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The South China Sea Adjudication and the Future of International Arbitration

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The India International Centre at Delhi – considered the hub of cultural and intellectual activity in the capital city, was witness to a unique event on the afternoon of 17 May 16. Organised by the Chinese Embassy in Delhi, the 'public lecture' saw six speakers articulate their views on the South China Sea (SCS) maritime disputes. Five of the six speakers were from think-tanks – either based in China or funded by Chinese entities, and one speaker was a scholar from the Chinese Navy. As could be imagined, espousal of the Chinese perspective dominated the proceedings. It is understood that a number of such 'lectures' are being conducted, with the aim of shaping views and opinions on this contentious dispute, before the impending adjudication by a tribunal hearing the Philippines' submission against Chinese claims in the SCS. While China's stance was unambiguously reiterated at the event, it left a significant question mark on the impending award, its immediate impact on the dispute and indeed the long term ramifications on an international system underpinned by norms of conduct between nation-states.

This paper aims to highlight salient aspects of the arbitration initiated by Philippines against China, and seeks to examine the possible outcomes of the proceedings of the tribunal. The paper will attempts to predict the Chinese reaction to the impending award, in the larger context of the international legal system and its primary reliance on voluntary compliance by states. The effect of the impending ruling on the overall dispute in the SCS, the claimant states and the US, as well as its impact on the international arbitration system, will also be briefly examined.

On 22nd January 2013, the Philippines initiated arbitration proceedings against China under provisions of the United Nations Convention on the Law of the Sea (UNCLOS), in response to the latter's claims in the SCS. Philippines sought the court's adjudication on three distinct aspects, viz. the effect of UNCLOS on China's claims represented by the nine-dash line, the proper nature of features claimed by China with the associated entitlements of territorial waters and Exclusive Economic Zones (EEZ) and thirdly, on the issue of Chinese activities violating sovereign rights and freedoms of Philippines in the SCS.[i] The Chinese Government refused to accept jurisdiction of the arbitration proceedings and issued a public statement titled "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of Philippines", in which it argued that the primary dispute was that of sovereignty of maritime features in the SCS, over which the tribunal had no jurisdiction.

The tribunal constituted at the Permanent Court of Arbitration (PCA) at The Hague, held three hearings in July 2015 to determine jurisdiction and admissibility of Philippines' submission. In its award on 20 October 2015, the tribunal ruled that it had jurisdiction with respect to seven out of fifteen submissions by the Philippines. It also concluded that seven other submissions would need to be considered in conjunction with the merits and sought clarification on the 15th submission from the Philippines.[ii] The tribunal concluded its merit phase hearings in November 2015 and is expected to issue its award in June/July 2016.

In admitting only seven out of the fifteen Philippine submissions, the tribunal has limited the outcome of this arbitration to determine the precise nature of certain disputed features in the SCS and the associated entitlements of territorial waters and EEZ, where and if applicable. For instance, in submission no. 4, which the tribunal has admitted, Philippines claims that Mischief Reef, Second Thomas Shoal and Subi Reef are Low Tide Elevations which do not generate territorial seas or an EEZ. However, the tribunal has reserved consideration of its jurisdiction on submission no. 5 in which Philippines has claimed that Mischief Reef and Second Thomas Shoal are part of its EEZ.[iii] The tribunal has therefore avoided considering issues pertaining to claims of sovereignty and restricted itself to examining those directly concerned with entitlements under the provisions of UNCLOS.

It is perceived that on most, if not all of the seven submissions, the tribunal's award will go in favour of the Philippines. This prospect has led to some speculation on the effect of such a ruling on China, especially as it is expected to dilute the basic premise of its territorial claims within the nine-dash line. Chinese claims hinge on entitlements of territorial seas and EEZ around maritime features in the SCS and the implicit sovereign rights to extract and exploit the natural resources of the seabed therein.[iv] If the tribunal rules that most of these features do not merit such entitlements, it promises to undermine the Chinese legal position and claims therein.

Arguably, there are a number of other factors that add to the complexities of the SCS situation. Primary among them is the involvement of the US and the Freedom of Navigation (FON) patrols conducted by the USN in the South China Sea. There is no doubt that the US has vital strategic interests that define its posture in the SCS. However, as a country that has not yet ratified the UNCLOS, a fact which the Chinese do not fail to highlight at every opportunity, the US position may be viewed by many as grandstanding sans the moral authority. While the US may argue that FON operations are conducted by the USN all over the world (including in the Indian EEZ to counter what the US perceives as 'excessive maritime claims'),[v] China has been vociferous in denouncing the presence of US military assets in the SCS and in highlighting that US actions in the region serve only to escalate tensions without contributing to the

resolution of the dispute, which in China's perspective, can only be achieved through bilateral engagement with each of the claimant states.[vi]

