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To rule over the waves

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Abstract
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LOWELL BAUTISTA - 25 JUL, 2016

The South China Sea tribunal award is a legal and moral victory for the Philippines — but the battle is only half won.

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In a celebrated legal battle many have characterised as the epic clash between David and Goliath, the Philippines overwhelmingly emerged the victor. It was widely acclaimed as the triumph of international law, the great equaliser. It was the exemplary illustration that small, weak states can confidently challenge powerful nations, standing on equal footing with them and bolstered only by the enduring principle that law and right will always triumph and prevail over brute power and might.

The Hague-based Permanent Court of Arbitration Arbitral Tribunal, after more than three years of bated anticipation since the case was filed, handed down its historic decision on the decades-old maritime dispute over the South China Sea (SCS), which Manila proudly calls the West Philippine Sea.

The Arbitral Tribunal, as most legal scholars and commentators have consistently foretold, decided in favour of the Philippines. The 500-page final award meticulously and thoroughly weighed the case brought by the Philippines and rigorously and strictly applied the rules of international law, principally the United Nations Convention on the Law Sea, universally regarded as the constitution of the oceans.
The unanimous verdict is clear: China’s so-called indisputable claim over the SCS anchored on Beijing’s controversial nine-dash line claim has no basis in international law and was incompatible with the UNCLOS, the arbitral tribunal valiantly declared.

Strictly speaking, the award is only binding upon the Philippines and China. However, the landmark verdict will have significant, lasting and far-reaching implications affecting the legal rights of all the claimant states and will strongly impact the management and resolution of the conflicting claims in the SCS. The tumultuous award is not the end of the road, but perhaps heralds just the beginning of rough and treacherous paths ahead.

The trial of the century
On 22 January 2013, the Philippines instituted arbitral proceedings against China under Annex VII of UNCLOS in respect of their maritime jurisdictional dispute in the SCS. The arbitration is the first international litigation initiated by a claimant state in the SCS. From its commencement, it was clear that this bold move was a game changer.

The proceedings have altered the terrain of strategies available to claimant states that have always eschewed legal options. The decision to go to trial was one that many considered foolhardy, reckless, legally indefensible, and doomed to fail. Beijing never concealed its displeasure over the audacious move, strongly arguing against the jurisdiction of the tribunal, which was rejected in the award on jurisdiction rendered in October 2015. China also refused to participate in the proceedings, and made its position clear that it will not honour the ruling. In accordance with the provisions of UNCLOS, the arbitration proceeded in China’s absence, with the five-member Tribunal deciding unanimously on both jurisdiction and merits in Manila’s favour.

Judgment day – an overwhelming victory
The final arbitral award of 12 July was not surprising because it was in Manila’s favour. It was a result which was, by and large, predictable and thus, to an extent old news.

However, what was surprising was that while many were expecting a favourable ruling, they were definitely not anticipating the magnitude and scale of victory that the arbitral tribunal delivered. The award was a clear, resounding and overwhelming moral and legal triumph for the Philippines. It is also final and binding, despite Beijing’s staunch position to ignore the award, claiming it is farcical, null, and void.

The arbitral tribunal solidly refuted and categorically declared that China’s nine-dash line claim as well as China’s historic rights over living and non-living resources in the SCS find no basis in international law and was incompatible with UNCLOS. The tribunal clarified that China does not possess historic rights over the resources within the ‘nine-dash line’ in areas within the Philippine EEZ or continental shelf; and that any historic rights that China may have over these resources is incompatible with UNCLOS and have been extinguished by China’s accession to UNCLOS and its entry into force.

The tribunal also declared that China’s reclamation activities have interfered with the rights of the Philippines under UNCLOS, irreparably damaged the fragile marine environment of the SCS, and are clearly in violation of China’s obligations under UNCLOS. The tribunal, mindful of the limits of its jurisdiction, carefully and explicitly avoided the issue of sovereignty whilst declaring that none of the features in dispute are “islands” being incapable of sustaining human habitation or economic life of their own, but merely “rocks” for purposes of Article 121(3) of UNCLOS that do not generate entitlements to an exclusive economic zone or continental shelf.

