

## Why a ruling that cannot be enforced still matters

Hao Duy Phan For The Straits Times  
Published Jul 16, 2016

### **It shows the Law of the Sea treaty provides a level playing field for states, big and small, to protect their legal rights.**

On Tuesday, the Arbitral Tribunal in the South China Sea disputes between the Philippines and China issued its long-awaited final award. It rejected China's claim of historic rights within the "Nine-Dash Line". It found that none of the features claimed by China is entitled to a maritime zone of more than 12 nautical miles. It concluded that China violated the Philippines' sovereign rights in its exclusive economic zone (EEZ) and caused severe harm to the marine environment.

The Philippines government welcomed the award, describing the ruling as a milestone decision. It said it would respect the award.

China, on the other hand, claimed that the arbitration was a political farce and the award was illegal, null and void. It insisted that the Arbitral Tribunal did not have jurisdiction. It refused to recognize the ruling or accept any proposal for negotiation based on the ruling.

While the award addresses many important legal issues concerning disputes on the interpretation and application of the United Nations Convention on the Law of the Sea (Unclos) and clarifies several legal aspects of the South China Sea disputes, the reaction from the concerned parties raises important questions about the enforceability of the Arbitral Tribunal's decision and the implications of a failure to comply with the award.

### **IS THE AWARD BINDING UPON CHINA?**

Article 296 of Unclos and Article 11 of Annex VII of the Convention provide that the Tribunal's decision shall be final and binding and shall be complied with by all parties to the dispute. This is a rule inherent in every judicial dispute-settlement system, including Unclos. There is no exception.



Crew members of a Hainan Airlines plane after it landed at a new airport China had built on Subi Reef of the Spratlys in the South China Sea on Wednesday, a day after the Arbitral Tribunal's ruling. The lack of an enforcement mechanism does not mean decisions of international courts and tribunals are generally ignored. PHOTO: REUTERS

A party cannot claim the award is not binding because the arbitration was instituted without its consent. Under Unclos' compulsory dispute-settlement regime, there is no need for the parties to a dispute to give their consent for the dispute to be referred to arbitration or adjudication. Their consent was already given in their ratification of the Convention.

China and the Philippines are both familiar with the compulsory nature of dispute settlement because they are also members of the World Trade Organisation (WTO). Unclos and the WTO deal with different subject matters but they have one thing in common - a compulsory dispute-settlement regime. China, in fact, is one of the most active users of the WTO dispute-settlement system.

A party cannot claim the award is not binding because it challenges the Tribunal's jurisdiction as China has done by insisting that the disputes in question were about sovereignty and not regulated by Unclos, or about maritime delimitation issues it chose to exclude from the Unclos dispute-settlement system.

But Article 288 of Unclos provides that, in the event of a dispute on the Tribunal's jurisdiction, the matter shall be settled by the Tribunal. The Tribunal settled the issue of jurisdiction with its award on jurisdiction in October last year and its final award this week.

A party cannot claim the award is not binding because it didn't participate in the proceedings. Article 9 of Annex VII provides that non-participation of one party would not constitute a bar to the proceedings.

In the Arctic Sunrise case between the Netherlands and Russia, Russia also chose not to participate. The proceedings went on in its absence. More than six months after the International Tribunal for the Law of the Sea (Itlos) ordered provisional measures, Russia released the activists and the ship, even though Russia claimed that it was merely following a domestic decision, not the order of Itlos.

A party cannot claim that the award is not binding because the Tribunal has members from Europe and Africa and not from China or Asia.

China could have appointed an arbitrator of its nationality or an Asian nationality. It didn't. China could have participated in selecting the three remaining arbitrators. It didn't. China could even have challenged the appointment of any arbitrator at any time. It never did. Now it cannot use the nationality of the arbitrators, four of whom are respected Itlos judges, to undermine the credibility of the Arbitral Tribunal's decision.

### **CAN THE AWARD BE ENFORCED?**

Like many international courts and tribunals, Unclos does not have an enforcement mechanism.

The lack of an enforcement mechanism does not mean decisions of international courts and tribunals are generally ignored. On the contrary, studies have shown that the vast majority of decisions by international courts and tribunals are implemented. China itself has a good record in implementing decisions of the WTO's compulsory dispute-settlement system without any external enforcement.

For the South China Sea disputes, failing to comply with the Arbitral Tribunal's decision would damage China's image and reputation. China will be seen as a rising power with little respect for international law or "a legal order for the sea".

Non-compliance by one party means the rights of the other party are violated. Non-compliance also creates an obstacle for the parties to move towards settling the underlying disputes in accordance with international law.

The South China Sea disputes are a matter of concern for many states. If one party's action is inconsistent with the award, other states and major powers might take measures to challenge the action. That will not be in the interest of China, of the Philippines, of peace, stability and security in the region.

The Philippines has said that it would be willing to hold bilateral talks with China based on the ruling. At some point, negotiation will be multilateral because the Spratlys disputes involve other states.

If negotiation does not work, Unclos provides that either party can request the Arbitral Tribunal to rule on issues arising from the implementation of the award. The Philippines might not use this option for now, but it might reconsider in the future.

Even if China does not respect the award and the Philippines does nothing to challenge the non-compliance, the award is still significant in many ways.

First, the award upholds the rule of law in the oceans. It reinforces the compulsory nature of Unclos' dispute-settlement regime and underscores Unclos as a level playing field for all state parties, big or small, to settle their disputes and protect their legal rights.

Second, the award defends the EEZ regime which is essential to the Convention and many coastal states. It confirms that claims of historic rights to the natural resources in the EEZ of other coastal states are incompatible with the EEZ regime provided for in the Convention.

Third, the award clarifies important legal issues concerning the interpretation and application of Unclos, especially the island regime. It contributes to the development of international law of the sea.

Fourth, the award helps to clarify several aspects of the South China Sea disputes. As a result, the scope of the disputes is narrowed. The overlapping areas in the Spratlys are now limited to only 12 nautical miles from the disputed rocks. As the award strengthens the position of the Philippines and other claimants, it will affect their negotiation direction and strategies. Space for compromise in their EEZ will decrease but incentives for them to engage in negotiations on joint development and cooperation in the newly defined overlapping areas will increase.

The award therefore still matters and has significant implications, even in the absence of compliance from one party.

- **The writer is a senior research fellow at the Centre for International Law, National University of Singapore.**