

**The South China Sea Dispute:
Where are we now and where are we heading?**

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The South China Sea dispute is now at the top of Southeast Asia's security agenda, and arguably the Asia-Pacific region's as well. It is likely to remain there for some time to come for several reasons.¹ First, despite renewed efforts by the Association of Southeast Asian Nations (ASEAN) and the People's Republic of China (PRC) to put in place confidence-building measures (CBMs) and possibly negotiate a formal code of conduct, it is highly unlikely that these measures will significantly impact the fundamental drivers of the dispute: sovereignty over the Spratly Islands and the nationalism it evokes; fishery rights and access to crude oil and natural gas deposits; and the on-going militarization of the dispute. Second, a political or legal resolution of the dispute seems as far away as ever. Indeed because the claimant countries have moved to bolster their jurisdictional claims in the South China Sea, compromise has become even harder to achieve. Put simply, the political will does not exist to pursue imaginative and win-win solutions to the sovereignty problem. As described later, a Philippine proposal to do just that was quickly sunk in 2011. Third, nascent Sino-US geopolitical competition in Asia has added an extra layer of complexity to what is already an extremely complex and contentious dispute. With the Obama administration's recent announcement that the United States would "pivot" towards the Asia-Pacific region, the South China Sea has taken on new importance as a test case for Sino-US relations. In response, the PRC is likely to harden its position.

Notwithstanding the heightened geopolitical importance of the South China Sea, few observers envisage a major conflict in the area any time soon —perhaps even never. The sea lanes that pulse through the South China Sea are so vital to the continued functioning of the global economy that it is clearly in no country's interests

to disrupt the free flow of maritime trade. And while the atolls themselves occupy an important strategic location astride those sea lanes, it is difficult to believe that any of the disputants would be prepared to spill blood and expend national treasure to capture them.

This is true of China, the principal player in the dispute. China's actions in the South China Sea have become more assertive over the past several years, and actions undertaken by its fishery enforcement agencies against survey ships chartered by the Philippine and Vietnamese governments in 2011 can only be described as aggressive. Several factors account for increased Chinese assertiveness. First, the PRC emerged from the Global Financial Crisis more confident and less willing to be "pushed around" by other countries, even as its own sense of insecurity grew due to mounting domestic problems. Second, the modernization of the People's Liberation Army Navy (PLAN) and the expansion of China's civilian maritime law enforcement agencies provide China with the assets to increase its presence in the South China Sea and enforce its jurisdictional claims. Third, China feels that Southeast Asian claimants such as Vietnam and the Philippines are "plundering" maritime resources that rightfully belong to it. The cable cutting incidents of 2011 can thus be interpreted as being non-too subtle messages of the dangers of continued defiance in the face of Chinese protests.

It is doubtful, however, that Beijing would be tempted cut the Gordian knot in the South China Sea. Decisive military action against the other claimants would be massively counterproductive to China's international image and regional foreign policy. As it is, PRC behaviour since 2007-08 in the maritime domain has undermined its "peaceful development" thesis, drained away some of the goodwill built up during its "charm offensive" in Southeast Asia in the first half of the 2000s, and led some ASEAN states to strengthen their defence and strategic relationships with the United States —none of these developments are in China's interests. If the PLA were to use force to resolve the dispute, China's relations with Southeast Asia —a region it has assiduously courted over the past two decades— would suffer a body blow from which it would be difficult to recover. US-Southeast Asia relations would, however, be given a massive fillip.

Although America has taken a more active interest in the South China Sea dispute since tensions started to ratchet up in 2007, US military intervention is unlikely. While Washington has stepped up capacity building support to the Armed

Forces of the Philippines (AFP) through the transfer of several refurbished Coast Guard cutters, and given full rhetorical backing to Manila, it has also been careful not to be drawn on the circumstances in which it would come to the aid of its Philippine ally if a clash were to occur in the South China Sea. The US position is that the 1951 Mutual Defense Treaty (MDT) does not cover Manila's Spratlys claims because it did not officially lodge those claims until 1978. However, under the MDT Washington and Manila are required to consult if the armed forces of either country come under attack. So in theory, a PLA-AFP clash in the South China Sea would trigger America's treaty obligations; Washington, however, refuses to discuss hypotheticals. Reading between the lines, it seems clear that the United States would be very reluctant to go to the mat for the Philippines in the Spratlys. But, as the US military is apt to say, everything is "scenario dependent".

