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The South China Sea Ruling

What Now for China?

By Zha Daojiong

Synopsis

China has chosen not to take part in the arbitral tribunal brought against it by the Philippines. Hence, now that the tribunal has issued its ruling, China should stay away from commenting on the case and instead offer concrete plans for functional cooperation in the South China Sea.

Commentary

AFTER THREE years, the international arbitration that the Philippines brought against China on issues relating to the South China Sea dispute between them came to a formal end on 12 July 2016. The findings of the arbitral tribunal did not come as a surprise.

The Chinese government has rejected the tribunal's finding, having exercised its right allowed in public international law not to participate in the tribunal. Chinese and/or non-Chinese citizens can take issue with the wisdom or the lack of it behind that decision. Regardless, a page has been established in history. Meanwhile, it is upon us to make use of moments of history.

China Needs to Move On

Call it by whatever name - anguish, frustration, or scorn - voices pertaining to an official Chinese position in response to the case have been aired. It would be utterly unwise and self-destructive for anymore effort organised or endorsed by the government of China over whatever aspect of the tribunal exercise the Philippines brought forth in 2013.

Lost in the mainstream rhetoric on the South China Sea is ‘functional cooperation’. China should champion maritime and marine functional cooperation on the South China Sea and the space above it. Do it in the same manner as initiating the Asian Infrastructure Investment Bank (AIIB), to fill in a development void the region faces but no one else seems to care enough about.

In the Declaration on the Conduct of Parties in the South China Sea (DOC), Article Six stipulates that “the Parties concerned may explore or undertake cooperative activities” such as a) marine environmental protection; b) marine scientific research; c) safety of navigation and communication at sea; d) search and rescue operation; and combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

Some are right to be skeptical. After all, Article Six of the DOC document begins by saying “pending a comprehensive and durable settlement of the disputes”. But that wording has not prevented such endeavours as the establishment of the ASEAN-China Joint Working Group on the Implementation of the DOC (JWG) in 2004. The JWG was tasked with formulating recommendations for developing cooperation.

Also in Article Six, it is stated that “the modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation”. This can be read as a political safeguard, which is a reflection of recognition of the domestic complexities associated with projects labeled as cooperation between parties in dispute of ownership.

It goes without saying that the United Nations Convention on the Law of the Sea (UNCLOS) commends its signatory states to fulfill their duties to utilise and preserve the oceans and ocean-related resources. As is true of all international law, a state’s entitlement to rights over resources goes hand in hand with its obligation to cooperate in protection and preservation. All littoral states of the South China Sea have ratified UNCLOS and therefore have a legal obligation to pursue cooperation with other member states.

Complexities of Functional Cooperation

Now, that is the ideal. As has been observed before, functional cooperation has its own share of complexities. Believers in the value of cooperation therefore come up with “low hanging fruit” as an analogy, in order to make expert proposals actionable. But then, what is “low” for one party may turn out to be too high for another.

China needs to look no further than its own experience in establishing and operationalising the AIIB. Just come up with details attractive to believers in good-faith efforts.

The South China Sea waters – bearing in mind the complexities associated with competing claims of sovereignty and other forms of rights to jurisdiction – are prone to overfishing, illegal, unreported, and undocumented (IUU) fishing, in addition to habitat destruction. In particular, IUU poses a terrible stigma as it often entails a net loss to the fishing communities along the coastal lines.

Functional Cooperation on fisheries can, ideally speaking, begin with developing common methodologies for establishing a case of IUU. Joint efforts need to be made to establish evidence in the entire chain of operations: flagging, staffing, financing, and end sales, etc. Domestic law enforcement agencies of the various states need to be on board, together with diplomats and law professionals.

Interested actors have the UN Food and Agriculture Organization (FAO) and other specialised agencies to look to for expertise. For example, it was the FAO that enabled the passage of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which entered into force in June 2016.

Winning Back the Goodwill

The tragic aviation incident of Flight MH370 lost on 8 March 2014 while en route to Beijing from Kuala Lumpur, should be a reminder for a new push towards international cooperation to enhance safety in civil aviation. No matter how maritime boundary lines are eventually going to be agreed upon among the states, safety of civil aviation is both an international legal obligation and self-interest.

Satellite services like China's Beidou navigational system can and should be put forward as a public good. In addition, under the framework of the International Civil Aviation Organisation (ICAO), China should invite interested parties to work together and enhance technological and operational connectivity in civil aviation. It is the safety of passengers that truly matters.

Back in 1997-1998, when Southeast Asian states were fighting a regional financial contagion, China won goodwill by not devaluing its currency. Little else needed to be said as a reminder. Today, the larger background is rather different. But the spirit of building up a friendly neighbourhood is the same: come up with deeds that others can feel positive about, without necessitating change in principled positions.

From now on, China will be ill-advised to get entangled in the expected political and diplomatic challenge to agree to implement – in a wholesale manner - the tribunal's ruling, a challenge that will come from within and outside the region. Beijing should focus on programmes that can truly promote safety in the use of the oceans and the space above, as well as in the preservation of maritime resources rather than (re) drawing lines through a shrinking pie. Doing so does not necessarily lead to a 'thank you' note from Southeast Asia or beyond. But, it can serve to balance those voices that promote China as the disruptive element.

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