effective occupation, using, for instance, private fishing activities and Boy Scout excursions.[93] The court decided in favor of Malaysia's ownership of the two islands.

One government official explained the need which was felt by the two parties to clarify border demarcations, given the ambiguity and uncertainty about the attribution of the two islets.[94] There was a shared interest by the parties to settle such ambiguity, in order to construct stable bilateral relations. This is one reason Indonesia managed domestic political backlash following the judgment which was not in their favor. This aspect will be examined later in this sub-section.[95]

2. ISSUES AND REASONING: TREATY INTERPRETATION AND *EFFECTIVITES* COMPARATIVES

The judgment of the Ligitan and Sipadan case denied both Dutch contracts with local political figures and Anglo-Dutch treaties as a basis for territorial

[86] *Ibid.*, 228.
[87] ICJ, Ligitan and Sipadan, para.1.
[88] Interview with a governmental expert, 23 November 2018 (file with the author).
[89] ICJ, Ligitan and Sipadan, Memorial, Indonesia 1 (1999), ch.IV.
[90] ICJ, Ligitan and Sipadan, Memorial of Malaysia 1 (1999), at 27.
[91] *Ibid.*, ch.7.
[92] *Ibid.*, ch.6.
[93] Memorial, Indonesia 1.
[94] Interview with a governamental official, 15 January 2021 (file with the author).
[95] Infra II.B.3.

ownership over the two islands.[96] Both parties denied the *terra nullius* status for the two islands. The court followed this, given the existence of local sultanates since the pre-colonial period.

Specifically, Indonesia's claims for territorial succession from the 1817 Dutch patronage contract with Sultan of Boelognan as well as subsequent contracts for territorial allocation in 1850 and 1879, were denied by the court as lacking geographical coverage for the two islands.[97] The court also denied Malaysia's claim for the chain of succession from Spain to the United States, then to the United Kingdom, finally succeeded by Malaysia as an independent State, for not clearly covering Ligitan and Sipadan.[98]

The two islands were defined as located in uncertain border areas between the two parties. Here, the court did not categorize the two islands as belonging to the original title holders, like local sultanates, nor defined the two islands as *terra nullius*. The court did not take a position to require legal basis for all corners of disputed geographical areas in order to legitimate colonial successions.[99] This is the issue of territorial expanse covered by a territorial title, rather than the issue as to whether a territorial title exists or not, as formulated in the 1986 ICJ Burkina Faso/Mali Frontier Dispute judgment.[100]

The court then set out the interpretation of Article IV of the 1981 Anglo-Dutch Convention as not defining territorial demarcation for the two islands. Article 4 is silent about the border allocation to the east of the island of Sebatik (Sebittick), close to North Borneo.[101] It provides the line of allocation (the 4°10'north latitude parallel) "shall be continued eastward... across the island of Sebittick."[102] The court interpreted this phrase as not covering the east to the island of Sebatik an "ordinary" and natural meaning of terms, following Article 31 of the Vienna Convention on the Law of Treaties.[103]

Indonesia claimed that the silence here assumed the existing intention by the parties to extend eastwards, based upon the purpose and objective of the Convention to bring about certainty and finality of border demarcation.[104] The

[96] Merits, para.99.
[97] *Ibid.*, para.113.
[98] *Ibid*.
[99] Seokyoon Huh, "Title to Territory in the Post-colonial Era Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)," European Journal of International Law 26, no.3 (2016): 714.
[100] ICJ Reports 1986, at 586.
[101] Merits, para.41.
[102] *Ibid.*, at 78, 5.22.
[103] *Ibid.*, para.2; Vienna Convention on the Law of Treaties 1155 UNTS 331 (entered into force 27 January 1980), art. 31.
[104] Memorial, Indonesia, 1, ch. V.

court adopted Malaysia's argument that the silence implied the lack of intention for extending the 4°10'north parallel line eastwards for border allocation.[105] This is an issue of case-by-case textual interpretation, the judgment of which depends upon comparative evaluation about facts and logics presented by each party.

Following the denial of basing treaties or contracts for geographical coverage, the court evaluated comparatively effective occupations by the two parties, as manifestation of State authorities, as had been set out in the 1923 Island of Palmas arbitration and the 1953 ICJ East Greenland case.[106] The Island of Palmas arbitration provided "continuous and peaceful administrative and regulatory activities" without a protest by a contesting party for a certain length of time, as a basis for territorial sovereignty.[107]

The East Greenland case judgment relativized the intensity of effective control when contested by other parties, emphasizing upon relative superiority of control in such cases.[108] It also confirmed the acceptance of "very little" evidence in the case of disputes on unhabitable areas.[109] The Ligitan and Sipadan judgment further emphasized the importance of "specificity", meaning that administrative control should not be general, but "specific" to disputed land areas.[110]

The court attached distinctive importance to Britain's administrative regulation on turtle and turtle egg management in 1930 as well as the designation of bird sanctuaries in 1933, both in Sipadan.[111] The court endorsed Malaysia's argument that these are administrative and regulative control as well as quasi-judicial activities.[112] Malaysia claimed that North Borneo authorities had settled turtle and egg collection disputes between local inhabitants, which was adopted by the court as evidence of acts à titre sovereign.[113] The court did not adopt Indonesia's argument that the settlement was personal-based, rather

[105] Merits, 117, para.52.

[106] *Ibid.*, para. 25; Island of Palmas (1928), RIAA, II, 829; Legal Status of Eastern Greenland (1933), PCIJ, Series A./B. no. 53; Giovanni Distefano, "La notion de titre juridique et les différends territoriaux dans l'ordre international [The Concept of Legal Title in Matters of Territorial and Maritime Disputes]," Editions A (Paris: Pedone, 1995). Constantinos Yiallourides, Disputed Waters and Seabed Resources in Asia and Europe (London and New York: Routledge, 2019). Zhenni Li, "International Intertemporal Law," California Western International Journal 48, no 2 (2018): 342.

[107] *Ibid.*, Palmas, 839.

[108] ICJ, Eastern Greenland, 141.

[109] *Ibid.*, 45 et 63.

[110] Merits, para.136.

[111] *Ibid.*, paras.143 et 144.

[112] *Ibid.*, para.143.

[113] Malaysia, Memorial, para.6.12.

than the manifestation of territorial sovereignty.[114]

The court, on the other hand, denied a sovereignty-manifesting characteristic for Dutch naval surveillance operations, such as naval patrols in the 1870s and HNLMS Lynx's patrol activities in 1921.[115] Unless other compelling factors exist, military or enforcement operations are normally State activities of high intensity. The court adopted Malaysia's allegation that the Dutch patrol activities had been sporadic and intermittent once-for-all "uneventful" matters.[116] Malaysia pointed out the sporadic nature of such patrol operations, as well as the lack of national flag-hoisting and detailed records in logbooks.[117] Indonesia may have had more skillful ways to present factual evidence for naval and enforcement activities.

Regrettably, the conclusion of the court on this point is not clear in its line of logic, merely stating that "it cannot be deduced from the report of the commanding officer of the Lynx or from any other document …that the naval authorities considered the waters…to be under the ownership of the Netherlands and Indonesia."[118]

The court also denied Indonesia's claim of their nationals' fishing and Boy Scout excursions in the islands, as private activities without the involvement of government authorities.[119]

The court, on the other hand, endorsed Malaysia's construction of lighthouses and navigational aids, as state authority manifestation.[120] International courts and tribunals generally attach less importance to the construction of lighthouses and navigational aids as sovereign actions, unless they are installed in "small islands", as was the case in the 1953 ICJ Minquiers and Ecrehos case and the 2001 Qatar/Bahrain case.[121] It is curious that international judicial judgements have adopted such a vague concept as a criterion.

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[114] Merits, para.143.
[115] *Ibid.*, para.130.
[116] *Ibid.*, para.139.
[117] Malaysia, Counter-Memoire, para.4.9
[118] *Ibid.*, Merits,117,para.139.
[119] *Ibid.*, para.140.
[120] *Ibid.*, para.147.
[121] Minquieres et des Ecrehos, France /Royaume-Uni (1953), ICJ Report, 1953, 70. Maritime Delimitation and Territorial Question between Qatar and Bahrain, ICJ Reports 2001, 40, at 99. Giovanni Distefano, Border Disputes and their Resolution according to International Law (Abu Dhabi: Emirates Centre for Strategic Studies and Research, 2005), 25.

The court here defined Ligitan and Sipadan as "small islands" thus granting evidential value to lighthouses.[122] The judgment described Sipadan as a small island with "approximately 0.13 sq.km".[123] This means, if it is converted to a square, 350 by 350 meters approximately. Some reports present Litigan as approximately 7.9 hectares (as a square, 250 by 250 meters approximately), and Sipadan as 16 hectares (400 by 400 meters).[124] The main island of Minquiers is 200 yards by 50 yards (350 by 85 meters), and that of Ecrehos is 300 by 150 yards (500 by 250 meters).[125] Minquiers and Ecrehos were, however, disqualified as "small islands." An island in dispute in the 2001 ICJ Qatar /Bahrain case is 12 by 4 meters, as qualified as "small island".[126] The court's application of the "small island" criterion may be criticized as discretionary and arbitrary.

The court denied the evidential value of the map which the Dutch authority submitted to its parliament in the ratification process of the 1891 Convention, as not clearly covering Ligitan and Sipadan.[127] On the other hand, the court accepted Malaysia's argument that the 1960 Indonesian archipelagic baseline regulation had not used the two islands as "outermost islands" for drawing archipelagic baselines.[128]

Indonesia defended itself with the argument that this lack of inclusion had derived from hastiness in legislation as well as political considerations to watch carefully the discussion in the Third United Nations Conference on the Law of the Sea where the concept and conditions for archipelagic waters were being debated.[129] Indonesia's defense proved its knowledge of the option for drawing archipelagic baselines. This drove the court further in favour of Malaysia's claim.

3. LESSONS FOR FURTHER JUDICIAL SETTLEMENT IN THE REGION

The Ligitan and Sipadan case demonstrated the importance of evidential presentations and reasonings in the evaluation of comparative effective occupation, *effectivités* comparatives. Indonesia and Malaysia engaged in "mirror arguments" in items for respective claims and defense, in order to

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[122] Merits, para.147.
[123] *Ibid.*, 634.
[124] Zainul Daulay, "Soverignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)," Law Reform 2, no.1 (2021): 119, 120.
[125] ICJ, Minquiers et Ecrehos, at 22.
[126] ICJ, Qatar and Bahrain, at 99.
[127] ICJ, Ligitan and Sipandan, paras.44 et 45.
[128] *Ibid*, para.130.
[129] ICJ, Ligitan and Sipadan, Counter-Memorial, Indonesia 1 (2000), para.7.54; Public Sitting held on Tuesday 4 June 2002, verbatim record, at 50.

prove relatively superior evidence and logics for *effectivités*.

The court was convinced by the British regulation for management of turtle and turtle eggs as well as the designation of a bird sanctuary.[130] The court applied the "small island" criterion, accepting lighthouse construction and navigation aids installment, in favour of Malaysia's claim.[131] The court then defined Indonesia's failure to include the disputed islands in its archipelagic baselines as evidence for not having been concerned about the territorial attribution of the islands.[132]

It may be natural that sovereign States with sensitivity to territorial integrity and natural resources allocation will feel hesitant in relying upon allegedly discretionary evaluative comparison by a third-party dispute settlement body.

From this viewpoint, Indonesia's management of domestic backlashes, following the judgment unfavorable to it, gives us thoughts and lessons, in tackling reticence about judicial settlement.

Relevant government officials explained to the author that the Indonesian government had been fortunate in responding to its domestic audience that the resort to litigation had been a policy choice by the previous presidential administration.[133] They also pointed out that, in the early 2000s period when the judgement was made, natural resources allocations, including oil and gas, in the Indonesia/Malaysia maritime border areas were not keenly recognized by domestic stakeholders.[134] This reduced the burden on the government to address criticism from domestic audience.

Indonesia's handling demonstrated that strong political leadership is needed for resorting to third-party dispute settlement procedures. In addition, the relatively less acute recognition of practical interests, including natural resources, can lead to tolerance for resorting to inter-State judicial processes. Whether these factors may arise in other disputes will not be certain. How countries like Indonesia may continuously recognize the advantage of third-party dispute settlement, despite the experience of being exposed to an unfavorable judgement, will be a test case for the prevalence of judicial settlement as an option in the region.

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130 *Ibid.*, Merits, para.144.
131 *Ibid.*, para.147.
132 *Ibid.*, para.130.
133 ICJ, Ligitan and Sipadan.
134 *Ibid*.

