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China's Stand on Arbitral Award: Nuances for India

China's rejection of the South China Sea arbitral award, issued on 12 July 2016, is of nuanced interest to India. At the Nuclear Suppliers Group in June, China had tacitly portrayed India as an outlier in the realm of international law on nuclear non-proliferation. Now, arguably, China itself can be seen to be in a similar position in the domain of the global law of the sea. This suits India. Unsurprisingly, an authoritative Chinese official source thinks that India's reaction to China's denunciation of the arbitral award has been cautious, careful and balanced.

P S Suryanarayana¹

China and India have suffered setbacks in two separate international theatres in recent weeks. For both countries, the reverses occurred *in absentia*. China boycotted the Permanent Court of Arbitration (PCA), while India unsuccessfully sought entry into the Nuclear Suppliers Group (NSG). The similarity ends there, but the Chinese rejection of the PCA's award is of particular interest to India – because of the challenges that rising powers face.

Beijing has vehemently denounced the PCA's award, issued on 12 July 2016, in a maritime dispute relating to the South China Sea. As a result, the Chinese can continue to pursue their superpower-aspiration only by suitably reassuring the wider world that international law will

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be safe in their hands, going forward. In contrast, New Delhi is better-placed despite its failure to secure the NSG membership in June 2016. In fact, India faces a delicious dilemma with regard to China in this situation. The reason is significant. At the NSG, China had tacitly portrayed India as an *outlier* in the realm of international law on nuclear non-proliferation.² Now, China itself can be seen to be an *outlier* in the domain of the global law of the sea. This suits India because it is not alone in being a rising power seen in such light. Such an insight is consistent with the differences between China's and India's respective foreign-policy priorities.

The PCA has unanimously and fully upheld the maritime rights and interests of the Philippines in its unilateral case against China in their dispute over access to the blue-economy resources in a segment of the South China Sea.³ Surely, the Court did not consider or settle the issue of Chinese or Filipino sovereignty over the disputed natural land-features in the relevant sea-waters. Nonetheless, the PCA has emphasised that these natural land-features cannot be deemed to be natural islands – a significant empirical finding that has gone against China. Indeed, the PCA's substantive interpretations of the United Nations Convention on the Law of the Sea (UNCLOS) have demolished China's consistent claims of exclusive and exceptional access to the blue-economy resources in the vicinity of the Philippines.

Finer Points of the Arbitral Award

As I have gathered from experts in global jurisprudence, the PCA has held that Beijing cannot enforce its claims of exclusive 'historical rights' to the blue-economy resources of the South China Sea. Also dismissed by the PCA is the international legality of the nine dash-lines that China had drawn for reserving to itself a vast water-spread in the South China Sea. Categorical, too, is the PCA's conclusion that Beijing is not entitled to a huge exclusive economic zone around the natural land-features in the South China Sea – land-features which existed, without human settlements there, at the time when the UNCLOS came into effect. Stated, as a corollary, is that any subsequent reclamation of land from the South China Sea, at the very sites of the original land-features, does *not* elevate them to the status of 'islands' and, therefore, does *not* entitle China to exclusive economic zones around such 'islands'. Surely, the PCA has not

² ISAS Insights No. 335: Shadow-Boxing over Nuclear Supplies: A China-India Tussle for 'Power', by P S Suryanarayana, 28 June 2016, <http://www.isas.nus.edu.sg>

³ Press Release issued by the Permanent Court of Arbitration in The Hague on 12 July 2016.

frowned upon the land reclamations *per se* by China and other littoral states as impermissible activities under the UNCLOS. However, the PCA is of the view that the reclamation activities should conform to the ecological and other obligations which the UNCLOS-signatories, including China, had undertaken to abide by. It has been further clarified that a cluster of original land-features in the South China Sea cannot be treated as an archipelago with its own exclusive economic zone, even if reclamations, which enlarge the original land-features, help to sustain human habitation on them.⁴

These paraphrased details of the PCA's award reveal the magnitude of China's discomfiture. Besides the Chinese perceptions of wounded national interest, there are other reasons why Beijing's strident reaction is of considerable interest to a country like India. It is indeed possible to compare China's anti-PCA stand with the nuances of India's positions on international laws that affect its vital national interest. Also transparent is how Pakistan, wanting to empathise with its "all-weather partner" – China – on the South China Sea issue, has downplayed the sanctity of international law as upheld by the arbitral court. In doing so, the Pakistani authorities have reserved their preference for another strand of perceived international law, the United Nations Security Council's Resolutions on the Kashmir issue.⁵

