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THE PCA VERDICT AND ITS IMPLICATIONS

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Background

The Philippines and China have been long engaged in maritime boundary and sovereignty issues in the South China Sea. The issues behind this dispute relate to various uncertainties created due to the rapid growth of China's maritime capabilities and territorial ambitions. The Philippines is one of the major player along with Vietnam involved in the long running South China Sea territorial dispute with China. It all started in 1995, when China occupied a feature called Mischief Reef, located more than 400 miles from main land China but within the Philippines EEZ.

The current legal dispute between the two countries is mainly about the sovereignty issue of Scarborough shoal and economic exploitation of the Philippines EEZ with in the 9-dash line declared by China. Scarborough shoal is a rock feature located about 120 nm from Luzon, Philippines and 460 nm from China. It forms one of the strategic point in the four-point constellation comprising Woody island, Fiery Cross Reef, Scarborough shoal and Mischief Reef.

The sovereignty of Scarborough Shoal is contested by China, Taiwan and the Philippines. These features are strategically important because the entire body of the South China Sea can be kept under intense watch by surveillance equipment on them. China had gained effective control of the shoal in 2012, and started land reclamation activities. It is attempting to install radar and other facilities for close monitoring of the US Basa air force base on Pampanga about 300 km off Scarborough Shoal.

The Philippines Claims

In January 2013, the Philippines submitted a Statement of Claim in the Permanent Court of Arbitration (PCA) under the 1982 UNCLOS challenging the validity of China's nine-dash line claim to almost the entire South China Sea. The Philippines submitted a total of 15 claims to the tribunal, of which five pertain to the Scarborough Shoal and balance deal with the maritime rights within the South China Sea. In its petition, it has brought out that China has unlawfully prevented Filipino fishermen from pursuing their



livelihoods by interfering with traditional fishing activities at Scarborough Shoal.

The Tribunal convened a hearing on jurisdiction and admissibility in July 2015 and rendered its award on 29 Oct 2015, unanimously deciding that it has jurisdiction to consider seven of Philippines' Submissions concerning the status of various rocks, reefs and islands in the South China Sea and the traditional fishing rights of the Philippines nationals.

The Final Verdict

The tribunal constituted by PCA under Annex VII to the UNCLOS gave its unanimous award¹ in favour of the Philippines with the following significant rulings:

(a) **China's Historic Rights.** The UNCLOS comprehensively allocates rights to maritime areas and China has no legitimate claims to exercise maritime control over areas within its 9-D line in the South China Sea. The Tribunal concluded that the historic maritime rights claimed by China were extinguished to the extent they were incompatible with the maritime zones provided for in the Convention.

(b) **Status of Features.** None of the Spratly Islands is capable of generating extended maritime zones. This is based on the fact that the current presence of

official personnel on many of the features is dependent on outside support and not reflective of the capacity of the features. The Tribunal emphasised that the provisions of UNCLOS depends upon the original capacity of the feature, in its natural condition, to sustain a stable community of people. It further declared that maritime areas around Mischief Reef and Second Thomas Shoal are within the EEZ of the Philippines.

(c) **Unlawful Chinese Actions.** China has violated the Philippines sovereign rights in its EEZ by interfering in their fishing & petroleum exploration activities and constructing artificial islands. Fishermen from the Philippines had traditional fishing rights at Scarborough Shoal and China had interred with these rights in restricting access. China has a positive obligation not to impede Filipino fishing vessels from exercising their rights.

(d) **Effect on Marine Environment.** China has caused severe harm to the marine environment by resorting to large scale land reclamation and construction activities at seven features in the Spratly Islands. By doing this, China has violated its obligations under the UNCLOS to preserve the marine eco system.

China's Stand

China refused to participate in the arbitration and made it clear through the publication of a Position Paper in Dec 2014, that the Tribunal under PCA lacks jurisdiction in the matter. China draws its claim, known as a nine-dash line, from historical use of the sea by Chinese vessels as far back as the Han Dynasty about 2,000 years ago. China feels that the dispute does not concern the interpretation or application of the Convention, but pertains to the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the UNCLOS. Further, China and the Philippines have agreed through the 'Declaration on the Conduct of Parties in the South China Sea' to settle their disputes through negotiations. By unilaterally initiating the arbitration, the Philippines has breached its obligation under the international law.² A statement issued by the Ministry of Foreign Affairs (MoFA) of the PRC said that the conduct of the tribunal as well as its award was unjust and unlawful.³

Legal Implications

The PCA is not a 'court' per se, in true legal sense but an intergovernmental organisation established by the 1899 Hague Convention to facilitate arbitration, fact-finding and other dispute resolution proceedings. As China has ratified the UNCLOS, the verdict by the tribunal constituted under the Convention is binding. However, there is no agency or a mechanism to

implement the award. Even the UN has no provision to enforce the decision, and taking the matter to the UNSC may not be fruitful as China and Russia would inevitably veto it. In any case, as the PCA tribunal has not settled the maritime boundary question, there is no bar on Chinese vessels' presence in the Philippines EEZ. The tribunal rejected China's argument that the dispute is actually about territorial sovereignty and held that the matters submitted to arbitration by the Philippines do not concern sovereignty. The tribunal has made it clear that "nothing in the award should be understood to imply a view on questions of land sovereignty"⁴.

