THE STRAITS TIMES.
SINGAPORE PRESS HOLDINGS,
NEWS CENTRE, 1000 Toa Payoh North, Podium Level 2, 318994

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South China Sea: Walking the talk

ONLY recently, Beijing soothed jangled nerves in the region by stressing its defensive inclinations and promising never to threaten any country. But tempers have flared again over the disputed South China Sea, with Vietnam and the Philippines accusing China of assertiveness – if not outright aggression – in separate incidents. Both have leaned on the US to intervene – a move that will add even more combustibility to the volatile mix.

The growing regularity of the clashes over the South China Sea underscores a worrying web of contention: So long as the territorial disputes remain unresolved, underlying tensions will fester; in turn, such tensions only serve to accentuate the risks of conflict so long as the dispute is unresolved. Arguably, such disputes are largely intractable, fuelled as they are by a heady mix of nationalist emotion and pride. As international relations theorist Ken Booth gloomily prophesied more than two decades ago, a "territorialist mood" will continue to feed tensions in years to come.

That said, however, certain things can still be done to ameliorate the situation. Speaking at a seminar this week, Singapore's former senior minister S. Jayakumar said that China should clarify its "puzzling and disturbing" nine-dotted lines map of the South China Sea, since it had no apparent basis under the United Nations Convention on the Law of the Sea (Unclos) and could be interpreted as a claim of all maritime areas within the nine dotted lines. To establish its credibility, Prof Jayakumar said the US – specifically the US Senate – should accede to Unclos. Many experts also agree that the 2002 Declaration on the Conduct of Parties in the South China Sea should be codified into a legally binding document.

In the interim, contesting states should set aside their sovereignty claims and explore the joint development of resources. This has been proposed by Beijing since the 1970s. There is also some precedent here. In 2004, the Philippines, China and Vietnam signed an undertaking to carry out joint oil exploration. The problem here, however, is that Asian countries are unlikely to trust China, given that Beijing's previous participation in such projects tended to almost always involve continental shelf belonging to another coastal state (as one cynical wag put it, China's position is "what's mine is mine, what's yours is mine"). Moreover, no two states can exclude other states from involvement. Lastly, the sharing of benefits from joint exploration is also problematic.

As difficult as it is, joint development remains the only feasible option in the interim, given the looming political obstacles standing in the way of a legal settlement. Disputing parties talking the talk of good order at sea should demonstrate their resolve by following through with concrete actions. Anything less is mere talk.

Consider joint development in disputed areas

Former senior minister S. Jayakumar gave the keynote address at the Centre for International Law's Conference on Joint Development and the South China Sea this week. Below is an excerpt of his speech.

THE Spratly Islands in the South China Sea have long been a source of tension and potential conflict in this region. Some or all of the islands and reefs are claimed by Brunei Darussalam, China, Malaysia, the Philippines, Vietnam and Taiwan. Many are occupied by the claimants and some have even been fortified.

The recent incidents since March this year involving China, Vietnam and the Philippines are particularly dangerous and disturbing. The most recent incident took place on June 9 about 270km from Vung Tau in the southern part of Vietnam. This is, to the best of my knowledge, the first such incident in this area.

To avoid any potential conflict, there is an urgent need to clarify the extent of the various claims and speedily conclude the implementation guidelines of the 2002 Declaration on the Conduct of Parties in the South China Sea (2002 DOC). The 2002 DOC should be seen as a step towards the elaboration of a binding Code of Conduct for the South China Sea.

In my view, stable relations between China and Asean, on the one hand, and among all the major powers with interests in the region, on the other hand, are essential conditions for regional growth and prosperity. In that sense, what is at stake is much more than the merits of specific territorial claims in the South China Sea. In this regard, two major powers – China and the United States – must take certain steps.

China: It should not continue to leave unaddressed the concerns and questions raised by many over its puzzling and disturbing nine-dotted-lines map.

I say it is "puzzling" because it does not seem to have any basis under the 1982 United Nations Convention on the Law of the Sea (Unclos), which China has repeatedly said it respects. I say it is "disturbing" because it can be interpreted as being a claim on all the maritime areas within the nine dotted lines.

