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Can the South China Sea Dispute be Resolved or Better Managed?

by

Dr. Ian STOREY
Senior Fellow, Institute of Southeast Asian Studies (ISEAS), Singapore

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Introduction

In February 2013, the eyes of the world were fixed on the Korean Peninsula following the DPRK's third nuclear test and subsequent threats to turn Seoul into a "sea of fire". North Korean rhetoric seems mainly for domestic consumption, as Kim Jong-Un moves to consolidate power following the death of his father in 2011, andtensions have eased.Now that the Korean Peninsula is relatively "calm", the focus has once again shifted back to the problem of contested territorial and boundary claims in Asia's maritime domain, specifically in the South China Sea and East China Sea. Over the past few years, these disputes have risen to the top of the regional security agenda where they are likely to stay for the foreseeable future given their seemingly intractable nature, growing nationalism in the claimant countries, an unwillingness to make concessions over sovereignty, and rising competition among the Great Powers for influence, markets, resources and ultimately primacy. The focus of this paper is the South China Sea and how the dispute may be mitigated.

The geopolitical and economic importance of the South China Sea is well known. The sea lanes which pass through it bind the economies of Southeast Asia together and act as vital arteries of world trade. Those same sea lanes also allow for the passage of military assets from the Indian Ocean into the Pacific Ocean and enable the Great Powers to project power across the region. Within the South China Sealie numerous small atolls and reefs, the majority of which are subject to competing sovereignty claims: the Paracel Islands in the northern part of the sea are occupied by the People's Republic of China (PRC), but this occupation is not recognized by Vietnam; further south, ownership of the Spratly Islands is claimed in whole by China, Taiwan and Vietnam, while parts of the group are claimed by the Philippines and Malaysia; Brunei and Indonesia have overlapping maritime boundary claims with China due to the latter's so-called "nine-dash line" which cuts into those two countries 200 nautical mile exclusive economic zones (EEZs). China, Taiwan, Vietnam, the Philippines and Malaysia have occupied a number of atolls and tried to entrench their sovereignty claims by constructing military and civilian infrastructure.

As with the East China Sea, however, the importance of the South China Sea dispute transcends the issue of proprietary rights over barren and largely uninhabited islets. For these disputes lie at the intersection of geopolitical forces that will determine the future of the Asia-Pacific region, the most critical of which are the rise of China and the trajectory of Sino-US relations. The disputes also underscore the growing importance of energy and sea lane security.

While tensions in the South China Sea have been rising in recent years, few observers predict that the dispute between China and the four ASEAN claimants will lead to all-out war in the South China Sea. All of the parties—indeed all countries in the Asia Pacific— have a common interest in maintaining peace and stability in the South China Sea and the free flow of maritime trade. As Indonesia's Foreign Minister Marty Natalegawa recently warned, "tinkering" with the fundamentals that have underpinned the shift in economic gravityfrom West to East over the past few decades could open a Pandora's Box.[1]

Conflict cannot, however, be ruled out. The main risk in the South China Sea is that one of the all too frequent "incidents at sea", in which patrol boats, warships, fishing trawlers and survey vessels belonging to the claimants bump up against each other, could spark a military confrontationtriggered by miscalculation, misperception or miscommunication. And while the countries involved would probably move very quickly to deescalate the crisis, lives could be lost and bilateral relations pushed to the brink. This risk is heightened due to the relative absence of conflict prevention and management mechanisms of the kind that existed between NATO and Warsaw Pact countries during the Cold War.Moreover, absent a resolution, the dispute will continue to fuel regional instability, uncertainty about the future, diplomatic and military tensions and defence acquisition programmes. It will also provide ample opportunities for the major powers to "fish in troubled waters".

Why are Tensions on the Rise?

Over the past two decades, tensions in the South China Sea have been cyclical. For much of the 1990s, and particularly between 1995 and 1998, the dispute generated serious tensions among the claimants, especially between China and Vietnam, and China and the Philippines. In the early 2000s, tensions eased considerably, primarily because the PRC adopted a more flexible and accommodating stance as part of its "Charm Offensive" towards Southeast Asia. China agreed to several conflict management and confidence building measures, most notably the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DoC) and the 2005 Joint Marine Seismic Undertaking, an agreement to conduct seismic exploration activities with the Philippines and Vietnam in disputed waters.