C. THE PEDRA BRANCA CASE (2008)

1. BACKGROUND AND MOTIVATION FOR JUDICIAL APPLICATION

The Pedra Branca, Middle Rock, and South Lodge case was a contentious case between Malaysia and Singapore on territorial sovereignty over islands and a low-tide elevation located in the south entry point of the Singapore Strait from the South China Sea.[135] These geographical figures are of importance in maritime traffic, thus crucial for navigational safety as well as maritime security. Clarity in their jurisdictional allocation is of wide-ranging interest for States and private parties in the region.

On Pedra Branca, as a main subject-matter of contention, a navigational lighthouse was established in 1851 by the British Crown Colony authority, then maintained and administered by the Singaporean authority.[136] Pedra Branca has approximately 8.56 square meters, with the size of 137 meters long and, on average, 60 meters wide.[137] Therefore, it can be categorized as a "very small island", by the preceding Ligitan and Sipadan case criteria.[138] According to that criterion, a small intensity of effective control can be counted, including the establishment and administration of a lighthouse.[139]

The Pedra Branca case was submitted based upon a special agreement by the parties in 2003.[140] It is noteworthy that the parties limited the scope of litigation to the territorial sovereignty of the geographical figures, separating the issue of maritime zone demarcation, leaving it to inter-governmental consultations through establishing a bilateral technical committee.[141] Maritime areas around Pedra Branca are not perceived as contentious zones in terms of natural resource excavation. The geographical figures in the areas are not a matter of keen nationalistic sentiment by the parties, either.

In early years of the 21st century, Malaysia has had territorial or maritime demarcation disputes and discrepancies with other parties, such as territorial sovereignty over Sara and Sarawak against the Philippines, as well as Spratly islands territorial and maritime claims against China and several neighboring States.[142] It should have been natural that Malaysia preferred a peaceful third-

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135 ICJ, Pedra Branca. Yoshifumi Tanaka, "Passing of Sovereignty, The Malaysia/Singapore Territorial Dispute before the ICJ," Hague Justice Journal 3, no.2 (2008).

136 ICJ, *Ibid.*, para.24.

137 *Ibid.*, para.16.

138 ICJ, Ligitan and Sipadan, para.147.

139 *Ibid*, para. 145.

140 Award, Annex, para.1.

141 Singapore Government Agency, Joint Press Statement (2 December 2010). Joint Press Statement (22 January 2020).

142 Mohammad Zaki Ahman and Amusafir Kelana, "An Inter-State Maritime Territorial

party settlement for a territorial sovereignty dispute mainly involving an interest of navigational safety and security.

The submission to the ICJ was decided at a top political level. As recorded, the then Malaysia Prime Minister stated that, though he was not confident about the substance, non-submission to the court would have been seen as the lack of confidence in the case.[143] It was the same Prime Minister who decided to discontinue in 2018 the submissions for revision and interpretation of the judgment, based upon "mutual respect."[144] This is an example of predilection for peaceful third-party settlement, rather than allowing for political escalation and confusion, damaging bilateral relations.

Relevant government officials explained to the author that the agreement by the both parties for litigation derived from the relatively tiny and peripheral position of the islands, which had less interests in terms of natural resources.[145] The deference of maritime demarcation issues to a technical committee was also counted as a facilitative factor for submitting the remaining issue of territorial sovereignty to judicial process.[146]

Legal experts in the both parties involved with the case shared with the author their self-confidence in winning the case for respective reasons.[147] Positive prospect for winning is necessary for motivating the parties to be subject to judicial process. Malaysia was wholeheartedly confident in its argument based upon existing treaties and contractual arrangements proving its sovereignty.[148]

Singapore relied exclusively upon the 1953 correspondence between colonial administrative authorities as evidence of the lack of sovereignty recognized by the Sultanate of Johor, succeeded by Malaysia.[149] Malaysian legal experts were continuously confident about Malaysian sovereignty, which led to the submission of revision of the case in 2017, resorting to new

Conflict," Jurnal Sosisohumaniora 7, no.2 (2005): 93.

143 *Ibid*.

144 Kamarulzaman Askandar and Cariervin Sukim, "Making Peace over a Disputed Territory in Southeast Asia," Journal of Territorial and Maritime Studies 3, no.1 (2016): 65.

145 Angaindrankumar Gnanasagaran, "Pedra Branca Dispute Reveals Disconnect between Malaysia and Singapore," The ASEAN Post, 12 January 2021, accessed 15 May 2023, https://theaseanpost.com/article/pedra-branca-dispute-reveals-disconnect-between-malaysia-and-singapore. "Malaysia accepts Ruling on Pedra Branca, says Mahathir," The Straits Times, 25 June 2019, accessed 15 May 2023, https://www.straitstimes.com/politics/malaysia-accepts-ruling-on-pedra-branca-says-pm-mahathir.

146 Interview with a governmental official, 15 May 2017.

147 *Ibid*., Interview with a governmental official, 22 April 2022.

148 Memorial of Malaysia I (2004).

149 Memorial of Singapore 1 (2004).

evidence, though finally discontinued in 2018.[150]

2. REASONING: ORIGINAL TITLE AND SUBSEQUENT STATE PRACTICE

In the exchange of submissions in the proceedings, Malaysia relied upon the existence of the Johor Sultanate as a territorial entity since the pre-modern period.[151] It also based its argument upon treaty settlements by the 1824 Anglo-Dutch Treaty for demarcation and the 1824 Crawfurd Treaty for territorial cession to the Singaporean Colonial Settlement, excluding islets located beyond 10 nautical miles from the coast on letters.[152] These were reinforced by the 1951 permission by the Sultanate granted to the Singaporean Settlement for establishing a lighthouse on allegedly Pedra Branca, as manifestation of the Settlement's territorial control.[153]

Singapore denied the Sultanate of Johor as territorial entity in the pre-modern period, defining its control as merely personnel allegiance to the Sultan, thus non-inhabited islands as Pedra Branca was outside of control.[154] Singapore also denied the two treaties in 1894 as not a contractual basis for territorial cessation.[155] It also denied the 1844 permission by the Sultanate as not covering Pedra Branca, based upon contextual interpretation.[156] Singapore based its claim upon state acts manifested in the process of establishing and managing the lighthouse with the time span from 1847 to 1851.[157]

Singapore then presented the correspondence in 1953 from the colonial authority of Singapore Settlement to an Administrative Officer in the Johor Protectorate as a basis for Johor's recognition of Singapore sovereignty over the island, along with subsequent administrative acts as evidence for effective controls.[158] The 1953 letter of response from the Johor authority provided that it did not claim the "ownership" of Pedra Branca.[159]

Singapore added in its Reply and oral hearings that Pedra Branca had been terra nullius at the timing of the lighthouse construction in 1847-1851.[160] This last-minute presentation contains difficulties in understanding its intention,

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150 Interview with a legal expert, 15 November 2016.
151 Memorial of Malaysia, para.36.
152 *Ibid.*, para. 50.
153 *Ibid.*, para.116.
154 Counter-Memorial of Singapore (2005) para. 3.2.
155 *Ibid.*, para.3.17.
156 *Ibid.*, para.5.4.
157 Memorial of Singapore, para.5.2-.
158 *Ibid.*, para.7.29.
159 *Ibid.*, 181.
160 Reply of Singapore (2005), 7.

given the general trend of court cases in disfavor of the terra nullius concept.[161] It may have been used as tactical argument in order to weaken Malaysia's treaty basis in 1824, playing up the meaning of alleged state actions after the lighthouse construction, including the 1953 correspondence.

The court denied the evidential value of treaty in 1824, due to the lack of clarity in letters, as well as the Johor's permission for lighthouse construction in 1844 for insufficient specificity.[162] Then, the court defined the original title by the Johor Sultanate over Pedra Branca and South Lodge, relying upon the general geographical scope covering these islets, as well as the lack of competing claims.[163] The terra nullius characterization was denied, due to the status of the islands as navigational hazards which should have been known or discovered.[164] Nonetheless, these reasonings favored Singapore by lowering its burden of proof to counter Malaysia's territorial claim without treaty or contractual basis.

The court accepted subsequent State practice as evidence for Singapore's sovereignty, including the 1953 correspondence.[165] It also enumerated Singapore's actions as *acts à titre* sovereign without Malaysia's protest: that is shipwreck investigation in the area, permission for Malaysian authorities' visits to the island, installation of military communication equipment on the island, public tender advertisement for reclamation projects, and Singapore's official report including the islands in an attached map, as well as Malaysia's official map excluding the islands.[166]

The court's reasoning showed that the 1953 correspondence could be defined as evidence for the recognition by the Johor authority of Singapore's sovereignty, as described as "ownership," over the island. Given the relative evidential weakness of Johor's original title, as opposed to treaty settlement, the 1953 recognition seems to be sufficient to rebut the Malaysian arguments. The court may have elaborated further evidential facts in order to complement its reasoning in favour of Singapore. However, this combined presentation blurred the core argument for authorizing Singapore's sovereignty.

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[161] Huh, "Title to Territory," 717. Marcelo Hohen," Original Title in the Light of the ICJ Judgment on Sovereignty over Pedera Branca/Pulau Batu Putech, Middle Rocks and South Ledge," Journal of the History of International Law 15 (2013):151. Dieter Dörr, "The Background of the Theory of Discovery," American Indian Law Review 38, no.2 (2014): 486. Randall Lesaffer, "Argument from Roman Law in Current International Law," European Journal of International Law 16, no.1(2005): 27.

[162] ICJ, Pedra Branca, para.145.

[163] *Ibid.*, para.117.

[164] *Ibid.*, para.61.

[165] *Ibid.*, paras.220, 222, et 223.

[166] *Ibid.*, para.231.

Potential parties for third-party judicial settlement on territorial disputes may have got an impression that the eternal presentation of facts and evidence for State control and administration would decide the case, thus tactical presentation and debate will count. The court should reasonably avoid arbitrary and discretionary countenance in its reasoning. It should rather clarify the crucial factor for deciding territorial disputes, as well as clearer rules for allocating and measuring the burden of proof.

D. THE SOUTH CHINA SEA ARBITRATION (2016)

1. BACKGROUND AND SIGNIFICANCE

The South China Sea arbitration award on merits on 12 July 2016 was made in the compulsory arbitration procedures under the 1982 UNCLOS, instituted by the Philippines on 22 November 2013, against China's maritime claims and activities in contested maritime zones.[167] The litigation was engaged directly in response to China's forceful control over Scarborough Shoal off the coast of the Philippines on 18 June 2012, following the China-Philippine stand-offs triggered by China's obstruction to Philippines' fishery activities in the surrounding maritime area.[168]

The litigation was also triggered widely by China's law enforcement operations and large-scale reclamation activities in overlapping maritime areas.[169] Thus, the background situation was similar to the ICJ Preah Vihear cases, where the plaintiff resorted to third-party dispute settlement procedures for eliminating military and enforcement control in disputed land areas.[170]

The Philippines' litigation was further based upon its concerns about China's consistent but intermittent territorial and maritime advancement in the South China Sea.[171] On 19 January 1974, China gained control over the Paracel Islands following military confrontations with South Vietnam, currently contested by the Socialist Republic of Vietnam: in 1988, China commenced occupation over seven geographical features in the Spratly Islands which had been controlled by Vietnam; and in 1995, China took the control of Second

[167] PCA, South China Sea, Award. Zhenguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea," American Journal of International Law 107, no.1 (2013): 106. Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea," American Journal of International Law 107, no.1 (2013): 142.

[168] Award, at 11. Zhou Fangyin, "Between Assertiveness and Self-restrain," International Affairs 92, no.4 (2016): 869.

[169] Award, at 67.

[170] Fangyin, "Between Assertiveness and Self-restrain," 869. Mark Raymond and David A. Welch, "What's Really Going on in the South China Sea?" Journal of Current Southeast Asia Affairs 4, no.2 (2022): 214.

[171] Bill Hayton, "How to Solve the South China Sea Disputes," ISEAS, no. 25 (2022): 6.