In the first place, as soon as the Philippines unilaterally invoked the PCA's jurisdiction, China had begun to voice its opposition unswervingly, and had indeed vowed to boycott the hearings as well as reject the court's findings.⁶ In the wake of the PCA's award now, China has re-asserted its plenipotentiary maritime rights and interests in the South China Sea.⁷ Beijing remains relentless, too, in renewing claims of its exclusive 'historical rights' in the sea-waters of its choice. At the same time, China does not seem to have slammed the door on the idea of bilateral talks with each of the other claimants to the Spratly 'islands' in the South China Sea. The implicit message is that such bilateral talks will not centre on the PCA's award and observations on state-access to the maritime resources in the South China Sea.⁸ China's accent

⁴ The paraphrased finer details of the PCA's award are based on the interpretations by international legal experts.

⁵ Pakistan's latest affirmation of faith in the United Nations Security Council's Resolutions on the Kashmir issue can be had from <http://mofa.gov.pk/pr-details.php?mm=NDAXMg>, on 24 July 2016.

⁶ Ministry of Foreign Affairs, People's Republic of China, A series of statements were made expounding that China "neither accepts nor participates in that arbitration". <http://www.fmprc.gov.cn>

⁷ Ibid. In a statement on 12 July 2016, the Ministry said: "China's territorial sovereignty and maritime rights and interests in the South China Sea shall under no circumstances be affected by those awards [handed down by the PCA on that day]. China opposes and will never accept any claim or action based on those awards".

⁸ Beijing's position, as paraphrased in this paragraph, is also based on various comments by Chinese leaders and officials after the PCA gave its award. These comments include a detailed statement by China's Ministry of Foreign Affairs on 13 July 2016.

on bilateralism suits India, which has repeatedly asked the Pakistani authorities to settle their differences with India through direct bilateral talks instead of seeking external interventions of one kind or another.

It is not strange that, while commenting on the PCA's award and China's reaction, India has merely drawn attention to the significance of the UNCLOS and international law. Without directly addressing China, India said: "Sea lanes of communication passing through the South China Sea are critical for peace, stability, prosperity and development. As a State Party to the UNCLOS, *India urges all parties to show utmost respect for the UNCLOS*, which establishes the international legal order of the seas and oceans" (emphasis added).⁹ While "all parties" certainly include China in this particular instance, there is no specific reference to Beijing. It is significant that India has taken a balanced view towards China despite having made common cause with the United States in January 2015 to work for maritime security and economic prosperity in the Asia-Pacific and Indian Ocean Region, including South China Sea.¹⁰

The Two Opt-Outs

In fact, an authoritative Chinese official source has told me that "India's reaction [to the PCA's award in focus here] is cautious, careful, and balanced". This should come as no surprise at all, although the substantive reasoning, which follows, is very subtle indeed.

India had, from the beginning, *opted out* of the entire Nuclear Non-Proliferation Treaty (NPT) when it came into force in 1970 (without China as a signatory) after the document was finalised by a few interested parties in 1968. The NPT forbids all states, except the five which had produced and successfully tested nuclear weapons by 1968, from following suit. These five states are the United States, the Soviet Union (now, its successor-state of Russia), the United Kingdom, France, and China; the last-mentioned two states, citing their respective national interest, did not sign the NPT right at the beginning.

⁹ Ministry of External Affairs, Government of India, Statement issued on 12 July 2016 on the PCA's award. <http://www.mea.gov.in>

¹⁰ India and the US issued a Strategic Vision Statement on issues relating to the Asia-Pacific and Indian Ocean region, including South China Sea, when US President Barack Obama held talks with India's Prime Minister Narendra Modi in New Delhi on 25 January 2015. Available on the websites of India's External Affairs Ministry and the White House.