Since 2007-08, however, tensions have been steadily rising, and especially since 2010. They show no signs of declining any time soon. A number of factors account for the uptick in tensions.

First, popular nationalism concerning sovereignty of the disputed atolls has been growing in intensity, especially in Vietnam and China, but also in the Philippines. Nationalism not only constrains the claimant governments' policy options it also encourages posturing and makes the compromises necessary for a resolution of the dispute harder to achieve.

Second, and related, over the past several years nearly all the claimants have moved to strengthen their sovereignty and jurisdictional claims through national legislation, submissions to the United Nations Commission on the Limits on the Continental Shelf (CLCS) and administrative acts. Such activities invariably lead to protests from the other claimants, leading to claim and counter claim.

Third, competition over access to maritime resources such as crude oil, natural gas and fisheries has been rising, resulting in a number of tense standoffs and incidents at sea. In April-May 2012, for instance, disputes over fishing rights sparked a crisis at Scarborough Shoal between the Philippines and China. Ultimately the Philippines was forced to back down in the face of superior Chinese maritime power, and the PRC now exercises de facto control over Scarborough Shoal. A year earlier, Chinese vessels had cut the cables of Vietnamese-chartered survey ships exploring for oil in Vietnam's EEZ. In March 2013, Chinese patrol boats fired warning flares at four Vietnamese fishing boats, setting one ablaze. And tragically, in May, a Taiwanese fisherman on a trawler allegedly fishing in disputed waters was shot dead by the Philippine Coast Guard provoking in a serious crisis in Philippine-Taiwan relations.

Fourth, the dispute has become increasingly militarized. The rapid modernization of the People's Liberation Army Navy (PLA-Navy) and the expansion of China's civilian maritime law enforcement agencies has enabled China to increase its presence in the South China Sea to the outermost limits of its "nine-dash line" and bring coercive pressure to bear on the Southeast Asian claimants, particularly Vietnam and the Philippines.The stand-off at Scarborough Shoal is a prime example of China's ability to intimidate the other claimants.

Fifth, America's more active interest in the dispute since 2008 has added an extra layer of complexity to the dispute. The United States does not take a position on the territorial claims but regards freedom of navigation in the South China Sea as a national interest and has voiced concern at growing tensions. America's more proactive stance towards the South China Sea has been met with varying degrees of enthusiasm by Southeast Asian countries. However,in China's view —or at least the view expressed in many commentaries in the state-run media—America is the main cause of rising tensions. Chinese analysts have accused

Washington of "meddling" in the dispute and exaggerating tensions as a pretext to increase its military presence in Asia to contain or encircle China.[2] Chinese analysts have also accused Vietnam and the Philippines of colluding with the United States.

Can the Dispute be Resolved?

What are the prospects of a resolution to the South China Sea dispute? Realistically speaking, the prospects are not very bright, at least for the foreseeable future. Although avenues do exist to achieve a settlement —either through international legal arbitration or by agreement among the parties themselves to settle or put aside their sovereignty claims so that resource extraction can proceed— the requisite political will in the claimants' capitals is currently absent. Moreover, the compromises that would be needed to achieve a resolution have become much more difficult to achieve because the principal protagonists —China, Vietnam and the Philippines— have hardened their positions over their respective claims and also because of rising nationalist sentiment. In the minds of nationalists, compromises and concessionsaremanifestations of weakness, and no government can afford to be seen by its citizens as being weak, especially on an issue as ultrasensitive and emotive as sovereignty. It should also be noted, however, that claimant governments' have deliberately fuelled nationalist sentiment over sovereignty issues, and used it as justification for adopting inflexible positions. Notwithstanding these obstacles, however, it is worth exploring some of the conflict resolution options that are available to the disputants should they muster the political will to pursue them.

