

QUAD-PLUS Dialogue



SOUTH CHINA SEA RULING: IMPLICATIONS FOR QUAD INTERESTS

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China's reaction to the award by the United Nations Convention on the Law of the Sea (UNCLOS)-established Permanent Court of Arbitration (PCA) on its maritime claims in the South China Sea, challenged by the Philippines, was disturbing in its belligerence.

China had declared publicly and in written submissions to the PCA that it did not recognise the court's jurisdiction and was not bound by its judgment.

It called the Philippines' plea to the court illegal as it violated bilateral understandings and discussions with the Association of Southeast Asian Nations (ASEAN), without, however, producing any evidence that the Philippines had at any time committed in writing to the Chinese bilaterally or during the ASEAN-China discussions on a Code of Conduct of Parties in the South China Sea and that it will forswear recourse to UNCLOS arbitration.

So how can the invocation of a provision of an international treaty signed by both China and the Philippines, which allows arbitration even at the instance of one party, over differences in interpretation of the provisions of that treaty, be illegal?

The PCA, which kept China informed of the proceedings at every stage and took cognisance of China's written objections submitted to it, ruled that under Article 9 of UNCLOS China's non-participation did not bar it from proceeding with the arbitration, that despite it China was still a party to the arbitration, and pursuant to the terms of Article 296(1) of the Convention and Article 11 of Annex VII "it shall be bound by any award the Tribunal issues."

This was the basis for statements by the U.S., Japan, and Australia that the award was final and China was bound by it, though in the U.S. case its failure to ratify UNCLOS undermines its position.

Addressing China's core argument for rejecting its writ, namely, that it had no jurisdiction to decide on sovereignty issues or on delimitation of maritime boundaries in the South China Sea, the PCA noted that the Philippines had specifically mentioned in its pleas that it was not seeking rulings on either of these two issues in its dispute with China. It was only seeking a determination that the

Parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea were governed by the Convention and that China's claims based on "historic rights" encompassed within its so-called "nine-dash line" were inconsistent with the Convention and therefore invalid.

The Philippines also sought determinations as to whether, under the Convention, certain maritime features claimed by both China and the Philippines were properly characterised as islands, rocks, low-tide elevations, or submerged banks.

If these features were "islands" they could generate an exclusive economic zone or entitlement to a continental shelf extending as far as 200 nautical miles.

If, however, these features were "rocks" they could not have a territorial sea greater than 12 nautical miles.

If they were not islands, but merely low-tide elevations or submerged banks, then pursuant to the Convention they would be incapable of generating any such entitlements, and that no amount of artificial reclamation work could change the status of the features.

On all these points, after taking into account China's Position Paper of December 2014 and other Chinese communications to the court, and conscious that China's non-participation required it to be particularly judicious, the Court decided in favour of the Philippines.

After the award China made highly bellicose statements. It rejected the award as "null and void." President Xi asked the People's Liberation Army (PLA) to "prepare to make war," with the PLA Navy South China Sea Fleet placed on "pre-war status."

That the Chinese president spoke of war over an arbitration award that has no mechanisms for enforcement represented the usual Chinese intemperate conduct and intimidation tactics when thwarted.

State Councillor Yang Jiechi pronounced that "the sovereignty issue in China's bottom line" and that "though China is large, we cannot lose one centimetre of inheritance left by ancestors." This is a dangerous line to take as by this China arrogates to itself the right to make claims based on its own reading of history and its own evaluation of the territorial legacy bequeathed to it by its "ancestors." It connotes intransigence, a summary dismissal of rival claims, rejection of international law, and even treaties it has voluntarily signed.

Foreign Minister Wang Yi has haughtily dismissed the award as a "political farce." This was the ruling of a tribunal established under a treaty that China is party to and it is on issues of dispute arising out of the interpretation of the provisions of the treaty that affects not only the rights of the parties directly involved but, by extension, those of the international community as a whole. To treat it as "farce" was a farcical position to take.

Chinese Vice Foreign Minister Liu Zhenmin was aggrieved because the PCA's five arbitrators lacked knowledge of "Asian culture." This suggests that in Chinese view only arbitrators who are well-versed in "Asian culture" should decide on differences between Asian parties. In other words, international law should be applied on the basis of cultural geographies.

The PCA's rejection of the legal validity of the nine-dash line and its conclusion that it found no historical evidence to support China's assertions that it exercised maritime control over these waters historically punctured Beijing's egregious claims.

The court's clarification of the extent of maritime jurisdiction that can be claimed from the reclamation of rocks and reefs, whether or not submerged at high tide—in the context of China's reclamation activities in the South China Sea—is of direct interest not only to regional countries but others whose trade flows through these waters and who have vital interest in freedom of navigation and overflight in this expanse. Forty percent of India's own trade passes through these waters. India is also engaged in oil exploration in waters that Vietnam claims since the mid-1980s.

