



Fundacja
Aleksandra Kwaśniewskiego
AMICUS EUROPAE

„BIULETYN OPINIE”

No 34/2010

The Spratly Dilemma: External powers and Dispute Resolution Mechanisms

Pooja Theresa Stanlas

Warsaw, November 2, 2010

The Yellow Sea, the East China Sea, and the South China Sea are areas dotted with numerous offshore and mid-ocean islands, and China bordering all three China Seas, has maritime jurisdictional disputes with neighboring littoral states that include among others continental shelf demarcation conflict with North Korea, South Korea, and Japan in the Yellow Sea; territorial disputes with Japan over sovereignty of the Senkaku (Diaoyudao) Islands in the East China Sea; maritime delimitation and territorial disputes over the Spratly and Paracel Islands with Southeast Asian countries and Taiwan in the South China Sea. The territorial dispute in Spratly islands is perceived by pundits and government officials alike as the most dangerous and potential international security flashpoint due to its geographical complexity and the number of claimants, strengthened by UNCLOS- sanctioned extension of national jurisdiction over maritime resources for littoral or coastal states.

This commentary attempts to understand recent developments in the South China Sea focusing on the role of China and the United States that may trigger potential hostilities. It will propose viable dispute resolution mechanisms in view of rising tensions in South China Sea due to increased US involvement and Beijing's rejection of its" interference".

Introduction

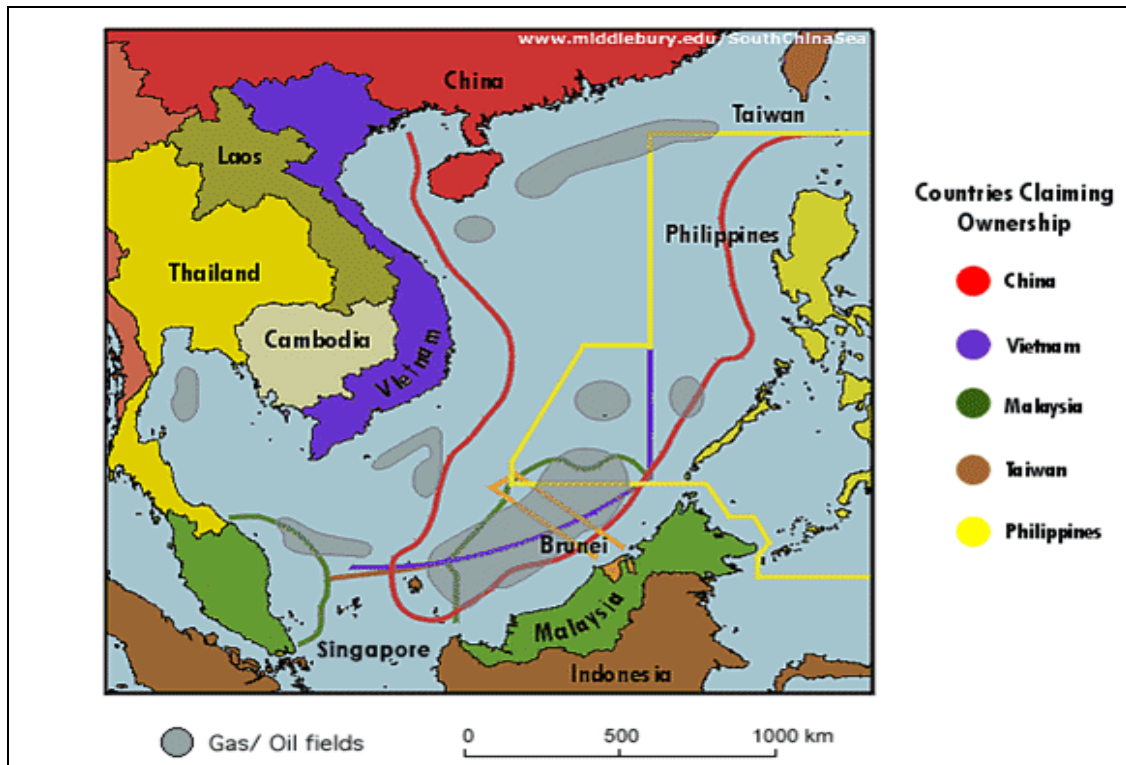
The recent strong Chinese reaction and outburst towards Japan for detaining a Chinese skipper on September 2010 whose trawler collided with Japan Coast Guard vessels near the disputed island of Senkaku caught the Japanese off guard. However, the claimant states in the disputed Spratly Islands in South China Sea such as Taiwan, Malaysia, the Philippines, Vietnam and Brunei will not be surprised by this. Beijing's aggressive position to protect its maritime claims is routine in the hotly contested Spratly Islands as well as Paracel islands which has militarized the South China Sea as claimant states retaliate aggressively using force. The Spratlys, also known as Nansha islands, has over 230 islands and atolls and stretches more than 500 nautical miles from north to south. At the nearest point it is less than 100 nautical miles from the coasts of Philippines or Malaysia, while the nearest point from Vietnam is about 350 nautical miles. It is about 400 nautical miles from the southernmost tip of Paracels.