In terms of international legal mechanisms only one body exists that has the authority to make a ruling on sovereignty of the Spratly Islands: the International Court of Justice (ICJ) based in The Hague, The Netherlands. Established in 1945 by the UN Charter, it is the world's principal judicial organ whose role it is to settle legal disputes involving member states. Since 1947, 152 cases have been submitted to the ICJ.[3] Three Southeast Asian countries have submitted their maritime territorial disputes to the ICJ: in 1998 Malaysia and Indonesia asked the ICJ to rule on ownership of Sipidan and Ligitan, two small islands off the coast of Sabah, and in 2003 Malaysia and Singapore submitted their dispute over ownership of Pedra Branca in the Singapore Straits. In 2002, the ICJ ruled that sovereignty of Sipidan and Ligitan belonged to Malaysia.[4] In 2008 the Court ruled awarded Singapore sovereignty over Pedra Branca and Malaysia ownership of Middle Rocks.[5] In both cases the key factor

which led the ICJ to award sovereignty was the ability to demonstrate the exercise of continuous and effective administration of the islands in dispute. Although all three countries accepted the Court's decision, subsequent disputes arose over the islands' maritime zones — an issue that the ICJ had not been asked to adjudicate in either case— particularly between Indonesia and Malaysia over access to energy resources in the Ambalat area.

The two rulings had important implications for the South China Sea dispute. First, they underscored the importance the Court attached to acts of administration. As a result, nearly all of the claimants stepped up activities designed to demonstrate administrative control over the atolls they occupied, including enhancing postal, telecommunication and transport links, and expanding and upgrading civilian and military infrastructures. Naturally these activities were protested by the other claimants as a violation of their sovereignty and an infringement of the DoC. It could be argued, therefore, that the ICJ rulings in Southeast Asia indirectly contributed to rising tensions in the South China Sea after 2007-2008. Second, the ICJ decisions raised questions about whether the disputed features should be classed as islands or rocks, and the maritime zones they could generate.

What are the chances that the ICJ will be asked to rule on the sovereignty of the Spratly Islands? At present the chances are virtually nil. While the Philippines has indicated that it would be willing to submit its claims to the ICJ, China has firmly ruled it out. China's long-standing policy is that it will not submit territorial and maritime boundary disputes to international legal arbitration. As far as China is concerned, the South China Sea dispute is bilateral in nature and can only be resolved by it and the Southeast Asian claimants on a one-on-one basis. While this formula has proved successful since the early 1990s in the resolution of most of China's land border disputes, and with Vietnam in 2000 over the Gulf of Tonkin, it has found little support among the Southeast Asian claimants in the South China Sea principally, it would seem, because of concerns over asymmetries of power.

China's negative attitude towards legal arbitration has been clearly demonstrated in 2013. On 22 January, the Philippines unilaterally submitted Sino-Philippine overlapping jurisdictional claims in the South China Sea to the UN.[6] Manila's submission challenges the validity of China's nine-dash line map and its apparent claims to sovereign rights within that line. The Philippine submission requests that an Arbitral Tribunal rule that China's claims are incompatible with UNCLOS and therefore invalid, and that China must desist from unlawful activities in the Philippines' declared EEZ, including the exploitation of living and non-living resources.[7] The submission does not call on the Arbitral Tribunal to determine sovereignty of the disputed islands (only the ICJ can do so) nor —in the view of the Philippines— does it

raise issues from which China in 2006 excluded itself from compulsory dispute resolution under UNCLOS including sea boundary delimitations, historic bays and titles and disputes concerning military activities.

In accordance with established policy, China has refused to participate in the proceedings. Instead it has reiterated that the dispute should be resolved through bilateral consultations and negotiations.[8] On 19 February China sent a *note verbale* to the Philippines' Department of Foreign Affairs formally rejecting its Notification and Statement of Claim on the grounds that it was "legally flawed".[9] In response, the Philippines stated that it remained committed to the arbitration process. It seems likely that China decided not to contest the case because of the high chance that the nine-dash line map would be declared invalid by the tribunal, a decision that would have embarrassed Beijing and set off a nationalist firestorm in the PRC.

