



MARITIME JURISDICTION AND MARITIME SECURITY COOPERATION IN SOUTH CHINA SEA

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1.

Southeast Asia is distinctively maritime in nature. It has a vast span of water with the South China Sea extending over 1800 miles from Sumatra to Taiwan linking the Indian and the Pacific Oceans. And the Straits of Malacca, Lombok, and Sunda are of strategic importance to the region and the world.

Shipping routes are the life-lines of East Asian economies. Being mostly export-oriented and resource-deficient, East Asian countries are heavily dependent on seaborne trade. As the South China Sea provides shipping routes connecting Northeast Asia with Southeast Asia and the Middle East, the freedom of navigation in the South China Sea is of crucial importance to East Asian seaborne trade and sustainable development.

There exist maritime jurisdictional disputes in the South China sea, which mainly embrace three dimensions: islands' sovereignty disputes; the delimitation disputes on EEZs (exclusive economic zone) and continental shelves; and freedom of navigation versus the extents of jurisdiction over territorial seas, international straits, archipelagic waters, and EEZs.

These disputes are of two different kinds of disputes. The islands' sovereignty disputes are issues left over by history; and the delimitation disputes on EEZs and continental shelves as well as the navigation issues are due to different interpretation and implementation of the relevant articles in the LOS Convention (UN Convention on the Law of the Sea).

Regarding the EEZ and continental shelf delimitation, the LOS Convention stipulates that the delimitation "shall be effected by agreement on the basis of international law....in order to achieve an equitable solution." This is a principled stipulation, and differences exist on its implementation. Here a big hurdle exists regarding the relation between EEZ and continental shelf claims of Southeast Asian



littoral states and China's claims of "historic waters" and "historic title" in the South China Sea. The LOS Convention stipulates that coastal states are entitled to have EEZs and continental shelves, and also mentions in several articles the factor of historic title which should be considered in the jurisdictional delimitation. China regards the nine-dashed line as the outer line of its historic title in the South China Sea. How to interpret China's historic title in the South China Sea, and how to make a balance between EEZ and continental shelf claims and historic title is an issue facing us.

Regarding the navigation issues, the LOS Convention establishes three regimes, namely 'innocent passage' through territorial waters, 'transit passage' through international straits, and 'archipelagic sea-lanes passage' through archipelagoes. Different navigational rights apply depending on the different regimes. As to the navigation in EEZs, the LOS Convention provides that freedom of navigation applies to EEZs; but under the LOS convention, coastal states have sovereign rights over EEZ resources, and EEZs fall into coastal states' spheres of jurisdiction. As the LOS Convention only offers general rules and principles and is ambiguous on many issues, differences in its interpretation and implementation are prevalent in the world community.

The existing jurisdictional disputes have affected regional peace and security, have affected the political relationship and stability among regional countries, and have affected regional economic development and marine resources exploitation.

2.

Navigation security in South China Sea is an important component of Asia security. Without addressing navigation security issues, regional security cannot be guaranteed. As there exists the potential to eliminate all high seas if some islands such as Thitu Island, Itu Aba Island, Spratly Island, and Scarborough Reef are given full effect of having 200 nm EEZs. A navigation code of conduct in EEZs is thus much needed.

The "Impeccable Incident" in March 2009 between China and the US in the South China Sea constitutes the most serious friction between China and the United States since the collision of their military aircraft near Hainan Island in April 2001. Like the previous one, this incident shows the two countries' different understandings and implementation of the LOS convention – particularly the Convention's provisions on coastal states' rights in their EEZs. In attempting to justify the US conduct in the South China Sea, Chairman of the Joint Chiefs of Staff Admiral Michael Mullen said that though the USNS Impeccable was in China's EEZ, the United States has the right to enter this area. But in fact, the Impeccable's activities did contravene the LOS convention, as the Convention



affords China jurisdiction over relevant activities in the EEZ and prohibits actions that are not for peaceful purposes.

