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A ruling on South China Sea dispute is no cause for gloom

The Hague tribunal's Philippines versus China arbitration could augur well – if complied with

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For The Straits Times

Filipino children flying their national flag on Pag-asa, a remote Philippine-held island in the South China Sea, on Dec 31 last year during a protest against China's claims in the South China Sea. PHOTO: AGENCE FRANCE-PRESSE

In the article, "South China Sea arbitration: What may follow", in The Straits Times last Saturday, writers Kang Lin, Jiang Zongqiang and Hu Xin attempt to give grounds for China's position that the Permanent Court of Arbitration at The Hague does not have jurisdiction over the maritime disputes between the Philippines and China in the South China Sea.

The tribunal had ruled at the end of last October that the case was "properly constituted" under the United Nations Convention on the Law of the Sea (Unclos).

The article also anticipates China's reactions, and predicts that rising tensions and escalating disputes in the South China Sea may follow the tribunal's final award.

It advances several arguments that mirror China's position regarding the tribunal's jurisdiction, or lack thereof, over the disputes. First, it argues that the tribunal – established in accordance with Annex VII of the 1982 Unclos – does not have jurisdiction because the disputes are not about the interpretation or application of Unclos; instead they concern issues of territorial sovereignty.

The tribunal addressed this argument, holding that each of the Philippines' submissions reflects disputes between the two states concerning the interpretation or application of Unclos. While it acknowledged it has no jurisdiction to consider issues of sovereignty, it concluded that none of the issues raised by the Philippines would require even an implicit determination of sovereignty.

Second, the article maintains that the disputes essentially constitute an integral part of maritime delimitation, which is excluded under China's 2006 declaration in accordance with Article 298 of Unclos.

But as the tribunal pointed out, a dispute concerning the status or the maritime entitlement of a feature is distinct from one concerning maritime delimitation. Several issues raised by the Philippines, therefore, are subject to the tribunal's jurisdiction because they are not an integral part of maritime boundary delimitation.

At the same time, the tribunal acknowledged that, depending on the status of certain features, some issues raised by the Philippines could be excluded by China's 2006 declaration, but because they were linked to arguments on the merits, it would decide whether it has jurisdiction over these issues, together with the merits.

Third, the article claims that the Philippines could not unilaterally submit the disputes to arbitration because it had made a commitment to dispute settlement through negotiation, which "should be seen as an obligation under international law".

The tribunal rejected this argument. It observed that none of the documents cited by China precludes the Philippines from seeking to resolve the disputes through the Convention. The 2002 Declaration on the Conduct of Parties and other joint statements by China and the Philippines, the tribunal concluded, are not legally binding treaties and do not establish any obligation to resolve the disputes exclusively through negotiation.

Fourth, the article states that the Philippines did not honour its obligation to exchange views under Article 283 of Unclos. The tribunal held that the Philippines met the requirement under Unclos to exchange views regarding the settlement of the disputes and had the right to institute proceedings against China.

CHINA'S POSSIBLE RESPONSES

The article predicts that the tribunal will render an award on the merits in favour of the Philippines. It anticipates that China will "surely not bow to the pressure brought by the final award". It suggests that China will insist more strongly on resolving the disputes through bilateral negotiation and might even undertake unilateral actions and bolster its military deployment in the South China Sea. In all, the article argues, the final decision of the tribunal will only increase the tensions and bring about instability in the South China Sea.

Contrary to these gloomy predictions, the ruling could represent a step forward, incentivising the parties to engage in more productive negotiations.

The article, somewhat self-contradictorily, alludes to this by suggesting that China will "upgrade its relations with Asean" and "prioritise discussion on a legally binding code of conduct" as a result of the ruling.

The award will clarify some legal issues concerning maritime rights in the South China Sea, but it will not resolve the underlying sovereignty disputes. Asean claimants, therefore, might be willing to negotiate with China if it brings its conduct into conformity with Unclos as defined by the tribunal. Such an outcome will contribute to addressing the "trust deficit" that creates the current sense of insecurity among the parties.

If China does not respect the award, that will constitute a major violation of Unclos, which provides that the award of the arbitration tribunal is final. Thus, how China reacts will be critical in shaping the international perception of China as a complier or a defier of its obligations under international law.

Unclos is widely accepted as a Constitution for the oceans that establishes the basic legal framework governing all major uses of the oceans, sets forth the regimes of all maritime zones and addresses all major legal matters relating to the law of the sea. Every state that is a party to Unclos, China included, has agreed to abide by its provisions and accept the decisions of courts or tribunals established in accordance with the Convention to interpret and apply the provisions.

Unclos provides that any problems arising from the implementation of an award may be submitted by either party for decision by the arbitration tribunal. If China fails to comply with the award, the Philippines may decide that it has no choice but to initiate further proceedings against China. China's non-compliance may also be seen as a threat to the system of compulsory dispute settlement that is integral to Unclos.

If China undertakes further unilateral and provocative actions inconsistent with Unclos in the South China Sea, it is not unlikely that outside major powers will take diplomatic, political or other measures. China would then reinforce its image as a rising power with little respect for international law and the rule of law in the oceans.

CONCLUSION

Peaceful settlement of disputes is an obligation of all members of the international community. Article 33(1) of the UN Charter enumerates arbitration and judicial settlement as peaceful means of dispute settlement. Unclos provides that, if any dispute arises between two states on the interpretation or application of the Convention and no settlement can be reached by negotiation, either party may unilaterally refer the dispute to an international court or arbitration tribunal . China voluntarily accepted the compulsory dispute-settlement procedures under Unclos when it ratified the Convention.

In addition to the Philippines versus China case, seven other maritime disputes in Asia alone have been unilaterally submitted for the Unclos settlement procedure. Unclos offers a level playing field for all parties to settle disputes and protect their legal rights in the oceans. It provides a framework for them to reduce tension, resolve conflicts, and maintain peace and stability.

The decision of the arbitration tribunal is expected to provide authoritative answers to some of the difficult questions concerning the law of the sea in the South China Sea. These include the status of features and their entitlement to maritime zones, and whether China's assertion of historic rights within the nine-dash line is consistent with its obligations under Unclos.

If accepted and complied with in good faith by all relevant parties, the award of the arbitration tribunal will promote peace, cooperation and joint development, and facilitate fruitful discussions among the parties towards the final resolution of the disputes.

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