

ASEAN and Dispute Resolution in the South China Sea
by
Mohd Nizam Basiron¹

Introduction

Much of the discourse on the South China Sea has been focused on traditional security issues. Geopolitics, SLOC security and competition over petroleum resources pervade much of the literature on the South China Sea. Indeed the importance of the South China Sea in traditional maritime security should not be understated. The whole or parts of the South China Sea is contested by five of its seven littoral States. The South China Sea also provides vital sea lanes for transportation of goods and materials that has spurred the growth of the economies of East Asia. Its role as a trading route dated back to as early as the fifth century when trade between India and China began while Arab and Iranian traders started using the South China Sea route by the eighth and ninth centuries (Brown and Sjostrand, 2001).

However, the somewhat skewed discourse on the South China Sea often ignores its function from other, non-traditional security perspectives. In 2000, it was estimated that the coastal regions of the South China Sea was populated by 270 million people (Talaue-McManus, 2000), most of whom are dependent on the South China Sea for nutrition and socio-economic well-being. In 2007, almost 7 million tonnes of fish were landed from the South China Sea amounting to more than 7 percent of the total world fisheries landings. Any decline in South China Sea fisheries could therefore adversely affect the food security of the region. Apart from fisheries, the South China Sea also hosts 15 percent of the world's coral reefs and 12 percent of the world's mangroves in 2000 (Talaue-McManus, 2000).

Viewed in totality, the South China Sea therefore is crucial to the security and stability of the region bordering it. The security and stability however is fragile as the tranquility in the South China Sea is underlined by tension and occasionally violence. The clash between China's and Vietnam's navies at Johnson South Reef in 1988, China's occupation of Mischief Reef in 1995 and more recently the confrontation between the United States Navy Ship Impeccable and China's fisheries surveillance vessels near Hainan are examples of how tense the situation in the South China Sea could be. On the other hand, there are also examples of cooperation and attempts at dispute resolution among the claimants. Bilateral efforts such as the Memorandum of Understanding to jointly develop oil and gas between Malaysia and Vietnam signed in 1992 signified a willingness to put-aside differences over territorial dispute for economic gains (Thao, 1999; Buszyinski and Sazlan, 2007). Similarly, China, Vietnam and the Philippines conducted a trilateral seismic survey in 2007, albeit within the Philippines legal continental shelf (Wain, 2010).

ASEAN, China and the DOC

The two main protagonists at the attempt to manage the dispute in the South China Sea are ASEAN and China. On 4 November 2002, ASEAN and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC). The main objective of the DOC is to 'enhance

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favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned.’ In other words the DOC is a stepping stone towards peaceful resolution of the dispute in the South China Sea. The DOC is premised on the principles of international law mainly the Charter of the United Nations, United Nations Convention on the Law of the Sea (UNCLOS) and the ASEAN Treaty of Amity and Cooperation in Southeast Asia. The underlying principles of the DOC are as follows:

- Peaceful resolution of the disputes in the South China Sea
- Trust and confidence building
- Respect and recognition of the provisions of UNCLOS relating to freedom of navigation and overflight.
- Maintaining the current status quo as far as the occupation of geographical features and islands, including unoccupied ones in the South China Sea, is concerned.

The DOC proposes to achieve the above through two mechanisms namely trust and confidence building and undertaking of “cooperative activities”. The former is based on activities such as dialogues and exchange of views, rendering of assistance and “humane treatment of persons in distress,” voluntary notification of military exercises and voluntary exchange of relevant information while the latter encourages the claimants to explore and pursue cooperation in the areas of marine environment protection, marine scientific research, safety of navigation and communication at sea, search and rescue and prevention of crime at sea.

While the declaration has contributed to a reduction in the intensity of the conflict, it has not all been smooth sailing between 2002 and now. The period has been punctuated by minor but sometimes deadly skirmishes such as China’s shooting of Vietnamese fishermen in 2005 and 2007.

Despite the DOC’s call for claimants to exercise restraint in the South China Sea, the countries concerned have hardly been dormant in carrying out activities that strengthen their claims. China, the Philippines and Vietnam completed a trilateral seismic survey in 2007. The survey could also be viewed as part of China’s divide-and-rule policy among the ASEAN claimants and was followed by a series of activities by the other claimants such as the visit of Taiwan’s President to the Dongsha island in February 2008 following the completion of an airstrip on the island in late 2007. Taken in isolation, these incidents may be considered as minor events in a wider scheme of South China Sea security. But taken together, they do constitute a threat to hard-earned stability in the area undermine at least the spirit if not the letter of the DOC.

