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Original Article

Building Cooperation for Managing the South China Sea Without Strategic Trust

Sam Bateman *

Abstract

The ruling from the arbitral tribunal dealing with the case between China and the Philippines in the South China Sea provides opportunities for fresh approaches to building cooperation for managing the sea and activities within it. This cooperation is both a necessity and an obligation of the countries bordering the sea. However, obstacles remain, particularly the lack of trust between the various stakeholders in the sea and the way in which important areas for cooperation, such as fisheries management, environmental protection and marine scientific research, have been politicised to the extent that even cooperation in these areas cannot proceed without greater strategic trust. The objective of this paper is to put forward a set of policy implications from the ruling that might overcome these obstacles and allow the necessary cooperation to proceed despite the lack of strategic trust.

Key words: South China Sea, arbitration ruling, maritime cooperation, trust, ASEAN

1. Introduction

The arbitral tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS) to deal with the dispute between China and the Philippines in the South China Sea produced its final ruling in July 2016 (PCA 2016). Despite frequent references to the ruling as being from the Permanent Court of Arbitration in The Hague, this is not so. Rather, it was a ruling from a tribunal established under Annex VII of the 1982 UNCLOS for dispute resolution. The Permanent Court of Arbitration only provided secretarial and media support for the tribunal.

The ruling has been described both as a ‘game changer’ (Beckman 2016) and ‘a stinging blow to China’s international prestige’ (Rosen 2016). However, as time goes by, it seems the impact of the ruling will be less than anticipated. It will remain of legal interest because of the criteria it established for determining whether offshore features are ‘islands’ or ‘rocks’. In this regard, the ruling went beyond what many international legal experts were expecting. But even this impact will be prospective rather than retrospective—countries, including Australia and Japan, that have claimed exclusive economic zones (EEZs) from features, which may not be ‘fully entitled’ islands under the criteria used by the tribunal, will not be changing their claims (Bateman 2016a).

On the credit side, the ruling provides opportunities, including a basis for negotiations between the parties involved (Xie 2016) and a return to a more cooperative

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path for managing the South China Sea and activities within it. Constructive dialogue is now required rather than destructive sniping. As the editors of the East Asia Forum have rightly pointed out, 'It is not a time for grandstanding, adding insult to injury or taking action that could be construed as provocative' (Editors, EAF 2016). This paper reviews the impact of the ruling on regional affairs and identifies some policy implications.

2. Regional Responses

Only seven countries have formally called for the award to be respected—Australia, Canada, Japan, New Zealand, the Philippines, United States and Vietnam (CSIS 2016). With the exception of the Philippines and Vietnam, Southeast Asian countries have 'sat on the fence'. Vietnam benefits from the ruling because it supports the country's exclusive sovereign rights and jurisdiction over the extensive EEZ generated from its lengthy mainland coast (Kraska 2016). After initially welcoming the ruling, the Philippines under President Duterte has opened up negotiations between Manila and Beijing to explore several cooperative initiatives (Song 2016). The Philippines' foreign policy shift has changed the discourse over the South China Sea and may reduce regional tensions over disruptive issues (Chan 2016).

The United States and Japan have pressed regional countries to make strong statements about the ruling (Ko & Puy 2016). However, recent regional forums have not mentioned it in their closing statements (Reuters 2016). The chairman's statement from the Association of Southeast Asian Nations (ASEAN) Summit in Vientiane in September 2016 'emphasised the importance of non-militarisation and self-restraint in the conduct of all activities, including land reclamation that could further complicate the situation and escalate tensions in the South China Sea', but did not mention the ruling (ASEAN 2016). This lack of reference to the ruling suggests the influence that China enjoys within the region. It also suggests that while Southeast Asian countries want the United States to remain in the region as a balance to

China, they are rather less supportive of more challenging moves by Washington.

3. Consequences

There are numerous consequences of the ruling (Rothwell 2016). By denying the legal basis of China's nine-dashed line under UNCLOS, it negated China's claim to maritime rights over much of the South China Sea and provided support for the littoral countries to exercise sovereign rights over resources in their EEZs. The importance the tribunal attached to EEZ jurisdiction may reinforce the nationalistic attitude the littoral states attach to their EEZs. This attitude will not help the development of effective cooperation for managing the South China Sea.

The judgement that there are no 'fully entitled' islands in the Spratly group was a surprising feature of the ruling. Theoretically, this provides a basis for a system of EEZ boundaries in the South China Sea with a number of enclaved territorial seas around the 'rocks'. There may even be patches of high seas, although these may be closed off in part by the outer continental shelf claims by Vietnam and Malaysia in 2009 that served to aggravate already complex disputes (Schofield & Storey 2009, pp. 13–16). Vietnam could also help 'clear the air' and demonstrate ASEAN solidarity, by dropping its claim to features within the EEZs of Malaysia and the Philippines. Elsewhere in the South China Sea, islands in both the Paracel and Pratas groups are much larger than those in the Spratlys and could be 'fully entitled' islands, but maritime boundaries near the Paracels cannot be defined while their sovereignty is disputed between China and Vietnam.

