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No. 166/2012 dated 5 September 2012

Rethinking Territorial Disputes in the South China Sea: Transforming Problem into Opportunity

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Synopsis

The disputes in the East and South China Seas have not led to war so far, but they can stoke competitive nationalisms and strategic alignments with worrying consequences for regional peace and security. Yet, they present an opportunity to construct a rules-based order grounded in principles and guided by an effective management regime and dispute settlement mechanism.

Commentary

THE TERRITORIAL disputes in the South China Sea have long been seen as a national and regional security problem. Though characterised as flashpoints, these disputes thus far have not resulted in outbreaks of war, and, by themselves, are not serious enough reasons for states to go to war with each other. The political, diplomatic, economic, and military costs of war in the contemporary era are very high.

Such considerations have prevented states from going to war over even more acute conflicts like that across the Taiwan Strait and on the Korean peninsula. Occasional tension and military clashes over maritime disputes has been the pattern over the last three decades, and is likely to continue. They are nevertheless a source of insecurity in the region especially for the smaller claimant countries.

Strategic significance

The strategic significance of the disputes has been raised by the fact that rising China is a major claimant. Beijing's U-shaped, nine-dashed lines lay claim to about 80 percent of the South China Sea. Beijing's attitude and behaviour in relation to the disputes have come to be viewed as a gauge of how a strong China may behave in the future. Such perceptions, combined with Chinese rhetoric and actions, have the potential to fuel anti-China sentiments and competitive nationalisms, reinforce historical antagonisms, and affect strategic alignments in the region. Smaller claimant countries may turn to more powerful countries like the United States to deter and counter Chinese assertiveness. Although the US is unlikely to become embroiled in these disputes, its so-called "pivot to Asia" strategy, along with Secretary Clinton's November 2010 remarks in Hanoi, has been widely interpreted in Asia in that context.

Competitive strategic alignments, if they do occur, will make power politics more prominent in the Asian security region working to the detriment of an ASEAN-centric rules-based order in Asia. There will still be rules but power would feature more prominently than principles in the making of order. The disputes could also

undermine ASEAN as an institution and its peace and security role in Asia. The failure of the 45th ASEAN Ministerial Meeting to issue a joint declaration is widely perceived as a setback for ASEAN. The subsequent joint ASEAN statement of principles mitigates but does not fully repair the damage to its reputation.

Emphasising management and settlement

Seeking to preserve respective claims, national strategies thus far have emphasised physical, political, administrative and economic control of disputed islets as well as political, diplomatic and military deterrence. Some have also attempted to expand their physical presence. Strategies adopted by ASEAN member countries include putting the issue on the back burner, leaving it to be resolved by the next generation, and accommodating rival claimants, especially China.

At the regional level ASEAN has focused on managing the disputes. The 2002 ASEAN-China Declaration on the South China Sea and the ongoing effort to formulate a Code of Conduct are key instruments in that effort. These national and regional strategies may seem pragmatic and serve short-term interests. However, they leave open the possibility of periodic tension and military clashes with the potential for worrying consequences.

To forestall this it is important to settle the disputes. ASEAN should begin to view the disputes not as problems to be managed but also as an opportunity to strengthen peace and security in the region and as a means to construct a rules-based order grounded in principles. Hence it should be active not only in managing the disputes but also in settling them. The longer term interests of all countries - national security, economic prosperity, international and domestic stability - and of ASEAN as an institution in terms of cohesion, role, and capacity, are better served by a settlement of the issue.

Settlement would strengthen the construction of a rules-based order in Asia. It will also demonstrate willingness and capacity on the part of Asian countries to resolve a problem that affects many of them. Peaceful resolution is not only in the interest of smaller countries but in the strategic interest of China as well. It is an opportunity for Beijing to demonstrate its constructive role and to assure all that it plays by principles and rules it advocates – namely sovereignty, equality, justice and the peaceful settlement of disputes.

Resolution would also avoid or dilute strategic alignments that Beijing terms as “Cold War” politics. Continued Chinese assertiveness will tarnish its regional and global image and contribute to the kind of power politics that it seeks to avoid. It will also be a persistent irritant in Beijing’s relations with Southeast Asian countries. Pending settlement, it behooves all parties not to elevate the disputes to the level of core national security. Such elevation will further complicate settlement. It is also important for ASEAN claimant countries to avoid strategic alignments that could stoke competitive power politics in the region.

Settlement mechanisms

Bilateral negotiation to settle these disputes is a non-starter. Except for the dispute over the Scarborough Shoal, all other disputes in the South China Sea are multilateral. Who decides the rightful parties to the conflict? Even in the case of bilateral disputes, negotiations will not make headway in the context of hardened positions and unwillingness to compromise. Bedeviled by sovereignty considerations, long standing dialogues and proposals for joint development have also not made headway.

All territorial disputes (bilateral and multilateral) in the South China Sea should be settled by referring them to a regional or international body with adjudication or arbitration powers. This way no country has to unilaterally compromise or renounce its claim. The sovereign right to make national decision is also not compromised. Such settlement will demonstrate respect for rule of law and maturity of Asian countries. Settlement would resolve a thorny issue and strengthen peace, security and order in the region.

It is crucial for all countries including China, a key player in the region, to balance parochial interests with larger national interests and the provision of regional public good. Harmonisation of national interest with the larger public good is a sine qua non for responsible major powers and in the construction of a healthy regional order.

International adjudication: precedents and problems

Reference to an international body is not without precedent in the region. Singapore, Malaysia, Indonesia, Thailand, and Cambodia have all referred cases to the International Court of Justice (ICJ). Japan has recently proposed that its maritime dispute with South Korea be settled through the ICJ.

Despite several precedents, referring disputes to an international body will not be easy or unproblematic. Major powers normally oppose international adjudication in the belief that it curtails their power and influence. On the contrary, submission to international adjudication has the potential to enhance a country’s moral power and

influence, and legitimate its international role. Moral authority is superior to brute force.

The declared positions of some countries not to accept international adjudication, current developments like the power transition in China, and the domestic criticisms leveled against Indonesia for bringing the Sipadan and Ligitan disputes to the ICJ could be cited as grounds that would work against referring the South China Sea disputes to an international body. Such considerations that affect tactics and timing should not, however, stand in the way of fresh thinking which calls for realism to be combined with idealism.

ASEAN should take lead

Dispute settlement by reference to an international body requires considerable innovative and concerted work by all claimant countries, especially by ASEAN as an institution. Composition of the bench, terms of reference, preparing national positions, etc. would have to be worked out within a specified time frame. Most importantly, claimant countries must prepare their body politics to accept the international verdict.

At the regional level, ASEAN has an invaluable role. It has attributes including moral authority, persuasive power and influence, as well as convening power that are not available to individual countries. ASEAN should take the lead in seriously exploring and tabling the idea to transform a problem into an opportunity. Though difficult, perseverance in managing and resolution of the disputes would restore ASEAN's credibility.

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