Despite China's dismissal of the Philippine submission, the case will continue. Following China's failure to appoint a judge within the required timeframe, the President of the International Tribunal on the Law of the Sea (ITLOS), Shunji Yanai, appointed a Polish judge, Stanislaw Pawlak, on its behalf.[10]Yanai went on to appoint three further judges to complete the panel of five (in its initial submission the Philippines had already selected its judge).[11]Once convened, the Arbitral Tribunal will decide whether the submission falls within its jurisdiction, a process that could take up to a year. If the Tribunal decides that it does have jurisdiction, a final ruling could take several years to reach. Any ruling handed down by the Tribunal will be binding but not enforceable. Should the Tribunal rule that China's claims are incompatible with UNCLOS, it will represent a victory for the Philippines and would put the onus on China to clarify its maritime claims. As seems likely, however, the PRC will simply ignore the ruling.

Two other possible avenues exist to resolve the dispute peacefully. The UN encourages countries that have territorial and maritime boundary disputes to resolve them on a bilateral or multilateral basis, and only turn to the ICJ or ITLOS as a last resort. In theory, therefore, the parties to the South China Sea dispute could sit down and negotiate ownership of the islands and agree on maritime boundaries. However, such a process would be fraught with difficulties for a host of reasons including, as noted earlier, moves by the claimants to strengthen their sovereignty and jurisdictional claims, an unwillingness to compromise due to rising nationalist sentiment, China's insistence that the dispute be resolved bilaterally, and because Taiwan is not recognized as a sovereign state by the other five claimants (Taipei has been consistently excluded from talks to manage and/or resolve the dispute).

A third possible option would be for the claimants to recognize that a legal or negotiated settlement is currently out of reach, and that the issue of sovereignty be set aside in favour of joint exploration and exploitation of maritime resources. This option was, of course, first suggested by Premier Deng Xiaoping in the late 1970s at a time when China was courting the ASEAN countries. But while it has remained a Chinese mantra ever since, Beijing has never expounded on the concept or suggested a framework to operationalize it. Nor has China ever taken seriously suggestions by other countries to put Deng's maxim into effect. For instance, in 2011 the Philippines made a proposal to transform the South China Sea into a Zone of Peace, Freedom, Friendship and Cooperation (ZoPFFC). The Philippine initiative envisaged a two-step process. The first would be to "segregate" disputed from non-disputed areas. Essentially this would mean declaring coastal waters, EEZs and continental shelves as "non-disputed" as these areas are governed by UNCLOS. In the Philippine view, only the Spratly Islands is a truly disputed area and should be "enclaved" accordingly. The second step called for the demilitarization of the Spratlys and the establishment of a joint agency to manage seabed resources and fisheries. In short, the ZoPFFC provided a roadmap for Deng's proposal. However, while China did not respond officially to the ZoPFFC, the state-run media derided it as a "trick" designed to facilitate US "meddling" in the South China Sea.[12] The ZoPFFC also failed to elicit support from the Philippines' fellow ASEAN members and was quietly shelved. Its rejection by China, and the lack of enthusiasm within ASEAN were major factors in Manila's decision to challenge the PRC's maritime claims at the UN.

One further option to "resolve" the dispute would be the use of force. Among the six claimants, only China is capable of pursuing that option as the modernization of the PLA over the past two decades has provided it with the capabilities to capture and probably hold the South China Sea atolls. However, such a scenario seems highly unlikely, as least in the short to medium term. China and the four ASEAN claimants eschewed the use of force to resolve the dispute in the DoC, a commitment all parties have reiterated time and again. Even if China were to renege on this pledge, the costs would far outweigh the benefits: military action by the PLA in the South China Sea would completely undermine China's "peaceful development" thesis; ruin its international image; reinforce the "China threat" thesis; disrupt maritime traffic on which the region's economic development depends; and push Southeast Asian countries into a tighter strategic embrace with the United States. None of these outcomes would be in China's interests.

The DoC and CoC Process: Is it Going Anywhere?

