The Debate

Whither the South China Sea Dispute?

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By Aileen S.P. Baviera

Solving the impasse requires a drastic change in the Chinese mindset to accept that the South China Sea is a shared resource vital to many nations and not just to China and to acknowledge that being a respected big power does not exempt one from the constraints of international law.

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By Zha Daojiong

While the tribunal’s importance has been inflated, strategically it is now in Beijing’s and Manila’s interests to come to an agreement. Meanwhile, some basic principles of law over rights and international waters have been forgotten and should be brought back to mind.
THE ARBITRAL AWARD in a case brought by the Philippines against China over the South China Sea was made public on July 12, 2016. In a procedural sense, it marked the end of the case. But its political and practical implications are just beginning and are far from certain.

Before proceeding, it is necessary to note that the award was “issued by an Arbitral Tribunal acting with the secretarial assistance of the Permanent Court of Arbitration (PCA),” as mentioned in a “notice to the media and the public” on the official website of the International Court of Justice (ICJ). Commentary on the award frequently links it to the PCA, which amounts to inflating its importance in the international legal system. In addition, the arbitration should not be confused with a case handled by the International Tribunal on the Law of the Sea (ITLOS), a United Nations-sponsored body set up to deal with the world’s maritime matters.

The said arbitral tribunal was established under Annex VII of the 1982 UN Convention on the Law of the Sea (UNCLOS). Both the Philippines and China have signed and ratified UNCLOS. In 2006, China filed a declaration to exclude, inter alia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures. When the Philippines initiated the arbitration process and notified China, the latter returned the former’s note verbale on the grounds that the nature of the case was in fact territorial sovereignty. The Philippines did not ask the tribunal to decide on territorial ownership per se, claiming that China was obliged to comply with the ruling, and went ahead with the case. In other words, both China and the Philippines dutifully followed procedural steps stipulated in public international law.

In hindsight, China had the option to simply keep quiet about the entire case, as most other states in similar situations have done. But it did not. Spokesmen for Chinese foreign policy routinely repeated their government’s position that it did not accept the arbitral process and would have no participation in its procedures, no recognition of its decisions and would not implement any demands that resulted.

Furthermore, in the months before the formal release of the award, China got itself into a number-counting race against the Philippines by lining up governments around the world that were said to have a basic position in relation to the award to be released by the tribunal. Although China did not initiate that race, the phenomenon spoke volumes about geopolitics intruding into what is normally understood to be a standalone process of law. It remains to be seen whether or not coalition-building of a similar nature is going to repeat itself in the future — this time with regard to putting the letter of the award into practice.

In the wake of the award, China and the Philippines remain the primary actors in deciding what to do about it. After all, formal agreement between two sovereign governments over ownership and rights is an accepted means of territorial dispute resolution. Reaching that agreement may involve protracted negotiations dotted by supporters and detractors from near and far. But, in a strategic sense, it is to the benefit of both countries for reasons including ridding them-
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But, in a strategic sense, it would be to the benefit of both countries, for reasons including ridding themselves of demands from their respective supporters — though perhaps in a de facto fashion — for payback of one kind or another.

Geographically speaking, the South China Sea is an international passage, on the water and in the airspace above. In the past, unilateral interdiction of non-military shipping through the waters did in fact take place. Lost in the voluminous rhetoric about security in the South China Sea is that both littoral and user states have a shared responsibility to prevent such disruptions from taking place again and to come up with rules for holding such behavior accountable.

Today, the focus of discussions is on “unplanned encounters” by navies and air forces that just show up at their own convenience.

This shouldn’t be the case. As a matter of fact, existing international law makes a distinction between littoral and user states when it comes to claims of rights in accessing waters that connect the high seas and sovereign areas. That distinction is held clear and binding for states and actors wanting a role in governing the Arctic Ocean, another semi-closed ocean serving as a vital passage for international navigation. But in deliberations on governing the South China Sea, that distinction is somehow lost.

Would a return to such basics in international law be useful? If the recent past can be an indicator, a littoral/user state distinction in approaching the South China Sea may well serve as a conveniently useful climbdown for those interests that sincerely want to see a reduction of tensions.

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