China's irascible conduct raised many concerns. It displayed great power hubris. China seems to believe that with its economic success, command of huge financial resources and mounting military capacities, it can flex its muscles, and that other countries, including the U.S., unwilling to risk a conflict, have no choice but to accommodate its conduct.

It has willfully caused territorial tensions, confronting several of its neighbours, including U.S. allies. It is willing to bury the talk of China's peaceful rise. It shows contempt for others by claiming that its reclamation works in the South China Sea, with runways and radars, is intended to provide "public goods." Its position that it has no intention to interfere with freedom of navigation and overflight in the South China Sea despite the nine-dash line amounts to asserting proprietary rights, but announcing that trespassers will not be prosecuted. In sum, freedom of navigation and overflight will flow from China's goodwill, not international law.

For India, the implications are evident. China's provocative conduct in the western Pacific suggests that the Depsang and Chumar incidents in Ladakh timed with the visits of Chinese leaders to India were willfully staged as part of China's intimidatory tactics. The statement of State Councillor Yang Jiechi, China's Special Representative for resolving the border issue, that his country "cannot lose one centimetre of inheritance left by ancestors" carries a lesson for us as we engage China.

China's conduct in the South China Sea has serious implications for our own relations with Beijing. The manner in which it has staked its claims in the South China sea, the "historical" justification for them, the total rejection of the claims of others, the disregard for international law, the deliberate stoking of regional tensions, the tactics of bullying and intimidation, the self-confidence that others will have to accommodate a strong China, the defiance of the U.S. on the assumption that its vast economic interests in China and the erosion of its power will dissuade it from militarily confronting Beijing over disputed islands in the region, and the summary repudiation of the UNCLOS arbitral award are relevant for shaping our policies towards China.

Chinese passports carry maps of the country's geographical frontiers that, besides the nine-dash line, also show Arunachal Pradesh and occupied parts of Ladakh as Chinese territory. State Councillor Yang Jiechi has stated apropos the UNCLOS arbitral award that "though China is large, we cannot lose one centimetre of inheritance left by ancestors." He is not referring to China's rights under international law, he is talking of ancestral legacy denied to it, overlooking the fact that when China became a party to UNCLOS, it renounced this supposed legacy. If a strong China believes that history and past empire building has given it rights that it can assert today, others could in theory claim such rights, too, generating tensions worldwide.

If China is so uncompromising about its "ancestral legacy," should the Tibetans and the Uighurs of East Turkestan be denied the restoration of their ancestral legacies snatched away by China's

territorial aggrandisement at their expense? Does China intend to recover its inheritance lost to Russia and the Central Asian republics, now that it has acquired muscle?

As China's Special Representative for resolving the border dispute with India, the intransigence of Yang Jiechi's pronouncement on sovereignty and territorial issues cannot be ignored. It actually darkens the prospects for a border settlement, as China cannot have a two-track approach to "historic rights," asserting them unabashedly in the western Pacific and relinquishing them in the Himalayas. China is, moreover, making its strategic opposition to India more public. The decision to build the China-Pakistan Economic Corridor through territory acknowledged as not legally belonging to Pakistan in the 1963 border agreement with the latter shows its scant regard for India's "historical rights" over the whole of Jammu and Kashmir.

After its stinging rebuff by the UNCLOS tribunal, China has retrieved diplomatic ground. The Philippines, the direct beneficiary of the award has, under President Duterte, decided to seek accommodation rather than confrontation with China. By scoffing at the U.S., it has weakened its hand in dealing with China. Vietnam, too, has been cautious in exploiting the arbitral award to its advantage. Indonesia has had a maritime spat with China over fishing rights in the Natuna Islands that belong to it and while its president took a tough stand on the issue, Indonesia has also reached out to China. ASEAN is divided over the issue, with Cambodia, Laos, and Brunei breaking ranks with others in the grouping. All these countries want to hedge their bets because of uncertainty about the U.S. commitment to the region and whether it will risk confrontation with China with which it has an extremely intertwined relationship financially and trade-wise. Australia is debating on the extent to which it wants to be put in a situation where it has to choose between its biggest economic partner China, and its biggest security partner America.

The election of President Trump has added to the existing uncertainties. The President himself has decried Chinese actions in the South China Sea. Secretary of State Rex Tillerson in his Senate hearing spoke of denying China access to the artificial islands it has built in the South China Sea. How U.S. policy decants in the months ahead will be of interest to the other Quad members.

The fiction of China's peaceful rise has been laid bare. The UNCLOS award and China's petulant reaction will test the credibility of U.S. security commitments in the region. The future of U.S.-India joint strategic vision for the Asia-Pacific and Indian Ocean regions will be tested by the course of U.S. action in meeting China's defiance in the South China Sea.