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Joint Development in the South China Sea: Time for ASEAN and China to Promote Cooperation?

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THE SPRATLY Islands in the South China Sea were a source of potential conflict in the region during the early 1990s. Four states (China, Malaysia, the Philippines and Vietnam) and Taiwan claim sovereignty over some or all of the islands as well as sovereign rights to explore and exploit the natural resources in and below the waters surrounding the islands. In addition, Brunei Darussalam claims sovereign rights to the natural resources in and under part of the disputed waters. The maritime zones in the South China Sea overlap in numerous ways, with some areas claimed by all five states plus Taiwan.

In recent years the South China Sea has been relatively calm. One of the major reasons for this is that China agreed in 1995 to discuss the South China Sea disputes at the multilateral level with ASEAN. The talks resulted in the ASEAN-China Declaration on the Conduct of Parties in the South China Sea, which was signed by the leaders of ASEAN and China on 4 November 2002 during the Eighth ASEAN Summit in Cambodia.

In the 2002 Declaration the Parties reaffirmed their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea (UNCLOS). The Parties declared that they will resolve the territorial disputes by peaceful means in a manner that is consistent with UNCLOS and international law.

The Parties also declared that they will exercise restraint and refrain from activities that would complicate or escalate the disputes, and that they will undertake efforts to establish confidence building measures and explore or undertake cooperative activities that are in the common interest. Although the 2002 Declaration also encouraged the Parties to explore or undertake cooperative activities, its major emphasis and achievement was on de-escalating the sovereignty and jurisdictional disputes and preventing potential conflict in the South China Sea.

Replacing Claims with Joint Development

As China continues its unprecedented economic development and its energy needs continue to rise, talk of “shelving” sovereignty claims and establishing joint development zones has increased. A significant development took place in 2005 when the national oil companies of China, the Philippines and Vietnam agreed to undertake joint seismic surveys in order to determine the extent of hydrocarbon resources in a disputed area of the South China Sea.

The time may be ripe for the ASEAN countries and China to formally agree to shelve the

sovereignty claims in the South China Sea and cooperate to develop and manage the natural resources, protect the environment, and create good order at sea. Before meaningful discussions can take place on the creation of joint development zones, it may be necessary to first negotiate a framework document that “shelves” or “freezes” existing claims and sets out the principles upon which cooperation and joint development can proceed. The framework document need not be a formal treaty. A declaration similar to the 2002 Declaration will suffice if the Parties have the political will necessary to abide by its principles in good faith.

Shelving the sovereignty claims may be the only viable option. Given the development of economic and political ties between China and ASEAN during the last decade and the principles in the 2002 Declaration, it is not likely that any of the Parties will attempt to resolve the disputes by the threat or use of force. Given the political sensitivity of the disputes and the potential resources at stake, the claimant states are not likely to reach an agreement to refer the disputes to an international court or tribunal and have them resolved in a win-lose format on the basis of which of the states has the stronger legal claim to sovereignty under international law. For similar reasons, it is highly unlikely that the claimants will be able to resolve the disputes through negotiations.

Furthermore, if the claimant states take a close look at the applicable provisions of UNCLOS, to which they are all bound, they should realize that their sovereignty claims over the “islands” in the South China Sea are fraught with potential legal problems. For example, many of the “islands” over which sovereignty is claimed are not “islands” entitled to a 200 nautical mile economic zone and continental shelf of their own, but “rocks” entitled only to a 12 nautical mile territorial sea because they are not able to support human habitation or economic life of their own. Still others are geographic features which are not even entitled to a territorial sea of their own under UNCLOS because they are not natural formed areas of land above water at high tide, but artificial islands, low-tide elevations, reefs or shoals.

Developing a management regime

Hence, the most viable option is to shelve the sovereignty claims and develop a management regime based on cooperation in order to deal with impending problems and issues such as the increasing need for offshore gas and oil resources, the potential collapse of fisheries resources in the region, and the need for cooperative measures to protect the marine environment and create good order at sea.

A new declaration to promote cooperation in the South China Sea will not succeed unless it addresses the major obstacle to enhanced cooperation. Some claimant states have been reluctant to cooperate because they fear that by cooperating they will be renouncing their own claim, recognizing the legitimacy of another state’s claim, or somehow assisting another state’s claim. Therefore, any new declaration must make it clear that existing sovereignty claims in the South China Sea are “shelved” during the period of the declaration, and that a claimant state cannot prejudice or diminish its claim to sovereignty by cooperating under the declaration. The declaration should provide that it will be valid for a significant period of time, such as 50 years.

The proposed declaration should also contain a clause that will enable Taiwan to unilaterally declare or affirm that it supports and will abide by the declaration. This is essential, given that Taiwan occupies the largest island and is a major fishing entity in the South China Sea. One formula that could be considered would be to include a clause which permits states and “other entities with interests in the South China Sea” to unilaterally declare that they support and will abide by the declaration.

Finally, the declaration should state that the conduct of the Parties to the new declaration in the South China Sea should be in accordance with the United Nations Charter, UNCLOS and the 2002 Declaration on the Conduct of Parties in the South China Sea.

A new declaration along the lines outlined above, together with the 2002 Declaration, would establish the legal framework necessary for the claimant states to “shelve” existing claims and cooperate to solve problems and issues of common concern, without prejudicing their existing claims. If ASEAN could successfully negotiate such an agreement with China and move the South China Sea disputes from conflict prevention to meaningful cooperation, it would greatly enhance its prestige as a regional body.

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