Thomas Shoal from the Philippines.[172]

Then, China temporarily took more non-confrontational approach for some period, exemplified by the 2000 China-Vietnam maritime demarcation agreement on the Gulf of Tonkin, along with agreements on fishing and common exploration/development zones for natural resources.[173]

In the 2010s, China reactivated its State actions for strengthening control over maritime zones, such as interference with Vietnam/Philippine seismic surveys in their respectively claimed EEZs in 2011, and the issuance of tenders by the China State energy company for offshore energy exploration in an EEZ claimed by Vietnam.[174]

In the same period, China intensified its intrusion to maritime areas claimed by Malaysia, as the southern end-post of the self-claimed "nine dash line" zone, covering virtually the whole South China Sea, as the dispatch of massive fishing boats, escorted by coast guard and naval ships.[175] China's large-scale reclamation and artificial island building in its occupied geographical features intensified in the same period, resulting in concerns amongst claimants in the region, including the Philippines.[176]

The litigation was also prompted and enabled by the increased clarification by China about its claims, triggered by its note verbales submitted in the proceedings of continental shelf extension in the UN Commission on the Limits of the Continental Shelf, under Article 76(8) UNCLOS.[177] China's note verbales on 7 May 2009, following the joint Philippines/Vietnam and Vietnamese submissions on extended continental shelf included China's claims in the South China Sea consisting of, first, "sovereignty over the islands and the adjacent waters," as well as, second, "sovereign rights and jurisdiction over the relevant waters, seabed, and subsoils, as widely known by the international community."[178] The note verbales were attached by the map

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[172] Manoj Joshi, "The South China Sea Disputes," ORF Occasional Papers, August 2016. Robin Gonzales, "The Spratly Islands Dispute," Thesis, University of Nevada, 2014, 33. M. Tailor Fravel, "China's Strategy in the South China Sea," Contemporary Southeast Asia 33, no.3 (2011): 292. Ben Dolven, Mark E. Manyin, Shirley A. Kan, "Maritime Territorial Disputes in East Asia," Congressional Research Paper, 2014, 8. Kazuhiro Nakatani, "The South China Sea Arbitration Award and the Rule of Law in the Seas," Japan Review 1, no. 2 (2017): 2.

[173] Benoît de Tréglodé, "Maritime Boundary Delimitation and Sino-Vietnamese Cooperation in the Gulf of Tonkin (1994-2016)," China Perspectives 3 (2016): 35.

[174] Fangyin, "Assertiveness and Self-restraint," 871.

[175] *Ibid*.

[176] Dolven, Manyin, Kan, "Maritime Territorial Disputes in East Asia," 10.

[177] UN Document, CML/17/2009, 7 May 2009. UN Document, CML/18/2009, 7 May 2009.

[178] *Ibid*.

with dashed lines which seemingly indicated the scope of China's claims.[179]

China's subsequent note verbale on 14 April 2011, following the Philippines' response to China's first note, added that China's sovereignty and related rights and jurisdiction were "supported by historical and legal evidence."[180] China had already proclaimed an EEZ and continental shelf, based upon the 1982 UNCLOS in its 1998 Exclusive Economic Zone and Continental Shelf Act, which included a provision stating that China's "historic rights" are not affected by its UNCLOS-compatible maritime claims.[181] Therefore, these notes and instruments showed China's maritime claims beyond territorial seas, consisting of UNCLOS-based claims for EEZs and continental shelves, as well as, in parallel, historical rights for sovereign rights and jurisdiction, which are seemingly analogous, in terms of contents to EEZ/continental shelf claims under UNCLOS.[182]

The upgraded clarity of China's claims led to the Philippines' submission which narrowed down subject matters, enabling the lifting of jurisdictional barriers under the UNCLOS procedures.[183] China made a further clarification on jurisdiction and admissibility by its Position Paper submitted on 11 December 2014.[184] The Position Paper was, together with the letter on 8 December 2015 by the Chinese Ambassador to the Netherlands, designated by the Tribunal as equivalent with preliminary objections, which further facilitated procedural screening in the litigation.[185]

China's reservation on 6 February 2009 to Japan's extended continental shelf, by referring to the eligibility of Okinotori-shima, an island with high-tide elevation, for continental shelf, also contributed to substantive arguments on the eligibility of artificial islands constructed by China on low-tide elevations and submerged marine areas in the South China Sea.[186] Indonesia reacted

[179] *Ibid*.

[180] UN Document, CML/8/2011, 14 April 2011.

[181] The Exclusive Economic Zone and Continental Shelf Act (1998), art.14.

[182] Sophia Kopela, "Historic Titles and Historic Rights in the Law of the Sea in the light of the South China Sea Arbitration," Ocean Development and International Law 48, no. 2 (2017): 181.

[183] Award, at 13.

[184] 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 the Philippines (7 December 2014), accessed 1 May 2023, http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm.

[185] Award on Jurisdiction and Admissibility (2015), at 23.

[186] UN Document CML/2/2009 (9 February 2009). Robert C. Beckman and Tara Davenport. "CLCS submissions and claims in the South China Sea," Paper, The Second International Workshop The South China Sea: Cooperation for Regional Security and Development, Vietnam 2010, 9.

to China's reservation in its note verbale on 8 July 2010 as contradictions to China's own claims.[187] These arguments were reflected in the Tribunal's deliberations in the merits phase.[188]

The South China Sea arbitration award enhanced clarity and predictability on both procedural and substantive issues, providing basis for policy decisions for relevant parties in the region. The award set a precedent on the scope of matters to be seized by the court or tribunal, namely jurisdictional limits deriving from territorial sovereignty as well as the exceptions on sea boundary delimitation. The award clarified the legal evaluation of historic claims and the island status under Article 121(3) UNCLOS.

In the screening on admissibility, the Tribunal prescribed the application of Article 282 UNCLOS on obligations under general, regional or bilateral agreements for dispute settlement, as well as Article 283 UNCLOS on obligations to exchange views.[189] It also set out the scope of third parties' participation as a prerequisite for the proceedings.[190] These clarifications provide useful guidelines for potential parties.

There is an argument that, given China's rejections against the legally-binding award, the arbitration is of practically negligible significance in resolution for South China Sea disputes, which have wider multi-faceted political and security characteristics.[191] Legal dispute settlement is inherently limited in its scope. Judicial judgments or arbitral awards will contribute to and facilitate the whole settlement by showing legally-binding norms, leading to the change of course for State actions and policies, as well as influencing relevant States' way of thinking.

The South China Sea Arbitration award made immediate effects upon China's actions, allowing for Philippine traditional fishing rights in Scarborough Shoal.[192]China refrained or reduced drilling and exploration activities in relevant maritime zones.[193] During the hearing sessions in the arbitration proceedings, China continued large-scale reclamation and artificial island building, which was later judged by the Tribunal as obstruction and

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[187] Indonesia, Note No.480/POL-703/VII/10 (8 July 2010).
[188] Award, at 175.
[189] UNCLOS, art. 121 and art. 283.
[190] Award on Jurisdiction and Admissibility, at 71.
[191] Statement of the Ministry of Foreign Affairs of the People's Republic of China (12 July 2016) para.2.
[192] Paul Reichler, "The South China Sea Arbitration and Beyond," Japan Review 3, no. 2 (2019): 4.
[193] Raymond and Welch, "What's Really Going," 14.

aggravation against tribunal settlement.[194]

China declared the completion of such activities in June 2015 before the final award.[195] On 29 March 2014, China demonstrated self-restraint in Second Thomas Shoal controlled by the Philippines, by leaving Philippine patrol and fishing activities and their rotating replacement.[196] In May 2014, China started the installation of deep water drilling rigs in waters controlled by Vietnam, and after collisions between China and Vietnam, the rigs were removed in July.[197]

On China's actions and policies wider in the South China Sea after the awards, it maintains annual fishing moratorium, covering most of contested maritime areas, as manifestation of China's attempt to reserve control over fishery resources in the South China Sea.[198] However, China generally demonstrates modest reactions by modifying its behavior.[199] China stopped asserting the "nine-dash lines" based upon historical rights, as denied by the awards.[200] Chinese agencies then use modified justifications such as offshore or outlying archipelagic baselines, based upon, still, alleged historical evidence.[201]

On the other hand, China still advocates the eligibility of artificial islands upon low tide elevations and submerged features for maritime claims.[202] Thus, China partially complies with the awards, while formally rebuffing the legitimacy and validity of the arbitration proceedings.

China also currently refrains from controversial measures which may create further backlashes in the region; First, it is reported that in August 2017 China abolished prepared regulations for setting straight baselines surrounding

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194 Award, 437.

195 Bing Ling, "China's Attitude to the International Legal Order in the Xi Era: The Case of South China Sea Arbitration," Sydney Law School Research Paper No. 19/04 (2019): 5.

196 Fangyin, "Assertiveness and Self-restraint," 875.

197 Feng Zhang, "Chinese Thinking on the South China Sea and the Future of Regional Security" in US-China Competition and the South China Sea Disputes, Huiyun Feng and Kai He eds. (London and New York: Routledge, 2018), 48.

198 Audrye Wong, "More than Peripheral," The China Quarterly 235 (2017): 745, which reports that the fishery moratorium was meant by the Chinese central government to stem local fishery operations reaching sensitive marine areas.

199 Fangyin, "Assertiveness and Self-restraint," 875.

200 *Ibid*.

201 National Institute for South China Sea Studies, "A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration," Asian Yearbook of International Law 24 (2018):155.

202 United States Department of State, "People's Republic of China: Maritime Claim in the South China Sea," Limits in the Sea, no.150 (2022).

seven geographical features in the Spratly Islands which it controls. Second, China has stopped short of instituting an air defense identification zone over the South China Sea, not following the precedent in the East China Sea which took place on 23 November 2013.[203]

China's actions and restraints are not totally consistent, especially in the passage of time, though. In 2021, China intensified its fishing boats' intrusion to the sea zones surrounding the Natuna Islands, Indonesia's territories, with the escort of coast guard and naval ships.[204]

2. JURISDICTION AND ADMISSIBILITY ISSUES: SEPARATING MARITIME ENTITLEMENT FROM TERRITORIAL SOVEREIGNTY

The Tribunal lifted jurisdictional barriers in its award on jurisdiction and admissibility on 29 October 2015, responding to China's objections compiled in its Position Paper formally submitted on 7 December 2014.[205] The objections included, first, the characteristic of the dispute as a territorial sovereignty matter which is not covered by the Convention unless except for some limited provisions on historic titles and historic bays.[206] Second, it consists of the exclusion of maritime boundary delimitation as exempted by China's declaration, as a governmental official statement, in 2006.[207]

The exclusion of territorial sovereignty disputes is not explicitly prescribed under the Convention. However, deriving from the textual lack of coverage under the Convention, such disputes are not included in the subject-matter of disputes "concerning the interpretation or application of the

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[203] Chang Ching, "Why is there no South China Sea Air Defence Identification Zone?" SCSPI, accessed 15 May 2023, http://www.scspi.org/en/dtfx/why-there-no-south-china-sea-air-defense-identification-zone. Mike Yeo, "Analysis: Can China Enforce a South China Sea Air-Defence Identification Zone?" USNI News, 18 July 2016, accessed 15 May 2023, https://news.usni.org/2016/07/18/analysis-can-china-enforce-south-china-sea-air-defense-identification-zone. Ankit Panda, "Is China Really About to Announce a South China Sea Air Defence Identification Zone?" The Diplomat, 1 June 2016, accessed 15 May 2023, https://thediplomat.com/2016/06/is-china-really-about-to-announce-a-south-china-sea-air-defense-identification-zone-maybe/. Chisako Masuo, Chugoku no Kodo-Genri [China's Behavioral Principles] (Tokyo: Chuko-Shinsho, 2019), 253.

[204] "Bakamla: Ribuan Kapal Asing Masuki Laut Natuna [Indonesian Maritime Security Agency, Thousands of foreign ships enter Natuna Sea]," CNN Indonesia, 13 September 2021, accessed 1 May 2023, https://www.cnnindonesia.com/nasional/20210913151110-20-693598/bakamla-ribuan-kapal-asing-masuki-laut-natuna.

[205] Award on Jurisdiction and Admissibility, at 2.

[206] Position Paper, China (7 December 2014), para.4, accessed 1 May 2023, http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm.

[207] United Nations, Division for Ocean Affairs and the Law of the Sea, Ocean & Law of the Sea, Declarations and statements (New York, updated 2022).

Convention."[208] Article 298(1)(a)(i) excludes explicitly "any unsettled dispute concerning sovereignty over…land territory" from compulsory conciliation under the Convention.[209] Arbitration procedures have higher intrusion to State sovereignty by legally-binding awards, thus naturally the exemption shall apply to the arbitration.

On territorial sovereignty, the Tribunal judged China's claims as historic rights over maritime resources, as distinct from historic titles for sovereignty. Historic rights as claimed by China concerns maritime claims with exclusivity short of sovereignty, limited to sovereign rights and jurisdiction on maritime resources, not including the freedom of navigation and overflight.[210] This is proclaimed by China itself.[211]

China claims its sovereignty over islands and their adjacent waters, so there might be a possibility that "adjacent waters" include the whole South China Sea. Here, China's claims had not been clear. The Tribunal referred to China's measures and actions, such as the oil excavation bidding in 2012 as well as the objection to Philippine award for petroleum blocks in 2011, beyond 200 nautical miles from any geographical features, and within China's "nine dash lines".[212] These measures proved that China's claims were beyond rights provided under the Convention.

