

BINDINGNESS, FINALITY AND COMPLIANCE IN THE SOUTH CHINA SEA ARBITRATION

Hao Duy Phan
Senior Research Fellow

INTRODUCTION

1 Bindingness and Finality

2 Compliance

3 Significance

1. BINDINGNESS AND FINALITY

Is the Award binding?

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FOREIGN AFFAIRS
2330 ROXAS BOULEVARD, PASAY CITY, PHILIPPINES 1300

FOREIGN AFFAIRS SECRETARY YASAY CALLS FOR 'RULES-BASED' APPROACH FOR RESOLVING DISPUTES

25 July 2016 – Philippine Foreign Affairs Secretary Perfecto R. Yasay Jr. rallied the foreign ministers participating in the 49th ASEAN Ministerial Meeting in Vientiane, Laos PDR to support a rules-based international order.



"The decision has provided a solid legal foundation on which a rules-based approach for resolving disputes in the South China Sea can be built," he told his peers in the region from the 10 countries of South East Asia, the Philippines included. He added that the ruling has upheld international law, particularly the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

Secretary Yasay pointed out that the decision has established jurisprudence on maritime disputes. "The ruling can move the dispute-settlement process forward" he pointed out. "The Philippines strongly affirms its respect for this milestone decision as an important

contribution to ongoing efforts in addressing disputes in the South China Sea."

Earlier, Secretary Yasay said the Philippines welcomes the issuance on 12 July 2016 of the ruling constituted under Annex VII of the 1982 UNCLOS.

Secretary Yasay said an ASEAN statement supporting the legal and diplomatic processes being pursued by the Philippines towards the peaceful resolution of the dispute, without taking sides, would not only reflect ASEAN acknowledgment and respect for a rules-based order, but also will reaffirm ASEAN's "centrality and solidarity in the regional security architecture that would enhance ASEAN's voice and growing influence in the international community."

He cited that the ruling is "final and binding to all parties concerned, is a clearly established fact" and that it has "significant implications for the entire region, not just the coastal states bordering the South China Sea."

Source: Philippine Department of Foreign Affairs

Is the Award binding?

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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

2016/07/12

With regard to the award rendered on 12 July 2016 by the Arbitral Tribunal in the South China Sea arbitration established at the unilateral request of the Republic of the Philippines (hereinafter referred to as the "Arbitral Tribunal"), the Ministry of Foreign Affairs of the People's Republic of China solemnly declares that the award is null and void and has no binding force. China neither accepts nor recognizes it.

Source: China's Ministry of Foreign Affairs

Article 296, UNCLOS

Decision [...] *shall be final*
and *shall be complied with*
by all the parties to the
disputes.

Article 11, Annex VII

The award shall be *final*
and *without appeal*, and
shall be complied with by
the parties to the dispute.

**PCIJ
Free Zones**

It would be incompatible with the Statute, and with its position as the Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties.

**ICJ
Genocide Convention**

Finality is to ensure that (i) the legal relations between the parties are stable, and (ii) an issue which has already been adjudicated will not be argued again. Depriving a party of such benefits must be seen as a breach of the principles governing the legal settlement of disputes .

Consent

UNCLOS

Part XV (Section 2): Inherent compulsory
dispute settlement system



Source: ITLOS

Consent is given in
advance when states ratify
the Convention.

Article 286: Any disputes [...] *shall*, where no settlement has been reached by recourse to section 1, *be submitted* at the request of *any party* [...] to the court or tribunal having jurisdiction under this section.

Article 9, Annex VII

Absence of a party shall not constitute a bar to the proceedings.



Arctic Sunrise

ICJ – Nicaragua: [a] State which decides not to appear must accept the consequences of its decision; [it] remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute.



M/V Norstar



Timor Sea

Jurisdiction

Article 288(4), UNCLOS

In the event of a dispute on the Tribunal's jurisdiction, the matter shall be settled by decision of the Tribunal.

Article 36(6), ICJ Statute

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

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National University of Singapore

Ad hoc



Source: PCA

Composition

Funding

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National University of Singapore

'Final'

'unless the parties to
the dispute have agreed
in advance to an
appellate procedure'
(Article 11 Annex VII)

**'Without
Appeal'**

2. COMPLIANCE

PCA Case N° 2013-19
IN THE MATTER OF THE SOUTH CHINA SEA ARBITRATION
- before -
AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE
1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA
- between -
THE REPUBLIC OF THE PHILIPPINES
- and -
THE PEOPLE'S REPUBLIC OF CHINA

AWARD

Arbitral Tribunal:
Judge Thomas A. Mensah (Presiding Arbitrator)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred H.A. Soons
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

12 July 2016

Does UNCLOS
have a
mechanism to
enforce
decisions of its
dispute
settlement
bodies?

Compliance with PCIJ/ICJ decisions on territorial, river and maritime issues

Did Both Claimants Comply with Decision?	Territorial Claims	River Claims	Maritime Claims	Total
Yes	15 (93.8%)	2 (66.7%)	8 (80.0%)	25 (86.2%)
Yes (appeal)	1 (6.3)	0 (0.0)	2 (20.0)	3 (10.3)
No	0 (0.0)	1 (33.3)	0 (0.0)	1 (3.4)
Total	16 (100%)	3 (100%)	10 (100%)	29 (100%)

Source: Sara Mitchell & Paul Hensel (2007)

WTO members comply with the rulings of the dispute settlement system in about 90 per cent of cases. *Source: WTO(2012)*

Compliance with judicial and arbitral decisions of UNCLOS dispute settlement bodies

Prompt Release

- M/V Saiga (Saint Vincent & Grenadines v Guinea)
- Camouco (Panama v France)
- Monte Confurco (Seychelles v France)
- Hoshinmaru (Japan v Russia)

Provisional Measures

- Enrica Lexie (Italy v India)
- Mox Plant (Ireland v UK)
- Land Reclamation (Malaysia v Singapore)

Maritime Delimitation

- Guyana v Suriname
- Bangladesh v Myanmar
- Bangladesh v India

Arctic Sunrise – Award of Annex VII Arbitral Tribunal

343. Given that the persons who had been detained by Russia were all released by 29 November 2013, *i.e.*, seven days following the prescription of provisional measures by ITLOS and three days prior to the Netherlands posting the bank guarantee, the Tribunal considers that Russia cannot be said to have failed to comply with this aspect of Paragraph 1(a) of the *dispositif* of the ITLOS Order.

South China Sea - Foreign Ministry Spokesperson of 31 October 31 2016 on Arrangements for Scarborough Shoal

We have seen all-round improvement of China-Philippines relations following President Duterte's visit to China. Under such circumstances, the Chinese side makes proper arrangements based on the friendship between China and the Philippines in response to the issue of President Duterte's concern.



Art 12 Annex VII

Problems from implementation of the Award may be submitted by either party to the arbitral tribunal.



3. SIGNIFICANCE OF THE AWARD

Functionality



Level playing field

Compulsory
nature

EEZ
regime

Historic
rights

Marine
Environment

Article
121(3)





THE LAW OF THE SEA

Source: UN

Thank you!

Hao Duy Phan (S.J.D.)

Senior Research Fellow

Centre for International Law (CIL)

National University of Singapore

Website: www.cil.nus.edu.sg