In 1974, China captured the Paracel Islands from Vietnam and continues to rule over the islands. Vietnam incidentally controls the largest number of islands in the Spratlys. All the claimants except for Brunei have established some kind of military presence here. Vietnam has occupied 27 islands and reefs in the western and central parts of the archipelago; the Philippines 8 in the eastern part; Malaysia 4 in the southern part; China 7 and Taiwan 1 in the central part. Brunei has claimed an EEZ in the southeastern part at Louisa Reef.

China however holds that the Spratlys are inalienable part of Chinese territory, in the context of its historic waters and declared South China Sea its "core national interests". China has legitimized

its claims over the entire South China Sea using the EEZ and the continental shelf principle as a coastal state enshrined in UNCLOS as well as historical records from the Han and Ming Dynasties. In fact, the overlapping jurisdictional and territorial claims couched in the language of sovereignty by claimant littoral states has led the issue to be recognized as “mother of all territorial disputes” due to the number of claimants complexity of the claims. Map 1 shows the location of Spratly islands including the oil and gas fields.

Map 1: The location of oil and gas fields and countries laying claim to the South China Sea



source: <http://www.usiofindia.org>

Surging interest in the Spratlys

The South China Sea dispute embodies two dimensions: territorial sovereignty and jurisdictional rights in maritime demarcation arising from differing interpretations concerning the 1982 Law of the Sea Convention (UNCLOS). Disputes in the South China Sea ironically was quiet for centuries but reared its ugly head after the 1973 oil crisis as the Spratlys is believed to have great potential for undersea oil and gas exploitation and abound in tropical fish, minerals and other marine resources. One study estimates that the South China Sea has a yearly harvest of five million tons of fish. Chinese surveys indicate (though not confirmed by other independent seismic tests) that about 25 billion cubic meters of gas and 105 billion barrels of oil exist in the continental shelf around the Spratly Islands. Huge advances in drilling technology and the growing interest of foreign companies in searching for new petroleum resources in the South China Sea have somewhat intensified the

disputes. Also at stake in the disputes is the oil to be found around the islands and in the adjacent continental shelf. The discovery of rich hydrocarbon bonanza offshore in Brunei and Malaysian state of Sabah has acted as incentive and catalyst for the escalating tensions.

The Spratly dispute is also about the strategic location of the islands straddling vital regional sea lanes. The islands sit astride major sea lanes; more specifically the lanes communicate on the southwest with the Indian Ocean through the Malacca-Singapore Straits, and on the northeast with the East China Sea and the Pacific Ocean. In fact, 80% of China's energy needs are conveyed through these waters. Escalating tension related to the disputes could adversely affect the flow of maritime trade and commerce as well as military transport between the Pacific and Indian Oceans. Major powers such as the US, Japan, Australia and India are much concerned about free access and navigational safety through the sea lanes and over flights.

Ascertaining competing claims using the UNCLOS provisions by littoral states is difficult as most of these islands sit literally mid-ocean where the floor depth plunges to 3,000 meters. Thus, identifying these islands as extension of the continental shelf of the littoral states is a tough exercise.