As for the other major and middle powers —Japan, Australia, South Korea, India and the European Union— all have expressed varying degrees of concern about recent developments in the South China Sea, either publicly or in private, but are generally content to sit on the sidelines and let ASEAN and the United States take the lead.

In short, the status quo is likely to remain in place for the foreseeable future. This means tensions will ebb and flow, talks on CBMs and codes will drag on and the claimant countries will issue claims and counter-claims. More worrying is the prospect of continued incidents at sea involving warships, civilian maritime law enforcement vessels, fishing trawlers, survey ships and drilling platforms. The increasing frequency of these kinds of incidents raises the risk of an accident clash at sea, which could escalate into a more serious diplomatic or military crisis, possibly leading to loss of life. The almost complete absence of conflict prevention/management mechanisms among the claimant countries raises the risk still higher. In 2012 energy companies that have been awarded contracts off the coasts of the Philippines and Vietnam intend to start drilling activities in contested areas. How China responds will be a litmus test of where the dispute is heading.

ASEAN, China and the South China Sea Dispute

How should we assess recent moves by ASEAN and China to move forward with the implementation of the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC) and draw up a formal code of conduct?

The DoC is a non-binding political statement of intent designed to freeze the status quo in terms of occupied features, reduce tensions and build trust. In the first half of the 2000s tensions subsided in the South China Sea and the DoC was often praised as a contributory factor. In reality, however, the DoC had very little impact, principally because none of the CBMs were effectively put into operation. Indeed it was not until 2005 that the two sides agreed to establish a Joint Working Group (JWG) to draw up implementation guidelines. It met only sporadically and by 2009 its work had become stymied due to a disagreement between ASEAN and China over a minor procedural point. As per the 2008 ASEAN Charter, member states are required to coordinate and develop common positions in the conduct of external affairs,² and ASEAN wanted this requirement reflected in the guidelines. But China objected to a formal clause on the grounds that ASEAN was composed of claimant and non-claimant countries. It was, of course, a stalling tactic by the PRC which may never have been serious about implementing the DoC.

ASEAN's seeming inability to move the implementation process forward put its credibility as the custodian of Southeast Asian security on the line, especially as tensions reached a high point in first six months of 2011. A "breakthrough", such as it was, was achieved in July 2011 when ASEAN finally conceded China's objection, even though the organization remains committed to meeting as a group before sitting down with PRC officials.

The implementation guidelines themselves are very disappointing.³ They reiterate the ASEAN members and China's commitment to promote peace and stability in the South China Sea and a peaceful resolution of the dispute, the implementation of the DoC in a "step-by-step" manner, that participation in cooperative projects be voluntary and that CBMs be decided by consensus. In short, the guidelines lack specifics and the provisions do not go beyond similar clauses contained in the DoC.

Nevertheless, now that agreement has been reached on the implementation guidelines, progress is possible on two fronts, at least in theory. First, the design and implementation of CBMs, and second, negotiation of a formal code of conduct.

