

## The South China Sea Territorial Disputes in ASEAN-China Relations

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Recent events call attention to the territorial disputes in the South China Sea as a site of escalating tensions and possible military confrontation between rival claimant states, particularly between China and Vietnam, and China and the Philippines. While in the past, various claimant states have each undertaken unilateral actions that have been interpreted as assertions of sovereignty (including passage of laws relating to territory and maritime zones, resource exploration and exploitation activities, and efforts to hamper similar activities by other countries), the newest cycle of tensions involves more worrisome elements.

### New Elements in the Disputes

These are, first, and foremost China's growing use of military, paramilitary or law enforcement authorities to assert sovereignty in areas under dispute enclosed in its 9-dashed lines map, especially in areas close to the coastlines of other littoral states. This must be understood in the context of rapid advances in Chinese capability and clear intent to project naval power in the East China Sea and the South China Sea. China recently registered this map indicating its official claim with the United Nations (as part of its protest against a joint Vietnamese-Malaysian joint



submission of their continental shelf limits in the SCS).

Second is the failure thus far of the regional multilateral diplomacy between China and the Association of Southeast Asian Nations (ASEAN) to move forward in promoting confidence building, cooperation or more urgently, in agreeing on conflict avoidance measures and other rules of conduct in the disputed areas.

Third is the uncertainty over the trajectory of great power relations, in an environment where China's rise is taking place amid United States economic decline and U.S. preoccupations elsewhere in the globe (despite the Obama government's stated intentions to remain a Pacific power).

The confluence of these factors seems to have changed the complexion of the territorial disputes in a number of ways. It is shifting the focus of the conflict management efforts from ASEAN-China confidence building and finding formulas for resource cooperation toward –

- the need to clarify the exact extent and legal bases of the respective claims, as well as the nature of the applicable laws or regimes in surrounding maritime zones;
- how to prevent the outbreak of armed hostilities and a longer-term arms race between rival claimants; and
- the question of whether or not bringing in the U.S. as a countervailing power to China is helpful or detrimental to progress in ASEAN-China diplomacy on the issue.

### Overlay of Big Power Competition

As has long been argued, the South China Sea disputes are a litmus test of China's attitude and behavior toward its smaller neighbors, it being the region's newest and biggest power. Its recent assertive stance and display of military power follows a fairly long period of smooth relations and bilateral as well as multilateral cooperation with Southeast Asian states, thus sending mixed signals to neighbors and appearing inconsistent with its much-touted New Security Concept. At the same time, U.S. concerns over what it sees

as lack of transparency in Chinese military modernization in general, and China's acquisition of anti-access area-denial capability in particular, resonate in some countries in South-east Asia. China's development of a submarine base on Hainan island and its intentions to deploy an aircraft carrier battle group are of special note.

Considering other factors such as the disagreements between China and the U.S. regarding U.S. spying activities in Chinese EEZ and airspace and China's discomfort over its so-called "Malacca dilemma" (i.e. dependence on the U.S. to provide sealanes security for its own oil imports through the Malacca Straits), it is increasingly obvious that beyond the territorial and resource disputes themselves are higher stakes involving competition for maritime control among the big powers. Efforts by the U.S. and Japan to involve India (with its powerful navy) in a regional security role to act as a balancer to Chinese influence are also indicative of growing geopolitical competition.

In the past, China, other claimants and ASEAN as a whole expressed that they were committed to ensuring a peaceful and stable environment in the South China Sea. More than ever, this peaceful environment will be seen as dependent not just on all the claimants exercising self-restraint, but in particular China assuring neighbors that the parameters and objectives of its emerging military power are non-threatening as well as dedicated to maintaining rather than undermining regional stability. Without such assurances, unfortunately, the neighbors will worry about looking for more effective ways of constraining the power aspirations of a potential regional overlord, particularly if the multilateral diplomacy will appear to have run its course and to have ended in failure.

### Bilateral vs. Multilateral Approaches

One bone of contention in the diplomatic front is that

China insists that the disputes be addressed through bilateral negotiations, resisting –

- “internationalization” of the disputes such as attempts to involve parties that are not directly concerned, principally the U.S.;
- efforts by the other claimant states (Vietnam, Philippines, Malaysia and Brunei) to come together and discuss the issue without China or prior to holding dialogue with China; and
- ASEAN’s initiatives to frame the disputes as a subject for ASEAN policy coordination and action vis-a-vis China.

