

THE SOUTH CHINA SEA ARBITRAL AWARD: NOT 'JUST A PIECE OF PAPER'

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As long as the claimant states continue to stand up to China's excessive claims and defend their legitimate claims endorsed by the arbitral award, and as long as other states around the world do not turn a blind eye to the situation and continue to voice their objections to activities in violation of international law, the arbitral award could be considered to have impact and not "just a piece of paper"

On the 3rd anniversary of the South China Sea Arbitral Award, an arbitration compliance report published by the Asia Maritime Transparency Initiative observed that 'China is in compliance with just 2 of 11 parts of the ruling, while on another its position is too unclear to assess'.¹ This observation is perhaps not a surprising, even if the outcome is disappointing. China has stated from the very beginning that the award is "null and void and has no binding force".² Beijing outright refused to comply with the award.

The issue of compliance of international law, including decisions of international courts and tribunals, has always been viewed as one of the most striking weaknesses of the international legal system. This limitation is partly explained by the lack of enforcement mechanisms under international law that is comparable to those under domestic law. Non-compliance in cases in which there is a power imbalance between the parties of the case usually draws even greater attention as it reinforces the perception that enforcement of international law is merely a matter of self-help.

However, it is precisely due to the lack of a formal enforcement mechanism under international law that compliance with international courts or tribunals' decisions could be undertaken through various means. In fact, states involved in international disputes have attempted to use a variety of measures to give

effect to judicial or arbitral decisions, even when other disputing parties to the case refuse to do so. This paper will look at some of these measures in international precedents and assess their applicability to the South China Sea arbitral award.

Precedents

The South China Sea arbitration is not the only instance in which a State, a powerful State to be exact, defies a decision rendered by an international court or tribunal. One can think of at least two other cases in which a permanent member of the United Nations Security Council (UNSC) has publicly denounced a judgment or award; namely the United States in *Nicaragua v United States* before the ICJ in 1986, and Russia in *Arctic Sunrise (Netherlands v Russia)* before the UNCLOS Annex VII arbitral tribunal in 2015. The measures that Nicaragua and the Netherlands undertook after the decisions were rendered are worth examining.

In *Nicaragua v US*, faced with the United States' non-appearance in the merits phase of the case and subsequent rejection of the judgment, Nicaragua brought the issue of enforcement to the UNSC pursuant to Article 94 UN Charter. This course of action unsurprisingly failed to gain any success due to the United States' veto power as a permanent member of the UNSC. Nicaragua then turned to the UN General Assembly (UNGA), at which it managed to persuade the UNGA to pass 4 resolutions requesting the US to comply with the judgment.³ While on the surface, these resolutions did not change the rhetoric that US was pursuing, it did draw public attention to the US' behavior and put pressure on Washington to adjust its foreign policies.

In a way, using the UNGA as a forum to exert pressure on the other disputing party was also the strategy that the small island Mauritius took in its dispute concerning the Chagos Archipelago against the UK. Mauritius had not been successful in its attempt to get the Annex VII arbitral tribunal to declare on the issue of the UK's occupation on the Chagos Archipelago in 2015.⁴ It then turned to the UNGA in 2017 and was successful in lobbying the UNGA to pass a resolution to ask the ICJ an advisory opinion on Pre-independence Separation of Chagos Archipelago from Mauritius,⁵ the result of which was a resounding

success for Mauritius.⁶ While this case is not exactly a case of non-compliance as the UK never rejected the arbitration, it provides an example of the venues that (smaller) states may explore to have their interests heard, i.e. public forums to draw attention to the wrong-doing.

The case of *Arctic Sunrise* is perhaps the most relevant to the South China Sea situation in terms of enforcement mechanisms as it was also resolved under the framework of Part XV UNCLOS. The arbitral awards found Russia to be in violation of various articles of UNCLOS and ordered Russia to pay compensation to the Netherlands. While Russia, to a certain extent implemented the measure required under the ITLOS Provisional Measure Order—albeit, according to Russia, pursuant to changes in its domestic law—it continued to reject the arbitral awards.

Despite its rhetoric, a recent development indicates that the arbitral award has not completely been ignored. On 17 May 2019, the Netherlands and Russia issued a *Joint Statement on Scientific Cooperation in the Russian Arctic Region and the Settlement of a Dispute*.⁷ Although this Joint Statement states that it is without prejudice to the legal positions of both states in regards of the dispute involving the *Arctic Sunrise*, it in fact incorporates several of the arbitral tribunals' findings. Most noticeably among these are Russia's agreement to pay compensation to the Netherlands, and the parties' agreement on the limits for coastal State measures to prevent or end protest actions at sea which 'reflects the language included in the award on the merits in *Arctic Sunrise*'⁸ but further specified in the context of bilateral relationship between the two.