The countries bordering the South China Sea are looking for 'fences in the sea' rather than recognising that maritime boundaries are not an end in themselves but rather a means of effectively managing maritime space. Due mainly to the geography of the sea, negotiating its maritime boundaries is always going to be difficult (Bateman 2016b). Rather than maritime boundaries per se, effective maritime management should be the basic objective of

the bordering countries. It is also their obligation under UNCLOS. All these countries are parties to UNCLOS,¹ and thus have an obligation under part IX of that convention dealing with ‘enclosed or semi-enclosed seas’ to cooperate on managing the sea. The words ‘should co-operate’ and ‘shall endeavour’ in Article 123 of UNCLOS place a strong obligation on the littoral states to co-ordinate their activities with living resource management, protecting the marine environment and marine scientific research. Furthermore, the opening sentence of Article 123 creates a more general obligation for them to cooperate ‘with each other in the exercise of their rights and in the performance of their duties under this Convention’. This obligation could be interpreted to include the maintenance of law and order at sea (CSCAP 2008, p. 2).

The necessity to cooperate in the South China Sea flows from factors such as increasing shipping traffic, pressures on marine resources (both living and non-living), environmental degradations and the need to avoid a ‘tragedy of the commons’ (a ‘lose-lose’ outcome). Reports have shown that over 60 per cent of the coral reefs in Southeast Asia, largely in the South China Sea, are either effectively lost or in a critical state of degradation (Wilkinson 2008, p. 11). Most fish stocks in the sea, according to a 2012 report from the United Nations Food and Agricultural Organization (FAO) are either fully exploited or over-exploited, particularly in the western part of the sea (FAO 2012, p. 59). Effective management of the marine environment and sustainable development of living resources depends on good marine scientific research, but even that is being frustrated by current levels of distrust.

The ruling from the arbitral tribunal now provides opportunities to go back to basics and start with ‘a clean sheet of paper’ with managing the situation in the South China Sea. Opportunities exist for negotiations between the parties involved (Xie 2016) and building functional cooperation. The focus of

negotiations should now be on functional cooperation for activities, such as marine scientific research, fisheries management, protecting and preserving the marine environment, maritime law enforcement, and search and rescue (SAR) (Bateman 2016a).

4. Obstacles to Cooperation

Despite the obligations and need for cooperation in the South China Sea, effective cooperation faces major obstacles. First, there is the reality that much current commentary on the South China Sea follows the realist theory of international relations that states largely act in their own self-interest.² Under this theory, states compete against each other to achieve their own interests rather than recognising the possibility of a ‘win-win’ outcome achieved through cooperation. Conversely, liberal thinking in international relations allows for states sharing some concept of the common good and avoiding a ‘tragedy of the commons’; in short, the realist approach inhibits cooperation while a liberal approach encourages it.

A second major factor is the lack of trust. Trust (or the belief that the other side ‘will do what is right’) is a key consideration (Hoffman 2002). However, trust is a difficult concept that means different things to different people and in different contexts. This is evident in the question as to what comes first between trust and cooperation. Cooperation to deal with ‘softer’ issues, such as SAR, fisheries management, marine scientific research and marine environmental protection, should help build trust, but as has been noted, a prevalent regional view is that even this cooperation cannot proceed without strategic trust.

The issue of trust cuts across all processes of cooperation and confidence building. Some forms of cooperation, such as counter-piracy and humanitarian assistance and disaster relief (HADR), are successful, but these activities are common interests of regional countries.

1. Cambodia is the only Southeast Asian country not a party to United Nations Convention on the Law of the Sea.

2. For example, most papers in the Special Focus edition of *Contemporary Southeast Asia*, dealing with the South China Sea vol. 33, no. 3, December 2011.

They are 'low-hanging fruit' that do not require the identification, even by implication, of another state as a competitor.³ A benefit of HADR operations and exercises is that these activities provide opportunities for regional defence forces, including those of China and the United States, to work together with common purpose (Johnson 2015).

Provocative actions and statements only serve to add to distrust and frustrate cooperation. Commencing with the Vietnam–Malaysia joint submission for an extended continental shelf in the South China Sea (Bateman & Schofield 2009), the American 'pivot' to Asia and the Philippines launching its arbitration case against China, recent years have seen an escalating spiral of provocation and counter-provocation that has led to increased strategic distrust between China and the United States, between China and ASEAN and even within ASEAN. Rather than cooperation on softer 'S' security issues, such as fisheries management and marine environmental management, being seen as confidence-building measures, there is now a belief that even these forms of cooperation are not possible without trust.

