

ISSUES IN THE SOUTH CHINA SEA DISPUTES

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Before discussing anything as complex as the international disputes on the South China Sea, it is best to define the issues involved.

Why is the situation so complex? There are many reasons. Five immediately come to mind. First, in most of the South China Sea, unlike in other parts of the world, the territorial disputes involve more than two claimants. Secondly, the disputes involve both land and water, which have to be distinguished from each other. A third is the related question of distinctions among the territorial sea, the exclusive economic zone and the continental shelf. Compounding the second and third reasons is the fact that none of the disputing claimants have designated which of the land features that they claim are islands and which are rocks. According to the 1982 United Nations Convention on the Law of the Sea, islands can generate exclusive economic zones and continental shelves, while rocks, according to the same Article 121 of the Convention, cannot. The fifth reason is that the disputes involve both international law and the national interests not only of the claimants but of others as well.

On the distinction between land and water, it would be good to keep in mind the principle that land begets water rather than the other way around. When we talk about the peaceful settlement of disputes, those disputes are about conflicting claims to land features, about which the 1982 UNCLOS has nothing to say, and to the expanses of water that they generate, which depend on the nature of the land features claimed. Thus, it would also be good to remember that, while the 1982 UNCLOS lays down rules pertaining to the sea, it or the International Tribunal for the Law of the Sea, which it created and is based in Hamburg, does not and cannot rule on the jurisdictional issues pertaining to claims to land features or to the waters that they generate.

As noted above, the 1982 UNCLOS defines, with some precision, what islands are and what rocks are. However, no claimant has designated which of the land features that it

claims are islands and which are rocks, perhaps preferring to maintain some measure of “strategic ambiguity” in its stance on its disputed claims.

Too many people, including those who ought to know better, for self-serving reasons or out of ignorance, perpetuate by their pronouncements the public, and even official, confusion between territory – land or sea – and the exclusive economic zone and the continental shelf. The 1982 UNCLOS defines, again with some precision, the territorial sea, the exclusive economic zone and the continental shelf, and the distinctions among them.

There are other issues. One is the question of negotiation versus confidence-building. Another is the assurances of freedom of navigation and overflight. Both questions involve the issue of bilateral dealings as against multilateral discussions. Non-claimants are right in taking no position on the jurisdictional and sovereignty issues pertaining to the South China Sea. Non-claimants who have done so are also right in asserting their stake in the peace and stability of the region and in the freedoms of navigation and overflight guaranteed in the 1982 UNCLOS. There is nothing bilateral in that stake and that interest. Others who have stayed quiet and sat on the fence so far should more audibly assert their stake and their legitimate interests.

Even on jurisdictional and sovereignty issues, in the current mix of claims, only the Paracels involve conflicting claims between no more than two parties, and the Chinese refuse to discuss this. In the Spratlys, the conflicting claims are among more than two parties and thus are inherently multilateral, not just bilateral.

In any case, care must be taken in making pronouncements and taking positions on the issue of bilateralism and multilateralism. It must be noted in this regard that all documents concluded by or in the context of the Association of Southeast Asian Nations, or ASEAN, on the South China Sea commit all parties to those documents to adhering to international law, including the 1982 UNCLOS, to which all claimants and all Southeast Asian states are now parties.

International law has to be respected by all parties to it, to the letter. But what if the requirements of international law clash with the nation’s or state’s perception of its national or regime interests or the political interests of its policy-makers at a certain time? Will those interests prevail, to be pursued even with the use of force? If that were the case, of what use

would international law and other international commitments be? In any event, why ratify the 1982 UNCLOS at all?

For example, the line on Chinese maps, consisting of nine dashes, that encompasses almost all of the South China Sea remains undefined. In the absence of coordinates and a coherent explanation of what the line and its nine dashes mean, one is at a loss in deciphering what it is exactly that Beijing and Taipei claim or, indeed, where the dashes actually are. It would serve to clarify the Chinese claim if the line were more precisely defined, provided it is so defined in accordance with the 1982 UNCLOS. As it is, one cannot speak of any kind of peaceful settlement unless the claim of the largest claimant, the one with the most extravagant claim, is made clear in accordance with international law. One cannot speak of joint development unless the question of where that joint effort is to take place is settled.

Yet, China seems reluctant to cede control of the South China Sea for fear of attack or invasion from that direction again, not to mention pressure from the nationalists in its population, which would have implications for the ruling party's legitimacy. By a similar token, if Vietnam were to concede Chinese control of the South China Sea, it would find itself surrounded by Chinese territory, land and maritime. Similarly, the Philippines would feel its western flank exposed. Malaysia would find the sea between its western and eastern wings out of its control. Brunei Darussalam would have no exclusive economic zone, continental shelf or "fisheries zone".

