

# *South China Sea arbitral award is not 'a piece of waste paper'*

Five years on, there remains much confusion over the process that led to the ruling in the Philippines-China dispute. A close-up look at the law of the sea sheds light on the proceedings and their legal effect.

Robert Beckman and Tara Davenport



Activists demonstrating outside the Chinese consulate on the fifth anniversary of an international arbitral court ruling invalidating Beijing's historical claims over the waters of the South China Sea, in Makati City, Philippines, earlier this month. PHOTO: REUTERS

July 2021 marks the fifth anniversary of the award of the arbitral tribunal in the South China Sea dispute between the Philippines and China.

Since the Philippines initiated the case against China in 2013, there have been countless stories in the press and on social media about it. Some have critiqued the substantive legal outcome in the award while others have cast doubt on the procedural aspects of the arbitral proceedings, inevitably raising questions on the legitimacy and validity of both.

Unfortunately, media coverage of the case has resulted in considerable confusion about the arbitral proceedings. This commentary attempts to clarify some of the misperceptions surrounding key procedural issues in the arbitration. It explains how the Philippines submitted the dispute to the arbitral tribunal, the constitution of the arbitral tribunal, the role of the Permanent Court of Arbitration (PCA), the implications of China's non-participation, and the legal effect of the award.

## States can unilaterally submit disputes relating to Unclos to tribunals

The 1982 United Nations Convention on the Law of the Sea (Unclos) was a milestone in international law. It was negotiated over nine years, covered a broad range of issues relating to ocean use and involved more than 160 states, including China and the Philippines.

The goal was to agree on a universally accepted convention for all uses of the oceans. Currently, Unclos has 168 parties. It has been described by Ambassador Tommy Koh as a "Constitution" for the oceans and has gained widespread acceptance as the prevailing legal order governing the rights and obligations of states in the oceans.

One of the unique features of Unclos is the compulsory system for the settlement of disputes between state parties on the interpretation or application of its provisions.

When a state ratifies Unclos, it agrees in advance that if a dispute arises between it and another state party on the interpretation or application of the provisions in Unclos, and that dispute cannot be resolved through negotiations, either party to the dispute can institute proceedings against the other party.

States parties agree to these procedures when they ratify Unclos. Their consent to dispute settlement procedures when a particular dispute arises is not required.

To provide maximum flexibility to states, Unclos allows states to select from a range of international courts and tribunals including permanent courts such as the International Court of Justice (ICJ) (the judicial organ of the United Nations), the

International Tribunal for the Law of the Sea (Itlos, a permanent court established under Unclos consisting of 21 judges), and ad hoc arbitral tribunals to be constituted when disputes arise.

When the Philippines instituted proceedings against China, Manila was simply exercising its rights under Unclos dispute settlement provisions. China's consent to the proceedings in the case was not specifically required as it had already consented when it ratified Unclos. Indeed, such unilateral referral of disputes to Unclos forums has been utilised by other states in Asia, including Malaysia's dispute with Singapore in the land reclamation case and Bangladesh's disputes with India and Myanmar on maritime boundaries in the Bay of Bengal.

The negotiators of Unclos recognised that there were certain disputes that states would prefer not to be subject to compulsory dispute settlement. Unclos accordingly gives states the choice to opt out of compulsory dispute settlement procedures for certain categories of disputes. For example, every state party to Unclos can declare that it does not accept the compulsory dispute settlement procedures for disputes concerning the interpretation or application of the provisions in Unclos on the delimitation of maritime boundaries, or on disputes relating to military activities.

China, like several other states, made a declaration excluding disputes on these issues from compulsory procedures. However, consistent with the practice of all international courts and tribunals, in the event of a dispute over whether these exceptions apply and whether an Unclos forum has jurisdiction, the Unclos forum itself has the authority to determine whether it has jurisdiction.

In the South China Sea arbitration, the arbitral tribunal considered whether these exceptions applied, and it decided that it had jurisdiction over some (although not all) of the disputes referred to it by the Philippines.

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## **The arbitral tribunal was properly constituted under the rules of Unclos**

Another source of confusion relates to the constitution of the arbitral tribunal and the selection of arbitrators.

As mentioned above, Unclos allows states (either on becoming a party to Unclos or after) to select from a range of international courts and tribunals, including the ICJ or Itlos or ad hoc arbitral tribunals.

If parties to a dispute have selected different forums or have not made a selection, the "default procedure" is arbitration under Annex VII of Unclos. This is commonly referred to as an "Annex VII arbitral tribunal".

Annex VII of Unclos sets out the rules of procedure for the conduct of arbitral proceedings when an Annex VII arbitral tribunal is the applicable forum.

Unless the parties to the case otherwise agree, an Annex VII arbitral tribunal consists of five arbitrators. One arbitrator is appointed by the state initiating proceedings. The other state then has 30 days to appoint one arbitrator. The two states are then to agree on the remaining three arbitrators.

