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No. 89/2011 dated 9 June 2011

China's Fishing Ban in the South China Sea: Implications for Territorial Disputes

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Synopsis

China's enforcement of a fishing ban in the South China Sea poses a dilemma for Vietnam as well as itself. Following legal principles could provide a solution for both parties while meeting conservation needs.

Commentary

THE 11 MAY 2011 announcement of China's annual fishing ban between 16 May and 1 August 2011 in the northern section of the South China Sea is likely to be defied by Vietnam. Such annual fishing bans have in the past evoked strong Vietnamese protests. While Hanoi accused China of violating its sovereign right in the sea outside the Gulf of Tonkin, Vietnamese fishermen have opposed the ban and vowed to continue their fishing as usual.

The defiance of China's fishing ban is likely to result in the arrest of Vietnamese fishermen and the confiscation of their vessels by Chinese authorities. This will lead to renewed tension and friction in the region, and damage the efforts of both China and Vietnam to improve their global image.

Dilemma of unilateralism

While a fishing ban during the spawning season is a necessary conservation measure to allow fish to replenish, what is controversial is the area that China's fishing ban covers: it is not only China's legitimate areas but also areas that Vietnam considers to be under its sovereignty and jurisdiction. The area also involves the Paracels, a group of islands at present occupied by China but also claimed by Vietnam. It is also a matter of concern to Vietnam that China's fishing ban covers areas that would have belonged to Vietnam had a delimitation line been marked in accordance with international law.

Vietnam faces a policy dilemma as a result of China's fishing ban. If its fishermen were ordered to refrain from going offshore, Vietnam would be considered as implicitly recognising China's sovereignty in the disputed areas. Thus, Vietnam decided to challenge the fishing ban even though it might be blamed for acting in an environmentally unfriendly way and, arguably, paying little regard to its conservation obligation.

Given its current naval capability, China has no difficulty in unilaterally enforcing the fishing ban. But taking unilateral measures may not be wise for China as the international community has been closely observing its more assertive behaviour in territorial disputes. China's enforcement of the fishing ban coupled with harsh measures against Vietnamese fishermen will deepen the concern that China is acting more aggressively on territorial issues.

Most importantly, the very purpose of conservation of the fishing ban is defeated by both China and Vietnam's unilateralism. China's typical countermeasures of arresting and confiscating fishing vessels do not deter the Vietnamese fishermen who are backed by their national authorities, much less provide a long-term solution from a conservation perspective.

The legal framework and state practice

The recent China-Vietnam spat over fisheries is, however, hardly unique. Such controversies are characteristic of maritime and territorial disputes in the world. Where maritime jurisdictional zones overlap, the United Nations Law of the Sea Convention (LOSC) already provides a solution. Parties to a dispute are to enter into a provisional arrangement of a practical nature, which is without prejudice to the final delimitation.

Among the existing arrangements that states practise is the so-called 'grey zone' model. This best serves conservation purposes as far as fisheries are concerned. Basically, this model stipulates that the disputed area -- the 'grey zone' -- is defined and temporarily separated from the maritime zones that apparently belong to only one country under international law. In this grey zone, one country will not enforce its laws against vessels of the other. However, to ensure sustainable fisheries, the two countries may agree to uniform conservation measures in the grey zone. Such a modus operandi with regard to fisheries in contested waters is possible thanks to the without prejudice clause omnipresent in every arrangement.

'Grey zone' agreements are not alien to China. Indeed, Beijing concluded two agreements of this kind with Japan and South Korea in 1997 and 2000 respectively to regulate fisheries in their overlapping maritime zones in East Asia. It is noteworthy that the former arrangement functions successfully even in the waters adjacent to China's claimed Diaoyu/Senkaku which Japan presently occupies.

The Paracels: An 'insurmountable' obstacle?

The controversies over the fishing ban have been a recurrent theme but an unaddressed issue in Sino-Vietnamese bilateral relations for more than a decade. This is despite both having entered into a fisheries cooperation arrangement. In fact with regard to the Gulf of Tonkin only, China and Vietnam concluded a reciprocal fisheries agreement in 2000 as a complement to their boundary delimitation settlement. This fact, plus the above-mentioned fisheries arrangements in East Asia, makes it hardly conceivable that there is as yet no modus operandi between China and Vietnam regarding fisheries regulation in the waters outside the Gulf of Tonkin.

The single obstacle to a fisheries arrangement outside the Gulf of Tonkin is the Paracels --sovereignty of which is being disputed by China and Vietnam. The existence of the dispute is both a matter of fact and a matter of law -- as China argues in relation to the Diaoyu/Senkaku dispute. It is on that basis and with long-term interests in mind that China and Vietnam should work closely with each other toward a provisional fisheries arrangement.

Such an arrangement should not compromise the position of either country on the Paracels. It will serve as the most graphic example of how China and Vietnam can engage in a 'comprehensive strategic cooperation partnership' for mutual economic development and regional stability.

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