The Tribunal also pointed out that China's designation of straight baselines around the Paracel Islands and Hainan under the 1996 Law on Territorial Waters and Contiguous Zones Act, as evidence for limiting territorial waters to 12 nautical miles from these baselines, precluding the South China Sea-wide territorial and internal water claims.[213]

China may have had different positions that, though they own territorial maritime claims in the whole sea, they refrained from the exercise of such rights, as a policy choice. The Tribunal saw no factual evidence that China exercised territorial sovereignty rights over the whole South China Sea in a continuous and peaceful manner without protest from other States, based upon the established international court and tribunal jurisprudence.[214]

The Tribunal denied the legal legitimacy of China's historical rights

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[208] UNCLOS, art. 288.
[209] *Ibid*., art. 298.
[210] Position Paper, China (7 December 2014), para. 28, accessed 1 May 2023,http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm .
[211] Award, at 67.
[212] *Ibid*., at 86.
[213] *Ibid*., at 91.
[214] *Ibid*., at 114.

over maritime resources in the merit award.[215] The Tribunal also denied the eligibility of geographical features in the South China Sea for EEZs and continental shelves under Article 121(3).[216] With these substantive judgments, it was concluded that the issue of maritime delimitation had disappeared, since there are no overlapping maritime zones with the Philippines.[217]

The Tribunal followed the established procedural sequence that jurisdictional issues can be judged in the merit phase unless the objection does not possess an exclusively preliminary character, as prescribed in its Rules and Procedure.[218] International courts and tribunals do not adopt the strict distinction between procedural and substantive matters, following the common law legal traditions. This may be unfamiliar for legal experts in the region who generally follow the code-based continental legal approach. Under this approach, jurisdictional requirements shall be prerequisite for proceeding to the merit phase, thus no substantive issue is addressed in the preliminary phase.

China claimed that the subject-matter of the Philippine claims were, as a matter of truth, territorial sovereignty and maritime delimitation, thus excluded from the Tribunal's jurisdiction.[219] The issue of historic rights over maritime resources, as claimed by China, was logically and practically separated by territorial sovereignty, since such rights were not claimed on the basis of geographical features, but based upon historical evidence. The Tribunal had no bearings upon territorial ownerships over geographical features.

From this viewpoint, the South China Sea arbitration awards can be distinguished from the 2015 Chagos Arbitration, in which the territorial ownership was exactly the subject-matter of the submission, though it took the form of defining "the coastal State" as designator of the maritime protection zone.[220] The Chagos award proclaimed that, in deciding upon exclusions from subject-matters as sovereignty objections, relative weight should be examined as to which extent territorial sovereignty is concerned, thus the sovereign matter is predominant, not with incidental connection.[221] This benchmark is to examine whether the territorial sovereignty element is incidental or ancillary

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[215] *Ibid*., at 112.
[216] *Ibid*., at 175.
[217] *Ibid*., at 261.
[218] PCA, South China Sea, Rules and Procedure (2013).
[219] Position Paper, China (7 December 202014), para.4, accessed 1 May 2023, http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm.
[220] PCA, Chagos Marine Protected Area, PCA 2011-03, para. 229.
[221] *Ibid*., para. 220.

to the dispute or not.[222] Such an approach is not exactly the reflection of the UNCLOS provisions, where any element which will relate decisions on territorial ownership shall be exempted, following the State's will to reserve sovereignty matters from third-party compulsory dispute settlement.

The denial of China's claims on historical rights and the eligibility of geographical features under Article 121(3) UNCLOS will consequentially affect maritime delimitation between China and the Philippines. China has lost all legitimacy for maritime claims beyond 12 nautical miles from geographical features, thus, as consequence, the Philippines' EEZ and continental shelf persist. Thus, there is no more need for maritime zone delimitation. The award affects the exercise of maritime delimitation. This is a consequence, not an element for which the jurisdiction by the Tribunal was denied a priori.

There is an issue that the judgment on low-tide elevations or submerged areas may directly concern territorial sovereignty, since designation on low-tide elevations will deny sovereignty completely, thus the State will lose its sovereignty.[223] The examination of low-tide elevations is a merit issue, and albeit a factual issue, a matter subject to the Tribunal's formal adjudication.

If the decision about low-tide elevations is excluded from jurisdiction, there will be a paradox. If geographic feature X is designated as low-tide elevation in the merit phase, the Tribunal will lose jurisdiction, thus the territoriality of geographical feature X is not denied and remains intact, though, as a matter of fact, it is not eligible. This should be an issue which needs legislative treatment, for instance, the court or tribunal may be authorized to refer to an enquiry committee, constituted by scientific and technical experts, to examine authoritatively the status of geographical feature X from scientific and factual basis.[224]

On jurisdictional matters, the Tribunal clarified the scope of law enforcement exclusions under Article 298 as those related to marine science research and fisheries, as provided under Article 297(2) and (3), following the 2013 Arctic Sunrise Arbitration award.[225] The Tribunal also made it clear

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[222] Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention," International Journal of Marine and Coastal Law 32, no. 2 (2017): 332. Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," International and Comparative Law Quarterly 46, no. 1 (1997): 37, 44.

[223] Position Paper, China (7 December 2014), para.23, accessed 1 May 2023, http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm; Stefan Talmon, The South China Sea Arbitration: Jurisdiction, Admissibility, Procedure (Brill, 2022), 309.

[224] UNCLOS, art. 289.

[225] Award on Jurisdiction and Admissibility, at 131.PCA, Arctic Sunrise, Award on Jurisdiction, PCA 2014-02, para.76.

that the law enforcement exclusions under Article 298 shall apply to the coastal State's enforcement in its EEZ, not to non-coastal State's enforcement activities in the coastal State's EEZ, as the case of China's activities within the Philippines' EEZ.[226]

On the issue of admissibility, the Tribunal followed the Chagos arbitration award that the requirement for prior exchange of views by the parties under Article 283 shall not need particular formality for such exchange.[227] The Tribunal denied China's objection under Article 283 to prioritize other agreements as the 2002 China/ASEAN Declaration on the Conduct of Parties in the South China Sea, which includes a provision to "undertake to" resolve disputes through consultations and negotiations.[228] The Tribunal denied the legally-binding character of this provision, thus justified the Philippines' submission to the arbitration proceedings.[229]

3. SUBSTANTIVE ISSUES: HISTORIC RIGHTS AND THE ISLAND STATUS

The Tribunal denied in its merit phase China's claims based upon historical evidence for control and manage natural resources in the South China Sea, beyond territorial and internal waters if China's territorial claims over geographical features are sustained.[230] China's historic claims were dismissed under the 1982 UNCLOS which has limited provisions on historic titles and rights as well as under the established customary international law.[231]

Historic claims tend to be abused by the State, with the intention to be exonerated from the burden to present detailed facts and evidence. China frequently uses State practice, such as discovery, navigational records, map description, fishing practice during the Han and Ming Dynasties, before the consolidation of sovereignty concept under modern international law.[232] The use of term "time immemorial" is meant to defy evidence for State actions in the modern times presented by contesters.

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[226] Award on Jurisdiction and Admissibility, at 145.
[227] *Ibid*., at 112. PCA, Chagos, Award, paras. 71, 72, and 75.
[228] Position Paper, China (7 December 2014), 30, accessed 1 May 2023,http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm .
[229] Award on Jurisdiction and Admissibility, at 106.
[230] Award, at 67. Christopher R. Rossi, "Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea Arbitration,"Cornell International Law Journal 50, no. 2 (2017): 231. Kopela, "Historic Titles and Historic Rights," 183.
[231] Award, at 98.
[232] Position Paper, China (7 December 2014) para.4, accessed 1 May 2023,http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm.

The Tribunal judged that the 1982 UNCLOS shall supersede the preceding norms and practices.[233] It also provided that customary international law requires the burden of proof upon claimants, demanding continuous and peaceful State control without protest from contesting parties.[234] This can be a deterrence to the abuse of historical claims. China's early practices of natural resource control were considered to be lacking in clarity and specificity, then could be categorized as States' rights and interests on the high seas.[235]

There may be an argument that the reference to the established customary international law was redundant and not necessary, since the evaluation based upon the 1982 UNCLOS was sufficient do deny China's historic claims.[236] The Tribunal sustained this, based upon the relevance of customary international law evaluation, as well as the need for "completeness" of dispute settlement.[237]

Article 288 UNCLOS provides the Tribunal's jurisdictional coverage as disputes "concerning the interpretation or application of the Convention."[238] The judgment on the compatibility of State actions with customary international law, along with UNCLOS provisions, can be categorized as disputes concerning the application of the Convention. In handling disputes and discrepancies, practitioners refer to and debate on specific UNCLOS provisions, as well as how rules on the same subject-matters of UNCLOS provisions are treated under customary international law.

As an issue of substance, the Tribunal clarified the application of the island status requirements under Article 121 UNCLOS to geographical features in the South China Sea.[239] It reiterated and judged the non-eligibility of low-tide elevations for territorial and maritime claims under the Convention.[240] The Tribunal also applied the term, "rocks which cannot sustain human habitation or economic independence of their own," as unqualified for owning EEZs and continental shelves under Article 121(3).[241] In consequence, the Tribunal concluded that all geographical features in the South China Sea are either low-tide elevations or rocks which cannot sustain human habitation or economic independence of their own.[242]

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233 Award, at 97.
234 *Ibid*., at 112.
235 *Ibid*., paras. 270, 271.
236 China's Position Paper, para. 4-.
237 Award, para.263.
238 UNCLOS, art. 288.
239 Award, para 481.
240 *Ibid*., at 119.
241 UNCLOS, art.121.
242 Award, at 204.

Article 121 is not clear in its logical structures on text. The Article makes it clear to define an island as opposed to low-tide elevations and submerged marine areas. It also provides, as logical deduction from the text, that rocks are islands' sub-category, thus some islands are designated as rocks.[243] The definition and characteristics for rocks are not clear, but presumed that rocks are designated by referring to their size, geological characteristics, the surrounding environment, functions, as well as relevant human practices. The Tribunal did not present the definition of "rocks" in the award.[244] It will presumably be clarified through the accumulation of cases and legislative consultations.

It is also becoming necessary to clarify the scope of islands which cannot sustain human habitation or economic independence of their own, as subjects which are increasingly relevant in view of physical degradation due to the sea level elevations.[245]

The Tribunal judged the status of geographical features which had not been included in the Philippines's submissions, such as Itu Aba and some other features in the Spratly Islands, as not qualified for EEZs and continental shelves under Article 121(3) UNCLOS.[246] The Tribunal used Itu Aba and other features as samples for all geographical features in the South China Sea, in light of their significance compared to the others.[247]

As a matter of judicial procedures and practice, judgment on subject matters which were not submitted by the claimant are not an operative part of the award, but part of factual and legal reasoning, following Article 10 to Annex VII to UNCLOS.[248] The Tribunal used the term "conclude" for defining the status of Itu Aba and other features, but the correct term should have been "consider," given its non-operative character.[249]

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[243] UNCLOS, art.121.
[244] Award, para. 481, 482.
[245] Duncan French, "Case Note: In the Matter of the South China Sea Arbitration: Republic of Philippines v People's Republic of China, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award of 12 July 2016," Environmental Law Review 19 (2017): 48. Natalie Klein, "Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea," in Resolving Conflicts of Law: Essays in Honour of Lea Brilmayer, C. Giorgetti and Natalie Klein, eds. (Brill, 2019), 14.
[246] Award, at 237.
[247] *Ibid*., para.626.
[248] Annex VII to UNCLOS, art.10, which provides that "[t]he award of the arbitral tribunal shall be confined to the subject-matter of the dispute."
[249] Award, para. 622 and 625.

Following these conclusions by the Tribunal on China's historic rights and the island status in the South China Sea, China's obstruction of Philippine fishing activities was judged to have infringed upon the Philippines' sovereign rights in its EEZ (Articles 56, 58(3), and 77 UNCLOS).[250] China's large-scale reclamations and artificial island constructions were found to have breached China's obligations to protect and preserve the marine environment (Articles 192 and 194(5) UNCLOS), as well as not to aggravate and extend the ongoing disputes before the Tribunal (Articles 279, 296, and 300, as well as general international law).[251]

4. IMPLICATIONS FOR DISPUTE SETTLEMENT IN THE REGION

The South China Sea arbitration made limited but meaningful contribution to the progress of dispute settlement relating the South China Sea, by clarifying legal rules on both procedures and substance. In particular, the clarification for the scope of exceptions regarding sea boundary demarcation enhanced the clarity and predictability for the State's decision upon resort to third-party litigation. The Tribunal provided that maritime entitlement can be judged independently from territorial sovereignty and maritime demarcation.[252]

Thus, for instance, when State A claims EEZs and continental shelves or their equivalent by allegedly illegal offshore archipelagic baselines, artificially-build geographical features on low-tide elevations or submerged marine areas, or any historical basis, these claims can be seized by the court or tribunal, regardless of territorial ownership and independently of opposite or adjacent States' EEZ or continental shelf in existence.