In March 2009, the Philippines sought to align its South China Sea claims with the requirements of the 1982 UNCLOS by adjusting its archipelagic baselines and proclaiming a "regime of islands" for the land features that it claims in the South China Sea or, as it prefers to call it, West Philippine Sea and for Scarborough Shoal (called Huangyan Dao by the Chinese, Bajo de Masinloc in Spanish and Panatag by the Philippines). In the same year, Malaysia and Vietnam appear to have done the same thing by measuring, in their "joint submission" to the UN Commission on the Limits of the Continental Shelf, their extended continental shelf not from the land features in the Spratlys but from the coastlines of their respective mainlands. Brunei Darussalam and Malaysia seem to have settled their overlapping maritime claims, at least as far as they concern oil and gas exploration and exploitation and passage of their nationals through the area.

A discussion of the clash of interests in the South China Sea can also be carried out in the context of the regional rivalry between China and the United States. China fears U. S.

activities in the seas on its vulnerable southeastern flank as part of the perceived U. S. attempt to “contain” China and prevent its “peaceful rise”. For its part, the U. S. and others insist on what they see as the right of non-coastal states to do anything permitted by international law on the “high seas”. The 1982 UNCLOS provisions on these matters leave room for differences in interpretation of the rights and duties of coastal states in their respective EEZs and of the rights and duties of others in those zones.

U. S. officials have invoked the need to conduct surveillance operations off China’s coast on account of what they deem as the lack of transparency in the People’s Republic’s military modernisation programme. On the other hand, Beijing insists on its right to protect its military activities from intruding foreign eyes and ears. These differences in the interpretation of the 1982 UNCLOS provisions on the EEZ and the clash of interests in the South China Sea have led to incidents like the 2001 collision between an American “intelligence” EP3 aircraft with 24 on board and a Chinese fighter plane, which killed the Chinese pilot and forced the U. S. plane to make an emergency landing on Hainan. In 2009, Chinese vessels “shadowed” or “harassed” and chased away the USNS *Impeccable*, a U. S. naval “ocean surveillance” ship operating in the Chinese EEZ off Hainan. At the same time, China and the U. S., both global powers, have stakes and interests in good relations with each other.

Yet another issue pertains to the Code of Conduct for the South China Sea, which everyone seems to desire, including the parties to the apparently interim November 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), the ASEAN states and the People’s Republic of China. The Declaration says, “The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.”

The joint communiqué of the ASEAN Ministerial Meeting of July 2011 has this to say: “Building upon the momentum of the 20th Anniversary of the Establishment of ASEAN-China Dialogue Relations in 2011 and the 10th Anniversary of the signing of the DOC in 2012, we initiated discussion in ASEAN on a regional Code of Conduct in the South China Sea (COC). We look forward to intensive discussion in ASEAN on a regional Code of Conduct in South China Sea (COC). In this regard, we tasked the ASEAN SOM to work on the development of the COC and submit a progress report to the 19th ASEAN Summit.”

The “guidelines” for the implementation of the DOC, guidelines that the ASEAN and Chinese foreign ministers subsequently adopted, state, “The decision to implement concrete measures or activities of the DOC should be based on consensus among parties concerned, and lead to the eventual realization of a Code of Conduct.”

Yet, no one has clearly explained how such a supposedly “legally binding” code would differ in terms of enforceability from a signed political declaration. For the Southeast Asian claimants, the time and energy expended on formulating a Code of Conduct might be better spent on elaborating on the definition of “restraint”, provided for in both the 1992 ASEAN Declaration on the South China Sea and the 2002 Declaration on Conduct. The DOC enjoins the parties to refrain from “action of inhabiting on (sic) the presently uninhabited islands, reefs, shoals, cays, and other features” in the South China Sea. The notion of restraint might be made to cover reinforcing or otherwise fortifying the facilities already in place. As it is, most claimants are busy reinforcing and fortifying the structures that they have already built on the land features that they claim.

In any event, an agreement on a code, like the adoption of the “guidelines”, would give the impression of progress, calm things down, and convey the message that ASEAN and China are dealing satisfactorily with the issues involved – without the necessity of concern or involvement on the part of “outside” powers.

What this paper is trying to convey is that the issues involved in the South China Sea are extremely complicated, as well as simple. They are simple in that just adhering to international law, including the 1982 UNCLOS, would go a long way in the peaceful management of the disputes and in the pursuit of joint development in the area. They are complicated for the reasons that the paper has described. In the light of their complex nature, people, especially the media and government officials, should be extraordinarily careful in their analyses of and pronouncements on the issues pertaining to the South China Sea.

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