ASEAN as an organization does not take a position on the merits of its members' claims in the South China Sea, not those of China. Nor is ASEAN in a position to "resolve" the dispute: as noted above, a settlement can only be achieved through international legal arbitration or through negotiations among the claimants themselves. However, as the dispute fundamentally affects regional stability, and impacts ASEAN-China relations as a whole, ASEAN has been engaging China on how to better manage the dispute since the 1990s. The results have been mixed, to say the least.

The 2002 DoC was signed after several years of negotiations, and is a non-binding political agreement designed to reduce tensions and build trust through cooperative activities and confidence building measures. However, it was not until July 2011 that ASEAN and China finally agreed on a set of guidelines to implement the DoC, by which time tensions were already on the rise. Those guidelines were short on specifics and merely reiterated the parties' commitment to promote peace and stability in the South China Sea and a peaceful resolution of the dispute, agreement to implement the DoC in a "step-by-step" manner, that participation in cooperative projects would be voluntary and that confidence building measures (CBMs) would be decided by consensus. While most ASEAN members, including Vietnam which had pushed for a stronger set of guidelines, put a brave face on the agreement, Philippine Foreign Secretary Albert del Rosario expressed the sentiments of many observers when he bemoaned the fact that without a more robust set of guidelines, the DoC still "lacked teeth".[13]Nevertheless, the guidelines broke the impasse and in January 2012 senior officials from ASEAN and China agreed to start implementing cooperative projects in four areas: search and rescue; marine ecosystems and biodiversity; marine hazard prevention and mitigation; and marine ecological environment and monitoring technique.Discussions continued between the two sides during 2012 and into 2013 but to date none of these projects has been implemented.

Even as talks on implementing the DoC continue, attention has shifted to the more urgent task of negotiating an ASEAN-ChinaCode of Conduct for the South China Sea (CoC) which the DoC calls for. The purpose of a CoC is much the same as the DoC, i.e. to reduce tensions and build trust, though it is envisaged as being "legally binding" and more detailed than the DoC. There is general consensus within ASEAN on the need for a CoC, and by mid-2012 the member states had agreed on a set of "proposed elements" as the basis for a code.[14]Much of the language was standard boilerplate, and the suggested mechanisms for

resolving disputes arising from violations or interpretations of the code seemed unworkable or inappropriate. These mechanisms included the ASEAN High Council (contained in the 1976 Treaty of Amity and Cooperation), the ICJ and ITLOS. The High Council has never been invoked, cannot issue binding rulings, and in any case it would be highly unlikely that China would allow it to discuss the South China Sea given that it would be outnumbered 10 to 1. As for the other options, as noted earlier, China has always ruled out taking the dispute to the ICJ and in 2006 exercised its right to opt out of ITLOS procedures concerning maritime boundary delimitation and military activities.

According to Mark Valencia, ASEAN subsequently drew up a "Zero Draft" of the CoC which mainly draws on the DoC and "proposed elements" but also contains some new provisions.[15] These new provisions include a clause calling on the parties to respect the EEZ and continental shelf of the coastal state, that the CoC shall apply only to "unresolved maritime boundary areas", and that the signatories refrain from conducting military exercises and surveillance activities, or other "provocative actions" in the South China Sea.[16]Some of the provisions are too vague and likely to be contested by some of the ASEAN states and China.

In late 2011 China agreed with ASEAN in principle to begin talks on a code in 2012. Six months later, however, it slammed on the brakes. During the ASEAN Leaders Summit in Phnom Penh in July, Chinese Foreign Minister Mr. Yang Jiechi stated that the "time is not ripe" to begin talks. China felt it was not ready to start discussions on the code for three reasons.[17] First, China accuses the Southeast Asian claimants, and particularly Vietnam and the Philippines, of repeatedly violating the DoC through unilateral and provocative activities that breach the "self restraint" clause. Of course Hanoi and Manila level the same accusation at Beijing, and it could be argued that China's "seizure" of Scarborough Shoal was a gross violation of the DoC. At any rate, China sees little point in pursuing a CoC when the DoC is not, in the words of Vice Foreign Minister Madame Fu Ying,being "faithfully observed".[18]Manila's decision to challenge Beijing's maritime claims at the UN in January provided Beijing with another reason to defer talks with ASEAN on a code, for in China's view it violates the spirit of the DoC.[19]

Second, while ASEAN maintains that it does not take a position on competing territorial claims in the South China Sea, Beijing remains unconvinced and suspects that Manila and Hanoi seek to harness ASEAN's agenda in pursuit of their own interests, and those of the United States.