The award on merits of the South China Sea arbitration may facilitate policy consultations amongst relevant parties surrounding the South China Sea, given the denial of eligibility for EEZs and continental shelves from all geographical features in the South China Sea.[253] The claimants may well engage in maritime delimitation endeavors, based upon EEZs and continental shelves measured from their coastal lines in accordance with the Convention. This is just occurring. In December 2022, Indonesia and Vietnam agreed on the delimitation of their EEZs in accordance with UNCLOS, with no considerations on China's claims.[254]

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[250] *Ibid*., at 319.
[251] *Ibid*., at 437.
[252] *Ibid*., at 85.
[253] *Ibid*., at 204.
[254] Sebastian Strangio, "After 12 Years, Indonesia and Vietnam Agree on EEZ Boundaries," The Diplomat, 23 December 2022, accessed 15 May 2023, https://thediplomat.com/2022/12/after-12-years-indonesia-and-vietnam-agree-on-eez-boundaries/.

There exist territorial ownership disputes, like the state of Sabah in North Borneo in Malaysia, claimed by the Philippines. Since the Philippines does not claim EEZ from Sabah as baselines, relevant parties may undertake consultations on EEZ delimitation, while shelving territorial sovereignty issues.

The Tribunal's denial of maritime eligibility from all geographical features leads to the reservation of a "high sea pocket" at the center of the South China Sea, beyond 200 nautical miles from any party's coastal baselines.[255] Relevant States and stakeholders shall be allowed to exercise the full-fledged freedom of navigation and overflight, as well as laying submarine cable and pipelines. Furthermore, natural resource exploitation can be assured, unless extended continental shelf claims by coastal States are recognized within the "high sea pocket".

Finally, on a de facto basis, the award may have some influence upon territorial sovereignty disputes over geographical features without prejudging final legal settlement. The Tribunal denied the sufficiency of effective control by China over maritime areas in the South China Sea in both pre-modern and current periods.[256] This applies, as a matter of fact, to some land features. Territorial ownership disputes shall be settled by the comparison of State actions for controlling the given features, as well as any fact of inter-State agreements or one party's recognition or acquiescence.[257]

Records of occupation may be evaluated in light of continuous and peaceful control without protest from contestants.[258] Taiwan's occupation of the Pratas Islands and Itu Aba as well as China's occupation of Woody Islands in the 1940s may be examined, based upon those benchmarks. Other recent occupations since the 1950s through the 1970s and 80s to 90s are either occupations by use of force without creating territorial titles, or actions protested by contestants.[259]

Predictably, judicial or arbitral procedures on land territorial disputes would become a legal battle for presenting sporadic administrative actions as evidence of control, or other claimants' actions or non-actions which may be

[255] Storey and Lin, "South China Sea," 21.
[256] Award, at 112.
[257] Supra, II.2 et 3.
[258] PCA, Palmas.
[259] The State Council, China, China Adheres to the Position of Settling Trough Negotiation the Relevant Disputes Between China and the Philippines in the South China sea (White Paper), para.68, which states that "the international community does not recognise effective control created through occupation by force," accessed 1 May 2023, http://english.www.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm

regarded as recognition or acquiescence.

Possible legal consequences may be the proclamation of being unjudgeable, like the evaluation of some sporadic State actions in the ICJ Pedra Branca case.[260] This would well lead to political settlement or cooperation schemes without prejudice to territorial ownership.

IV. PRESCRIPTIVE ANALYSIS ON LEGAL DISPUTE SETTLEMENT IN ASIA

A. TRENDS FOR LEGAL SETTLEMENT IN AND AROUND THE SOUTH CHINA SEA

As has been seen in the preceding sections, Southeast Asian countries, particularly those surrounding the South China Sea have been increasing their resort to third party dispute settlement procedures, including litigation and compulsory conciliation, since the beginning of this century.

There are two patterns: one is what may be referred to as a genuine trend for the conscious use of legal procedures, either judicial proceedings or arbitration by like-minded and similarly-characterized States in the region, notably Indonesia, Malaysia, and Singapore[261].

Indonesia and Malaysia instituted by mutual agreement for the 2002 ICJ Ligitan and Sipadan Case, then Malaysia and Singapore commenced the 2008 ICJ Pedra Branca Case. Both treated high-staked issues on territorial sovereignty. The 2005 Land Reclamation arbitration under Annex VII to UNCLOS between Malaysia and Singapore was also amicably commenced with relatively shallow preliminary objections by Singapore.[262]

Three States share almost all attributes and backgrounds which are considered to be factors favorable for legally-binding third-party dispute settlement procedures: common interests as maritime and transit nations, based upon trade and investment, with a strong aversion to military solutions, with middle –level status situated in the neighborhood.[263]

[260] ICJ, Pedra Branca.

[261] Beth A. Simmons, "Capacity, Commitment, and Compliance, International Institutions and Territorial Disputes," Journal of Conflict Resolution 46 (2002): 829.

[262] RIAA XXVII, 135.

[263] John Merrills and Eric De Brabandere, Merrills' International Dispute Settlement, Seventh Edition (Cambridge: Cambridge University Press, 2022), 13. Andrew T. Guzman, "International Tribunals: A Rational Choice Analysis," University of Pennsylvania Law Review 157, no. 1 (2008): 171. Karen K. Alter, "Do International Courts Enhance Compliance with International Law?" Review of Asian and Pacific Studies 25 (2018): 70.

In the Ligitan and Sipadan case, the Malaysian leader was reportedly not totally confident about wining the litigation, preferring a peaceful settlement for a sticky issue for the sake of bilateral friendship. Malaysia and Singapore were inclined towards administrative management for maritime zones in the Land Reclamation case, rather than winning or losing.[264] Malaysia lost the Pedra Branca case, but its control over domestic backlash proved the country's mature understanding of litigation frameworks: You sometimes win, and sometimes lose, but in the long-term you are benefited by the settlement of disputes.

The other category is the use of compulsory institutionalized dispute settlement frameworks raised by one party, mostly less-resourced States, through unblocking jurisdictional and admissibility barriers against a larger powerful contestant.[265] These include the 2013 ICJ Preah Vihear interpretation case, the 2016 South China Sea arbitration under Annex VII UNCLOS.

The plaintiff State utilized logics and reasons to allow for litigation procedures, sometimes by separating high-staked territorial sovereignty issues, and sometime by opening limited windows for jurisdiction under conditions and requirements in the procedures. Institutional frameworks, typically the 1982 UNCLOS, with a certain level of compulsory dispute settlement procedures, have been effectively used by less powerful States.

Why the State accept compulsory legally-binding procedures in institutional setting? In most cases, contracting parties accept third-party settlement procedures as a package in its conclusion or participation for the framework. This is considered to be a meaningful benefit for the parties.

In the case of UNCLOS, for instance, contracting parties are granted or endorsed to enjoy wider territorial waters, secured international strait passage, and standardized EEZs and continental shelves. At the time of ratification, States have slim ideas over contentious cases raised by other parties in the future. As human behavioral science shows, people tend to value instant gratification, rather than future risks.[266] China did not imagine, at its ratification of UNCLOS in 1996, the litigation instituted by the Philippines over South China Sea claims in 2013. Southeast Asian countries are generally deft in

[264] RIAA XXVII, 135.

[265] Eric de Brabandere, International Dispute Settlement, From Practice to Legal Discipline (Cambridge University Press, 2018). Chisa Ishizuka, "Jurisdiction of the International Court of Justice under Compromissory Clauses of Multilateral Treaties," (Japanese language), Hitotsubashi Journal of Law and International Studies 1 (2002): 355, accessed 1 May 2023, https://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/22924/hogaku0110103550.pdf.

[266] Shane Frederick, George Loewenstein, and Ted O'Donoghue, "Time Discounting and Time Preference," Journal of Economic Literature 40, no.2 (2002): 351.

handling institutionalized dispute settlement frameworks.

B. FACTORS FOR CHOOSING THIRD-PARTY DISPUTE SETTLEMENT

In more general terms, one may consider factors and elements in favour of resort to third-party dispute settlement procedures, particularly in the context and background of Asia, notably amongst States surrounding the South China Sea. The selection for specific dispute settlement methods is an extension of the State's pursuit for its interests, as in the case for any foreign policy actions. The State decides policy measures by comparing benefits and costs with calculating each element's probability and risks.

In academia, there has been a long debate on factors and elements for choosing legal dispute settlement, such as the preference for impartial, binding authoritative judgement, based upon accurate and well-founded reasonings as well as precise evaluation of relevant facts.[267] On the other hand, there is a list of elements for refraining from adversarial, clear-cut, all-or-nothing, non-reviewable solutions, without considering overall historical and political contexts, made by uncontrollable discretionary deliberations, based upon legal counsel's debates.[268]

With all these relevant elements, the State considers and calculates perspectives for winning or losing the case, particularly in the case of zero-sum single-cut disputes, like territorial and maritime demarcation disputes. The government will be willing to use legally-binding procedures in any way, if it considers the probability for winning the case is 100 per cent.

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[267] Guzman, "International Tribunals," 172. Yuval Shany, "No Longer a Weak Department of Power?" European Journal of International Law 20 (2009):1. Laurence R. Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals," California Law Review 93 (2005): 3. Simon A. Benson, "Fragmentation or Coherence?" International Journal of Law and Public Administration 3, no.1 (2020): 79. Carla S. Copeland, "The Use of Arbitration to Settle Territorial Disputes," Fordham Law Review 67 (1999): 3074. Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation," Case Western Reserve Journal of International Law 32 (2000): 420. Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, et. al., "The Concept of Legalization," International Organization 54, no.3 (2000): 401.

[268] Andreas Paulus, "International Adjudication," in The Philosophy of International Law, Samantha Besson and John Tasioulas eds. (Oxford University Press, 2012), 207. Lara M. Pair, "Judicial Activism in the ICJ Charter Interpretation," ILSA Journal of International & Comparative Law 8 (2001). Ernest A Young, "Judicial Activism and Conservative Politics," University of Colorado Law Review 73, no.4 (2002): 1139. George W Downs, "Enforcement and the Evolution of Cooperation," Michigan Journal of International Law 19, no.2 (1998): 319. Eric A. Posner and Miguel F. P. de Figueiredo "Is the International Court of Justice Biased?" Journal of Legal Studies 34, no. 2 (2005): 610. Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals," California Law Review 93, no.1 (2005): 3.

The government seriously contemplates domestic political backlash in the case of losing. This is a phenomenon in both democratic and less democratic countries. If the government has long educated and promoted, amongst their nationals, the inviolability of their alleged territories. It will never take the risk of referring to a third-party procedure with any probability of losing.

If a less democratic State has promoted domestically the sense of infallibility and invincibility of its leader, statecraft, or political party, uncontrollable independent judicial procedures will be too risky to resort to. In the case of democratic countries with semi-regular government changes, the defeat of an international judicial case may be overcome by attributing responsibilities to the previous administration, as was the case for Indonesia in the 2002 Ligitan and Sipadan case.

The State may also consider, if it loses, backlashes from fellow States or the whole international community, as the fear of reputation costs and reciprocal non-compliance or retaliation from the contestants or other parties to a multilateral framework.[269] However, the State will be more worried about its existential risks threatened from its domestic audience. Thus, damage control and domestic management in the case of defeat will be crucial in the State's decision-making for resort to or accept third-party legal dispute settlement.

The State may consider overall long-term interests in its decision-making. The prolongation of disputes may undermine friendly and stable bilateral or regional relations.[270] This was the case in Malaysia's choice of judicial settlement in the 2002 Ligitan and Sipadan case as well as the 2008 Pedra Branca case. Reputational costs or lost credibility caused by not resorting to a well-established dispute settlement procedure may be also relevant to the State's decision.[271] However, intangible interests are generally less crucial, compared to clear-cut interests at stake in disputes, as territorial ownership and resource-endowed maritime zones.

In sum, the State's calculation for resorting to third-party dispute settlement procedures can be formulated as follows:

$$Q=\alpha A-(1-\alpha)B+C$$

Q: Preference for third-party dispute settlement.

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[269] Andrew T. Guzman, "The Cost of Credibility," Journal of Legal Studies 31, no. 2 (2002): 305..
[270] Helfer and Slaughter, "Why States Create International Tribunals," 5. Benson, "Fragmentation or Coherence," 80.
[271] Tom Ginsburg and Richard H McAdams, "Adjudicating in Anarchy," William & Mary Law Review 45, no.4 (2003-2004): 1229.

A: Perceived benefits for winning the case.

α: perceived probability of winning. ($0 \leq \alpha \leq 1$)

B: Perceived costs for losing the case.

C: Other overall elements for favoring litigation, such as friendly bilateral or regional relations.