Recent “provocative” postures and developments: A cause for worry?

The overlapping claims dating back to 1950s reaching its peak in the 1990s till now does not appear ripe for any immediate resolution. Despite the claimants expressing intentions to resolve the dispute without resorting to military means, force has been used in the past to enforce and expand national claims. There is widespread fear this could be employed again with far-reaching disastrous consequences, especially with US Secretary of State Hillary Clinton during the July 2010 Asean Regional Forum in Hanoi, stating unequivocally that it is in the “national interest” of US to ensure security and stability of important sea lanes of South China Sea for freedom of navigation and trade within the principles of international law. The US statement that it is in its “national interest” to see the territorial disputes resolved through a "collaborative diplomatic process by all claimants" and thus it “is there to stay” has effectively internationalized the Spratly dispute. This elicited a fierce and thinly veiled threat from China. The Global Times, sister newspaper of the People's Daily, in its editorial titled "American shadow over South China Sea" warned ASEAN countries that "regional stability will be difficult to maintain" if they "allow themselves to be controlled" by the US.

Global Times further declared: "Southeast Asian countries need to understand any attempt to maximize gains by playing a balancing game between China and the US is risky. China will never waive its right to protect its core interest with military means." The United States had very recently and publicly announced that it would be happy to craft a legally binding and enforceable "code of conduct" to end the Spratly disputes that “threatens” regional stability, which received only lukewarm response from ASEAN. It is evident the regional body is reluctant to accept US offer as it rightly

perceives China would be not too pleased by US interference is what is essentially a regional issue involving specific claimant nations. The member states of ASEAN maintain friendly ties with US and use it from time to time as a bulwark against perceived expansionist moves by either China or external parties.

In addition, the US endorsement of Hanoi's view that the decades-old conflict should be resolved multilaterally rather than bilaterally has angered China which believes and prefers a bilateral route for effective negotiation. China's unwillingness to engage in multilateral negotiations with ASEAN, despite signing a declaration on the non binding and voluntary Declaration on the Conduct of Parties (DOC) with the regional group in 2002 for commercial cooperation and to maintain peace and stability in the region is based on two valid reasons: First, China does not believe that ASEAN is a relevant intermediary body as some of its member states themselves are claimants in the Spratly dispute; hence, any negotiations can get mired in conflict of interests. Secondly, the bilateral route is preferred by China as it has overlapping and competing claims only with four Asean member states (Malaysia, Vietnam, Philippines and Brunei) and the issue has little impact or ramifications for say Laos, Cambodia or Myanmar.

Diplomatic activities and means have been used vigorously to find a viable and long lasting solution to the sovereignty disputes, through the DOC and before that its predecessor The ASEAN Declaration on The South China Sea in 1992. Despite China's emphasis on joint development of the Spratly Islands what appears to have triggered the worry of the littoral claimants and extra regional power such as the US is the former's attempts at consolidating its advantages in power equations. The DOC remains a good will approach but has failed to produce any serious results as claimant countries do not want to appear to compromise on issues of sovereignty and nationalism (the islands themselves do not have any intrinsic value).

As China expands economically and militarily as a super power, it is expected to increase its operational reach into Spratlys. The termination of US military bases in Philippines and Vietnam has made the former anxious of its diminishing strategic role in this part of the region and the perceived rise of China which may use military force to strengthen its position for economic and geo strategic gains have unnerved the Asean claimants. This is aggravated by increasingly bold and belligerent statements from Chinese officials. For example, on 23rd September 2010, at the UN General Assembly, the Chinese premier said the nation would "never bend or compromise" on issues related to state sovereignty and territorial integrity" referring to South China Sea which prompted President Obama to delete the term "South China Sea" from a joint statement released after meeting with ASEAN member states in New York a day later. China need not fear the US encirclement despite the US moves to form strategic partnership with Vietnam and Asean states and in addition, Southeast Asian states expanding economic and trade ties with China will somewhat constrain them in terms of eliciting US support to push China to a solution.

