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The South China Sea:
Stabilisation and resolution

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Stabilisation

Stabilisation of the South China Sea means implementing conflict prevention measures to prevent accidental conflict in disputed areas, particularly as China increases deployments of patrol craft in the region. On 2 September 2002 ASEAN negotiated a Declaration on a Code of Conduct (DOC) with China regarding the South China Sea, which was intended to be preparatory to a Code of Conduct (COC). It was anticipated that the COC would obligate the claimants to resolve their disputes peacefully and observe rules of behaviour that would prevent clashes and conflicts from arising.

There are several difficulties with the COC, which have not yet been resolved; the major one being that ASEAN cannot agree on its content and extent. The first was whether it was to be legally binding. Some within ASEAN have called for a legally binding COC to ensure compliance with norms of good behaviour. Others point to the impracticality of the effort and argue that it should be voluntary. The second was the extent of the COC: Vietnam insists that the code should cover the Paracels, which it claims but others have demurred fearing that it would only provoke China's opposition and delay all prospect for its realisation. The third was how to obtain China's agreement. China has resisted the COC, since it would constrain its harassment tactics against the ASEAN claimants, and has demanded that ASEAN negotiate with it first. If ASEAN agreed to this demand the result would be an emasculated version of the code that would not meet the ASEAN claimants' purposes. Philippine President Benigno Aquino has resisted the Chinese demand, and with the support of Vietnam and Thailand has insisted that ASEAN agree on a COC first. Cambodia wanted to involve China in the negotiations, while Indonesia's Foreign Minister Marty Natalegawa sought a compromise position, suggesting that ASEAN at least ought to listen to China before negotiating the COC. China, however, now insists that it would negotiate with ASEAN over the drafting the COC 'only when conditions are ripe.' The fourth difficulty was that the Chinese interpretation of the COC refers to activities outside the Chinese claim area and cannot be applied to an area it regards as 'territorial waters.' At the present moment prospects for the COC are not bright.

Another useful stabilisation measure would be to negotiate an avoidance of Incidents at Sea Agreement (INCSEA) in order to prevent clashes, and to avoid accidental escalation into conflict when they occur. These agreements would detail procedures to avoid collision between patrol vessels; to require commanders to use caution in approaching other vessels and ensure a safe distance. They would also include procedures for communication between navies and governments in the event of a clash, and the establishment of a hotline between naval commands or coastguards in the area. The most notable example is the agreement between the United States and the Soviet Union concluded on 25 May 1972 after a series of incidents at sea involving harassment, simulated attacks and dangerous manoeuvres. On 19 January 1998 the United States and China concluded an agreement to ensure maritime safety, which called for consultations, measures to improve maritime practices, and the use of communications procedures when vessels encounter each other. Though a step in the right direction, this agreement was limited to consultation; something more concrete is required under the present circumstances.

China may be reluctant to consider an INCSEA, which would limit its freedom of action in what it considers its territorial waters, but its attitude might change if it faced the consequences of an accidental clash or a crisis. China's harassment tactics against Vietnam and the Philippines have had the effect of drawing in the United States which, as the Chinese complain, has emboldened the ASEAN claimants to resist. The danger is that an accidental clash might occur that could threaten escalation, particularly in instances in which the Chinese prolong their harassment activities. In this context, the main incentive for China to consider an INCSEA would be to stabilise the area and prevent accidental conflicts which would involve external powers.

Resolution

Second track diplomacy

Informal workshops have been used as a means of dispute resolution when formal diplomacy reaches a stalemate and the parties are searching for a way out of their difficulties. Often called interactive problem solving, this approach may be used to stimulate ideas and proposals which can be carried over into formal diplomacy. Indonesian Ambassador Hasjim Djalal promoted workshops on the South China Sea which were sponsored by the Indonesian Foreign Ministry and, until 2001, funded by the Canadian International Development Agency (CIDA). They have since continued with ad hoc funding. Entitled 'Managing Potential Conflicts in the South China Sea', they were held annually, beginning in Bali in January 1990. They involved government officials and technical experts on maritime cooperation and resource development from 11 countries, initially the ASEAN six, Taiwan, Cambodia, Laos, and Vietnam; China and Taiwan joined in 1991. Attempts were made to transform these second-track workshops into the first track by Indonesian Foreign Minister Ali Alatas in 1992 and 1994, but China objected. Since then ambitions have been scaled down and Hasjim Djalal declared that the intention was not to resolve the dispute but to devise cooperative programs, promote dialogue and develop confidence-building measures (CBMs).

