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The South China Sea disputes: How States can clarify their maritime claims

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Synopsis

One of the sources of tension in the South China Sea is that the maritime claims of the claimant States are ambiguous and sometimes inconsistent with UNCLOS. If the claimant States would bring their maritime claims into strict conformity with UNCLOS, it would clarify the areas of overlapping maritime claims. This would set the stage for negotiations between the concerned claimant States to attempt to reach provisional arrangements for joint development agreements in the overlapping claim areas.

Commentary

When we observe the flurry of actions and reactions of States causing increased tension in the South China Sea, it often appears that there are no rules of international law governing the activities of claimant States, and that it is all a game of power politics. This is simply not the case.

The significance of UNCLOS

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is of fundamental importance to the South China Sea disputes for three reasons.

First, it establishes a detailed legal framework setting out the rights and obligations of States with respect to uses of the oceans. All of the States with maritime claims in the South China Sea (China, Brunei, Malaysia, Philippines and Vietnam) are parties to UNCLOS and are legally bound by its provisions.

Second, UNCLOS sets out the maritime zones which coastal States can claim from land territory over which they have sovereignty. For example, coastal States have a right to establish a 12 nautical mile (nm) territorial sea adjacent to their coast in which they have sovereignty, subject to the right of all States to innocent passage.

UNCLOS also provides that coastal States have the right to an exclusive economic zone (EEZ) extending out to 200 nm from their coasts in which they have sovereign rights for the purpose of exploring and exploiting the living and non-living resources of the waters and of the seabed and subsoil. Under the EEZ regime, coastal States have sovereign rights to exploit the fisheries resources in their EEZ, and they can prohibit fishing by other States, including States whose nationals have habitually fished in their EEZ.

Third, UNCLOS sets out the maritime zones that can be claimed by coastal States from offshore geographic

features.

How States can clarify their maritime claims

One of the major sources of tension in the South China Sea is that many of the claimant States have made maritime claims that are ambiguous or which are not completely consistent with the provisions of UNCLOS. If claimant States took measures to bring their maritime claims into strict conformity with their rights and obligations under UNCLOS, it would be of great assistance in clarifying the maritime disputes in the South China Sea. There are three types of measures the claimant States should take.

First, the claimant States who are claiming a 200 nm EEZ from their mainland coast (or from their main archipelago in the case of the Philippines) should, if they have not already done so, give official notice of the outer limit of their EEZ by publishing charts or lists of geographic coordinates, as required by UNCLOS. In addition, if they have measured their 12 nm territorial sea and 200 nm EEZ from straight baselines along their coast, they should, if they have not already done so, give official notice of such baselines by publishing charts or lists of geographic coordinates, as required by UNCLOS.

Second, the claimant States should identify the names and locations of islands over which they claim sovereignty. This is important because States can claim sovereignty only over off-shore features which meet the definition of an island, and only islands are entitled to a territorial sea and other maritime zones. An island is defined as “a naturally formed area of land, surrounded by water, which is above water at high tide.” Most of the geographic features in the South China Sea are reefs, shoals, cays or low-tide elevations which are not above water at high tide. One academic study concluded that less than 25% of the approximately 170 geographic features in the Spratly Islands meet the definition of an island.

Third, if the claimant States believe that any of the islands they claim are entitled to an EEZ and continental shelf of their own, they should identify such islands and give notice of the EEZ claim from them by publishing official charts or lists of geographic coordinates of the limits of such claims, as required by UNCLOS. This is important because most of the islands in the South China Sea are tiny, uninhabitable rocks. Under UNCLOS, “rocks which cannot sustain human habitation or economic life of their own” are not entitled to an EEZ or continental shelf.

Joint development in area of overlapping claims

If the claimant States took the above measures it would bring their maritime claims into conformity with UNCLOS, and the areas of overlapping maritime claims could be identified. Once the areas of overlapping maritime claims have been identified, UNCLOS obligates the States concerned to enter into provisional arrangements of a practical nature, pending the final agreement on the delimitation of maritime boundaries. Such provisional arrangements can include agreements to jointly develop the fisheries or hydrocarbon resources.

Further, UNCLOS provides that during the transitional period, States must not take unilateral action in the overlapping maritime areas which would jeopardize or hamper the reaching of a final agreement on the delimitation of the maritime boundaries. Finally, such provisional arrangements are without prejudice to any claims to territorial sovereignty over islands and to the final delimitation of the maritime boundaries.

If the claimant States brought their maritime claims into conformity with UNCLOS as set out above, it would clarify the areas of overlapping maritime claims. It would also be consistent with the 20 July 2012 Statement of the ASEAN Foreign Ministers on ASEAN’s Six-Point Principles in which they reaffirmed the commitment of the ASEAN Member States to fully respect the universally recognized principles of International Law, including UNCLOS.

This would set the stage for negotiations between the claimant States to attempt to reach provisional arrangements, including joint development agreements. As recognized many years ago by the late Deng Xiaoping, the only viable way to deal with the intractable territorial sovereignty disputes in the South China Sea is to set aside the disputes and jointly develop the resources.

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