Third, China is only willing to consider talks with ASEAN on the basis of equality. It does not want an ASEAN "zero draft" to be the basis of negotiations. Moreover, China feels that the ASEAN states are trying to "bully" it into agreeing to talks, and that the organization's behaviour does not resonate well with public opinion.[20]

Lack of progress on the South China Sea is not only due to intransigence on China's part, but also the lack of consensus within ASEAN on how to deal with the problem. This lack of consensus stems from differing national interests and their varied relationships with China.The ten members of ASEAN have differing interests in and positions on the South China Sea: Vietnam and the Philippines view the problem as a major national security concern; fellow claimants Malaysia and Brunei tend to downplay tensions; Indonesia and Singapore have both called on China to clarify its claims; the four non-claimants in mainland Southeast Asia —Thailand, Myanmar, Cambodia and Laos— do not perceive a direct stake in the dispute and in any case wish to avoid jeopardizing close economic and political links with China by taking positions inimical to Beijing's interests.[21]

ASEAN does have a lowest common denominator consensus on the dispute: that all parties and stakeholders have a vested interest in peace and stability in the South China Sea; that the dispute should be resolved peacefully in accordance with international law and without the use of force; and that China and ASEAN should pursue confidence building measures to reduce tensions. But beyond this there is no consensus on how to move forward with conflict management and conflict resolution. The problem of ASEAN solidarity over the South China Sea was brought into sharp relief in July 2012 whenASEAN failed to issue a joint communiqué because of differences over whether the dispute should be mentioned.[22] At the 22nd ASEAN Summit in April 2013 the ASEAN Chair, Brunei, moved skillfully to avoid a repeat of the July 2012 fiasco by ensuing a consensus position among the ten members. Nevertheless, the divisions within ASEAN over the South China Sea still exist, and could well grow in the face of increasing Sino-US competition.

As the 2013 Chair of ASEAN, Brunei has made the CoC a priority, as has the organization's new Secretary-General Le Luong Minh. At the 22nd ASEAN Summit in Bandar Seri Begawan on 24-25 April, the foreign ministers agreed to work with China for the "early conclusion" of such a code.[23]Prior to the summit, Foreign Minister Natalegawa had indicated that ASEAN and China would begin talks on a CoC.[24] It was subsequently reported that China's newly appointed foreign minister, Wang Yi, had agreed to start discussion at a meeting of senior officials on 2 April.[25] Between 1-5 May, Wang visited Thailand, Indonesia, Singapore and Brunei. This was his first overseas trip as foreign minister and was widely

perceived as aimed at improving relations between China and Southeast Asian countries in the wake of on-going tensions in the South China Sea. In a joint press release issued on 5 May in Brunei, it was announced that agreement had been reached to "advance the Code of Conduct (COC) progress in a step by step manner" and that the issue would be discussed by the Joint Working Group (JWG) on implementing the DoC in Thailand later the same month. An Eminent Persons and Experts Group (EPEG) on the CoC would also be established to compliment the work of the JWG.[26] The composition of the EPEG and how it would assist the JWG was not stated.