The perpetuation of sovereignty disputes and the ongoing impasse does not see a final settlement in a short period. However, despite US stance in the South China Sea emphasizing on the need for its presence to ensure stability and safety of navigation, it is China and the five claimant states party to the Spratly dispute who must lead the way. There has to be political will to use existing mechanisms and institutions to manage the competing claims in the South China Sea. A rights-based solution or alternative dispute resolution approach will help. In order for the DOC to have any currency, it should be made into a legally binding document as there is widespread perception it is a dead letter due to the fact it is voluntary and non obligatory. In fact a China-Asean working group on the DOC met only four times since 2004. ASEAN must however, resist temptation to refer to the United States to help it craft an enforceable DOC despite its desire to use the US as a buffer against China and especially since US has aligned itself with Asean efforts to find a multilateral solution to the rival maritime claims. Instead, it is imperative that the states that signed the DOC come together for a negotiated approach to produce a more effective document. This is only possible with China coming on board and agrees to the obligatory nature of the DOC. The contents of the existing DOC have already set the path for joint resolution to the problem of South China Sea which was only an interim political agreement. Despite China and some claimants using force to take over some of the disputed marine features, China has accommodated the ASEAN nations in many instances related to the South China Sea claims and the dispute remains primarily confined to politics rather than military. Thus, making the DOC legally binding will further underscore the importance of peaceful and negotiated solution to the long standing problem. In fact, this should be discussed as the Asean as the China-Asean working group on the DOC is meeting for the second time in 2010.

The claimant states are signatories to UNCLOS which clearly outlines the claims of coastal states (the reference to UNCLOS appears in the DOC as a relevant convention for referrals related to maritime disputes) pertaining to exclusive economic zone, continental shelf and extended continental shelf. The UNCLOS equity principle is vital in maritime delimitation to ensure an equitable solution for all. The states will do well to resort to the Convention to discuss the sovereign status of their claims. In order to do that however, they have to first freeze their claims on the disputed areas. The language of international law and convention could set the stage for a more constructive solution to the problem. In addition, the equidistant line-based negotiations contained in UNCLOS for maritime boundary demarcation and delimitation is a good 'starting point' for negotiation, as it provides a point of reference for disputing states to pursue fairness or equity. This is of course subject to agreement by the claimants. It is important to note that all the Asean claimant states have good and expanding trade ties with China and may not want to risk pushing China to the corner jeopardizing economic relations and thus the "equity" approach is the best at the moment, especially with the economic success of China-Asean Free Trade Area (Cafta) since the beginning of 2010. Map 2 shows the UNCLOS-defined EEZ and the disputed islands in South China Sea.

Map 2: The EEZ in the South China Sea



The second institutional approach is through arbitration conducted by the International Tribunal on the law of the Sea (ITLOS) or the International Court of Justice (ICJ) using the UNCLOS provisions especially on the definition of island (article 121) and on ocean governance. It should be jointly submitted to the ICJ by all the claimants. Accepting third-party assistance for dispute settlement especially when issues are deadlocked and without hope of compromise must be considered. Third-party assistance is not the same as 'internationalization' of the disputes. 'Internationalization' of the disputes means intervention by foreign countries whereas third-party assistance refers to third-party involvement to reach equitable and peaceful solution such as through adjudication by the ICJ or ITLOS as arbitrator which has a binding force and the mediation by a conciliation commission.

Claimants not favorable to the ICJ adjudication can form an ad hoc arbitral tribunal of their own choice whereby parties to the disputes are free to select the arbitrators and jointly determine the tribunal's composition and terms of reference. While awaiting a good and realistic option to be achieved by negotiation among parties, joint development projects can be negotiated but to establish the economic zones, it is necessary to establish a formal treaty that freezes the existing claims of the disputants. Territorial disputes must be first resolved or temporarily shelved before joint exploration and exploitation of living and non living resources can occur as experience indicate that absence of agreement of sovereign rights of coastal states can dilute the position of negotiating states aggravated by imbalance in military might (especially in the case of China which in military terms is the strongest claimant). In fact joint development projects for oil and sea bed exploration and sharing of resource development as well as marine environmental protection should set the agenda for the immediate future.