What did the workshops achieve? Their organisers have claimed that the delegations got to know each other and their positions better, and in particular the Chinese were made more aware of the views of the other claimants. They pointed to the Declaration on the South China Sea, which was endorsed by both ASEAN and China in July 1992, and claimed that it was a product of discussions in the workshop. Similarly, the idea of a COC was often discussed at workshop meetings before the DOC was signed in November 2002. Nonetheless, whatever its merits, the workshop approach failed to achieve its primary goal, which raises questions about its efficacy. Second-track diplomacy may have made claimants in the South China Sea more aware of each other's positions, but it alone cannot bring about resolution.

Third party mediation

Article 287 of the United Nations Convention on the Law of the Sea (UNCLOS) enjoins parties to a maritime dispute to resort to four dispute resolution mechanisms: the International Tribunal for the Law of the Sea (ITLOS) in Hamburg; the International Court of Justice in The Hague (ICJ); ad hoc arbitration in accordance with Annex VII; or a 'special arbitral tribunal' constituted for certain categories of disputes. Compulsory mediation with binding authority is voluntary and UNCLOS stipulates that 'a state shall be free to choose' one of these methods of dispute resolution. UNCLOS has no immediate way of dealing with a situation in which the claimants have no intention to resort to binding mediation. The consent of the parties is required and China is unlikely to accept third-party mediation over an issue which it regards as a domestic concern involving Chinese territory. Some Chinese scholars nonetheless support the idea. Professor Ji Guoxing from the Shanghai Institute of International Studies has proposed that an ad hoc tribunal or non-official third party could play a role without 'institutionalising' the negotiating process or 'internationalising' the dispute. The only attempt to invoke third-party mediation over the issue occurred on 22 January 2013 when Philippine Foreign Secretary Albert del Rosario announced that the Philippines would invoke Annex VII and take the issue to a 'special arbitral tribunal'. Predictably, China opposed the move: without its consent the case is unlikely to be heard.

Legal resolution

A legal resolution means applying the principles of UNCLOS according to an agreed equitable formula that would take into account the claims of the littoral states. According to Articles 74 and 83 of UNCLOS–III, in the case of overlapping EEZs and continental shelves, delimitation will be effected by agreement on the basis of international law or the ICJ to 'reach an equitable solution.' Both articles mention that if no agreement is reached within a 'reasonable period of time', then the parties are required to refer to the dispute resolution procedures in Part XV. Article 279 of Part XV says that the parties have an 'obligation to settle disputes by peaceful means.' A logical approach would be to apportion maritime territory according to contiguous EEZs and

continental shelves where they have been declared, using coastline lengths to determine the maritime zones that occupied islands would be entitled to. Something similar was proposed in 1994 by Indonesian Foreign Minister Ali Alatas when he called for a 'doughnut' solution. This proposal would allow each state to claim a 320 km EEZ, leaving an inner hole, creating a South China Sea map resembling a doughnut. The inner area would then be subject to joint development, and the revenue would be divided according to an agreed formula. The proposal was promoted by Ambassador Hasjim Djalal when he visited the ASEAN countries in May and June 1994, but it was too ambitious to attract support.

A related proposal by Ji Guoxing is to allow Vietnam, the Philippines, Malaysia and Brunei to their declared EEZs and continental shelves, while China would surrender the U-shaped line and its claim to 'historic waters', and would be compensated by the doughnut section. In overlapping areas, bilateral or trilateral development would be adopted. Aside from the practical difficulties of arranging the apportionment, the major problem is that neither China nor Vietnam has defined their claim. China's U-shaped line has not been officially explained: whether it is a claim to islands or an exclusive claim to sea territory is unclear, and its exact boundaries remain undefined. Vietnam has issued declarations of sovereignty over the islands without specifying exactly what is included in the claim or what the coordinates are. Moreover, these proposals would significantly reduce the maritime area available to China, which would be stripped of its claim to the entire area with little compensation, particularly as the oil and gas fields of the South China Sea lie outside the centre area.

Joint development

For many years, joint development was regarded as a way of overcoming the sovereignty imbroglio. If claimants could be induced to cooperate over oil and gas extraction perhaps they would learn to overcome their differences over sovereignty in a cooperative solution. The idea was first broached by Chinese Premier Li Peng in Singapore on 13 August 1990 when he called upon claimants to set aside sovereignty to enable joint development to proceed. The Chinese premier wanted to improve relations with ASEAN after the Tiananmen Square incident of June 1989 and the naval clash with Vietnam in the South China Sea in March 1988 which alarmed ASEAN. Joint development was then raised by various ASEAN leaders and Chinese officials but without further clarification. It may be a solution in bilateral disputes where the parties are willing to share resources but it may not apply in complex multilateral maritime disputes where there are unresolved claims to the entire disputed area.