Are we on track for an ASEAN-China CoC in time for the next summit in October? Probably not. The deadline, as with previously suggested deadlines for a code, is unrealistic. Based on the experience of the DoC, discussions are likely to be prolonged, perhaps lasting several years. In addition, whether China's offer to start talks is a genuine attempt to move the process forward remains open to question. Wang's offer of talks may have been aimed to alleviate pressure on China from some of the ASEAN members to negotiate a CoC, deflect criticism from its assertive actions in the South China Sea, and allow Beijing to focus on the Senkaku/Diaoyu dispute with Japan which almost certainly has a higher priority than the problems in the South China Sea. By agreeing to begin talks with ASEAN, China may be hoping to project the image of a cooperative and constructive partner, but then blame the lack of progress on the Philippines and Vietnam for alleged violations of the DoC. The *China Daily* offered a foretaste of this when it stated that China is "not afraid to talk about 'codes of conduct' but first it has to be determined which country (or countries) is violating the spirit of the Declaration on the Conduct of Parties in the South China Sea. Otherwise no 'code of conduct' will seem credible."[27] Moreover, even if, after a year or two of talks, ASEAN and China finally do agree on a code, given the differing positions of the various parties, and the need to achieve consensus, how effective will it actually be in reducing tensions? It is unlikely that an ASEAN-China code of conduct of the South China Sea will fundamentally affect the central dynamics of the dispute.

Additional Conflict Management/Prevention Mechanisms

In addition to the DoC/CoC process —or even as part of it— there are other conflict management and prevention mechanisms which, if all parties adhered to, might significantly reduce the risk of a naval clash in the South China Sea.

The Convention on the International Regulations for Preventing Collisions at Sea (COLREGS)

COLREGS was adopted in 1972 by the International Maritime Organisation (IMO), the specialized agency of the UN with responsibility for the safety and security of shipping. There are 170 members of the IMO including China and the ten ASEAN members. COLREGS essentially sets out the "rules of the road" to prevent collisions between ships.[28] It includes rules governing when ships should give way, overtaking procedures, and head on and crossing situations. Although all the parties to the South China Sea dispute are bound by COLREGS there have been instances in which the rules have been violated.[29] The CoC should include a clause reminding the parties that ships flying their flag are bound by the rules of the Convention.

Code for Unalerted Encounters at Sea (CUES)

CUES was developed by the Western Pacific Naval Symposium (WPNS), a forum inaugurated in 1988 to promote cooperative initiatives among regional navies. The WPNS has 20 members, including the PRC and 8 ASEAN members (Brunei, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam). The first draft of CUES was released in 1999. The purpose of CUES is to "offer safety measures and a means to limit mutual interference and uncertainty and facilitate communication when naval and public ships, submarines or aircraft make contact".[30] Specifically it provides a code of conduct for when warships encounter each other "casually or unexpectedly".

CUES encourages WPNS navies to comply with the COLREGS. It lists actions which a "prudent commander" should avoid, including "simulation of attacks by aiming guns, missiles, fire control radars, torpedo tubes or other weapons in the direction of vessels or aircraft encountered", the discharge of weapons in the direction of other vessels, and "aerobatics in the vicinity of ships encountered" (i.e. low level over passes or "buzzing").[31] Parts 4 and 5 of CUES suggest a set of standard communication procedures for ships and aircraft, including emergency signals.

CUES is not an international treaty and it adoption by WPNS navies is voluntary. It is unclear whether the navies and maritime agencies of China and the eight ASEAN members have adopted CUES. In order to improve communication between and among the navies of claimant states, and prevent encounters at sea from escalating into crisis situations, the naval forces of ASEAN and China should give serious consideration to implementing CUES if they have not already done so.

Incidents at Sea Agreements

Arguably the most successful maritime CBM has been a series of INCSEA agreements between the USSR/Russia and 12 other countries signed between 1972 and 1994.[32] The first INCSEA —known officially as the Prevention of Incidents on and Over the High Seas— was signed in 1972 and set out procedures designed to avoid collisions at sea and hostile manoeuvres. As noted by David Griffiths, while the Soviet-US INCSEA did not prevent incidents from happening it "provided an effective mechanism to keep them from escalating out of proportion".[33] The fact that the agreements have outlasted the Cold War, and that Russia and America still hold an annual dialogue on INCSEA, is a testament to its success as a CBM.