China, which was not a member of the United Nations by 1970 (that seat was held by Taiwan until 1971), signed the NPT as late as in 1992. By contrast, India did not want to sign the NPT at all, because of the Treaty's discriminatory division of the world into two camps – the haves and the have-nots – based on the singular consideration of when a country tested a nuclear weapon. Therefore, India kept its 'nuclear option' open, and carried out nuclear-explosion tests in 1974 (as an experiment) and in 1998 (for weapon-making). Moreover, New Delhi does not intend to give up its nuclear arsenal and sign the NPT as an ordinary 'have-not' member of this Treaty. These well-chronicled details are recounted here to draw a comparison between India's *total opt-out from the NPT* and China's *opt-out from certain provisions of the UNCLOS*.

Interestingly, the PCA has not endorsed Beijing's contention that the Filipino case was vitiated by the duly-exercised Chinese opt-out from certain aspects of the UNCLOS. The Filipino case, in Beijing's view, should not have been considered at all, in the first place, because of the partial Chinese opt-out. Soon after the PCA delivered its award, China argued that "*The Arbitral Tribunal disregards the fact that the essence of the subject-matter of the arbitration initiated by the Philippines is issues of territorial sovereignty and maritime delimitation . . . deliberately circumvents the optional exceptions declaration made by China under Article 298 of [the] UNCLOS*" (emphasis added).¹¹

In a comparative analysis, a key question here is whether China's partial opt-out from the UNCLOS and India's total opt-out from the NPT should be seen in the same light. The finer details of China's partial opt-out are not relevant to this comparison of state-behaviour towards international law on one subject or another. In brief, China's partial opt-out from the UNCLOS relates to territorial sovereignty and maritime delimitation. Noteworthy in this context is that the PCA has not disputed or negated China's sovereign right to opt out of certain provisions of the UNCLOS. Similarly, there is nothing in international law to prevent a sovereign-state like India to stay away from (in a total opt-out from) the NPT, especially if such a country is willing to bear the collateral difficulties in accessing the global civil-nuclear market.

A salient point of absolute relevance to the China-India relationship in the present analysis is this: The Chinese authorities have argued, albeit outside the PCA, that the arbitral tribunal has no jurisdiction over them in the Filipino case which had impinged adversely on their partial opt-out from the UNCLOS. In effect, China is claiming immunity from the PCA's award despite being a signatory to the UNCLOS, a valid piece of international law. In significant

¹¹ http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml

contrast, China itself had earlier taken the line that the Indians could not claim any immunity from the NPT, also a valid piece of international law, based on their total opt-out from that Treaty. On that basis, China had, on 23 and 24 June 2016, scuttled India's bid for membership of the Nuclear Suppliers Group (NSG).

Dual Interests

China's stand was, and still is, that India should accede to the NPT as a 'nuclear have-not' country in order to secure membership of the NSG. For keeping India out of the NSG on this basis, the Chinese delegates in that forum adopted nuanced diplomatic tactics (the details being outside the purview of the present analysis).¹² In the process, China chose to ignore the salient fact that India is the only non-NPT country to have been exempted from this Treaty-related NSG-guideline as far back as in 2008. This reflected an appreciation of India's non-proliferation credentials; Beijing, too, was a party to this waiver for New Delhi, albeit at the behest of Washington (as I have shown in earlier ISAS publications).

It is evident from this brief discussion that China, which championed international law (pertaining to the NPT) to keep India out of the NSG, is wary of international law (as interpreted by the PCA in relation to the UNCLOS). It is significant, too, that India, which has already settled its maritime dispute with neighbouring Bangladesh through arbitration under the UNCLOS, is *not* at all strident in insisting that Beijing abide by the PCA's award. The reason for India's reticence of this kind is clear.

The Indians are hopeful that their 'waiver' or exemption from the NPT-related NSG-guideline will, sooner or later, stand them in good stead for membership of that forum. So, it is not in India's interest to stridently call upon China to abide by the PCA's findings, although the arbitral court had given a 'binding' award. It does not necessarily follow, of course, that China would or should reciprocate and allow India in as a member of the NSG.

For China, the interests of its "all-weather partner" – Pakistan – are important, too. The larger international community does not equate Islamabad with New Delhi in their non-proliferation credentials. However, and having addressed the diplomatic fall-out of the clandestine A Q Khan nuclear proliferation network, Pakistan is very keen to enter the NSG with the help of

¹² For details, same sources as in Note 2

China. Not surprisingly, therefore, Pakistan has now fully supported China on the issue of the PCA's award. However, the resonance of China's rejection of the PCA's award is of more-nuanced interest to India rather than Pakistan in South Asia.

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