Cooperative maritime regime

In the 1990s the idea of a cooperative regime was proposed by scholars. A maritime regime is a cooperative effort to regulate behaviour in a given area according to agreed rules and norms which give effect to the notion of a common good. Article 123 of UNCLOS stipulates that states 'bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention.' The article adds that they should do so 'directly or through an appropriate regional organization.' Mark Valencia has championed this approach, arguing that regional maritime cooperation could proceed progressively from policy consultation to policy harmonisation, coordination and national policy adjustments. A maritime regime could involve the creation of a Spratly Resource Development Authority, or a Spratly Management Authority, which would grant permits for exploration and joint development; it would be an international organisation with a secretary general, a secretariat, and a council. It would direct the financial resources of claimants into a common fund to promote joint efforts to develop the area's oil and gas fields. The idea of a cooperative regime has appeal, but its implementation requires agreement between the claimants and a resolution of the claims. It is a product of a resolution of the issue, but not a means to bring about a resolution. The idea may act as an incentive to the claimants to resolve their claims, but its acceptance would require a political decision by China, in particular.

UN conference on the South China Sea

Proposals for a cooperative maritime regime could be endorsed by a UN-sponsored conference on the South China Sea, which would be convened to give effect to Article 123 of UNCLOS. This article urges states to 'cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention', either directly or through an 'appropriate regional organization.' UNCLOS has not provided sufficient guidance in regard to the procedures to be adopted to resolve the legal issues raised by a semi-enclosed sea such as the South China Sea. This could be the task of a special conference, which would involve China and the ASEAN claimants in the first instance, as well as external stakeholders. Such a conference would reveal the legal weaknesses of the claims, including the U-shaped line, and would seek their cooperative adjustment. The agenda would also include the formation of a regional body or cooperative regime that would adopt rules regarding fishing practices and quotas, oil and gas exploration, and the passage of naval vessels in the maintenance of freedom of navigation in the area.

Philippine President Fidel Ramos in 1992 proposed an international conference on the Spratlys under UN auspices; it was raised again by his Foreign Minister Raul Manglapus at the ASEAN Foreign Ministers meeting in July 1992. China has rejected multilateral negotiations on the issue in the past and may continue to insist that the South China Sea is Chinese territory. However, the incentive for China to join this process of resolution is to legalise its position there and stabilise the area without the prospect of raising tensions or increasing the risk of conflict with external powers. China will not gain legal acceptance of its claim by power alone, and through a conference of this kind would at least gain shared access to the resources there. It would repair its relationship with ASEAN and would earn the gratitude of the organisation. It would ease the regional polarisation created by China's attempt to gain unilateral benefits in the sea by resorting to power. China would also avoid pushing the ASEAN claimants to the United States and Japan for support and would give external powers no cause to cooperate against it. It would also remove the main motive for America's pivot strategy, stimulating cooperation rather than rivalry with the United States. China's regional position would be enhanced and its international credibility elevated.

Conclusion

Neither China nor Vietnam may be ready for a resolution of this kind, which would demand that they surrender their extensive claims. The Chinese leadership has invoked nationalism over this and other issues, which would make it particularly difficult for it to accept a negotiated resolution of the issue. China may have locked itself into an uncompromising position when compromise and adjustment would be in its best interests and would further its policy goals in the region. In the past, governments have been locked into seemingly unyielding positions, but have been compelled to change them when faced with the prospect of conflict and escalation of a crisis. Indeed, crisis can have a shock effect upon decision-making systems, making political leaders aware of the dangers of continuing with familiar behaviour and demanding of them a major change of policy and attitude. A clash between naval or coastguard vessels caused by error or miscalculation by a local commander, or a deliberate move by China swayed by heady nationalistic spirit to remove one of the ASEAN claimants from the islands, cannot be excluded. At the present moment it appears that only crisis will trigger the necessary change of attitude over the South China Sea, particularly within China.

CONCLUDING REMARKS

The conference held in March 2013 at the Australian National University did not come to any specific conclusion in regard to Australia's regional security environment and the South China Sea, whether in terms of the future development of the dispute or a possible resolution. Many interesting ideas were raised during the course of the discussions. One was that institutions and economic ties should bind the protagonists and thereby prevent the issue from becoming unmanageable. Economic interdependence would have a constraining effect upon the parties and would ensure that escalation of existing conflict would not occur. Though the argument was accepted in principle, participants doubted that the restraining effect would be noted in every specific situation, and particularly in the South China Sea, where China has become increasingly insistent in its claim. A second concept proposed at the conference was that UNCLOS, international law, and the notion of sovereignty are not appropriate to Southeast Asia, which has historically arranged its affairs in other ways. Here, the countries of the region have traditionally deferred to China, while international law can be regarded as an external imposition that would only complicate the issue. One way or another, the ASEAN claimants will have to seek resolution of the issue in terms of their relationships with China. The response to this latter argument was that time has moved on and that sovereignty has become an essential feature of the modern Southeast Asian state, despite what may have been the case in pre-modern times. For the most part these states regard international law as a means of underpinning their sovereignty and protecting their territorial integrity, a process of managing their relationships for which there is no alternative in the modern states system.