

## Why the South China Sea Arbitration Case Matters (Even if China Ignores It)

The *Philippines v. China* case has value far beyond the simple question of China's compliance.

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With the final award in the 2013 arbitration case initiated by the Philippines against China set to be delivered on July 12, China has ramped up its campaign to undermine the credibility of the Tribunal. From press conferences to academic conferences, Chinese government officials and academics alike have gone to considerable lengths to justify China's non-compliance with the award citing, among other things, the Tribunal's lack of jurisdiction and the political motivations of the Philippines in bringing the case. China's threatened non-compliance with the decision raises important questions on the role of international courts and tribunals in the international system. What is the value of the award when it is overwhelmingly clear that China is not going to comply with it?

Traditionally, the effectiveness of international courts and tribunals has been measured by whether their decisions have been complied with. Thus, judgment-compliance has become a central preoccupation in both international law and international relations scholarship, partly to counter the realist position that international law does not really matter in great power politics. It is unsurprising, therefore, that the value of the Philippines' arbitral proceedings against China has been derided because of China's non-compliance. For example, one [commentator](#) has stated that "international law litigation is not going to be an effective counter to China" because there is very little chance that China would comply with any negative ruling and that China will not face any "immediate or tangible punishment for its non-compliance." [Another academic](#) has argued that the arbitral tribunal can only make a very limited contribution, inter alia, because China may ignore the decision and the tribunal has no mechanism to enforce its own judgments.

Contrary to the above opinions, the value of the arbitral proceedings should not just be determined by China's non-compliance. International courts and tribunals have a complex array of functions in the international system, and to conflate their value with compliance misunderstands their role. The value of the Philippines/China arbitral proceedings goes beyond China's non-compliance and it is important to articulate this value to those who question the importance of international dispute settlement to global peace and security.

## Clarifying Important Legal Issues in UNCLOS

The first and foremost function of an international tribunal is application and interpretation of the law. The decisions of international courts/tribunals established under a particular treaty regime (regime courts) provide clarity and information on the contents of applicable norms in that treaty and also adapt existing norms to unforeseen circumstances. The legal interpretations of regime courts are perceived as more impartial than the inevitably self-serving arguments that disputing States can put across.

This is particularly relevant in the context of the 1982 UN Convention on the Law of the Sea (UNCLOS). UNCLOS was the result of nine years of negotiations over controversial issues. As with most multilateral conventions, it contains both legal principle and political compromise. Certain provisions were left deliberately ambiguous because to endow them with more detail would scuttle any possibility of agreement and thus derail the conclusion of a binding treaty. Other provisions were vague out of necessity – it was not possible to comprehensively address each and every issue pertaining to the law of the sea.

One of the mechanisms put forth by negotiators to deal with this ambiguity was the elaborate *compulsory* dispute settlement system in Part XV of UNCLOS. States Parties delegated to the various UNCLOS dispute settlement bodies the authority to interpret provisions to resolve legal disputes on the interpretation or application of UNCLOS. The compulsory nature of Part XV also acted as a dispute avoidance device. Under UNCLOS, States operate under the “shadow” of dispute settlement as unreasonable behavior can be unilaterally referred to third party dispute settlement. Without this, States would continue to utilize ambiguities in the text to maximize their claims, further exacerbating disputes and undermining the major objective of UNCLOS to establish a legal order for the oceans that promotes its peaceful use.

Thus, the primary value of the tribunal’s ruling is the clarification of certain principles in UNCLOS that have hitherto been shrouded in uncertainty, or been subject to conflicting interpretations. For example, one of the major issues that has exacerbated tensions in the South China Sea is the lack of a clear definition of an island capable of sustaining human habitation or economic life of its own under Article 121 (3). Previous international courts and tribunals have managed to avoid pronouncing definitively on this issue but this will be impossible in the Philippines/China Arbitration proceedings.

