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The South China Sea Disputes

Who Governs the South China Sea?

By David Rosenberg

Synopsis

The Permanent Court of Arbitration at The Hague will release its ruling today (12 July 2016) on the maritime territorial dispute in the South China Sea between the Philippines and China. What is the outlook like going forward?

Commentary

THIS WEEK'S decision of the Permanent Court of Arbitration at The Hague in The Netherlands in the case of The Philippines vs China will be the first time that any international tribunal will rule on the validity of China's territorial claims to nearly the entire South China Sea.

The root cause of the conflict is that China, the United States, and many countries in Southeast Asia have different views about who controls what in the South China Sea, based on their differing interpretations of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The US refers to the South China Sea as international waters, and has pledged to increase its freedom of navigation patrols. China argues that the South China Sea has historically been Chinese, and is only defending its territorial waters. Neither claim is consistent with UNCLOS guidelines.

What the Dispute Is About

The South China Sea is an enclosed sea bordered by several states, all possessing 200 nautical mile exclusive economic zones (EEZ). Hence, the South China Sea is not primarily international waters, but rather overlapping EEZs.

According to UNCLOS, the EEZ boundaries must be determined through negotiations by the claimants. Many Southeast Asian states have negotiated their maritime boundaries with each other bilaterally. None has done so with China, with the notable exception of the China-Vietnam agreement on border delimitation and joint resource management in the Tonkin Gulf ratified in 2004.

China seems to claim that it owns virtually all of the South China Sea, and therefore sees no need to negotiate anything. However, Vietnam, the Philippines, Malaysia, and Brunei also have claims to parts of the South China Sea. They all want China to delineate its claims so that they can negotiate their maritime boundaries bilaterally, as provided by UNCLOS guidelines.

Unfortunately, Beijing has not precisely defined its claims to the South China Sea. Its nine-dash line map is manifestly ambiguous and unacceptable in international law. Therefore, no negotiation can occur.

Intentional Ambiguity?

Some analysts point out that this is intentional ambiguity. If China were to define its South China Sea boundaries in line with UNCLOS provisions, there would be many conflicting territorial claims that would need to be negotiated.

Both China and the US accuse the other of militarising the South China Sea. Both are correct. China is increasing its naval and air activities in the vicinity and has created a series of artificial islands that could accommodate combat ships and aircraft. The US is assisting several Southeast Asian claimants enhance their naval and air capabilities. Washington is increasing its own land-based presence in the Philippines and Australia.

Many observers in Washington believe that China is developing a capability to interrupt freedom of navigation in the South China Sea. Beijing claims it has no such intention and emphasises that it is highly dependent on trade through these waters. It insists that any military capability it has in the region is entirely defensive. However, other countries around the South China Sea have cause to wonder exactly what interests China is defending.

China's newly-built military capabilities in the South China Sea are for the PLA-Navy, the Fisheries Law Enforcement Command, the Coast Guard, and the China Marine Surveillance Agency. In the past two months, vessels from these Chinese maritime forces have aggressively intruded with fishing boats in the EEZs of Vietnam, the Philippines, Malaysia, and Indonesia without the permission of these states. China has also stationed an oil rig in waters claimed by Vietnam.

There appears to be no easy solution to maritime militarisation in the South China Sea. As more combat ships and aircraft are added in a relatively small maritime space, the possibility of military encounters and/or accidents will increase over time. A case in point is the March 2016 capture of a Chinese fishing vessel off Indonesia's Natuna Island. That led to a Chinese coast guard encounter with the Indonesian coast guard boat.

There have been similar confrontations involving China and Vietnam around the Paracel Islands, between China and the Philippines around Scarborough Shoal, and between China and Malaysia near the Luconia Shoals.

The Road Ahead

What can be done in this situation? Southeast Asian states should continue to define, negotiate, and resolve their overlapping claims in the South China Sea. They should ask China to do the same thing. The problem with this seemingly reasonable proposal is that China has repeatedly stated that negotiating boundaries in the South China Sea is out of the question. Unfortunately, without negotiating overlapping EEZs, there is no prospect for resolving competing claims.

That may change with the UN tribunal ruling. The judges will almost certainly rule that China's nine-dash line is not a valid maritime claim and that China is not entitled to any historic rights beyond its territorial seas, exclusive economic zones, and continental shelves according to UNCLOS.

That ruling will amount to an order that China clarify its maritime claims based on entitlements from land features, not ambiguous dashes on a map. Beijing is unlikely to clarify its claims in the South China Sea because the tribunal orders it to do so. The Chinese government has repeatedly said that it will not recognise any ruling.

But being branded an international outlaw will involve significant costs for Beijing. It will undermine China's claim that it is a responsible rising power that deserves a greater hand in global governance. It will make other countries wary of Chinese initiatives such as the Asian Infrastructure Investment Bank. It will drive regional states even closer to Tokyo and Washington.

These costs to Beijing could make an eventual political compromise more appealing. China might agree to redefine the nine-dash line based on UNCLOS rather than historic rights and enter real negotiations with its neighbours. To promote that kind of political compromise, the other claimant states and Washington will need to embark on a sustained campaign to garner international support for the tribunal's ruling. Support will also need to come from like-minded countries like Australia, Japan, and European states.

In the meantime, regional policy-makers need to take the initiative for negotiating agreements for joint resource management whenever opportunities become available. For example, at the 2015 Boao Forum for Asia, Beijing officially launched the Year of ASEAN-China Maritime Cooperation, and announced that China and ASEAN nations would carry out cooperation in the areas of marine economy, maritime connectivity, marine science research and environmental protection, safety and security, and cultural and people-to-people exchanges on the sea. Regional diplomats and political leaders should work actively to test China's intentions and turn these pledges into targets and timetables.

Even amidst all the current maritime disputes, a naval code of conduct was approved by more than 20 nations – including South Korea, China, Japan, the United States, and Australia - at the biennial Western Pacific Naval Symposium in Qingdao in April

2014. The Code for Unplanned Encounters at Sea (CUES) was endorsed by naval officials. The principles are not binding, but represent a small but positive sign of improved communications to reduce the risk of naval encounters escalating into conflict.

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