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South China Sea



Activists at a protest in front of the Chinese Embassy in Manila on July 12, ahead of the tribunal ruling.
PHOTO: AGENCE FRANCE-PRESSE

Tribunal ruling will affect many other states' claims

The July 12 tribunal ruling on a maritime dispute case brought by the Philippines against China helped to clarify international law on oceans and sets a high bar for what constitutes islands. It will have repercussions for many regional states' claims.

Robert Beckman

The United Nations Convention on the Law of the Sea (Unclos) contains the most elaborate and complex dispute settlement regime contained in any international treaty.

The key element in the dispute settlement regime is that States Parties consent in advance to a system of compulsory procedures that will result in a legally binding decision by an international court or arbitral tribunal. The general rule in the Unclos dispute settlement regime is that if a dispute arises between two States Parties on the interpretation or application of any provision of the convention, and that dispute cannot be resolved by negotiation, either party to the dispute may unilaterally institute proceedings to have the dispute resolved by an international court or arbitral tribunal.

The consent of the other party to this procedure for a particular dispute is not required because it gave its consent to these procedures when it became a party to the convention.

Unclos permits States Parties to opt out of the compulsory procedures entailing binding decisions for certain categories of disputes that are highly sensitive by making a formal declaration to the UN secretary-general. States Parties may opt out of the compulsory procedures for disputes on the interpretation or application of the provisions on maritime boundary delimitation, disputes involving historic bays or titles, and disputes concerning military activities. Several states have made declarations excluding these categories of disputes from the compulsory procedures on the settlement of disputes, including China, Korea and Thailand.

Several states in Asia have resorted to the compulsory dispute settlement procedures in Unclos. First, Malaysia instituted proceedings against Singapore in the dispute concerning Singapore's land reclamation activities in the Johor Strait.

Second, Bangladesh instituted proceedings against both India and Myanmar with respect to longstanding disputes on the delimitation of maritime boundaries in the Bay of Bengal.

Third, Japan instituted proceedings against Russia on the prompt release of its vessels in the Hoshimaru and Tomimaru cases. Fourth, the Philippines instituted proceedings in 2013 against China with regard to China's actions in the South China Sea. Most recently, Timor Leste invoked the procedures in Unclos against Australia in an attempt to bring their maritime boundary dispute to "compulsory non-binding conciliation" as provided for in Article 298 of Unclos.

Cases have also been instituted against states in the Asian region. Australia and New Zealand instituted proceedings against Japan in the "southern bluefin tuna" cases.

In addition, Italy instituted proceedings against India in a case concerning the Enrica Lexie incident that is currently before the International Tribunal for the Law of the Sea.

It should be noted that the compulsory dispute settlement procedures in Unclos are only applicable to disputes on the interpretation or application of provisions in Unclos. There are no provisions in Unclos on how to determine which state has the better claim to sovereignty over disputed offshore islands. Therefore, the dispute settlement regime in Unclos cannot be invoked to resolve the dispute about who has the better claim to sovereignty over the disputed islands in the South China Sea or East China Sea.

The Philippines vs China case

In recent months, the spotlight has been put on the dispute settlement regime in Unclos because of the case instituted by the Philippines against China in 2013. China refused to participate in the case, but the arbitration proceeded in its absence as provided for in Unclos. The decision of the tribunal on the merits of the case was given on July 12.

The Philippines versus China case highlights several points about the dispute settlement system in Unclos.

But first let me correct one common misunderstanding about the case. The case was not heard by the Permanent Court of Arbitration (PCA) in The Hague. Nor was it heard by the International Tribunal for the Law of the Sea in Hamburg.

It is not correct to refer to the case as a "PCA arbitration".

The case was heard by an arbitral tribunal established under Annex VII of Unclos. The Permanent Court of Arbitration at The Hague (which is not actually a court) is simply providing secretariat services to the Annex VII arbitral tribunal at the tribunal's request. Information about the case is found on the website of the PCA because it is providing secretariat services to the tribunal.

I will now make a few points about the case. First, the Philippines invoked the procedures in Unclos to bring China to arbitration on several disputes concerning the interpretation or application of Unclos. China's consent to participate in this particular arbitration was not required. This is because China, like all other parties to Unclos, consented to the compulsory dispute settlement procedures in Unclos when it ratified the convention.

If China believed that the tribunal lacked jurisdiction over some or all of the disputes raised by the Philippines, it had the right to challenge the jurisdiction of the tribunal.

However, it is clear under Unclos that the decision on whether the tribunal has jurisdiction in the case is made by the tribunal, not by the state objecting to its jurisdiction. This is a common principle in international arbitration known as "competence de la competence".

Second, the award of the arbitral tribunal is final and binding on the two parties to the dispute, the Philippines and China. However, there is no mechanism by which the tribunal can enforce its decision.

The dispute settlement system in Unclos, as in other international treaties, assumes that because states have agreed to the convention and its dispute settlement provisions, they will comply in good faith with decisions of courts or tribunals rendered in accordance with the provisions in the convention.