Further, while the issue of whether historic rights can be recognized in the Exclusive Economic Zone has a definitive answer to most law of the sea experts, China has relied on the absence of an express denunciation of historic rights in UNCLOS to substantiate its argument. Similarly, there is also uncertainty on the rights and obligations of States in the territorial sea

surrounding a disputed feature, including the protection of the marine environment and fishery and law and enforcement activities. A definitive ruling on these issues from the arbitrators, (who consist of three current ITLOS judges, one former ITLOS judge, and one law of the sea expert) would provide authoritative, independent guidance on critical aspects of law of the sea.

The importance of clarification of legal norms cannot be underestimated. One only has to look at the decision of the International Court of Justice in *Nicaragua v. the U.S.* The United States famously withdrew from the merit proceedings after it lost the jurisdictional challenge, refused to comply with the final judgment issued in 1986, and engaged in a campaign to discredit the ICJ's ruling. Yet the Court's rulings on use of force and the UN Charter have permeated our understanding on the principles governing these matters and have had lasting impact, despite U.S. non-compliance.

### **Enhancing the Legitimacy of UNCLOS and Its Dispute Settlement System**

A critical by-product of the law interpretation and application function of the tribunal is the enhancement of the legitimacy of UNCLOS and its dispute settlement system. UNCLOS courts and tribunals are not mere agents for Member States but are "trustees" for the UNCLOS regime. Trustee courts interpret and apply the law to both reduce legal disputes but also to contribute to the overall goals of that particular regime so as to enhance its legitimacy. By articulating norms and clarifying uncertainties, the tribunal is contributing to the public order of the oceans and thus the legitimacy of the regime. Further, it also warrants mention that the ICJ's decision against the major superpower at that time in *Nicaragua vs. U.S.* enhanced its legitimacy in the eyes of the world and indeed, it even experienced an uptick in the number of cases it received after the decision was issued. In the same way, the award can also contribute to increased confidence in the UNCLOS dispute settlement system.

### **Shaping Future Negotiations Between the Parties**

According to a [recent report](#), China has offered to negotiate with the Philippines if it ignores the award. This highlights another benefit of the award – it has brought China to the negotiating table and altered the balance of power in negotiations. Even if both parties were to ostensibly ignore the findings in the award, it will inevitably play a role. For example, in maritime delimitation negotiations, parties are not bound to take into consideration international law on delimitation and are free to agree to any boundary they want, provided that the interests of third states or the international community are not prejudiced. That said, international law underpins claims advanced during such negotiations. While final delimitation agreements are not necessarily determined by international legal principles on delimitation, they often incorporate a compromise between opposing interpretations of

international law. Thus, the cat is out of the bag as they say, and it will be very difficult for the award not to have any impact on bilateral negotiations between China and the Philippines. This is not a bad thing as the award could potentially clarify some contentious issues that have previously proved intractable, such as the location of the disputed areas between the parties.

### **Impact on Other State and Non-State Actors in the South China Sea**

China's non-compliance does not mean that other State and non-State actors will ignore the ruling. Non-claimant States with an interest in the region may shift their policy considerations and decision-making as a result of the ruling. Claimant States are not precluded from using the findings on the status of features or the validity of historic rights in their dealings with China. Private actors such as oil and gas companies may also adjust their risk considerations for operating in disputed areas in the South China Sea as a result of the decision.

### **Prompting Parties to Clarify Their Claims**

One of the most important benefits of dispute settlement is the process itself. In normal cases where both parties participate, the preparation of a legal case forces a more thorough examination of the issues. Evidence is gathered, facts verified, information exchanged, all of which allows parties to have a better understanding of the respective merits of each other's position. China did not participate in the arbitral proceedings, but received the voluminous submissions from the Philippines along with evidence about the features in the South China Sea. It prepared a position paper in which it articulated its position using legal arguments to justify its stance. This interaction with international dispute settlement has no doubt compelled China to re-examine its policies in the South China Sea and is slowly but surely prodding China toward clarification of its claim, both internally and externally. It is worth reiterating that the conflict in the South China Sea started escalating in the 1970s. Before 2009, there were many unknowns: the nature, number, and status of the features, and the nature of the claims of all the Claimants including China, which pursued a policy of deliberate ambiguity. Just as the 2009 submissions by Malaysia and Vietnam to the Continental Shelf Commission were legal steps that transformed the status quo, the 2013 arbitral proceedings and the information that was generated by it will once again shake up the legal landscape that underpins the South China Sea disputes.