However, if one of the states fails to appoint an arbitrator, or if the two states cannot agree on the remaining three arbitrators, the remaining arbitrators are then to be appointed by the president of Itlos. When appointing the remaining three arbitrators, the Itlos president is required to consult with the parties to the case.

In the South China Sea arbitration, the Philippines appointed Itlos judge Rudiger Wolfrum of Germany as an arbitrator. China then had 30 days to appoint one arbitrator.

However, China did not appoint an arbitrator or consult with the Philippines on the appointment of the remaining three arbitrators because it had decided not to participate in the case. The Philippines then exercised its right to request the Itlos president to appoint an arbitrator for China and to appoint the remaining three arbitrators.

Some reports in the media have raised questions on why four of the arbitrators were appointed by a Japanese government official. The simple reason is that Judge Shunji Yanai of Japan had been elected by the other Itlos judges to serve as the president of Itlos from 2011 to 2014. As president, he was responsible for appointing an arbitrator for China and the remaining three arbitrators.

Judge Yanai did not have free choice in appointing the remaining arbitrators. Annex VII requires him to appoint persons from the list of arbitrators maintained by the UN Secretary-General. The list of arbitrators is comprised of persons nominated by Unclos state parties who are experienced in maritime affairs and who enjoy the highest reputation for fairness, competence and integrity.

In addition, Judge Yanai was required to appoint persons of different nationalities, and he could not appoint anyone who was in the service of, ordinarily resident in the territory of, or a national of either of the parties to the dispute.

Judge Yanai appointed four persons from the list of arbitrators - three Itlos judges (from Ghana, France and Poland) and a law of the sea expert from the Netherlands. Some media reports have questioned why Judge Yanai failed to appoint any Asians to the arbitral tribunal. However, there were very few Asians on the list of arbitrators because most of the Asian state parties to Unclos had not exercised their right to appoint persons to the list.

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## **The case was heard by an Annex VII arbitral tribunal, not the PCA**

Some media reports have also created confusion about the award by describing it as having been issued by the PCA, rather than an Annex VII arbitral tribunal. Such reports have suggested that the PCA is not really a court or an arbitral tribunal with international standing, thereby casting doubt on the award.

The PCA is not an international court or tribunal, but is a registry established by states in 1899 to facilitate the peaceful settlement of disputes that have been referred to arbitration. In the majority of Annex VII arbitrations unilaterally initiated by state parties to Unclos, the PCA is appointed as the registry that provides administrative services such as the arrangement of hearings, facilitation of communication between parties and record of documents.

The PCA has no say as to how cases are decided and provides only administrative support.

## China's non-participation

When a case is instituted against it, a state is entitled to adopt whatever litigation strategy it thinks fit, including a decision not to participate in the case, either fully or partially.

However, as is the case with most international courts and tribunals, Annex VII of Unclos specifically provides that if one party to a dispute does not appear or fails to defend its case, the other party may request the tribunal to continue the proceedings and make an award, and that the absence of a party shall not constitute a bar to the proceedings. The rationale for such provisions is to ensure that states were not presented with an easy way of preventing an adverse judgment or award.

However, Annex VII also provides that before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

Undoubtedly, the non-participation of China placed a greater burden on the arbitral tribunal than in a normal case. That said, the tribunal took several steps to ensure that it had jurisdiction and that the Philippines' claim was well-founded in fact and law.

For example, while China did not officially participate, it made its position known on several occasions, including in a 2014 position paper. The tribunal considered China's official statements when determining whether it had jurisdiction (also consistent with international practice).

In addition, the tribunal required the Philippines to make additional arguments on issues that it felt had been inadequately addressed by the Philippines and requested further evidence from it to substantiate its arguments on certain issues. The tribunal also appointed its own independent experts to examine certain issues in order to ensure that the Philippines' claims were well-founded in fact and law.

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## The legal effect of the award

China has stated that the award is null and void, has no binding effect on China, and should be treated by the international community as a "piece of waste paper". This is unsurprising - the award is contrary to China's position and interests in the South China Sea.

However, China's characterisation of the award does not deprive the award of its legal effect under international law. Unclos clearly provides that the award of the arbitral tribunal is final and without appeal, and shall be complied with by the parties to the dispute. This applies even if one of the parties does not participate in the case.

The nature of international law is such that the arbitral tribunal has no power to force a state to comply with an award even though it is legally binding on parties to the dispute. Unclos dispute settlement provisions assume that states will comply in

good faith with the provisions in the treaty they ratified. If they fail to do so, it risks undermining the integrity of the rules-based order set out in Unclos.

While arbitral awards are binding only on the parties to the dispute, they may also have broader legal effects vis-a-vis the international legal order. Arbitral awards are a subsidiary means of determination of the rules of international law. The award clarified the legal meaning of Unclos provisions that have previously been uncertain or subject to conflicting interpretations. Its findings can be relied upon by states and other international courts and tribunals.

While the extent to which the award will be relied upon by other actors is still evolving, it is clear that the award is no mere piece of waste paper.

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