Muted jubilation in Manila
The reaction in Manila is currently one of muted jubilation. The new administration under Philippine President Rodrigo Duterte presciently adopted a “no taunt, no flaunt” policy which was very favourably received by Beijing. The Philippine Foreign Affairs secretary issued a terse statement calling for “restraint and sobriety” following the Philippines’ landmark win.

The silence of President Duterte could be disconcerting and rather uncharacteristic, but possibly the prudent and judicious approach at this difficult time. In sharp contrast to Duterte’s popular image of being fearless, volatile and unpredictable, his conciliatory and amicable position towards China seems a conundrum.

There is challenging and real work ahead on more contentious issues of sovereignty, maritime delimitation, reparations and fisheries enforcement, and multilateral negotiations. For the time being, Duterte’s deliberate decision to be cautiously tight-lipped, averting the possibility of any unintended callous or inflammatory statements, should be respected. The absence of any triumphalist, provocative or escalatory announcements is clearly a move in the right direction.

**Beijing’s acerbic reaction**

Even the reaction from Beijing, although sternly worded, was not exactly jingoistic. However, there have been numerous disconcerting allegations made publicly by Chinese diplomats and scholars that cast aspersions against the integrity and impartiality of the tribunal judges alleging that they have been illegally influenced and even bribed in order to rule against Beijing. Others contend that the composition of the tribunal was manipulated by Shunji Yanai, President of the International Tribunal for the Law Of the Sea, who is from Japan, a country with longstanding territorial issues with China.

These allegations need not be dignified with the criticisms, sitting in the realm of political rhetoric and posturing rather than on an understanding of the relevant UNCLOS provisions and rules of
procedure, and of general international law. It is rather unfortunate that the award, based on merits, has been challenged by tangential and inappropriate issues not germane to the case. However, China should be allowed to speak and even to criticise the tribunal, as it is in a free and democratic public space. The myriad of voices within China should also not be silenced.

This is an opportune time for China to clarify its legal position in respect of its claim over the South China Sea. The tribunal has declared that the nine-dash line is not valid under international law. This, China cannot ignore.

It is always much easier to discredit a case than to win a case. Even patriotic ideas that have fuelled nationalistic sentiments of past and current generations have a natural shelf life. The world can no longer oblige China with the mantra that its claim is indisputable, when it has been effectively refuted. Neither should it be allowed to play the innocent card when it clearly defies and undermines the authority and effectiveness of international law.

There is some unsettling dissonance with China’s overt pronouncements that it will honour and respect international law and its acts of intensifying military activities and building artificial structures on another State’s EEZ, as well as its open defiance to the arbitral tribunal’s award.

The road ahead
Manila clearly won the legal battle. However, convincing and compelling China to honour, abide by and comply with the award of the arbitral tribunal is outside the ambit of Manila’s legal triumph. While the decision is final and binding, the arbitral tribunal does not have the power or the resources to coerce China to concede to the overwhelming legal and moral victory that the Philippines secured for itself.
Yet, the very nature of international law, characterised by the absence of a global police force or a mechanism for implementing itself and awards such as this, does not mean that the award is an empty, *pyrrhic victory* – something won at devastating cost.

This is now the new ground zero. The precedential weight of the arbitral tribunal award must be acknowledged and must be the starting point of any bilateral negotiations. Manila should establish a multi-faceted, long-term, multi-sectoral negotiating framework encompassing issues such as fishing rights, security issues, economics and trade, and protection of the marine environment, among others.

As should be expected, in the short term, bilateral relations between Manila and Beijing will have to undergo a period of recalibration. During this transitional period, the inherent risk of miscalculation will be high, and both parties will need to assert their respective claims and positions without provoking any serious escalation of tension, open conflict resulting in loss of life, or dragging in extra-regional, non-claimant states, which will unduly raise the stakes for all parties.

The incalculable strategic risks and economic costs of any military clash between any of the parties involved over the South China Sea disputes renders it an option that must be avoided at all cost.

The post-arbitration geopolitical situation in the South China Sea will likely be a period defined by a belligerent, defiant China. Nonetheless, in the long-term, it should be expected that the bilateral relations between the Philippines and China will be mended and restored, as it is more robust, resilient and need not only be defined by their competing claims over the South China Sea.

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