This stop gap measure in the transitional period towards the final and equitable boundary settlement is practical and feasible approach. In addition, investors would be more encouraged to invest here if economic risks and political instability resulting from the jurisdictional disputes are minimized. The disputing states could reap the economic benefits from the resources. Shelving the disputes to establish the joint development area must not affect the claimant states' stance on maritime boundary delimitation during the period of joint development. Agreeing to joint development areas would entail affected parties to specify their claims and identify overlapping areas after which arrangements need to be made for joint assessment of resources and programme as well as sharing of profits and losses. Priority should be given to joint exploitation of fishery and marine resources as well as areas with promising oil and gas deposits. The Timor Gap Zone of Cooperation Treaty signed by Indonesia and Australia in late 1990 to establish provisional regime for joint development in the zone and Malaysian-Thai agreement to jointly explore and exploit oil and gas resources in the Gulf of Thailand can be used as effective examples. Some scholars have also suggested the forming an Eminent Persons Group that will function as high level dispute mediator consisting of distinguished and well known credible representatives who are acceptable to all disputing parties to induce a peaceful settlement.

At this crucial moment, disputes should not shift the attention from more pressing concerns in South China Sea which is becoming a haven for pirates as regionally coordinated patrol efforts and mechanisms in the Straits of Malacca to counter piracy have pushed the pirates to find newer pastures. In September 2010 alone, nine piracy incidents had been recorded by the International Maritime Bureau. This security threat could affect the South China Sea's strategic position as an important sea lane of communication. The littoral claimant states should come together and conduct for joint patrols in these strategic waterways which China and Japan (an estimate 75 percent of Japan's oil is conveyed through these sea lanes) in particular heavily depend on for energy imports. More than half the world's merchant fleet (by tonnage) traverse the South China Sea annually. Since the Spratly dispute impacts on the United States, particularly in terms of freedom of navigation and overflight, the states could consider having joint collaborative efforts with the US to ensure security of the sea lanes while the issue of sovereignty is being thrashed out.

Underlying the negotiations on the boundary delimitation is the spirit of compromise and accommodation. As the claimants are also signatories of the 1982 UN Convention on the Law of the Sea the disputing states should use the common and unified criterion to guide respective adjustments, using parameters set by Convention as departure points and taking into consideration the interests of all claimants including China. All relevant factors such as historic title, island entitlements, continental shelf rights, proportionality, geomorphological features, and economic interests will need considered. The following have been proposed by scholars studying the issue:

- Vietnam, the Philippines, Malaysia, and Brunei to have their own EEZ and continental shelf with mutually agreed adjustments.
- China has to relinquish its “nine-dashed intermittent line” and its "historic waters" claims and as a compensation given the middle part of the South China Sea (Thitu Island to the north, Amboyna Cay to the south, Nansha Island and Commodore Reef to the east, and Spratly Island to the west). It can be allowed to claim continental shelf by taking these islands as base points for connecting them.
- Applying the equidistant line method for delimitation in overlapping areas. If however, this method is found disagreeable, alternative arrangement regarding bi-or trilateral development can be arranged.

However, it is essential that as departure point for dispute settlement, the claimant states consult and reach agreement on their baselines.

Conclusion

The maritime jurisdictional disputes in the Spratly Islands are thorny as they can arouse parochial nationalism. Equitable solution to this problem is imperative and the way forward is clear with competing claimant states playing a leading role for joint economic development of the disputed areas while simultaneously seeking accommodation using UNCLOS principles in the settlement of disputes. In the mean time, parties to the dispute must be reminded through regular meetings the need maintain the status quo and refrain from military and economic activities, renounce the use of force, and guarantee the security and freedom of navigation in the sea lanes while awaiting the gradual process of negotiated settlements.

* * *

Pooja Theresa Stanslas – Senior Researcher at the Centre for Maritime Security and Diplomacy (MSD) in Maritime Institute of Malaysia (MIMA).

The views expressed herein are solely those of the author and do not reflect the views of MIMA or the Malaysian Government, as well as do not necessarily represent those of the Amicus Europae Foundation.