Based upon this, zero-sum territorial disputes, for instance, may have a large sum of A, quite a large sum of B, and some amount of C. The State's perception on probability of winning will decide a final choice for resort to third-party settlement. Malaysia resorted to the ICJ proceedings in the 2008 Pedra Branca case. Hypothetically, if Malaysia perceived A as 5, B as 10, and C as 3, in the scale of 10, $Q=5\alpha-10(1-\alpha)+3=15\alpha-7$. If $Q>0$, α should be more than 7/15. Malaysia may have considered that it would win the case with the probability of 7 amongst 15, then instituted the ICJ proceedings.

Maritime administrative management cases may have relatively small sums of A and B, as well as a large sum of C. Again, hypothetically, in the 2005 Land Reclamation arbitration between Malaysia and Singapore, Malaysia perceived A as 5, B as 2, and C as 5, thus $Q=5\alpha-2(1-\alpha)+5 = 7\alpha+3$.[272] If $Q>0$, α should be more than minus 3/7. Malaysia may have considered that it would lose the case with the probability of three out of seven, but resorted to the UNCLOS arbitration procedure.

C. FURTHER CLARITY AND CONSISTENCY FOR COURTS AND TRIBUNALS

States tend to hesitate about litigation for a number of reasons. States choose legally-binding third-party dispute settlement by consent, so the subject-matter of settlement should be within the consent.[273] Otherwise, the State will be surprised and frightened against future litigation. The State also expects that judgement should be well-reasoned and consistent with precedents, enabling their rational calculation for resorting to procedures, as seen in the preceding section.

Recent judicial and arbitral cases have been accumulating basically clear and predictable decisions, which encourage the trend in the region surrounding the South China Sea towards more resort to third-party settlement procedures.

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[272] RIAA XXVII, 135.

[273] Merrills and De Brabandere, Merrills' International Dispute Settlement, 13. ICJ, Asylum, Judgment, ICJ Reports 1950, 266, at 402; Annex VII to UNCLOS, art.10.

The more instituted are cases, the more clarified are rules and reasoning. Then, the more the States rely upon third-party settlement. This is a virtual circle.

The 2016 South China Sea arbitration, for instance, provided that maritime entitlement may be separately considered from territorial sovereignty, thus defined the outer limit of jurisdiction with clarity. The same arbitration clarified the status of historical rights under UNCLOS and customary international law, as well as the application of Article 121(3) on "rocks which cannot sustain human habitation or economic life of their own" to the South China Sea, providing clear basis for maritime delimitation amongst relevant parties.

The Timor Sea Conciliation clarified the requirements for alternative proceedings to exclude UNCLOS procedures, providing that other proceedings should be supposed to seek proactively for legally-binding settlement.

With these forward trends, the author considers that international courts and tribunals may need more consciousness for consistency and coherence in some categories of cases. In territorial and maritime demarcation disputes, factual situations should be more coherently categorized, with the order of evidential intensity being clearly formulated in each category.

If there is a treaty between colonial States (or, in some limited cases, with independent local States) or contracts with local authorities, defining territorial or maritime demarcation, the challenging party should demonstrate clear contesting facts in the form of explicit recognition. If there is no treaty, but if the one party is judged to own original title, the contestant party should prove relevant facts, depending upon the intensity of the original title, in most cases, at least acquiescence or tacit recognition. If there is no treaty nor original title, it was originally *terra nullius* or uncertain territorial expanse, so the comparison of effectivités will decide the ownership. These categories are summarized in Table 3, with graphic illustrations (Table 4).

In concrete terms, the first category is represented by the ICJ Preah Vihear case, where Thailand's acquiescence of French note verbale attached by a map was judged to rebut the existing treaty settlement. The court justified this decision by adding other subsequent practice showing control and acquiescence, but more explicit recognition of treaty revision on the side of Thailand may have been basically required.

The second category was the 2008 ICJ Pedra Branca case, where the original title by Malaysia was rebutted by the 1953 correspondence between Singapore and the Johor regional administration, recognizing Singapore's territorial ownership. This was enough evidence, if the 1953 correspondence is legitimately interpreted as recognition. This was the ICJ's judgment. Given

the relatively lower evidentiary intensity of original titles, facts of acquiescence plus the accumulation of effective control without protest, if any, should have been sufficient for its rebuttal.

The third category is typically exemplified by the 2002 Ligitan and Sipadan case, where the comparison of effectivités decided the territorial ownership, given the uncertainty in the status of the relevant islands.

As another example which may need further clarification, some judicial cases regarding the evidential requirements of effectivité for "small islands" need more consistent clarification. The ICJ decided that state control required for territorial ownership for "uninhabited small islands" may be weaker than those required for non-small islands. The threshold for "small islands" may well be more clearly and consistently provided.

V. CONCLUSION

This article has examined why Southeast Asia has been traditionally reticent about the use of international third-party legal dispute settlement procedures. It also analyses, why and how, since the outset of this century, countries surrounding the South China Sea have shown a steady increase of cases resorting to third-party legal procedures.

As a background, Southeast Asia, particularly sub-regions surrounding the South China Sea, is featured by the semi-closed sea at its center, encircled by the continental side and the archipelagic maritime areas. The South China Sea is connected to the outer seas by narrow outlets as chokepoints, which provide special positions and preoccupations to States holding straits and transit points, seeking for a stable maritime order.

Historically, the region had been influenced by diverse culture bases, with less consciousness about territorial management. This was gradually converted to territorial entities and exclusive maritime zones through Western colonialization. This gives special features to territorial and maritime demarcation disputes in the region. Contestant parties first pursue the records of treaties or contracts as basis for territorial or maritime entitlement by them or colonial predecessors. Then, if such contractual bases are non-existent or feeble, parties seek factual evidence for original titles by their own, or the contestant party's recognition or acquiescence. If there are no original titles nor state manifestation, the parties present factual evidence of state practice for effective control without protest, as *effectivités* comparatives, which are judged by the court or tribunal for identifying superior evidence for territorial

ownership.

The Southeast Asia region has been steadily intensifying political platforms for cooperation, led by the Association of Southeast Asian Nations (ASEAN). This provides a sense of cooperation and personal contacts by Member States' officials and stakeholders. This leads to the pursuit for effective third-party legal dispute settlement procedures. Stakes in the region are natural resources, including oil and gas mining as well as fisheries. These are consistently the origin of the need for territorial and maritime dispute settlement.

Recent cases regarding Southeast Asia can be categorized into two: First, judicial or arbitral cases by like-minded and similarly-characterized States in the region, namely Indonesia, Malaysia, and Singapore; as well as, second, the use of compulsory institutionalized dispute settlement frameworks, through unblocking jurisdictional and admissibility barriers by the plaintiff parties, in most cases, less resourced States. States choose third-party legal procedures by comparing the benefits of winning and the costs of losing with perceived probabilities, as well as possible overall benefits like the stability and friendship of bilateral relations.

In order to mitigate States' hesitancy against legal procedures, the courts and tribunals are encouraged to give further well-reasoned consistent judgements and awards. For instance, territorial and maritime demarcation disputes should be based upon precise correspondence between original entitlements and subsequent State actions. When there are treaties or contacts for original territorial or maritime entitlements, the contestant party should present explicit recognition by the other party for rebutting original entitlements; when there is original titles without treaty basis, the contesting party is required to present, at least acquiescence with evidence of subsequent State control, depending upon the intensity of the original title; When the disputed area was originally terra nullius or uncertain territorial expanse around borders, the parties need to present evidence for State controls, by which the court or tribunal decides territorial ownership with superior State control.

APPENDIX

Figure 1. The South China Sea and Surrounding Seas: Schematic Chart

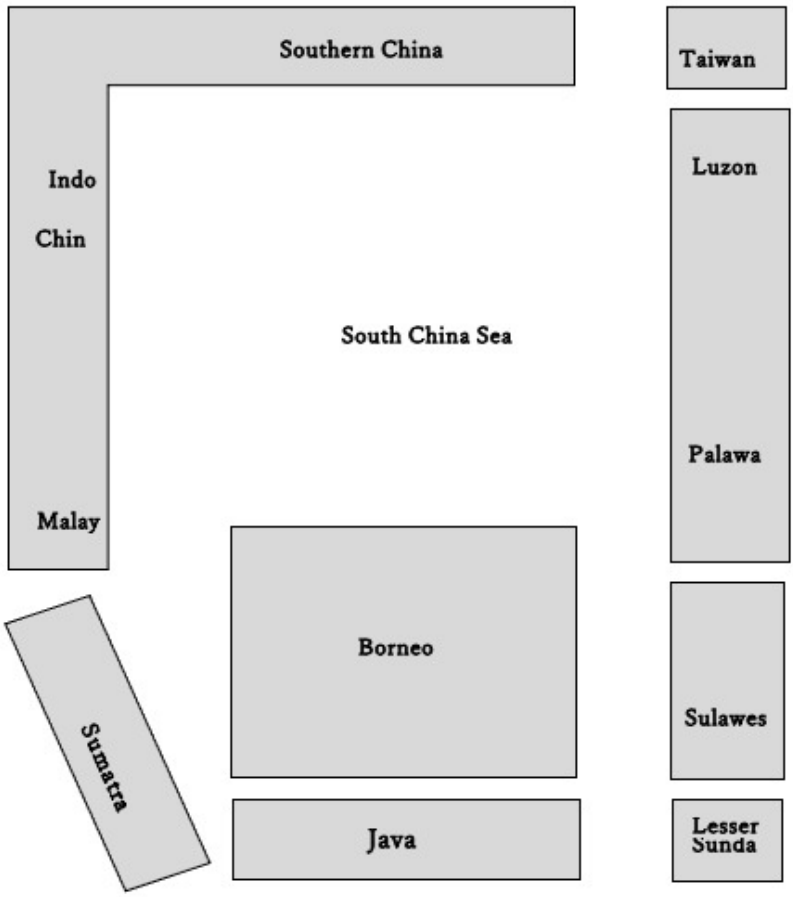


Figure 2. The South China Sea and Surrounding Seas: Major Straits as Chokepoints

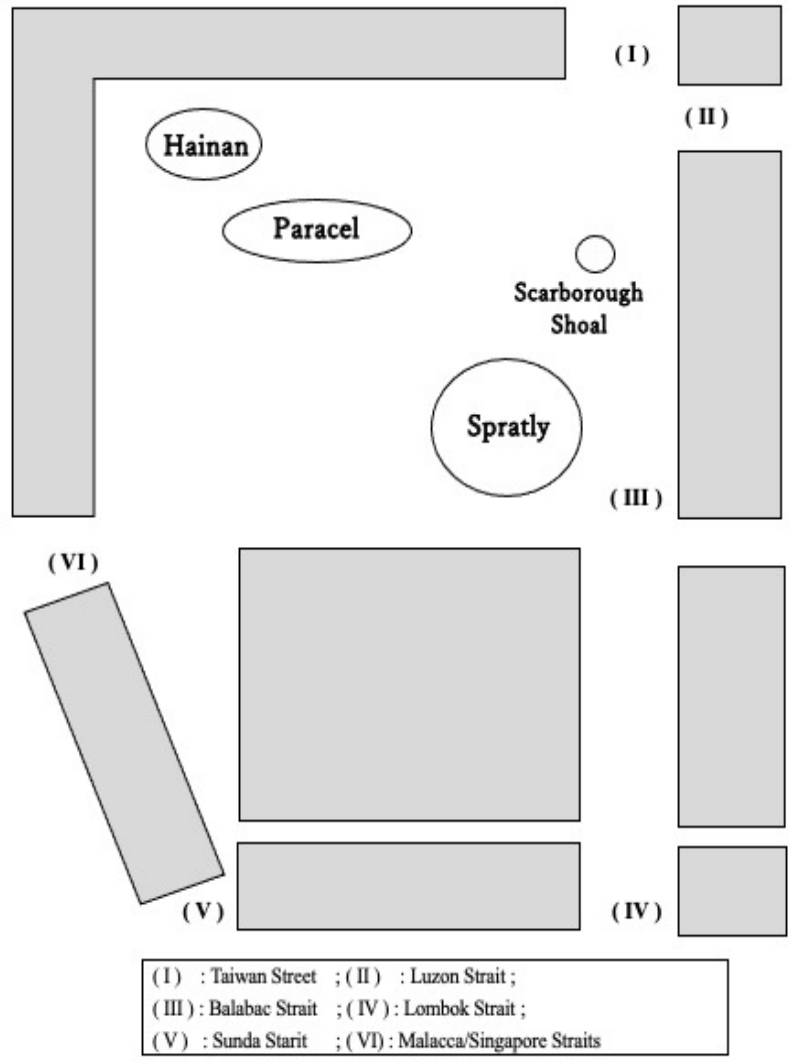
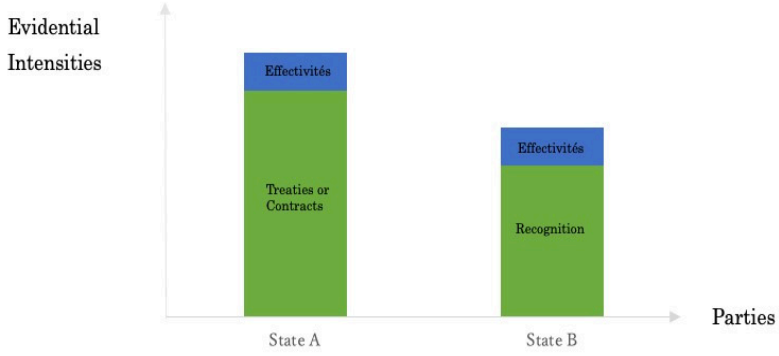