Significance of ruling

In its award, the arbitral tribunal gave rulings on several legal issues that are very significant for all parties to Unclos.

CONFIRMS EEZ RIGHTS

First, it confirmed that, under Unclos, a coastal state has sovereign rights to explore and exploit the natural resources in its exclusive economic zone (EEZ), and that the sovereign rights of the coastal state in its EEZ are not compatible with "historic rights" claimed by other states. In other words, Unclos provides that the coastal state has sovereign rights to all the fisheries resources in its 200-nautical-mile EEZ, notwithstanding the fact that some of the areas in its EEZ may have been the historic fishing grounds of other states, and notwithstanding the fact that prior to Unclos entering into force, other states may have fished in those waters because they were governed by the principle of freedom of fishing on the high seas.

HIGH BAR SET FOR 'ISLANDS'

Second, the tribunal in this case was the first international court or tribunal to interpret and apply the language in Article 121(3) of Unclos, which provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf".

The tribunal ruled that none of the disputed islands in the Spratlys, including the largest, Itu Aba – also known as Taiping – are islands entitled to an EEZ and continental shelf of their own. The tribunal held that all of the largest islands in the Spratlys are "rocks" entitled to no more than a 12-nautical-mile territorial sea.

The result of this ruling is that there are no areas of overlapping EEZ claims between the coasts of the bordering states and the disputed islands. This greatly reduces the significance of the disputed islands in the allocation of resources, as it means that most of the hydrocarbon and fisheries resources in the South China Sea are within the EEZ of the bordering coastal states.

The tribunal set quite a high bar for an island to be entitled to an EEZ and continental shelf of its own. The tribunal concluded that for an island to be entitled to an EEZ and continental shelf of its own, the island must, in its natural condition, be able to sustain either a stable community of people or economic activity that is not dependent on outside resources and is not purely extractive in nature.

This criterion means that many small uninhabited islands in this region will be entitled to only a 12-nautical-mile territorial sea. This has implications for many parties to Unclos.

If States Parties to Unclos respect the decision of the Annex VII arbitral tribunal as an authoritative interpretation of Unclos, they should review their own national practice and bring their own claims from small offshore islands into conformity with the decision of the tribunal.

Future of Unclos

In conclusion, allow me to say a few words on the future of Unclos. In my view, Unclos establishes a legal order for the oceans that has not only withstood the test of time, but is also increasingly important. All states, whether or not they are parties to the convention, have a vital stake in ensuring that activities in the oceans are governed by the legal rules set out in Unclos, and not by power. States Parties to Unclos have an additional interest in ensuring that the regime they established continues to be respected and followed.

It should be noted that the compulsory dispute settlement procedures in Unclos are applicable only to disputes on the interpretation or application of provisions in Unclos. There are no provisions in Unclos on how to determine which state has the better claim to sovereignty over disputed offshore islands. Therefore, the dispute settlement regime in Unclos cannot be invoked to resolve the dispute about who has the better claim to sovereignty over the disputed islands in the South China Sea or East China Sea.

The legal regime in Unclos ensures that all states, including the maritime powers, enjoy high seas freedoms in and above the waters of the South China Sea outside the territorial sea of any state, and that the sea lanes of communication through the South China Sea remain open to all states.

At the same time, Unclos ensures that the sovereignty and jurisdiction of coastal states in their territorial sea and archipelagic waters is respected. It is in the interests of all states that the careful balance of interests that is set out in Unclos is respected by all states.

This is vital not only to trade and development, but also to the national security of both coastal states and the maritime powers.

If Unclos is going to continue to govern relations between states in all uses of the oceans, States Parties must also recognise that the dispute settlement regime in Part XV is a vitally important component of the convention.

Disputes on the interpretation and application of the provisions of Unclos are certain to arise, and such disputes must be resolved by peaceful means.

Almost all states believe that such disputes should be resolved through negotiations. However, this is not always possible. Situations will arise where negotiations fail and one party to the dispute believes its only recourse is to invoke the compulsory procedures entailing binding decisions in Part XV of Unclos. This is the very reason why Part XV was made an integral part of the package deal.

In the long run, Unclos will not achieve its objective of creating a rules-based order for the oceans unless all States Parties to Unclos fulfil their obligations under the convention in good faith, including their obligations to resolve their disputes in accordance with the dispute settlement regime in Part XV, and their obligation to abide by the decisions of international courts and tribunals on the interpretation and application of the convention.

In my view, it is also essential that all States Parties respect and follow the decisions of courts and tribunals interpreting its provisions, even though the decisions are legally binding only on the parties to the case.

One final point: Renewed efforts must be made to encourage the United States to become a party to Unclos. The calls by the US for all states to respect the rules-based order for the oceans that is set out in Unclos is undermined by the fact that it is not a party to Unclos.

Many observers believe that it is hypocritical of the US to call on other states to abide by the provisions of the convention and comply with decisions of courts and tribunals on its interpretation, when it itself has not become a party and has not subjected itself to the dispute settlement procedures in Part XV of the convention.

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