A substantial conflict between the right of coastal states to control adjacent maritime areas and the right of maritime states to enjoy the freedom of navigation has endured for much of the history of the law of the sea, and East Asia is an area where the reconciliation of these two rights has caused controversy. East Asian countries need to establish an agreed definition of navigational rights to be applied in practice so as to guarantee freedom of navigation and regional SLOC security.

Freedom of navigation and safety of navigation in the South China Sea is in the interests of China, the US, Japan, South Korea and other regional countries. The guarantee of freedom of navigation in the South China Sea is the major concern of extra-regional powers. Countries like the US and Japan are much concerned about free and safe access through the sea-lanes and air corridors there. Free passage through the sea-lanes is vital to the US for movement of its warships between the Pacific and Indian oceans. A former State Department spokesman James P. Rubin said, “While we take no position on the legal merits of competing claims to sovereignty in the area, maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for peace and prosperity of the entire Asia Pacific region, including the United States.”

China has repeatedly said it respects freedom of navigation through the South China Sea’s crucial shipping lanes, and has assured regional countries that it would not take steps to impede freedom of navigation through contested areas of the South China Sea. In fact, China has never interfered in foreign vessels navigating in the area and will not do so in the future. There has been nothing to suggest that China would obstruct freedom of navigation. The problem is that since there exist different jurisdictional areas, different navigation regimes should be applied in the South China Sea.

3.

Regarding islands sovereignty and maritime delimitation disputes, usually there are three approaches to achieve a fair and equitable solution:

Firstly, solution through negotiations and mutual compromise among related parties. China prefers mostly this approach. One recent positive event is the exchange of the bilateral agreement between China and Vietnam on June 30, 2004 on the territorial sea, EEZ, and continental shelf delimitation in the Beibu Gulf (Tonkin Gulf) and the



bilateral agreement on fishery cooperation in the Beibu Gulf after the two agreements had been approved respectively by their parliaments. The Sino-Vietnamese disputes in the Beibu Gulf lasted for more than 30 years. The bilateral talks on the Gulf had been held intermittently since August 1974, and had produced no results until the leaders of the two countries decided in 1999 to solve the disputes by the end of 2000, and the agreement was signed on December 25, 2000.

Secondly, solution through the adjudication by the International Court of Justice (ICJ) and the arbitration or mediation of a third-party. Arbitration handles disputes in the form of adjudication, which is similar to judicature, but arbitration is voluntary jurisdiction. Related countries are free to select the arbitrator(s). According to international experiences, arbitration is the most desirable approach in the third-party involvement.

Asian countries are not accustomed to accept third-party assistance for the disputes' settlement, but changes have taken place in recent years. The rule by ICJ in December 2002 on the ownership of Sipadan and Ligatan Islands (Malaysia/ Indonesia) in the Celebes Sea and the rule by ICJ in May 2008 on sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore) are something of a landmark.

As to the South China Sea, in my view, related parties might consider the acceptance of arbitration by arbitral tribunal provided in the Convention's Annex VII when the conditions of settlement through negotiation are not matured for a long period of time and when the disputes procrastinate indefinitely. China issued a declaration on August 25, 2006 not to accept any procedures provided for in Section 2 (compulsory procedures entailing binding decisions) of Part XV (settlement of disputes) of the LOS Convention. The Declaration states, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."

The above declaration indicates that China would settle disputes mainly through consultation and negotiation, but in my view, the above declaration does not indicate the non-existence of the possibility of settling disputes by arbitration. Article 287/3-287/5 (Choice of Procedure) of the Convention make the arbitral tribunal have compulsory jurisdiction over the disputes on the explanation and application of the Convention by the signatories. In fact, no matter what attitude a signatory takes towards Article 287, at least it has to accept the jurisdiction by the arbitral tribunal.