The DoC identifies five possible areas for cooperative activities. In January 2012 ASEAN and China reportedly began discussing CBMs. However, the CBMs under discussion—search and rescue and joint scientific surveys—are among the least controversial and even if properly implemented are unlikely to contribute to a lowering of tensions.⁴

As talks on the scope and modalities of CBMs proceed, ASEAN also wants to initiate discussions with China on the guiding principles of a formal code. Initially China demurred, and indicated that it would prefer to implement the DoC first and only start discussions on a code later. However, in November 2011 ASEAN and China agreed to begin talks on a code in early 2012. According to one report, the two sides have set July 2012 as the deadline for a draft code.⁵

But achieving this goal is likely to be a tall order. There are two major problems facing ASEAN and China. First, given the diversity of interests among the 11 parties, agreement on the contents of a code will be problematic. What will be its geographical scope? Will Taiwan be included? What kind of activities will the code seek to prohibit? Will it include joint management of maritime resources? Second, how will the code be enforced? These and other questions remain unanswered for the time being.

Another development in Sino-ASEAN relations vis-à-vis the South China Sea in 2011 was the Philippine proposal to transform the area into a Zone of Peace, Freedom, Friendship and Cooperation (ZoPFFC). Unlike the DoC or proposed code, Manila's initiative is designed to resolve the dispute rather than simply manage tensions. In essence, it seeks to create an actionable framework for the late Chinese leader Deng Xiaoping's proposal of the late 1970s that the claimants should shelve their sovereignty disputes and engage in joint management of resources.

The ZoPFFC consists of two steps. The first is to "segregate" disputed from non-disputed areas of the South China Sea. Essentially this means declaring coastal waters, EEZs and continental shelves as non-disputed while "enclaving" the Spratly Islands as a disputed area. The second step would see the claimant countries demilitarize the atolls currently under occupation followed by the establishment of a joint agency to manage seabed resources and fisheries.

Even though the Philippine proposal has its merits, it quickly faced strong headwinds. This was partly because of the manner in which it was presented. As the first step towards segregating disputed and non-disputed areas, in April 2011 the Philippines formally challenged China's 9-dashed line map at the United Nations. Subsequently Manila proposed to Beijing that the two sides submit their overlapping claims to the International Tribunal on the Law of the Sea (ITLOS). However, China rejected the Philippine approach on the familiar grounds that it is a bilateral problem that requires a bilateral approach.⁶

Philippines has also had problems gaining the support of fellow ASEAN members for the ZoPFFC proposal. ASEAN does not take a position on China's claims, and the ZoPFFC proposal would require it to do so for the South China Sea to be "segregated" into disputed and non-disputed areas. Consensus has been impossible to obtain. In July 2011 ASEAN foreign ministers agreed to consider the Philippine plan and in September Manila hosted a meeting of ASEAN legal experts to examine it. However, only eight members sent representatives – Cambodia and Laos did not, reportedly under pressure from China to boycott the meeting. Therefore consensus was not possible. The Philippines attempted to forge consensus over the ZoPFFC at the meeting of ASEAN foreign ministers in Bali in November 2011, but to no avail. According to Indonesian Foreign Minister Marty Natalegawa some members felt that the proposal would "interrupt the momentum" of the DoC and CoC process.⁷ ASEAN Secretary General Surin Pitsuwan has indicated that the initiative "remains to be discussed further".⁸ And while Manila is intent on pursuing it, opposition from the PRC and the lack of support from within ASEAN suggests the ZoPFFC is already dead in the water.

US Response to Developments in the South China Sea⁹

US policy over the South China Sea has been relatively consistent since the mid-1990s though there has been a change in tone and emphasis since 2009-10.

The State Department statement made in 1995 at the height of the Mischief Reef crisis was repeated practically word for word by Secretary of State Hillary Clinton at the ARF in 2010, except that the latter began by emphasising US interests rather than policy – a subtle but important difference. Clinton reiterated that the US has a national interest in freedom of navigation in the South China Sea, that it

supports a peaceful resolution of the dispute and that it opposes the use of force. She also restated that the US does not take a position on the territorial claims of the various disputants. However, it *does* take a position on maritime boundary claims. Thus when Clinton said that claims to the sea should be made from the land, she was implicitly challenging China's 9-dotted line map.