This posture by China, reiterated by Vice Foreign Minister Cui Tiankai last June, is a throwback to its position prior to China’s agreement to the 2002 Declaration of Conduct in the South China Sea. There is no way China can prevent ASEAN or even the claimant states among ASEAN from consulting among themselves on such an important issue.

Since the ASEAN Foreign Ministers issued the Manila Declaration on the South China Sea in 1992 (when ASEAN had six, rather than the current ten members), the effects of the disputes on regional peace and stability had already been recognized as a matter of collective interest to ASEAN, at least as represented then by the six signatories, strengthened further after Vietnam joined the Association.

Among the non-claimants to the Spratlys and Paracels, Indonesia has been drawn into the fray by the fact that its Natuna gas fields fall within China’s 9-dashed lines claim and by the active role it has played in facilitating Track Two workshops on the matter since the early 1990s. Singapore, on the other hand, arguably has the most to lose by any disruption in regional trade that might ensue from conflict and has been the most active in ensuring a continuing U.S. military presence in the region.

However, it is to ASEAN’s woe that it has been unable to adopt a stronger common position on the importance of

this issue and on what approach to take toward its resolution. Moreover, some ASEAN countries – the Philippine government, being a case in point – have wavered between accommodation and resistance toward China and between emphasizing bilateral over multilateral approaches.

### **Conflation with Other Maritime Security Challenges**

The territorial and sovereignty disputes in the Spratlys and Paracels are only one of several interlocking layers of potential conflict and therefore security challenges in the South China Sea. Aside from the disputes and military competition for sea control among the big powers, there are also undefined or overlapping maritime boundaries resulting in jurisdiction issues, as well as threats to maritime safety and sealane security such as piracy, terrorism, smuggling and trafficking.

The territorial disputes are very much intertwined with the maritime boundaries and jurisdiction conflicts. Territorial disputes aggravate problems over maritime jurisdiction because they lead to difficulty in determining the basis from which a state’s maritime zones are to be projected, as stipulated in the UN Convention on the Law of the Sea, therefore leaving it unclear whether said state or another should exercise rights and obligation over particular swathes of ocean. On the other hand, the desire to extend maritime boundaries farther out to sea so as to enlarge control over ocean spaces and resources has emboldened states to assert more strongly their respective territorial claims.

At the same time, territorial disputes and overlapping maritime zones become conflated with maritime safety and security issues because many of the challenges such as piracy and smuggling occur within the exclusive economic zones (EEZs) and territorial seas of coastal states, therefore under UNCLOS giving coastal states the primary duties and obliga-

tions to regulate such activities, even though they may not have the capacity for it.

Given the foregoing discussion of the increasing complexity of the security environment in the South China Sea, it is becoming evident that mitigating security threats and preventing the outbreak of armed conflict will require a multi-level, multi-stakeholder process. As countries immediately surrounding the South China Sea, ASEAN and China should find ways of cooperating to attain peace and stability in our shared maritime spaces, with the active support of other legitimate users and stakeholders. Failing that, we may well end up opening the region to the risk of both big power conflict and a chaos of other maritime security threats and challenges.

### **A Multi-level approach: Mitigating Sovereignty Disputes, avoiding Armed Conflict while Building a Cooperative Maritime Security Regime**

A multi-level approach must be based on a determination of

- the precise subject of the source of conflict, including a definition of the areas that are contested and those that are not;
- who are the primary parties and – if any – secondary stakeholders; and
- what are the legitimate needs and interests of the parties that must be taken into consideration.

In the South China Sea, there are separate but interrelated disagreements over –

- sovereignty over territory (where the claimants Brunei, China, Malaysia, Philippines, Vietnam and Taiwan are primary parties concerned over security, territorial integrity, and/or access to resources);
- jurisdiction over maritime zones (where littoral states

and other traditional users of the ocean are legitimate stakeholders and where the stakes range from freedom of navigation, coastal state control over illegal activities in its surrounding waters, access to resources in the EEZ and continental shelf); and

- who should have primary responsibility for addressing common or transnational security challenges such as piracy, maritime terrorism, environmental and natural disasters, and the like.

The principle proposed here is of inclusiveness with respect to all legitimate stakeholders.