Figure 3. Patterns of Territorial Disputes and Rebutting Evidence

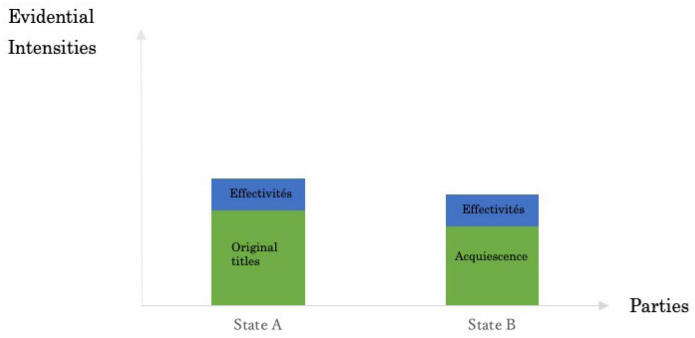
	Preceding legal basis	**Evidence required for rebuttal**
A (Preah Vihear)	Treaties or contracts	Recognition (in most cases, explicit)
B (Pedra Branca)	Original titles	Recognition, or Acquiescence, or Prescription
C (Ligitan Sipadan)	No original title	*Effectivitlés comparatives* (acquiescence factors included)

Figure 4. Graphic Illustrations for Territorial Dispute Patterns

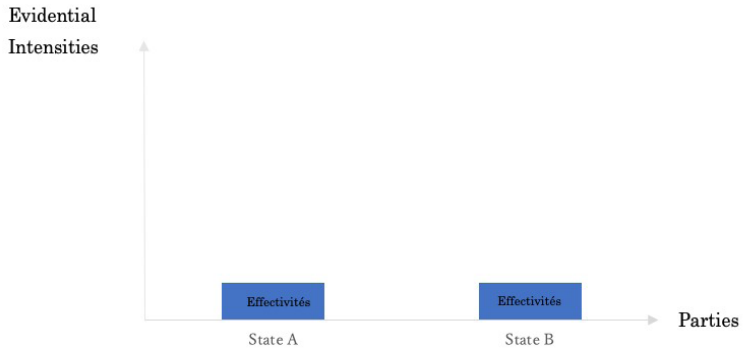
A: Treaties or contracts as a basis for territorial ownership.



B: Original titles owned by one party.



C: *Terra nullius* or uncertain territorial expanse as an initial condition.



BIBLIOGRAPHY

Journals and Periodicals

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, et. al. "The Concept of Legalization." International Organization 54, no.3. (2000): 401-419.

Ahman, Mohammad Zaki and Amusafir Kelana. "An Inter-State Maritime Territorial Conflict, A study on Malaysia's Conflict Resolution through Peaceful Means." Jurnal Sosisohumaniora 7, no.2 (2005): 93-109.

Alter, Karen K. "Do International Courts Enhance Compliance with International Law?" Review of Asian and Pacific Studies 25, (2018): 51-78.

Askandar, Kamarulzaman and Cariervin Sukim. "Making Peace over a Disputed Territory in Southeast Asia: Lessons from the Batu Puteh/Pedra Branca Case." Journal of Territorial and Maritime Studies 3, no.1 (2016): 65-85.

Banks, Nigel. "Settling the Maritime Boundaries between Timor-Leste and Australia in the Timor Sea." Journal of World Energy Law and Business 11 (2018): 387-409.

Barnett, Michelle. "Cambodia v Thailand, A Case Study on the Use of Provisional Measures to Protect Human Rights in International Border Disputes." Brooklyn Journal of International Law 38 (2012): 269-303.

Basu, Pratnashree. "The Eastern Corridor and the Law of the Sea." ORF Occasional Papers, November 2020.

Beckman, Robert. "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea." American Journal of International Law 107, no.1 (2013): 142-163.

Benda, Harry J. "The Structure of Southeast Asian History: Some Preliminary Observations." Journal of Southeast Asian History 3, no. 3. (1962): 106-138.

Benson, Simon A. "Fragmentation or Coherence? Does International Dispute Settlement Achieve Comprehensive Justice?" International Journal of Law and Public Administration 3, no.1 (2020): 77-88.

Boyle, Alan E. "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction." International and Comparative Law Quarterly 46, no.1 (1997): 37-54.

Brown, Christopher. "A Comparative and Critical Assessment of Estoppel in International Law." University of Miami Law Review 50 (1996): 370-412.

Chesterman, Simon. "Asia's Ambivalence about International Law and Institutions: Past, Present and Future." European Journal of International Law 27, no.4 (2017): 945-978.

Copeland, Carla S. "The Use of Arbitration to Settle Territorial Disputes." Fordham Law Review 67. (1999): 3073-3108.

D'Amato, Anthony. "Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law." Virginia Journal of International Law 10, (1969):1-31.

Daulay, Zainul. "Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia)." Law Reform 2, no.1 (2021):119-128.

De Tréglodé, Benoît. "Maritime Boundary Delimitation and Sino-Vietnamese Cooperation in the Gulf of Tonkin (1994-2016)." China Perspectives 3 (2016):

33-41.

Dörr, Dieter. “The Background of the Theory of Discovery.” American Indian Law Review 38, no.2 (2014): 477-499.

Downs, George W. “Enforcement and the Evolution of Cooperation.” Michigan Journal of International Law 19, no.2 (1998): 319-344.

Eric A. Posner and Miguel F. P. de Figueiredo “Is the International Court of Justice Biased?” Journal of Legal Studies 34, no. 2 (2005): 599-630.

Fangyin, Zhou. “Between Assertiveness and Self-restraint: Understanding China’s South China Sea Policy.” International Affairs 92, no.4 (2016): 869-890.

Fravel, M Tailor. “China’s Strategy in the South China Sea.” Contemporary Southeast Asia 33, no.3 (2011): 292-319.

Frederick, Shane, George Loewenstein, and Ted O’Donoghue. “Time Discounting and Time Preference: A Critical Review.” Journal of Economic Literature 40, no.2 (2002): 351-401.

French, Duncan. “Case Note: In the Matter of the South China Sea Arbitration: Republic of Philippines v People’s Republic of China, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award of 12 July 2016.” Environmental Law Review 19 (2017): 48-56.

Gao, Zhinguo and Jia, Bing Bing. “The Nine-Dash Line in the South China Sea: History, Status, and implications.” American Journal of International Law 107, no.1 (2013): 98-124.

Ginsburg, Tom and Richard H. McAdams. “Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution.” William & Mary Law Review 45, no.4. (2003-2004):1229-1339.

Guzman, Andrew T. “The Cost of Credibility,” Journal of Legal Studies 31, no. 2 (2002): 303-326.

Guzman. Andrew T. “International Tribunals: A Rational Choice Analysis.” University of Pennsylvania Law Review 157, no. 1 (2008): 171-235.

Helfer, Laurence R. and Anne-Marie Slaughter. “Why States Create International Tribunals: A Response to Professors Posner and Yoo.” California Law Review 93, (2005):899-956.

Hendrapati, Marcel. “Implication of the ICJ Decision respecting Sipadan Ligitan case towards basepoints and maritime delimitation.” International Journal of Sciences: Basic and Applied Research 14, no.1 (2014): 374-393.

Henry, Etienne. “Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law, with Special Reference to the Just Contra Bellum Regime.” Melbourne Journal of International Law 18, no.2 (2017): 1-35.

Hohen, Marcelo. “Original Title in the Light of the ICJ Judgment on Sovereignty over Pedera Branca/Pulau Batu Puteh, Middle Rocks and South Ledge.” Journal of the History of International Law 15, no.2 (2013): 151-171.

Huh, Seokyoon. “Title to Territory in the Post-colonial Era Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008).” European Journal of International Law 26, no.3 (2016): 709-725.

Ishizuka, Chisa. “Jurisdiction of the International Court of Justice under Compromissory Clauses of Multilateral Treaties: Some Relationships between Court Judicial

Policy and Parties' Judicial Strategies." (Japanese language) Hitotsubashi Journal of Law and International Studies 1, (2002): 355-388. https://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/22924/hogaku0110103550.pdf

Jenne, Nicole. "Managing Territorial Disputes in Southeast Asia: Is There More Than the South China Sea?" Journal of Current Southeast Asia Affair 3 (2017): 35-61.

Joshi, Manoj. "The South China Sea Disputes." ORF Occasional Papers, August 2016.

Kaye, Stuart. "The Timor Gap Treaty: Creative Solutions and International Conflict." Sydney Law Review 16 (1994): 72-96.

Klein, Natalie. "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention," International Journal of Marine and Coastal Law 32, no. 2 (2017): 332-363. https://doi.org/10.1163/15718085-12322045.

Kopela, Sophia. "Historic Titles and Historic Rights in the Law of the Sea in the light of the South China Sea Arbitration." Ocean Development and International Law 48. (2017): 181-207.

Koperla, Sophia. "The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunal." Australian Yearbook of International Law 29. (2011): 87-134.

Lesaffer, Randall. "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription." European Journal of International Law 16, no.1 (2005): 25-56.

Li, Zhenni. "International Intertemporal Law." California Western International Journal 48, no.2 (2018) :342-347.

Ling, Bing. "China's Attitude to the International Legal Order in the Xi Era: The Case of South China Sea Arbitration." Sydney Law School Research Paper No. 19/04 (2019): 1-21.

Mitchel, Martin D, "The South China Sea, A Geographical Analysis," Journal of Geography and Geology 8, no. 3, (2016):14-25.

Nakatani, Kazuhiro. "The South China Sea Arbitration Award and the Rule of Law in the Seas," Japan Review 1, no. 2 (2017): 1-5.

National Institute for South China Sea Studies, "A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration," Asian Yearbook of International Law 24 (2018): 151-293.

Ovchar, Alexander, "Estoppel in the Jurisprudence of the ICJ, A Principle Promoting Stability Threats to Undermine it," Bond Law Review 21. (2009).

Pair, Lara M, Judicial Activism in the ICJ Charter Interpretation, ILSA Journal of International & Comparative Law 8. (2001): 181-221.

Posner, Eric A. and John C. Yoo. "Judicial Independence in International Tribunals." California Law Review 93, no.1 (2005): 1-74.

Ramon, Adrianus Adityo Vito. "Completing the Jigsaw: The Recent Development of the Maritime Boundaries in the Timor Sea." Indonesian Journal of International Law 15, no.4 (2018): 481-522.

Raustiala, Kal. "Compliance & Effectiveness in International Regulatory Cooperation." Case Western Reserve Journal of International Law 32 (2000): 387-440.

Raymond, Mark and David A. Welch. "What's Really Going on in the South China Sea?" Journal of Current Southeast Asia Affairs 4, no.2 (2022): 214-239.

Reichner, Paul. "The South China Sea Arbitration and Beyond: China's Approach to

the Law of the Sea and the Rule of Law." Japan Review 3, no. 2 (2019): 4-12.
Rossi, Christopher R. "Treaty of Tordesillas Syndrome: Sovereignty Ad Absurdum and the South China Sea Arbitration." Cornell International Law Journal 50, no. 2 (2017): 231-283.
Shany, Yuval. "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary." European Journal of International Law 20 (2009):73-91.
Simmons, Beth A. "Capacity, Commitment, and Compliance, International Institutions and Territorial Disputes." Journal of Conflict Resolution 46 (2002): 829-856.
Sulmasy, Glenn and John Yoo. "Counterintuitive: Intelligence Operations and International Law." Michigan Journal of International Law 28, no.3 (2007): 625-638.
Tamada, Dai. "The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement." European Journal of International Law 33, no.1 (2020): 321-344.
Tanaka, Yoshifumi. "Passing of Sovereignty, The Malaysia/Singapore Territorial Dispute before the ICJ." Hague Justice Journal 3, no.2 (2008): 103-344.
Thayer, Carlyle. "ASEAN, China and the Code of Conduct in the South China Sea." SAIS Review of International Affairs 23, no.2 (2013): 75-84.
Traviss, Alexandra C. "Temple of Preah Vihear: Lessons on Provisional Measures." Chicago Journal of International Law 13 (2012): 317-344.
Tseng, Peter. "The Peaceful Non-Settlement of Disputes: Article 4 of CMATS in Timor-Leste v Australia." Melbourne Journal of International Law 18 (2017): 349-372.
Watts, Sir Arthur. "Enhancing the Effectiveness of Procedures of International Dispute Settlement." Max Planck Yearbook of United Nations Law 5 (2012):1-39.
Wong, Audrye. "More than Peripheral." The China Quarterly 235 (2017): 735-757.
Young, Ernest A. "Judicial Activism and Conservative Politics." University of Colorado Law Review 73, no.4 (2002):1139-1216.