The FON operations in the SCS have also served to underscore the differences in interpretation of the extent to which coastal states may exercise sovereign control over maritime zones. While there is a general consensus on unbridled freedom to commercial shipping outside of territorial waters, there are stark differences in understanding the extent of freedom enjoyed by foreign naval vessels in the EEZ of a coastal state. Countries on the 'liberal' side of this argument, such as the US, argue that nothing in the UNCLOS permits coastal states to challenge transit of naval vessels through the EEZ. The 'realist' argument, adopted by many other countries including India, demands that foreign naval vessels intimate the coastal state of their intentions, whilst transiting through its EEZ.[vii] The UNCLOS is envisaged as a package deal – Article 309 states that no state may make reservations or exceptions to the convention. However countries such as India and China have made use of Article 310, which allows states to make declarations while signing, ratifying or acceding to the convention, to announce such restrictions on military vessels in their EEZ. Much like the 17th century debate between Grotius' *Mare Liberum* and Seldon's *Mare Clausum*, countries have adopted varying interpretations of the UNCLOS to suit their national interests and in consonance with the abilities of their maritime forces to operate in distant waters. Even if issues of sovereignty in the SCS were to be resolved, it is unlikely that the differences in determining the extent to which sovereign control can be imposed on the global commons, will be removed or even reduced by any significant measure.

Another intriguing facet in the SCS, is the Taiwanese occupation of Taiping or Itu Aba Island – the largest island feature in the Spratly group. As an island, Taiping generates entitlements of territorial seas, EEZ and continental shelf.[viii] All shoals, reefs and other features that are being examined by the tribunal in the Philippines case, fall within the EEZ that Taiping Island may generate. In its Position Paper, China accuses Philippines of 'dissecting the Nansha (Spratly) Islands' by excluding features occupied by the Philippines, from the current arbitration. It is particularly scathing in its criticism of the Philippine reticence in recognizing Taiping island, which it states is 'currently

controlled by the Taiwan authorities of China', as a maritime feature controlled by China. This, China argues, is a grave violation of the One-China policy.[ix] The ambiguous political status of Taiwan, together with the maritime entitlements commanded by Taiping Island, promise to further murky the dispute over sovereignty of these islands.

While China has refused to take cognizance of the tribunal, its proceedings and its subsequent ruling, the outright rejection of an unfavourable ruling by a permanent member of the United Nations Security Council (UNSC), promises to have serious ramifications for the future of a rules-based global order. Such a situation, however, is not without precedent. In the Nicaragua vs US case adjudicated by the International Court of Justice (ICJ) in 1986, the court found the US in violation of customary international law and ordered it to pay reparations to the government of Nicaragua.[x] The US had earlier unsuccessfully contested the jurisdiction of the court to deal with the matter and subsequently did not participate in the merits phase. The US refused to comply with the court's order and resisted international pressure to pay reparations to Nicaragua. Five years later, in 1991, Nicaragua, under the administration of President Chamorro, voluntarily withdrew its claim from the ICJ.[xi] It was a glaring instance of subversion of international norms by a country that vociferously advocated compliance, but refused to do so itself when such norms were in conflict with its *raison d'état*.

Legal systems, both domestic and international, aim to protect rights of aggrieved individuals and entities including nation states. In the absence of statutory enforcement mechanisms, international order relies upon voluntary compliance – an aspect where it would be expected for global powers to lead by example. The US – which incidentally is the world's most prolific litigator at the ICJ,[xii] and China, have a pivotal role in determining the future of such a global order, as was envisioned in the UN Charter. In the current geopolitical situation, however, it would be rather optimistic to expect major powers to uphold the primacy of international law over considerations of *realpolitik*, especially as these countries are often able to 'coax' smaller nations into compliance through financial, political, diplomatic and indeed military means. Moreover, the current structure of the UNSC, allows permanent members to stall a collective response to con-compliance with the award of an international court of law. Smaller, less

influential nations are therefore likely to find themselves increasingly on the receiving end of a system that was evolved primarily to protect their rights. The Chinese today are quick to quote the American con-compliance in the Nicaragua case, when confronted by the likelihood of their non-adherence to the international system. This finger-pointing that accompanies the selective disdain for a rules based international order, would need to stop if the system is to be salvaged from what appears to be the inevitable. For that to happen it is imperative that China and the US start playing by the rules.

Notwithstanding the likely Chinese indifference to the tribunal's award and the expected dent to the international arbitration system, it is anticipated that an award in favour of the Philippine submission may encourage other claimant states in the SCS to seek arbitration as well.[xiii] Favourable outcomes may not directly translate into tangible change in the situation on ground. They would, however, serve to delegitimize Chinese claims and possibly put China under pressure to tone down the rhetoric associated with its claims. Whether China would do so, remains a matter of speculation.

While the situation in SCS is unlikely to change for the better in any dramatic fashion due to the outcome of this arbitration, there is keen interest in the nature, tone and tenor of the impending award. It is likely to set a precedent for resolution of maritime disputes in other parts of the world, by first determining entitlements generated by disputed features before the adjudication on sovereignty issues, possibly by the ICJ. What is also certain is that the award, notwithstanding its nature, will intensify the debate between *Mare Liberum* and *Mare Clausum*, and underscore the increasing conflict between international law and foreign policy imperatives of states.

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