A second obstacle is related to the lack of trust. This is the way in which 'softer' issues of maritime cooperation have been 'securitized' as non-traditional security issues. This securitization contributes to the 'politicisation' of maritime cooperation, even for activities that are obligations of the littoral countries. This restrictive security approach leads to distrust and is a large part of the reason why cooperation for SAR and even marine scientific research has failed to gain momentum, let alone cooperation for the potentially more sensitive issues of oil and gas exploration and fisheries management.

The United Nations Environment Programme/Global Environment Facility South China Sea project, 'Reversing Environmental Degradation in the South China Sea and Gulf of Thailand' is an example of this process of 'politicisation'. This project ran from 2002 to 2008 in Cambodia,

China, Indonesia, Malaysia, Philippines, Thailand and Vietnam (Vo & Pernetta 2010). It focused on the priority areas of the loss and degradation of coastal habitats, over-exploitation of fisheries and land-based marine pollution. It achieved some good outcomes, particularly by fostering cooperation among the scientists of participating countries, but increased political tensions prevented the momentum of cooperation from being sustained. One lesson learnt was the importance of separating 'the scientific and technical from the policy and decision-making to allow for a better integration of scientific and technical data into the decision-making process than would be possible with a single, joint forum that could have resulted in confusion between the purely scientific and technical on the one hand, and the policy related issues and concerns on the other' (Vo & Pernetta 2010, p. 592). Or put more simply, politics should be kept out of the science.

The third factor is the focus of littoral countries on independence and sovereignty. They are reluctant to engage in cooperative activities because that may compromise sovereignty claims and national independence. This is often despite enthusiastic rhetoric about the cooperative ideal. Perceptions that cooperation implies some concession on sovereignty claims and fears of domination by the larger partners in a cooperative framework are significant obstacles to cooperation. Cooperative initiatives should be based on the clear understanding that cooperation is without prejudice to sovereignty claims.

A last obstacle is that cooperation can also involve financial costs above and beyond what it costs to manage maritime interests independently. Much time and effort can be expended in reconciling one's own interests with those of other parties, and countries will make a simple cost-benefit analysis of whether cooperation is worthwhile. They will not engage in cooperation if they perceive the costs exceed the benefits.

5. Promoting Cooperation

Since 1990, Indonesia has hosted a series of informal workshops on managing potential

3. While this might also appear to be the case with search and rescue, sovereignty disputes also impact on the designation of search and rescue areas of responsibility.

conflicts in the South China Sea with the last workshop held in Bandung in November 2016 (Salim 2016). The main goal of these workshops is not to solve the sovereignty disputes in the South China Sea but to develop a sense of 'community' in the South China Sea area that reflected the spirit of cooperation in UNCLOS, especially through the semi-enclosed seas concept in part IX (Djalal 2009). In addition to annual workshops, the process has included technical working groups and groups of experts meetings on issues in particular areas of cooperation, including marine scientific research, marine environmental protection, resource assessment and development, and legal matters. The process has achieved agreement for some cooperative initiatives in these areas (Townsend-Gault 2009, p. 196), but due to lack of funding, there has been little follow through on these initiatives, and the workshop process has made uneven progress.

In the recent years, China has taken a lead with initiating cooperation in the South China Sea. It launched the ASEAN-China Maritime Cooperation Fund with a budget of \$500 million in 2011 (Hayton 2016). This provided for the establishment of expert committees on marine scientific research, environmental protection, search and rescue and transnational crime, and other bilateral arrangements with Southeast Asian countries including a planned China-ASEAN Ocean College. Then at the Boao Forum in 2016, China announced the establishment of the China-Southeast Asia Research Centre for the South China Sea to conduct and coordinate research on resources, the marine environment and so on (Chen 2016). However, these initiatives have made little progress due mainly to the lack of trust among regional countries about China's motives. They appear to believe that greater trust is required before there can be cooperation. As one researcher has observed, 'Scientific cooperation hasn't reduced mistrust, and common interests don't prevail' (Boisseau du Rocher 2015, p. 8).

UNCLOS Article 123(d) provides that the bordering states to the South China Sea may invite 'other interested states or international organizations' to participate in fulfilling

their obligations to cooperate. With the exception of the United Nations Environment Programme/Global Environment Facility South China Sea project, there has been little or no effort to implement this article despite it providing an avenue for other countries and international organisations to contribute expertise to assist effective management of the South China Sea, particularly with the management of fish stocks and marine environmental protection. Rather than contemplating further military operations in the South China Sea, 'interested states', such as Australia, Japan and the United States, could be bringing 'carrots' rather than 'sticks' to the South China Sea by offering up their maritime expertise. Because of their extensive maritime interests, they all have extensive expertise in relevant fields.

