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Scarborough Shoal: Flashpoint for Confrontation or Opportunity for Cooperation?

By Robert Beckman

Synopsis

The recent flare-up between the Philippines and China over Scarborough Shoal is a territorial sovereignty dispute, but it also raises issues relating to the interpretation and application of UN Convention on the Law of the Sea. The main issue is whether the two States can move beyond the current stand-off and negotiate a joint cooperation arrangement to manage fisheries exploitation in the area in dispute.

Commentary

SINCE 10 April 2012, Scarborough Shoal has been the source of a standoff between government vessels of the Philippines and China. The issue is whether it will continue to be a flashpoint for potential conflict, or whether the Philippines and China can do a paradigm shift and turn the dispute into an opportunity for cooperation in the South China Sea.

Scarborough Shoal is a large atoll surrounded by a reef with a lagoon of about 150km2. It is valuable because the lagoon and the surrounding waters are rich in fisheries and other marine life which have been exploited by fishing vessels from both China and the Philippines for decades. Scarborough Shoal is located 124 nautical miles (nm) from Zambalies Province in the Philippines and 472 nm from the coast of China. It is within the 200 nm exclusive economic zone (EEZ) claimed by the Philippines from its main archipelago. However, the fact that the Shoal is within the EEZ of the Philippines does not give the Philippines sovereignty over it or make it part of its territory.

Classic case of territorial sovereignty dispute

Because five or so rocks on the Shoal are reportedly above water at high tide, it meets the definition of an “island” under the 1982 UN Convention on the Law of the Sea

(UNCLOS). Therefore, it is subject to a claim of sovereignty in its own right and is entitled to a 12 nm territorial sea of its own. The fact that it is within the EEZ of the Philippines is not relevant to the sovereignty issue. Neither is the fact that the Shoal is within the nine-dashed lines on China's infamous map.

Scarborough Shoal is a classic case of a territorial sovereignty dispute. The Philippines asserts that it has exercised effective occupation and effective jurisdiction over the Shoal since independence in 1946. To reinforce this claim it points out that it built a lighthouse on the Shoal in 1965 and that it has conducted surveys and research in the waters surrounding the Shoal.

China asserts that Scarborough Shoal and its adjacent waters have been Chinese territory for generations and that it discovered the Shoal, incorporated it into its territory and exercised jurisdiction over it. Further, China also claims that the Shoal is included in the Zhongsha Islands, one of the four archipelagoes inside China's infamous nine-dashed line map to which it has historic claims to sovereignty. China also argues that the Philippines never disputed Chinese jurisdiction until 1979.

There is some difficulty with China's argument that it has sovereignty over Scarborough Shoal based on the inclusion of the Shoal within China's historic claim to Zhongsha Islands, otherwise known as Macclesfield Bank. First, Scarborough Shoal is geographically a considerable distance from Macclesfield Bank. Second, under international law, Macclesfield Bank may not be capable of being subject to a claim of sovereignty because it is completely submerged. As claims to maritime zones can only be based from land or from islands, it would be difficult for China to argue that Scarborough Shoal falls within any maritime zone claimed from Macclesfield Bank.

A legal dispute could also arise on the status of the waters outside the 12 nm territorial sea of the Shoal. This would raise issues concerning the interpretation and application of Article 121 of UNCLOS on the regime of islands. UNCLOS provides that all islands are in principle entitled to maritime zones of their own, but paragraph 3 of Article 121 provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf".

The Philippines will maintain that the five tiny rocks on Scarborough Shoal are "rocks" within Article 121(3) and that they are not entitled to an EEZ or continental shelf of their own. Consequently, the waters beyond the 12 nm limit are within its EEZ measured from its main archipelago. China could challenge this position by arguing that one or more of the rocks on the Shoal are entitled to an EEZ and continental shelf.

Two possible options

The recent flare-up is not the first time that the sovereignty dispute over Scarborough Shoal has arisen between the two States. A similar incident occurred in the mid-1990s which also involved fishing vessels and diplomatic exchanges between the two Governments. This resulted in the negotiation of a bilateral code of conduct in 1995 in which the two States promised to settle their bilateral disputes in accordance with recognised principles of international law, including UNCLOS. This in turn prompted

the negotiation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea.

There are at least two possible options on how potential conflicts between China and the Philippines over Scarborough Shoal can be managed. Both require that the two States first agree (at least informally) that sovereignty over the Shoal and the 12 nm territorial sea around it are in dispute. They can do this without acknowledging the legitimacy of the other's claim and without prejudice to their own claim.

The first option is for the two States to agree to refer the territorial sovereignty dispute to an international court or tribunal and ask them to decide which State has the better claim to sovereignty. This was done by Malaysia and Indonesia over Sipidan-Ligitan and by Singapore and Malaysia over Pedra Branca/Pulau Batu Puteh. In both cases the States agreed to refer the sovereignty disputes to the International Court of Justice.

The second option is for the two States to agree to set aside the sovereignty dispute and jointly manage the fisheries in the disputed area. They could either declare a fishing moratorium in the disputed area or agree to a total annual catch for each States' nationals. Each State could agree to regulate its own nationals, and focal points and hotlines could be established to enable patrol vessels to immediately report any activities contrary to the arrangement.

If such a cooperative arrangement could be negotiated for the disputed area around Scarborough Shoal it could serve as a model for cooperative arrangements in the other disputed areas in the South China Sea.

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