Books and Book Chapters

Beckman, Robert and Leonardo Bernard. "Disputed Area in the south China Sea, Prospects for Arbitration or Advisory Opinion." In The South China Sea, A Crucible of Regional Cooperation or Conflict-Making Sovereignty Claims, edited by C. J. Jenner and Truong Thuy. New York: Cambridge University Press, 2016.
De Brabandere, Eric. International Dispute Settlement, From Practice to Legal Discipline, Cambridge University Press, 2018.
International Court of Justice. The International Court of Justice: Handbook. United Nations, 2014.
Klein, Natalie. "Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea." In Resolving Conflicts of Law: Essays in Honour of Lea Brilmayer, edited by C. Giorgetti and Natalie Klein. Brill, 2019.
Masuo, Chisako, Chugoku no Kodo-Genri [China's Behavioral Principles]. Tokyo: Chuko-Shinsho, 2019.
Merrills, John, and Eric De Brabandere. Merrills' International Dispute Settlement,

Seventh Edition. Cambridge: Cambridge University Press, 2022.

Natalegawa, Marty. Does ASEAN Matter? A View from Within. Singapore: ISEAS, 2018.

Natalie Klein, "Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea," in Resolving Conflicts of Law: Essays in Honour of Lea Brilmayer, C. Giorgetti and Natalie Klein, eds. (Brill, 2019),

Pauker, Guy J., F. H. Golay, and C. H. Enloe. C H, Diversity and Development in Southeast Asia. New York: McGraw-Hill, 1977.

Paulus, Andreas. "International Adjudication." In The Philosophy of International Law, edited by Samantha Besson and John Tasioulas. 207-224. New York: Oxford University Press, 2012.

Pluvier, J. M. Southeast Asia from Colonialism to Independence. New York: Oxford University Press, 1974.

Schofield, Clive. "What's at Stake in the South China Sea?" In Beyond Territorial Disputes in the South China Sea, edited by Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, and Leonardo Bernard. Cheltenham: Edward Elgar, University of Wollongong, 2013.

Storey, Ian and Lin Cheng-yi, eds. The South China Sea Dispute, Navigating Diplomatic and Strategic Tensions, Singapore: Yusof Ishak Institute, 2016.

Talmon, Stefan. The South China Sea Arbitration: Jurisdiction, Admissibility, Procedure. Brill, 2022.

Tseng, Katherine Hui-Yi. Rethinking South China Sea Disputes, The Untold Dimensions and Great Expectations, Oxford: Routledge, 2017.

Yano, Toru. Japan's Southeast Asia Policy, In Search of Mutual Trust. Tokyo: Simul International, 1978.

Yiallourides, Constantinos. Disputed Waters and Seabed Resources in Asia and Europe, Maritime Disputes and International Law. New York: Routledge, 2019.

Zhang, Feng. "Chinese Thinking on the South China Sea and the Future of Regional Security." In US-China Competition and the South China Sea Disputes, edited by Huiyun Feng and Kai He. London and New York: Routledge, 2018.

Legal Documents

Charter of the United Nations. 1 UNTS 15 (entered into force 24 October 1945).

Statute of the International Court of Justice. 33 UNTS 993 (entered into force 24 October 1945).

Agreement Establishing Certain Seabed Boundaries in the Area of Timor and Arafura Seas. 974 UNTS 319 (signed 9 October 1972).

Vienna Convention on the Law of Treaties. 1155 UNTS 331 (entered into force 27 January 1980).

Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia. 29 ILM 475 (signed 11 December 1989, entered into force 9 February 1991).

United Nations Convention on the Law of the Sea (UNCLOS). 1833 UNTS 397 (entered into force 14 November 1994).

Japan-Singapore Economic Partnership Agreement (entered into force 30 November 2002). Available at <https://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>.

Timor Sea Treaty between the Government of East Timor and the Government of Australia. 2258 UNTS 3 (signed 20 May 2002, entered into force 2 April 2003).

Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea. 2483 UNTS 359 (signed 12 January 2006, entered into force 27 June 2006).

Japan-Cambodia Investment Agreement. (signed 14 June 2007). Available at <http://www.cambodianembassy.jp/web2/?page_id=555&lang=en>.

Charter of the Association of Southeast Asian Nations. 2624 UNTS 223 (entered into force 15 December 2008).

China. The Exclusive Economic Zone and Continental Shelf Act (1998).

China. Note Verbales submitted in the proceedings of continental shelf extension in the UN Commission on the Limits of the Continental Shelf, UN Document CML/2/2009(9 February 2009), CML/17/2009 (New York, 7 May 2009), CML/18/2009 (New York, 7 May 2009), CML/8/2011 (New York, 14 April 2011).

Indonesia. Note Verbale No.480/POL-703/VII/10 (8 July 2010).

Regional Comprehensive Economic Partnership. (signed 15 November 2021). Available at https://rcepsec.org/legal-text.

Agreement between the Government of the Republic of Indonesia and the Government of the Commonwealth of Australia establishing Certain Seabed Boundaries. (signed 18 May 1971), Available at <https://www.ecolex.org/details/treaty/agreement-between-the-government-of-the-commonwealth-of-australia-and-the-government-of-the-republic-of-indonesia-establishing-certain-seabed-boundaries-tre-152886/.>

Island of Palmas (1928), 2 RIAA 829.

Legal Status of Eastern Greenland (1933), PCIJ Ser.A/B no. 53.

Colombian-Peruvian asylum (1950), ICJ Reports 1950.

Minquieres et des Ecrehos (1953), ICJ Report 1953.

Temple of Preah Vihear, Merits, between Cambodia and Thailand (1962), ICJ Report 1961.

West Sahara, Advisory Opinion (1975), ICJ Report 1975.

Gulf of Maine Case, ICJ Reports 1984.

Burkina Faso/Mali Frontier Dispute Judgment (1986), ICJ Report 1986.

Southern Bluefin Tuna cases (1999), ITLOS (1999)280, 23 RIAA 1.

Maritime Delimitation and Territorial Question between Qatar and Bahrain (2001), ICJ Report 2001.

Sovereignty over Pulay Ligitan and Pulay Sipadan (2002), ICJ Reports 2002.

Land Reclamation by Singapore in and around the Straits of Johor (2005), RIAA XXVII.

Sovereignty over Pedra Branca/Pulau Batu Pujtech, Middle Rocks and South Ledge (2008), ICJ Reports 2008.

Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (2012), ITLOS, Case no. 16.

Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (2013), ICJ Reports 2013.

Whaling in the Antarctic case (2014), ICJ Reports, 2014.

Seizure and Detention of Certain Documents and Data, Provisional Measures, Order (2014), ICJ Reports 2014.

Railway Land (2014), PCA 2012-01.

Arctic Sunrise Arbitration (2014), PCA 2014-02.

Chagos Marine Protected Area Arbitration (2015), PCA 2011-03.

South China Sea Arbitration (2016), PCA 2016-1.

Application for Revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, ICJ, filed in the Registry of the Court (2 February 2017).

Timor Sea Conciliation (2018), PCA 2016-10.

Web Sources

Ching, Chang. "Why is there no South China Sea Air Defence Identification Zone?" SCSPI, accessed 15 May 2023, http://www.scspi.org/en/dtfx/why-there-no-south-china-sea-air-defense-identification-zone.

CNN Indonesia. "Bakamla: Ribuan Kapal Asing Masuki Laut Natuna [Indonesian Maritime Security Agency, Thousands of foreign ships enter Natuna Sea]." 13 September 2021. Accessed 1 May 2023, https://www.cnnindonesia.com/nasional/20210913151110-20-693598/bakamla-ribuan-kapal-asing-masuki-laut-natuna.

Davenport, Tara. "Compulsory Conciliation under UNCLOS: Prospects for Future Use, Centre for International Law." University of Singapore. Accessed 6 October 2022, https://cil.nus.edu.sg/wp-content/uploads/2020/03/Compulsory-Conciliation-under-UNCLOS-Prospects-for-Future-Use-Dr-Tara-Davenport.pdf.

Gnanasagaran, Angaindrankumar. "Pedra Branca Dispute Reveals Disconnect between Malaysia and Singapore." The ASEAN Post, 12 January 2021. Aaccessed 15 May 2023, https://theaseanpost.com/article/pedra-branca-dispute-reveals-disconnect-between-malaysia-and-singapore.

International Court of Justice. "List of All Cases." Accessed 31 March 2021, https://www.icj-cij.org/en/list-of-all-cases.

Ministry of Commerce, People's Republic of China, Spokesman's Remarks (16 November 2020). Accessed 31 March 2021, http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/202011/20201103017259.shtml.

Panda, Ankit. "Is China Really About to Announce a South China Sea Air Defence Identification Zone?" The Diplomat, 1 June 2016. Accessed 15 May 2023, https://thediplomat.com/2016/06/is-china-really-about-to-announce-a-south-china-sea-air-defense-identification-zone-maybe/.

Strangio, Sebastian. "After 12 Years, Indonesia and Vietnam Agree on EEZ Boundaries," The Diplomat, 23 December 2022, accessed 15 May 2023, https://thediplomat.com/2022/12/after-12-years-indonesia-and-vietnam-agree-on-eez-boundaries/.

The Straits Times. "Malaysia accepts Ruling on Pedra Branca, says Mahathir." 25 June 2019. Accessed 15 May 2023, https://www.straitstimes.com/politics/malaysia-

accepts-ruling-on-pedra-branca-says-pm-mahathir.
UN News. "Security Council urges permanent ceasefire after recent Thai-Cambodia clashes." 14 February 2011. Accessed 15 May 2023, https://news.un.org/en/story/2011/02/366652.
United States Energy Information Administration. "The South China Sea is an important world energy trade route, Major Crude Oil Trade Flows in the South China Sea (2011)." Today in Energy, 4 April 2013. Accessed 15 May 2023, https://www.eia.gov/todayinenergy/detail.php?id=10671#:~:text=Almost%20a%20third%20of%20global,Gulf%20suppliers%20and%20Asian%20consumers.
Yeo, Mike. "Analysis: Can China Enforce a South China Sea Air-Defence Identification Zone?" USNI News, 18 July 2016. Accessed 15 May 2023, https://news.usni.org/2016/07/18/analysis-can-china-enforce-south-china-sea-air-defense-identification-zone.

Other Sources

ASEAN Secretariat, ASEAN welcomes Cambodia-Thai firm commitment to avoid further clashes, Jakarta (22 February 2011).
Beckman, Robert C. and Tara Davenport. "CLCS submissions and claims in the South China Sea." Paper, The Second International Workshop The South China Sea: Cooperation for Regional Security and Development, Vietnam 2010.
Chong Ja Ian, "ASEAN's Non-Intervention and the Myanmar Conundrum," ASEAN Focus, Jakarta, (2021).
Dolven, Ben, Mark E. Manyin, Shirley A. Kan. "Maritime Territorial Disputes in East Asia." Congressional Research Paper, 2014.
Gonzales, Robin. "The Spratly Islands Dispute." Thesis, University of Nevada, 2014.
Hayton, Bill. "How to Solve the South China Sea Disputes." ISEAS 25. Singapore: Yusof Ishak Institute (2022).
Heine-Geldern, R, "Conception of State and Kingship in Southeast Asia," Data Paper 18, Cornell University (1956).
Joint Press Statement; Eight Meeting of the Malaysia-Singapore Joint Technical Committee on the Implementation of the International Court of Justice Judgment on Pedra Branca, Middle Rocks and South Ledge (22 January 2020).
Koh, Tommy, Lecture on International Law, Southeast Asia Lecture Hall, Foreign Policy Community of Indonesia, Jakarta, 8 August 2022 (online lecture).
Ministry of Foreign Affairs, Singapore, Transcript of Press Conference by Foreign Minister Prof S Jayakumar and Mah Bow Tan (9 October 2003).
Morales, Neil Jerome, "Philippines turns up heat on China over boats massing in South China Sea," The Jakarta Post (6 April 2021).
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 the Philippines (7 December 2014).
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 the Philippines (7 December 2014).
Singapore Government Agency, Joint Press Statement on the 5th Malaysia-Singapore Joint Technical Committee Meeting on the Implementation of the ICJ Judgment

on Pedra Branca, Middle Rocks and South Ledge, 29-30 November 2010 (2 December 2010).

Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration established at the Request of the Republic of the Philippines (12 July 2016).