A consensus on the South China Sea issue may be emerging between China and ASEAN (Ngeow 2016). The removal of this divisive issue from the ASEAN agenda will allow the association to focus back on closer regional cooperation with scope for a 'dual-track' approach to the management of the South China Sea—the current track focused on a binding Code of Conduct (COC) plus a parallel track focused on cooperation for managing the sea and activities within it. The latter might be based on the current initiatives by China through the ASEAN-China Maritime Cooperation Fund.

A cooperative management regime is the only means of managing the South China Sea and activities within it. This will only be achieved when the bordering countries change their mindsets from one of sovereignty, sole ownership of resources and seeking 'fences in the sea' to one of functional cooperation and cooperative management (Bateman 2016b). An acceptable framework for a new regime would be a web of provisional arrangements covering cooperation for different functions with perhaps even different areas for each function. These functions could include joint management of oil and gas resources, fisheries, SAR, marine scientific research, good order at sea and protection of the marine environment. Regardless of whether or not maritime

boundaries are agreed, urgent safety, resource and environmental problems dictate the need for increased dialogue and cooperation.

6. Way Ahead

The concluding part of this paper considers what might be performed to promote cooperation to ease tensions in the South China Sea. Major needs include greater trust and more effective management of regional maritime concerns. Current negotiations on the South China Sea occur mainly through regular Senior Officials' Meetings (SOM) and Joint Working Group Meetings on the Implementation of the Declaration on the Conduct of Parties in the South China Sea. The last of these meetings were held in August 2016 with the parties once again reaffirming 'their commitment to properly managing differences, increasing mutual trust and removing disturbances so as to make the South China Sea a sea of peace, friendship and cooperation' (MFA PRC 2016). Despite this lofty ideal, progress towards a binding COC remains slow with grounds for caution about any illusions of progress towards it (Parameswaran 2016).

The cooperation track might be progressed by disconnecting essential civil maritime cooperation on non-traditional security issues from the more traditional security concerns reflected in the sovereignty disputes and the search for a binding COC. These are the root causes of distrust. Desecuritizing civil maritime cooperation, largely covering the forms of cooperation that are both an obligation and a necessity, might allow it to proceed even without political trust.

Trust might be considered at different levels. While strategic distrust is the most serious problem, operational distrust restricts the cooperation necessary to deal with issues, such as marine pollution, SAR and fisheries. Operational trust is currently conflated with strategic trust, the lack of which has become the main obstacle to effective maritime cooperation.

It may be possible to build operational trust without strategic trust. A fixation on resolving sovereignty claims reinforces distrust and

inhibits cooperation, whereas cooperative activities on 'softer' issues could help build operational trust even though strategic trust is absent. A strong South China Sea forum, based on the existing SOM but bringing together officials from functional departments (e.g. fisheries, environment and shipping) rather than foreign ministries, might be established to promote civil maritime cooperation for tasks such as law enforcement, SAR and marine environmental protection. A recent positive development in this regard is the proposal initiated by the ASEAN Maritime Forum for the establishment of an ASEAN Coast Guard Forum (ASEAN 2015). If China was also invited to participate in ASEAN Coast Guard Forum meetings, it could become a useful vehicle to provide good order in the South China Sea without being bogged down by strategic distrust.

7. Policy Implications

China and ASEAN should now be given space to work out their differences and explore cooperation for managing the South China Sea without pressure or provocation from extra-regional/non-littoral powers. There is no strategic imperative for these powers to take any action, including no extant threat to freedoms of navigation and overflight that warrant confrontational assertions of these freedoms. Dialogue between ASEAN and China should now be given the chance to work.

Policy implications include the following:

- A Track 1 Forum, possibly based on the existing SOM, should be established to manage maritime cooperation in the South China Sea.
- Negotiations should focus on functional cooperation for activities, such as marine scientific research, fisheries management, protecting and preserving the marine environment, maritime law enforcement and SAR.⁴

4. These were areas for cooperation identified in the 2002 Declaration on the Conduct.

- Cooperative initiatives should be based on the clear understanding that cooperation is without prejudice to sovereignty claims.
- Regional forums should continue to promote counter-piracy and HADR operations and exercises.
- Epistemic communities of marine scientists, marine environmental experts and fisheries managers should be given the freedom to conduct their business without political interference.
- The bordering countries to the South China Sea might invite other interested states and international organisations to provide expertise in managing the South China Sea and activities within it.
- An ASEAN-China Coast Guard Forum might be established to help promote operational trust in the South China Sea.

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