

The South China Sea Arbitration Award (Philippines v. China) and the Rule of Law at Sea

Professor Kazuhiro Nakatani
The University of Tokyo

Abstract

This paper summarizes the epoch-making findings in the South China Sea arbitration award (Philippines v. China) on July 12, 2016. It also elaborates on potential implications of noncompliance with the arbitration award by China and argues that, in light of the rule of law, when a country loses a case it must comply with the international ruling.

The arbitration award for the South China Sea (Philippines v. China) on July 12, 2016 has an epochal significance for the rule of law at sea. The award (together with the October 29, 2015 ruling on jurisdiction and admissibility) positively affirms jurisdiction and admissibility, advances the case, and rules that China's series of ambitious statements and activities in the South China Sea are illegal and invalid under international law.

In the arbitration, first, regarding the historical rights and "nine-dash line" claims by China, the award found that any such rights which are contrary to the United Nations Convention on the Law of the Sea (UNCLOS) were nullified when the Convention came into effect, and that China has no legal basis for claiming historical rights to resources in sea areas inside the "nine-dash line." Second, with regard to standards for being classified as an "island" under Article 121 of the Convention, the award found that an island must have the capacity to sustain either "a stable community of people" or "economic activity that is not dependent on outside resources or purely extractive in nature," and that the high-tide features in the Spratly Islands are all "rocks" with no exclusive economic zone (EEZ) or continental shelf, and not "islands."

Third, the award found that China's activities in the South China Sea are in violation of international law as follows: (1) China violated the sovereign rights of the Philippines with respect to its EEZ and continental shelf by prohibiting the Philippines from fishing in the EEZ and by constructing installations and artificial islands at Mischief Reef without the authorization of the Philippines; (2) China violated the traditional fishing rights of Philippine fishermen by prohibiting access to Scarborough Shoal; (3) China violated Articles 192–194 of the Convention, which make the preservation and protection of fragile ecosystems and the habitats of endangered species obligatory, by large-scale land reclamation and the construction of artificial islands; (4) China violated UNCLOS Article 94 and the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) by preventing Philippine vessels from approaching Scarborough Shoal, causing grave risk of collision at sea.

Because the arbitration award is legally binding (UNCLOS Annex VII Article 11), if China does not implement the award, which she currently shows no signs of doing, it will be in violation of international law. The immediate cessation of constructing artificial islands, withdrawal of the "nine-dash line," and other activities are now China's obligation under international law.

In general, the *res judicata* of arbitration awards itself is limited to the concerned case and states, but even when those states conduct diplomatic negotiations regarding the implementation

of an arbitration award, they must not deviate from the overall framework of the award. Moreover, because of the universal value of the sea, countries other than the Philippines and China (especially countries which make major use of the South China Sea such as Japan) are not solely third parties, but rather parties with legitimate interests in the China's faithful implementation of the arbitration award as countries with direct interests.

The Joint Statement of the Philippines and China of October 21, 2016 (paragraph 40) reads, “[R]egarding the South China Sea … both sides also reaffirm the importance of … addressing their territorial and jurisdictional disputes by peaceful means … through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS.” While the expression “sovereign states directly concerned” is believed to show China's intent to exclude not only third countries but also Taiwan, both the Philippines and China must recognize that “universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS” include the arbitration award as a matter of course. The Philippines requested the arbitration tribunal to adjudge and declare that “China shall respect the rights and freedoms of the Philippines under the Convention, [and] shall comply with its duties under the Convention,” but the tribunal found such a declaration unnecessary, citing the fundamental principle of international law that “bad faith is not presumed.” Whether or not such an arbitration award, whose implementation depends on the good faith of the countries involved, is naive depends on the actions of the Chinese side. The good faith or bad faith of China has been placed under the scrutiny of the international community.

Because there is no systematic framework to ensure implementation of an arbitration award, in cases like this, where the state that lost the case has no intention of implementation, the arbitration award is inevitably ignored and not implemented. (Regarding judgments by the International Court of Justice, UN Charter Article 94 Paragraph 2 states, “the Security Council may … make recommendations or decide upon measures to be taken to give effect to the judgment,” but in cases where the country which lost the case is a permanent member of the Security Council, the invocation of that paragraph cannot possibly be expected.) The nonperformance of the April 18, 1977 Beagle Channel arbitration award in a territorial dispute between Chile and Argentina is a serious precedent of noncompliance with an arbitration award related to territory. Argentina, which effectively lost the case, was dissatisfied with the award and refused to comply. When Chile, which was seeking implementation, proposed referring the case to the International Court of Justice, Argentina refused, stating that would be *casus belli*, and then began an invasion of Chilean islands on December 22, 1978. Pope John Paul II sensed a crisis and proposed mediation; this proposal was accepted by both countries on January 9, 1979. The mediation was prolonged, during which the Falklands war took place, and a treaty of peace and friendship between the two countries was finally signed at the Vatican on November 29, 1984, resolving the conflict. In this treaty, the two countries agreed to essentially the same contents as the original arbitration award, but a huge price was paid to arrive at that point. It would be in the interest of the international community that China does not follow the negative precedent.

The Three Principles of the Rule of Law at Sea presented by Prime Minister Shinzo Abe at the Asian Security Summit (“Shangri-La Dialogue”) on May 30, 2014ⁱ point out items that are a matter of course under international law. Moreover, these points are of particular importance today when there are countries that do not observe international law and advance changes in the *status quo* made through force. The sea is an area where it is particularly necessary to stress the rule of law in the international community. There are great concerns that if the contents of the arbitration

ⁱ Three principles of Rule at Law of Sea presented by Prime Minister Shinzo Abe from Shangri-la Dialogue Speech 2014: Countries must: (1) make and clarify claims based on international law, (2) not use force or coercion in trying to drive their claims, and (3) seek to settle disputes by peaceful means.

award are ignored, that will have a harmful effect on the rule of law in all other sea areas.

In relation to international adjudication, simply stated, following the “rule of law” means when a country loses a case it must comply with the international ruling. Japan effectively lost what is known as the case concerning whaling in the Antarctic at the International Court of Justice, and implemented the contents of that ruling “as a nation that respects the international legal system and the rule of law as foundations of the international community.” As to whether or not China can implement the arbitration award as a responsible nation, the ball is now in China’s court. Recalling the words of the Joint Statement of the Japan and Philippines of October 26, 2016 (paragraph 12), “With regard to the South China Sea Arbitral Award, the two leaders acknowledged the importance of a rules-based approach to the peaceful settlement of maritime disputes without resorting to the threat or use of force, in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the UN Charter and other relevant international conventions,” the Philippines should act in a manner that does not remove the backbone of the effective contents of the arbitration award.

In relation to the “Declaration on the Conduct of Parties in the South China Sea” (DOC), which was agreed on by the Association of Southeast Asian Nations (ASEAN) member states and China in 2002, although the DOC is not legally binding, China’s actions in the South China Sea are in violation of the DOC. (For example, voicing objections to the navigation of U.S. warships is in violation of Paragraph 3 which reaffirms respect for the freedom of navigation, and constructing man-made islands and making the island habitable for humans are in violation of Paragraph 5, in which the parties undertake to exercise self-restraint in action of inhabiting presently uninhabited islands, reefs, etc.) In preparation for a future legally binding “Code of Conduct for the South China Sea” (COC), from the perspective of the rule of law at sea, the arbitration award should be used as a reference and caution exercised so the COC does not contradict the arbitration award’s contents.