For territorial sovereignty issues, bilateral negotiations are appropriate for disputes that are bilateral in nature, where no third party interests will be severely prejudiced by the outcome of a bilateral resolution. In the South China Sea, this may apply only to the Paracels (assuming Taiwan is not a separate stakeholder from the PRC), and possibly to Brunei's corridor overlapping the Malaysian claim. Wherever a bilateral resolution may infringe on fundamental interests and needs of a third party, then dispute settlement that excludes that party will likely run into trouble, in which case a multilateral approach (i.e. involving three or more relevant parties) would be appropriate. It is important to stress that the proposed multilateral approach involves only direct parties and is distinct from so-called "internationalization" of the disputes that is the subject of Chinese criticism.

However, the most urgent matter with respect to the territorial and maritime jurisdiction disputes is not resolving the question of sovereignty or sovereign rights, but mitigating the effects of sovereignty claims in the meantime that these remain unresolved. Territorial and boundary issues in the South China Sea are likely to be successfully addressed only through a protracted process or series of peaceful bilateral as well as multilateral consultations among the various parties, leading to a hopefully equitable political settlement

based on principles and norms in international law. (At some point arbitration or mediation may play a role but this is not pre-determined).

Joint development projects in fisheries, oil and gas, or joint management of other ocean concerns may be undertaken upon agreement of the parties, as an interim measure or even as a permanent solution. Such initiatives may also benefit hugely from efforts of the regional states to come to common understanding or interpretations of the relevant provisions of the Law of the Sea, e.g., on the definition of islands as opposed to rocks, given its importance for the determination of maritime zones, and on issues such as transit/innocent passage and legitimate military uses of the ocean.

An atmosphere where you have one country threatening or using force against another, arms build-ups and counter build-ups, and demonstrations of power through unilateral military drills, such as have occurred in the last two years, is far from conducive to the conduct of any consultations and negotiations toward this end. If this atmosphere is to prevail it would be a reversal of painstaking confidence-building efforts that have been undertaken between China and Southeast Asian countries in the last two decades.

To restore some civility and predictability in the actions of various parties, a regional code of conduct has become imperative, with the single most important goal of conflict avoidance. Such a Code can initially be pursued bilaterally, or "mini-laterally" among the claimant-states only, but to have the full effect of calming the waters and restoring confidence in regional stability, a multilateral agreement among not just the claimants or even littoral states but involving other users of the ocean (particularly those engaged in military activity) may be more effective and sustainable. A code of conduct will focus on military CBMs and ways of addressing existential threats rather than diplomacy, such as procedures to prevent incidents at sea, or measures to

demilitarize the region and encourage civilian presence instead for the security of oil installations or the like.

The management of the disputes is also very much related to the question of regional maritime security cooperation, and more broadly speaking, ocean governance. There is a need to elevate ASEAN and China's perspective on the South China Sea from focusing excessively on territorial disputes back to a diplomacy on ocean governance encompassing the economic, development, security, environmental imperatives of managing it as a semi-enclosed sea, rights and obligations pertaining to which have been stipulated in UNCLOS.

In the last decade alone, the ASEAN Regional Forum, CSCAP and other security dialogues have engaged in widening discourses on maritime security focused on problems such as sealane safety and security, maritime search and rescue, marine environmental protection, and others.

In Southeast Asia, regional navies and enforcement agencies have shown willingness to cooperate on information-sharing and capacity-building (e.g. the Information Fusion Center in Singapore and the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against Ships in Asia or ReCAAP), and gradually higher and more complex levels of cooperation, such as the MALSINDO (Malaysia-Singapore-Indonesia) anti-piracy Malacca Straits patrol that cover the territorial waters of the three countries, and the MALSINDO Plus Thailand Eyes in the Sky program of coordinated air patrols.

This broader agenda of ocean governance and maritime security regime building on the other hand may have important implications for the eventual resolution of the disputes particularly in terms of encouraging cooperative multilateral security frameworks based on shared interests and mutual benefit.

To conclude, the territorial disputes in the South China

Sea are not stand alone issues but rather, are implicated in conflicting maritime jurisdiction claims, brewing big power conflict, and in the imperative of managing shared ocean spaces beset with transnational maritime security challenges. While it is important to sustain dialogue and to make real progress on the management of the disputes per se, ultimately only a multi-level, multi-pronged, and multi-stakeholder approach inclusive of primary parties and other legitimate stakeholders can guarantee a successful outcome.

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