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South China Sea: A course-correction needed

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This post is part of a debate on South China Sea ruling

Tuesday's South China Sea adjudication demonstrates that the UNCLOS framework is totally unsuited to sorting out the complex conflicting claims in the South China Sea in a way that the relevant parties will accept. By effectively announcing the Philippines as winner and China as loser, the tribunal's finding is now the basis for empty point-scoring. There is zero chance that China will accept an outcome arrived at in this way.

UNCLOS acknowledges the futility of this sort of process: the over-arching UNCLOS principle is that the parties involved should sort things out by mutual agreement. UNCLOS then blesses whatever they have agreed on, even if it doesn't fit precisely into UNCLOS norms.

With the South China Sea, a complex multi-party solution will be needed rather than a few general rules-of-thumb and one-sided legal proceedings. The South China Sea disputes can't be resolved by lawyers in a distant court or some surveyor's equidistant lines on charts.

Before the disputing parties dig themselves into positions from which retreat is difficult, a different negotiating pathway needs to be opened up. The first step would be to bring all the parties together in a single negotiation forum. The obvious grouping is ASEAN and China (but not Taiwan, as it just raises too many side issues). ASEAN hasn't had the unity or resolve to do this so far and China has worked to keep its dealings on a bilateral basis. But with Indonesia now feeling pressured by China in the Natuna Sea and China rebuffed in The Hague, there just might be the chance for ASEAN to seize the initiative. If this really is an important issue, the core ASEAN countries can't let the weak peripheral members dictate continuing irrelevance.

What would be the basis of this 'Outside-UNCLOS' framework? The starting-point is a recognition that 'win-win' is better than a contest with a winner and a loser. Economics can provide this win-win. The key is to seek out opportunities for economic collaboration rather than make futile efforts to draw definitive borders. The first element might be to postpone attempts at border demarcation until later – much later. The second is to identify the many economic opportunities which would arise if the area is not actively contested and to seek opportunities for joint development. These could be in fishing (sorting out the illegal fishing and sharing the area equitably), petroleum joint ventures, and undersea pipes and cables which become feasible and profitable when areas are developed jointly. Seabed and water column could be divided up or shared in innovative ways, which delivers something for each of the contesting participants. Revenue from petroleum exploitation could be divided between the relevant parties by negotiation. China's engineering expertise can find an outlet in these projects. The ADB and AIIB could provide favoured funding, recognising the many beneficial externalities that would result from joint projects. The local marine environment, under great threat, could be a big winner.

Working together, all parties would have some interests at stake which would be lost if they decide to go it alone. Each has to feel that the deal is more beneficial than the traditional confrontation, in which any economic development in the area will be contested physically and diplomatically.

Does this sound a bit like the state of play in the Timor Sea? At the time when the CMATS Treaty was agreed in 2006, it was seen by both Australia and Timor-Leste as a way of moving forward to reap the economic benefits in the disputed area (in particular, proceeding with Greater Sunrise gas), with a revenue sharing that reflected negotiation rather than geography. Seabed was separated from water column (as it had been earlier with Indonesia), contrary to UNCLOS norms but allowing each country to have an ongoing interest in the disputed area. Maritime boundaries were put on hold for fifty years.

Since then, Timor has become disenchanted with the Treaty, and strong nationalist feelings have put the benefits offered by CMATS beyond reach. But the historical precedent is there: countries can sit down and hammer out complex agreements well beyond the scope of UNCLOS. The key is to shift the negotiating priority away from delineating borders and towards the economic benefits that lie on the seabed and in the waters, waiting to be shared.

Photo: Getty Images/VCG

britbob • 7 days ago

The latest ruling from the PCA comes as no surprise as the ICJ stated in an earlier case that no country can unilaterally delimit another's 200 mile EEZ. For that and some other relevant judgments (3 pages) Google: "Falklands - Territorial Waters Academia"