Thirdly, shelving the disputes for a period and working for joint development among relevant parties in the disputed areas. Though this is not the permanent solution to the problem, but only an expedient measure in the transitional period towards the final equitable settlement, it is a practical and realistic approach, and the preferred alternative to no action. Joint development can be initiated both before the final delimitation and after the delimitation agreement when resources stride across two sides. All parties could reap the benefits from the resources.

Faced with maritime jurisdictional disputes, regional countries have tried to seek for transitional settlement. Indonesia and Australia reached the agreement on cooperative development in the Timor Gap in 1989 after 10 years of tough negotiations, but its experiences have not been well spread and its follow-up effects are limited. This agreement is worth detailed study.

China has worked to seek such temporary solutions with relevant countries in line with this idea, but so far has made no substantial achievements. A recent encouraging development is the trilateral joint maritime seismic working agreement on cooperative exploration in the South China Sea reached among the oil companies of China, the Philippines, and Vietnam signed in Manila on March 14, 2005, which offers good prospects for starting joint development. After this agreement, China has encouraged Malaysia and Brunei to participate in the joint survey. The problem is that as the Philippines has not yet completed its domestic legal procedures; the joint seismic survey among the three signatories has not yet achieved any substantial progress.

As the jurisdictional disputes in South China Sea are so complicated, joint development is a wise and feasible approach at present. The framework and modality of joint development is an issue to be discussed. I suggest that we might first agree to have an overall framework for joint development in the whole South China Sea; indicating the willingness of all parties concerned and the basic principles to be pursued as did in the Declaration on the Code of Conduct on the South China Sea. Then we might have various forms of joint development, including bilateral, trilateral, quadrilateral, or quinquelateral levels depending on the different overlapping areas. For example, in the Vanguard area, the disputes are only between China and Vietnam. Thus a bilateral cooperation meets the needs.

4.



With the increasing political and economic interdependence in East Asia, various security cooperative approaches have developed in Track-I and Track-II levels. Dialogues and visits between regional leaders have increased, several constructive strategic partnerships have been established, and new momentum has emerged in military relationship among regional countries. However, on the whole, these security dialogues are scattered and fragmentary with limited effects, and have not formed a regional organic and efficient mechanism. So far East Asia has no security mechanism in the true sense, and has no well-defined and established rules.

The few existing Track-II maritime security dialogues in East Asia such as the Western Pacific Naval Symposium are without avail in the prevention of conflicts. And though CSCAP (Council for Security Cooperation in Asia Pacific) has a Maritime Security Working Group, it remains as a low-level research group, and is not efficient.

As compared with Europe, East Asia lags far behind in maritime jurisdiction. There are in Europe 42 maritime boundary agreements dealing with territorial sea, EEZ and continental shelf delimitation, the majority of which were signed in the 70s and 80s of the 20th century. Apart from negotiated settlement, they approached ICJ (the International Court of Justice) and accepted international arbitration for the settlement. Examples are the ICJ judgment on North Sea continental shelf in 1969; and the Court of Arbitration's decision on the continental shelf delimitation between UK and France in 1977 and 1978. As to the navigation issues, no serious contention has occurred in Europe. It appears that mutual confidence and political will of leaders are of significance in managing maritime jurisdictional security. Moreover, the formation of EU (European Union) has more or less dimmed the boundary issues.

The situation requires that maritime jurisdictional security in Southeast Asia should be put on the regional security agenda now, and the promotion of mutual trust and the enhancing of political will among regional leaders for the disputes' settlement are much needed.

As the solutions are no easy tasks and time-consuming, strenuous efforts should be devoted to establishing mechanisms for conflict prevention.

To my mind, conflict prevention measures to be taken into consideration include: the signing of INCSEA (incidents at sea agreement) or a Code of Conduct between and among regional navies to prevent the situation from being out of control; the setting-up of the East Asian Maritime Security Forum with the participation of regional and extra-regional scholars and experts which will be held annually; and the formation of the East



Asian Community (EAC) for political, economic, and security cooperation, and the inclusion of regional maritime security within the framework of EAC.