### **The Award as a Focal Point for Other Actors**

In a recent empirical study, [Karen Alter](#) argues that international courts are not able to resort to a "world policeman" to enforce their decisions but they can rely on a range of state and non-state actors to put pressure on governments to shift their behavior in a way that is more consistent with

international law. In this way, the decisions of international courts and tribunals are a focal point that provide legal, political, and symbolic leverage that can be used by domestic and international actors to shift the behavior of States toward policies that are more in line with international law, even if that change does not amount to compliance with the exact terms of the decision.

A good illustration of this is *Nicaragua vs. U.S.*, which is frequently portrayed as another instance of a superpower ignoring the decision of an international court. What is overlooked, however, is that after the ICJ had issued its provisional measures order in 1984 requesting that the United States cease its actions supporting the Contras in their struggle against the Nicaraguan Sandinista Government, the U.S. House of Representatives rejected the Reagan administration's request for Contra aid for the first time. Subsequent requests were denied until June 25, 1986, two days before the delivery of the judgment on the merits. While official aid did continue after the judgment on merits was issued in 1986, according to one [author](#), the two year hiatus in aid significantly undermined the efforts of the Contras and they never subsequently posed a serious threat to the Nicaraguan Government. In this case, the actions of domestic actors brought about a change in U.S. policy.

Thus even in the face of China's non-compliance, the Philippines/China award can be a focal point that can be used by relevant stakeholders to engender an overall change in China's South China Sea policy that is more restrained and in line with international law. This will depend on how other States, international organizations, and non-State actors react to the Award.

To date, it is unclear whether relevant actors will take up this challenge. China has unsurprisingly made a concerted effort to prevent the award from being a source of pressure. It has engaged in a relentless campaign to undermine the credibility of the award. It has also [gathered declarations](#) from a disparate group of states supporting the resolution of disputes through bilateral negotiations rather than by international courts (although the number of States is reportedly [much lower](#) than China claims). The Philippines itself appears to be [lukewarm about taking a strong stance after the award is issued](#). The ASEAN members may not be able to muster sufficient agreement amongst themselves to issue a joint statement supporting the award, although as noted by [one expert](#), such unity is critical. Equally as important is the reaction of domestic actors. While a [2013 survey](#) suggested that a majority of the Chinese public supported submitting the disputes to arbitration, it is doubtful this support will continue after the award has been rendered. The government has framed the award as undermining Chinese sovereignty in the South China Sea which will no doubt stoke nationalistic fervor on this issue.

Nonetheless, the award has the potential to nudge China in a direction that is more consistent with the rule of law in the oceans. After all, it is one thing to act contrary to interpretations of international law that have been articulated by other States and are thus still subject to debate. It is quite another to be in

express violation of principles articulated by a third party imbued with final and binding legal authority.

### **Concluding Thoughts**

In an ideal world, China would have participated and respected the decision of the tribunal. However, its non-compliance does not render the arbitration a Pyrrhic victory nor is it a vindication of *realpolitik* over law. Instead, the award can have some very real benefits that are simply not captured by narratives focused on China's non-compliance. Confronted with China's rejection of the tribunal and predictions that the award will escalate China's assertiveness in the South China Sea, it is easy to overlook the fact that the tribunal's role is a discrete one. Its objective is to issue a final and binding decision on a *legal* dispute on the interpretation and application of UNCLOS. It will not resolve the complex and multi-faceted disputes that dominate the South China Sea, but is an essential step that will help clarify issues that have been obstacles for any long-lasting settlement. When the dust settles and the sting of being brought to court has faded, perhaps China will see the value of third party dispute settlement for the law of the sea in the same way it has recognized its value in trade disputes. Until then, no matter how hard China (and even the Philippines) tries to ignore the decision, as of July 12, it will be out there. There is no going back now.

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