the interpreter

The PCA ruling, Australia and Timor-Leste

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This post is part of a debate on South China Sea ruling

The Hague tribunal decision last week in the South China Sea case will have far reaching implications, finding that any 'historic rights' China claimed within the Exclusive Economic Zones (EEZ) of other states were extinguished by UNCLOS itself, and China's subsequent ratification of the treaty in 1996.

Despite some claims to the contrary, China's stated refusal to accept the decision does not signal that the UNCLOS framework is unsuitable to solving complex maritime disputes. On the contrary, as Robert Beckman, head of the Ocean Law & Policy Programme at the NUS Centre for International Law argues, this authoritative decision will likely influence government legal advisers and negotiators for years to come.

While some commentators now urge consideration of ASEAN as the multilateral body to address the dispute via negotiations, Beckman considers the decision to be a 'game changer' likely to reinforce the current positions of ASEAN parties to the South China sea dispute, including Indonesia, which can now be expected to assert that the decision applies to their own EEZ claims. As such, evolving international jurisprudence will clearly frame and delimit any future multilateral or bilateral negotiations. This highlights the reality that while negotiations will always be a vehicle for settling boundary disputes, such negotiations should take place within the framework of international law.

While China has said that the Tribunal had no jurisdiction, the process was not entirely one-sided. The Tribunal was at pains throughout to ensure that China was informed via its embassy to The Netherlands. China also made its positions known throughout the proceedings in a variety of ways, and the Tribunal openly stated that it factored China's positions into its deliberations. It is too early to conclude definitively on the impact of this landmark decision, as China needs to be given time to absorb and reflect upon the findings. China will have to decide if it wants to be part of the rules-based order that UNCLOS frames, as its ratification of treaty and its stated positions and actions in international fora have often suggested.

Timor-Leste has been quick to note that Foreign Minister Julie Bishop's call for China to respect an international rules-based order is at odds with Australia's persistent refusal to negotiate maritime boundaries with Timor-Leste. This refusal was made more complete by Australia's withdrawal from the UNCLOS dispute mechanisms shortly before the restoration of Timor-Leste's independence in 2002. This move was clearly an effort to avoid the increasingly strong presumption of a median line boundary in international law. The Australian government is playing a two-step on the issue, urging China to respect international law describing the verdict as 'final and binding' while refusing to abide by an independent umpire in maritime boundary dispute with Timor-Leste. If Australia wants to model good international citizenship to the region, it should reinstate its recognition of the jurisdiction of the International Court of Justice, and the International Tribunal of the Law of the Sea, for maritime boundary delimitation.

While Stephen Grenville urges the South China Sea parties along the path of negotiated settlements like CMATS, the 2006 treaty, which seeks to delay a maritime border determination for 50 years, is hardly a model for the rest of the world to follow. CMATS remains inoperative as a resource sharing agreement, some nine years after its signing. Timor-Leste considers CMATS void due to its claims that Australia spied on its negotiation team in 2004, and is therefore tainted by bad faith.

On 11 April Timor-Leste initiated a compulsory conciliation under UNCLOS that Australia has no choice but to go with, although the determination will be non-binding, and Australia is challenging jurisdiction. For these reasons, CMATS can hardly be held up to China and other claimants in the South China Sea dispute as a model for problem solving. It is not clear why The Philippines would heed Stephen Grenville's call to follow the CMATS model and jointly develop resources with China, when such resources are within their exclusive economic zone under international law. Closer to home, it is also possible that ASEAN could in future take a position on the Australia-Timor-Leste dispute that will not please Canberra.

Despite the Australian government's reaffirmation of CMATS in the wake of the UNCLOS decision, the Opposition's recent commitment to revisiting a maritime boundary in line with international law, and submitting to arbitration if it cannot be resolved, demonstrates how fragile this aspect of Australian regional foreign policy now is, lacking bipartisan support. This was probably the only major foreign policy difference between the two major parties. In light of the close election outcome, DFAT and its defenders can no longer pretend this remains a settled position of the Australian state.

As Beckman concludes, states concerned with the importance of a rules-based order for the oceans will emphasise that the award is final and binding, and call on China to act in accordance with it. We have already seen this position reflected in Minister Bishop's comments. But he also notes that states calling on China to abide by the decision will appear hypocritical if they do not 'first reflect on the implications of the award on their own claims and activities'.

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