After the verdict, countries of this region will be encouraged to opt for legal solution to their lingering maritime issues. The scope and power of international maritime law has been understood well by the world community. Legally, a vast swath of the South China Sea is no longer disputed. In light of the ruling, if Vietnam decides to go to court, China's oil exploration plans in nine blocks off the Vietnamese coast would be considered a breach of law.

Operational Implications

It is clear that the verdict has brought in a great deal of clarity to the strategic landscape of the vast South China Sea. Operationally, a major portion of the South China Sea now falls in to the category of international waters, within which all states have rights of passage and over flights. This will encourage the US and other countries to

embark on more frequent freedom of navigation operations (FONOP). To counter these activities and make its presence felt in the region, China may decide to establish an ADIZ in the South China Sea.

In the coming days, Chinese maritime security forces may have to confront more and more of Filipino fishermen venturing out to sea in the troubled areas. With no decision on the sovereignty of features, China is likely to continue its ongoing construction and militarisation activities on reclaimed islands. Meanwhile, the PLA Air Force has commenced regular South China Sea combat patrols, practising tactics and increasing response capabilities to all kinds of security threats.⁵As per the Chinese Defence Ministry, China and Russia will hold joint naval exercises in the South China Sea in September 2016, just like the one held in 2014 few months after a flare-up in a territorial dispute between Beijing and Tokyo over a cluster of islands.⁶

Conclusion

China, on its part, has rejected the verdict and declared the ruling null and void. The Chinese Vice-Premier, Liu Yandong is of the opinion that the tribunal had wilfully overstepped and abused its mandate.⁷ China is likely to continue militarisation of the reclaimed islands and pursue its long term strategic domination of the region. In fact, there is strong possibility of China

declaring establishment of ADIZ in the South China Sea to demonstrate sovereignty.

The ruling has derailed China's relations with major ASEAN countries, as eight of the ASEAN members issued statements supportive of the ruling. Although, the tribunal has given its verdict on issues between these two countries, its verdict will have implications for future actions by other countries of the region. In the near future, nations will be seen taking one or other side and some may even switch sides to suit their objectives.

The PCA verdict is unambiguous and direct on the maritime claims, environmental issues, fisheries and freedom of navigation. It has shown the world the power of international maritime laws and may ultimately turn out to be a game changer. Although, the ruling is binding under international law, it is not enforceable. But that does not mean that it will not be effective, because the legitimacy of the verdict and the strategic alignment of the key players of the region will create appropriate diplomatic and/or security mechanisms to enforce it. We may also see emergence of an international coalition to ensure strict following of international laws.⁸

(Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of the Centre for Air Power Studies [CAPS])

Notes

¹ Press Release by Permanent Court of Arbitration, The Hague, 12 July 2016, <https://pca-cpa.org/wp->

content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf, accessed on 26 July 2016.

² Ibid.

³ Dr Avinash Godhbole, ICWA Viewpoint, The South China Sea Arbitration, 22 July 2016, www.icwa.in/pdfs/VP/2014/SouthChinaSeaArbitrationvp22072016.pdf,

⁴ Arun Mohan Sukumar, South China Sea Case: A Guide to the Verdict, 12 July 2016, <http://thewire.in/51045/the-hague-verdict-is-a-big-victory-for-the-philippines-but-not-for-the-south-china-sea-dispute/>

⁵ China Conducts Military Drills in South China Sea, 06 Aug 2016, <http://www.telesurtv.net/english/news/China-Conducts-Military-Drills-in-South-China-Sea-20160806-0021.html>

⁶ Jeremy Page, China, Russia Plan Naval Drills in South China Sea, The Wall Street Journal, 29 July 2016, <http://www.wsj.com/articles/china-russia-plan-naval-drills-in-south-china-sea-1469707620>

⁷ Jayant Prasad, All at the South China Sea, The Hindu, 01 Aug 2016, <http://www.thehindu.com/opinion/lead/all-at-the-south-china-sea/article8925134.ece>

⁸ Alexander L. Vuving, Why the South China Sea Ruling Is a Game Changer, The Diplomat, 27 July 2016, <http://thediplomat.com/2016/07/why-the-south-china-sea-ruling-is-a-game-changer/>