The US and China have had an INCSEA-type framework in place since 1998 known as the Military Maritime Consultative Mechanism (MMCM). However, the MMCM has been much less successful than the 1972 INCSEA mainly due to the fact that whereas Washington and Moscow both agree that foreign military surveillance activities in the EEZ of another country are legitimate, Beijing's position is that they are illegal. China is reluctant to negotiate an INCSEA with America on the grounds that it would simply legitimize US military activities in their EEZ. This fundamental difference of opinion led to the Impeccable Incident in 2009. And while the MMCM established a telephone hotline, when the US military tried to contact its Chinese counterpart during the Impeccable Incident, no one picked up the phone in Beijing.[34]

An INCSEA between China and ASEAN countries, or between China and ASEAN as an organization, might be less controversial as some members take the same position as China on foreign military activities in the EEZ. An ASEAN-China INCSEA could incorporate COLREGS and CUES and establish other CBMs such as telephone hotlines and advanced notification of naval exercises in the South China Sea (a requirement set out in the DoC which has been largely ignored by the claimants).

Conclusion

Due to a combination of factors, including rising nationalism, rivalry over maritime resources, changes in the military balance of power in Asia, hardening positions over territorial and maritime boundary claims, and sharpening geopolitical competition between China and America, the South China Sea dispute has entered a new and perhaps more dangerous phase. While few observers predict a major conflict in the South China Sea, ongoing tensions continue to breed suspicions, worst case scenario thinking, arms build-ups and regional instability. The increasing frequency of incidents at sea raises the risk of an accidental clash at sea which could escalate into an unwanted diplomatic and military crisis. In my view, it is simply a matter of time before a naval clash occurs and lives are lost.

A resolution to the dispute seems as far away as ever —further in fact. And joint development also seems a distant prospect. The political will to achieve progress on either front is simply not present today. While it is unclear how long the status quo will continue, it is imperative that the claimant countries, supported by other interested stakeholders, focus on concrete and achievable conflict management mechanisms which go beyond mere symbolism. These include a robust and effective CoC which clearly articulates expected norms of behaviour and activities which disputants should refrain from. ASEAN and China should also adhere to existing conflict prevention mechanisms such as COLREGS and CUES. An ASEAN-China INCSEA could draw on both these documents.

The window of opportunity to negotiate and operationalize CBMs and thus create an environment of trust favourable to a peaceful and mutually acceptable resolution to the dispute seems to be closing. Now is the time for action.

NOTES

[1] "Indonesia floats South China Sea draft at UN", *Associated Press*, 26 September 2012.

[2] See, for instance, "Clearing the sea of troubles", *China Daily*, 4 May 2013.

[3] See International Court of Justice website < http://www.icj-cij.org/homepage/>.

[4] Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes," *Harvard Asia Quarterly* (Fall 2005), pp. 36-46.

[5] Ian Storey, "Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation", in Daljit Singh (ed.), *Southeast Asian Affairs 2009* (Singapore: ISEAS, May 2009), pp. 36-60.

[6] Notification and Statement of Claim, Department of Foreign Affairs, Manila, 22 January 2013, available from <http://www.dfa.gov.ph/>.

[7] Ian Storey, "Manila Ups the Ante in the South China Sea," *China Brief*, Vol. XIII, Issue 3 (1 February 2013).

[8] Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on January 23, 2013.

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[27]"Clearing the sea of troubles", *China Daily,* 4 May 2013.

[28] Convention on the International Regulations for Preventing Collisions at Sea 1972 available at <http://www.imo.org.>

[29] For a video of one such incide see <http://www.youtube.com/watch?v=nOOlX9a_ZQA&feature=related> . In this encounter — which is alleged to have taken place somewhere in the South China Sea in 2011— a Vietnamese coast guard vessel rams a China Marine Surveillance ship in clear violation of the COLREGS.

[30] Code for Unalerted Encounters at Sea, p. 4.

[31] Ibid. p. 12.

[32] The USSR/Russia signed INCSEAs with the United States (1972), the United Kingdom (1986), Canada (1989), France (1989), Italy (1990), Norway (1990), Spain (1990), Greece (1991), Japan (1993) and South Korea (1994).

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