Options for South China Sea

Looking at these precedents, the question is then: what are the options that may be available for claimant states in the South China Sea to, even in the face of China's defiance of the arbitral award, enforce the arbitral award? While no disputes are the same, it is arguable that some lessons could be drawn.

As the South China Sea award was not handed down by the International Court of Justice, the option of bringing the issue of compliance to the UNSC is not available. In light of recent developments, there is perhaps little likelihood that

the Philippines and China could agree upon a Joint Statement similar in nature to that between the Netherlands and Russia to give effect to the arbitral award.

However, it is worth noting there is a fundamental difference between the *Nicaragua v US* or *Arctic Sunrise* cases and the *South China Sea* arbitration. While the arbitral award is indeed only binding on the parties to the dispute,⁹ due to the nature of the South China Sea being a semi-enclosed sea and the interrelated interests of other claimant states in the region, the arbitral award, or at least certain parts of the award, has arguably created 'an objective regime', and an *erga omnes* effect. This means that the award entails legal effects for states which are not parties to the case. Consequently, not only does the Philippines as a party to the award but other states which have a stake in the South China Sea have the right and obligation to give effect to the arbitral award. What are some of the ways by which they could do so?

From the experience of Nicaragua and Mauritius, putting a spotlight on the situation at global forums such as the UNGA could be an option to draw attention to activities which are inconsistent with the legal order established by the award. Vietnam took a measure of a similar nature after the deployment of the Chinese oil rig Haiyang Shiyou 981 in 2014 near the Paracels. Vietnam sent various letters to the UN Secretary General requesting the content of the letters that Vietnam had sent to China condemning the Chinese activities in the Vietnamese EEZ and extended continental shelf be circulated in the sixty-eighth session of the UNGA.¹⁰

From the practice of the Joint Declaration between the Netherlands and Russia, another measure that that claimant states could consider is to conclude an agreement which incorporate certain elements of the award, reiterating the holdings of the tribunal and thereby giving effect to the arbitral award. The issues that could be incorporated may include those that may be seen as less politically sensitive, but are no less important to deal with ongoing activities which are contrary to the ruling and which continue cause tension in the South China Sea such as ramming and sinking of fishing boats,¹¹ or harvesting endangered species.¹² So, for example, in relation to safety of navigation, security and safety of life at sea, the agreement could reiterate the obligations

under Article 94 UNCLOS and the standards of the navigation expounded by the tribunal in the award, e.g. COLREGS; in relations to marine environmental protection, the agreement should highlight the obligation to protect the marine environment under Articles 192, 194, 206 UNCLOS, particularly the obligation of due diligence on the part of flag states in prevent harm to the marine environment, including the protection of endangered species as elaborated by the arbitral award. Similar to the Joint Statement between the Netherlands and Russia, the parties may agree to insert the face-saving clause 'without prejudice to the legal positions of the states to the South China Sea arbitration', all the while still showing the value of the arbitral award and the rule of law in general. The Code of Conduct which is at the moment in the process of being negotiated provides a great opportunity for the parties to do this.

In the long term, another way to ensure that the arbitral award has effect is to ensure that proposals of future maritime delimitation or fisheries management should be based on the understanding that the exercise of sovereign rights and jurisdiction in the South China Sea need to be based on legitimate claims to maritime zones under UNCLOS, not on historic claims encompassing the whole South China Sea; and in determining these maritime zones, no features in the South China Sea generate more than 12nm maritime zones. The experience of the Gulf of Tonkin Maritime Boundary Agreement between China and Vietnam shows that historic claims could be put aside when negotiating an agreement based on relevant rules of international law should there be sufficient good faith and political will to do so.

On the field, the arbitral award could be considered to be 'enforced' when states consistently object to China's attempts to enforce its excessive maritime claims. We see such efforts in the current stand-off between Vietnam and China, in which China sent Haiyang Dizhi 8, a survey vessel owned by the government-run survey corporation, escorted by dozens of Chinese coast guard vessels and maritime militia to undertake an oil and gas survey in an area that is well within Vietnam's EEZ and continental shelf. China has justified its action on the basis of an ambiguous claim that it has "sovereign rights and jurisdiction over the relevant waters".¹³ However, as the 2017 arbitral award has made clear that China's nine-dash line claim is not valid and that no features in the Spratlys are

entitled to a maritime zone beyond 12nm, it is difficult to see how China would have sovereign rights and jurisdiction in the area in question. Instead, according to one observer, “the incident fits into a familiar pattern where China has been obstructing efforts by other claimant states in the South China Sea to carry out energy exploration activities.”¹⁴ Vietnam has repeatedly condemned the activity through various official channels,¹⁵ and will continue operations near Vanguard Bank.¹⁶ Such a consistent and principled response to Chinese activities based on claims which had been struck down by the arbitral tribunal is one of the practical ways to make use of, and at the same time give effect to, the arbitral award.