Senior US officials have, since 2009, articulated support for the DoC process and ultimately a formal code. However, US has "walked back" from what Clinton said at the ARF that it was prepared to mediate talks on the DoC: US position is now that it does not see a role for itself in defining mechanisms for the DoC. Washington's primary concern right now is that the dispute be better managed – this in recognition of the fact that a negotiated settlement is not in prospect. Washington is concerned by the lack of solidarity within ASEAN over the South China Sea, and also the lack of leadership over the next few years as the smaller members of ASEAN take over the chair. The United States also viewed the July 2011 implementation guidelines as very weak, but put a positive spin on it in that agreement keeps the process moving forwards.

America wants to see "enhanced predictably" in the South China Sea. It does not see the issue as a local problem that should be resolved by the locals: it sees it as an international problem that impacts all the major economies of the Asia-Pacific region. Hence the US believes the issue should be discussed at all major regional security forums such as the ARF, East Asia Summit, ASEAN Defense Ministers Meeting-Plus etc. The United States intends to raise the issue at every opportunity and, together with allies and partners, wants to send a clear and consistent message to China of what the collective expectations are – yet at same time US keen to reassure Beijing that no one is trying to deny China its legitimate rights under customary and international maritime law. The South China Sea is also now high on the agenda for US in its bilateral discussions with China.

Washington recognizes, however, that while most ASEAN countries want America to play a stabilizing role in the South China Sea it is not in Southeast Asia's interests to see the issue generated friction between the US and China.

Is there a role of the US military? Not much, for now. The focus is very much on ASEAN take the lead diplomatically. However, US Pacific Command (PACOM) is providing capacity building support to some countries, especially its treaty ally the Philippines, in terms of equipment and training exercises. And while the United States

Navy is not necessarily increasing its presence in Southeast Asia, it is giving port visits and other activities a higher visibility.

The view from PACOM, however, is that the status quo in the South China Sea has a limited shelf life and that by 2015-20 the Chinese Navy will possess the capabilities to execute a wider range of missions in the South China Sea and bring coercive pressure to bear on the smaller claimant states. Senior PACOM officials believe the window of opportunity to bring the dispute to an amicable settlement is closing.

One final point: there is a school of thought in Washington that on-going tensions in the South China Sea are advantageous to the US in that they help facilitate closer relations between it and its Asian partners. Strengthened alliances and partnerships seen as a source of US strength, particularly as it “pivots” towards the Asia Pacific.

NOTES

¹ For recent analysis of the dispute see the special focus issue of *Contemporary Southeast Asia* 33, Number 3 (December 2010); Patrick Cronin, Peter A. Dutton, M. Taylor Fravel, Robert D. Kaplan and Will Rogers and Ian Storey, *Cooperation from Strength: The United States, China and the South China Sea*, Center for a New American Security (January 2012) <http://www.cnas.org/files/documents/publications/CNAS_CooperationFromStrength_Cronin_1.pdf>; Clive Schofield, Ian Townsend-Gault, Hasjim Djalal, Ian Storey, Meredith Miller and Tim Cook *From Disputed Waters to Seas of Opportunity: Overcoming Barriers to Maritime Cooperation in East and Southeast Asia*, National Bureau of Asian Research (July 2011); and Clive Schofield and Ian Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions*, Jamestown Foundation Occasional Paper (November 2009).

² The ASEAN Charter (Jakarta: ASEAN Secretariat, 2007), p. 31.

³ Guidelines for the Implementation of the DOC proposed by ASEAN, July 2011.

⁴ “Situation in South China Sea ‘peaceful and stable’”, *Minad News*, 13 January 2012.

⁵ “2012 deadline set for Spratlys code”, *The Philippine Star*, 22 November 2011.

⁶ “China nixes Philippines bid for UN court”, *Philippine Daily Inquirer*, 13 July 2011.

⁷ “ASEAN way of Philippine proposal on Spratlys”, *Kyodo*, 15 November 2011.

⁸ Ibid.

⁹ The analysis contained in this section is partly based on discussions with senior US Defense Department and State Department officials in Honolulu and Washington in 2011.