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Managing the South China Sea: Sovereignty is not the Issue

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Synopsis

Sovereignty disputes and maritime boundaries in the South China Sea will not be resolved in the foreseeable future. Accordingly the claimant countries must change their mindsets from nationalistic assertions of rights to one of functional cooperation and management.

Commentary

TWO ISSUES confuse discussion of the South China Sea disputes. The first is the mistaken notion that sovereignty over the islands and reefs of the sea can be resolved on a multilateral basis. This is incorrect because sovereignty is fundamentally a bilateral issue for resolution between the states that claim a particular feature.

The second confused idea is that maritime boundaries, or some other segregation of the disputed areas, will be determined by the law. This is also incorrect. The settlement of boundary disputes, like that of sovereignty, is fundamentally a political issue for negotiation between the respective parties.

Sovereignty

China is regularly criticised for seeking to discuss the sovereignty disputes in the South China Sea bilaterally. Along with Taiwan and Vietnam, China lays claim to all the insular features of the sea; except the islands in the far south that are under either Malaysian or Indonesian sovereignty, and the islands close to the coast of Vietnam. Some of the disputed features are also claimed by Brunei, Malaysia, and the Philippines.

While arrangements for cooperation in managing the South China Sea and its resources can be discussed multilaterally, sovereignty is a matter for bilateral discussion between the disputing parties. ASEAN, for example, as a regional grouping, cannot discuss sovereignty over particular features with China.

As Ambassador Tommy Koh pointed out in a recent Review Brief in The Straits Times: "ASEAN as a group, does not support or oppose the claims of the four ASEAN claimant states." He noted that "any perception that the claims of Brunei, Malaysia, the Philippines and Vietnam are backed by ASEAN is incorrect".

The disputes over the Spratly islands are a difficult issue for ASEAN because the features claimed by the Philippines, Malaysia and Brunei are also claimed by Vietnam. Bilateral resolution of these claims between the ASEAN members would be a major step forward that would then allow subsequent bilateral negotiations with China. However, this step is unlikely while countries focus on asserting their individual claims.

The UN Law of the Sea Convention (UNCLOS) is often cited as the magic document that if properly followed, would resolve the problems of the South China Sea. However, UNCLOS is not intended to address sovereignty disputes. These must be reconciled on a bilateral basis between the disputants. The law of the sea only comes into play when sovereignty over land features has been agreed.

Maritime Boundaries

Maritime boundaries are intended to set limits on sovereignty, jurisdiction and the allocation of resources, and provide a basis for effective management of regional oceans and seas. Without them, good order at sea is much more problematic.

Good order at sea, including effective arrangements for the development and management of resources, is customarily based on cooperation between states and agreed maritime boundaries between them. However, due to the complex geography of the South China Sea and the multiple bordering states, a conventional system of straight line maritime boundaries will be impossible to achieve in many parts of the sea. This situation is aggravated by the difficulties of resolving the sovereignty disputes, including agreement on which insular features qualify as “islands” under international law entitled to a full set of maritime zones.

The UN guidelines for determining maritime boundaries note that the negotiation of a maritime boundary between two or more States is always “political in nature”. The law of the sea can inform negotiations, but ultimately the negotiating countries can agree whatever boundary they like. The same goes for determining some other basis for delineating areas for joint or cooperative management in the South China Sea. The process is essentially a political process between the parties.

Changing Mindsets

The South China Sea disputes will only be settled when the bordering countries change their mindsets from one of sovereignty, sole ownership of resources and seeking “fences in the sea” to one of functional cooperation and cooperative management. Largely led by the Indonesia-sponsored workshops on resolving conflict in the South China Sea, this was where the process was heading in the 1990s and early 2000s. However in recent years it has become bogged down by nationalistic assertions of sovereignty, some of which are ill-founded, which set back any progress towards cooperation with managing the sea, its environment and its resources.

While countries have this nationalistic mindset, settlement of the South China Sea disputes is highly unlikely. Besides the difficulties of negotiating a solution to a problem that involves six parties — one of which, Taiwan, is not recognised by the others as a legal entity — none of the claimants have demonstrated the political will to compromise on their sovereignty claims.

A cooperative management regime is the only solution. The only acceptable framework for such a regime would be a web of provisional arrangements covering cooperation for different functions and perhaps even with different areas for each function. These functions include development of oil and gas resources, fisheries management, marine safety, marine scientific research, good order at sea, and preservation and protection of the marine environment.

Furthermore any agreement or plan along these lines developed by ASEAN members that ignores the position of China is doomed to failure. Discussion of this functional approach must be on the agenda to prevent the South China Sea from simmering away as a major obstacle to regional stability.

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