Prognosis

The South China Sea offers contrasting options for its littorals. On the one hand, to continue with the current status quo, on the other to work towards a lasting resolution to the problem through a number of possible alternatives which could include, among others, functional cooperation in traditional and non-traditional security areas, economic activities, environmental the development of a legally binding instrument or implementing the DOC. To date however, a lasting solution to the South China Sea dispute appears illusive. While the claimants participate

in meetings such as the Workshop on Managing Conflict in the South China Sea which began in 1990 and projects such as the United Nations Environment Programme – Global Environment Facility Project on Reversing Environmental Degradation Trend in the South China Sea and Gulf of Thailand which ran from 2001 to 2009, for the most part, they were mired in national positions which prevented consensus and created the proverbial “Gordian Knot” which is impossible to unravel. There are obviously lessons to be learnt from the many initiatives taken in terms of strengths and weaknesses as well as the obstacles to greater cooperation and would serve as pointers for future dispute resolution in the South China Sea.

Is there a Way Forward?

If the claimants of the SCS are serious about peace and stability in the region, they would have to find ways and mean to move the DOC forward. The DOC has not effectively moved beyond the 2002 signing ceremony. None of its agenda in marine scientific research, pollution prevention, environmental protection and safety of navigation has progressed. In other words there has been a lot of talking and not enough walking. Unless of course the status quo with its intermittent conflicts are acceptable to all concerned. This should not be the case given the heightened level of tension now and possible outbreak of conflict even at the slightest provocation and the presence of non-claimant countries in the region.

There were renewed calls a legally binding code of conduct to be negotiated quickly following the ASEAN Regional Forum in Hanoi in July 2010. However, progress towards the code of conduct is slow. Based on the experience with the development of a set of guidelines to implement the DOC it may be a long drawn process. ASEAN and China have met six times through the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea since 2004 to finalise the guidelines but with no clear end in sight.

Scholars studying dispute resolution in the South China Sea are divided between the pessimists and optimists (Bateman, 2010). There are obviously major obstacles to overcome. Bateman (2010) suggested these include the lack of an effective regime to govern the areas of cooperation espoused in the DOC; deep-seated nationalism among the claimants who see the situation as a “zero-sum game, winner takes-all” situation (Mak 2008); and the nature of the dispute which does not lend itself to legal adjudication and arbitration.

There is also an apparent division among the ASEAN members. ASEAN members can be categorized into four groups vis-à-vis the DOC and dispute resolution in the South China Sea:

- countries that want an immediate start to the work on the legal document i.e., Vietnam and the Philippines;
- members which prefer a more gradual approach, namely Malaysia, Brunei;
- non-claimant ASEAN members that maintain an active interest in the DOC i.e., Singapore and Indonesia; and
- non-claimants who have not expressed any views on the DOC i.e., Laos, Cambodia and Myanmar.

China's ambassador to ASEAN had attributed the delay in formulating guidelines for implementing the DOC to ASEAN's internal machinations in deciding whether its members should consult with each other first before consulting China (Hanqin, 2009). A divided ASEAN would only play into China's hands and leadership among its members is vital. Vietnam played this leadership role during its tenure as ASEAN's chair throughout 2010 by highlighting the issue and attempting to garner international support for a legally binding code of conduct. However since 2010 much of the momentum gained towards a binding code of conduct appeared to have dissipated. This was evident in the much watered-down joint statement between ASEAN and US leaders released on 24 September 2010 which did not mention the South China Sea specifically but only reaffirmed the need for "...regional peace and stability, maritime security, unimpeded commerce and freedom of navigation..."

In light of the situation, China's naval expansion and likely increase in US naval presence in the South China Sea and Southeast Asia in general, no doubt, there is the need for a more "enduring" solution to the South China Sea issue. The underlying philosophy behind the DOC to create "favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned" should be considered in any process to negotiate a code of conduct of other legal instrument for the South China Sea. At the same time there are a number of "hard" questions which the claimants need to ask as they embark on the journey towards a code of conduct:

- Would the code of conduct change the status quo in the South China Sea as espoused by the DOC or merely reinforce it?
- Would the code of conduct advance cooperation in the areas identified in the DOC?
- What would be the role of external powers in the process? Given that there are also external parties interested in the South China Sea, should the code of conduct govern their activities as well?

Conclusions

At first glance the dispute caused by overlapping maritime claims in the South China Sea is as one analyst suggests appear intractable. There are too many claimants with ongoing bilateral and multilateral disputes as well interests of external powers particularly the United States. ASEAN and China however are continuing their efforts to manage the dispute in the South China Sea. The focus of these efforts for now is the DOC which was signed by ASEAN and China in 2002 and its implementation. While critics have argued that the DOC has not met its objectives in furthering cooperation in the South China Sea, the DOC has in many ways managed the dispute and prevented it from turning into open conflict among the claimants. However given the increased interest and the long running dispute in the South China Sea the DOC needs to be taken one step further towards actual cooperation. The process thus far has been gradual and it may take some time before actual cooperation is realised. This is despite some of the statements made by a few ASEAN diplomats towards the latter half of 2010 calling for a formal code of conduct in the South China Sea.

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