While all of these actions may seem hollow or even futile at the moment in light of China’s aggressive activities at sea, they are nonetheless important. Under international law, there are no international police forces to bring states to comply with judgments, states themselves are the law enforcers. And as long as the claimant states continue to stand up to China’s excessive claims and defend their legitimate claims endorsed by the arbitral award, and as long as other states around the world do not turn a blind eye to the situation and continue to voice their objections to activities in violation of international law, the arbitral award could be considered to have impact and not “just a piece of paper”.¹⁷

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Notes

¹ ‘Failing or Incomplete? Grading the South China Sea Arbitration’, *Asia Maritime Transparency Initiative*, July 11, 2019, accessed August 7, 2019, <https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration/>

² “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”, *China Daily*, July 12, 2016, accessed August 8, 2019, http://www.chinadaily.com.cn/world/2016scsi/2016-07/12/content_26062029.htm

³ Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (New York: Oxford University Press, 2004), 197–211.

⁴ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Arbitral Award of 18 March 2015, PCA website, accessed August 7, 2019 http://www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899

⁵ “General Assembly Adopts Resolution Seeking International Court’s Advisory Opinion on Pre-independence Separation of Chagos Archipelago from Mauritius,” United Nations website, June 22, 2017, accessed August 7, 2019 <https://www.un.org/press/en/2017/ga11924.doc.htm>

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⁷ “Joint Statement of the Russian Federation and the Kingdom Of The Netherlands on Scientific Cooperation in the Russian Arctic Region and the Settlement of a Dispute,” Government of the Netherlands website, May 17, 2019, accessed August 7, 2019, <https://www.government.nl/documents/diplomatic-statements/2019/05/17/joint-statement-of-the-russian-federation-and-the-kingdom-of-the-netherlands-on-scientific-cooperation-in-the-russian-arctic-region-and-the-settlement-of-a-dispute>>

⁸ Alex Oude Elferink, “Settlement of the Dispute concerning the Arctic Sunrise – A belated recognition of the relevance of the award on the merits in the Arctic Sunrise case?” JCLOS Blog, July 8, 2019, accessed August 7, 2019, <http://site.uit.no/jclos/2019/07/08/settlement-of-the-dispute-concerning-the-arctic-sunrise-a-belated-recognition-of-the-relevance-of-the-award-on-the-merits-in-the-arctic-sunrise-case/>

⁹ Article 11, Annex VII, United Nations Convention on the Law of the Sea (UNCLOS), United Nations website, accessed August 7, 2019, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁰ See <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm>, accessed August 7, 2019.

¹¹ “Philippine boat sinking after Chinese ship’s assault,” *The Rappler*, June 15, 2019, accessed August 7, 2019 <https://www.rappler.com/nation/233107-photo-philippine-boat-sinking-after-chinese-ship-assault>, and “Vietnam says fishing boat sunk by Chinese ship”, *The Bangkok Post*, March 8, 2019, accessed August 7, 2019, <https://www.bangkokpost.com/world/1641412/vietnam-says-fishing-boat-sunk-by-chinese-ship>

¹² “China’s Most Destructive Boats Return to the South China Sea,” *Asia Maritime Transparency Initiative*, May 20, 2019, accessed August 7, 2019, <https://amti.csis.org/chinas-most-destructive-boats-return-to-the-south-china-sea/>

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¹⁵ “Statement of the MOFA Spokesperson on the violations of Viet Nam’s EEZ and Continental shelf by the Chinese survey ship, Haiyang Dizhi 8, and its escort vessels,” Viet Nam’s MOFA, July 25, 2019, accessed August 7, 2019, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns190726103258

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¹⁷ “Nothing more than a piece of paper’: former Chinese envoy dismisses upcoming ruling on South China Sea claims,” *South China Morning Post*, July 6, 2019, accessed August 5, 2019, <https://www.scmp.com/news/china/diplomacy-defence/article/1986029/nothing-more-piece-paper-former-chinese-envoy-dismisses>