This ambiguity has led to concerns not just among claimant states, and it is clearly in China's interests to clarify the extent of its claims and thereby dispel any apprehensions over its intentions. Failure to do so could jeopardise the trust essential for any peaceful resolution and undermine all the gains Chinese diplomacy has made over the last two decades.

United States: The US is a major maritime power whose engagement with, and presence in, the region is crucial for maintaining stability in the South China Sea. Unfortunately, it has yet to become a party to Unclos. This despite the US having stressed many times its interests in the South China Sea, especially freedom of navigation. Every administration since President Bill Clinton's has requested the Senate to accede to Unclos and I hope the current Senate will do so.

Singapore is not a claimant state and we have good relations with all of the claimants. We are neutral vis-a-vis the various claims. This does not mean we have no interests.

Like Indonesia and other non-claimant Asean states, Singapore's interest is to ensure that these claims do not threaten regional peace and stability or impede freedom of maritime navigation, overflight rights and the freedom to lay and repair submarine cables in the South China Sea.

As a small state, we also have an interest in ensuring that all the claimant states, when pursuing their rights and obligations, will always act in accordance with international law, including the Unclos. In this regard, the Philippines' decision to amend its archipelagic baselines law in 2009 to bring its legislation into conformity with Unclos is a positive move.

Unclos contains no provisions on how to resolve sovereignty disputes over islands or other geographic features. It only sets out what maritime zones can be claimed from such islands or features and that delimitation of overlapping maritime zones shall be effected by agreement on the basis of international law, in order to achieve an equitable solution.

Some Unclos member states such as Australia, China and Korea have chosen under Article 298 to opt out of the Unclos dispute settlement mechanism for disputes relating to maritime delimitation. Unclos also has a provision whereby, when it is impossible for states to reach an agreement on delimitation, these parties should make every effort to enter into "provisional arrangements of a practical nature".

On July 22, 1992, Asean foreign ministers adopted the Asean Declaration on the South China Sea in response to increased tensions in the South China Sea in the early 1990s. The 1992 Declaration calls upon claimant states to:

- Resolve disputes by peaceful means;
- Exercise restraint;
- Explore the possibility of cooperation; and
- Use the 1967 Treaty of Amity as a basis for establishing a code of conduct for the South China Sea.

In the mid-1990s, discussions to reduce tensions in the South China Sea began at a bilateral level. In August 1995, the Philippines and China issued a joint statement on conduct in the South China Sea, followed by the Philippines and Vietnam in November 1995.

In July 1996, Asean foreign ministers agreed to conclude a regional code of conduct in the South China Sea. Asean states and China subsequently agreed in December 1997 to, inter alia, resolve their disputes in the South China Sea through friendly consultations and negotiations in accordance with universally recognised international law, including Unclos.

Between 1996 and 2001, Asean states and China held discussions aimed at adopting a Code of Conduct for the South China Sea. As some states were reluctant to adopt a legally binding code of conduct, a proposal was made to first adopt a non-binding "declaration".

On Nov 4, 2002, the 2002 Declaration on the Conduct of Parties in the South China Sea was adopted by the foreign ministers of Asean and China. The 2002 DOC, inter alia:

- Reaffirms the freedom of navigation and overflight in the South China Sea as provided for by universally recognised principles of international law, including Unclos;
- Emphasises consultations and dialogues concerning relevant issues;
- States that parties undertake to respect the provisions of this Declaration and take actions consistent therewith;
- That parties agree to work, on the basis of consensus, towards regional peace and stability.

The 2002 DOC provides for its implementation through confidence-building measures, cooperative measures, and through dialogue and consultation. A plan of action was adopted in November 2004 and a joint working group was established in December 2004 to formulate recommendations on (a) guidelines and the action plan for the implementation of the 2002 DOC; and (b) specific cooperative activities in the South China Sea.

However, the working group's Terms of Reference were silent on a Code of Conduct. Notably, although official statements in the past few years seem to reflect the continued importance of the 2002 DOC, little progress has been made in its implementation.

If negotiations do not lead to an agreed political solution, then in my view, the ideal is to follow the excellent examples set by Malaysia and Singapore and Malaysia and Indonesia in the Pedra Branca and Sipadan and Ligitan cases, respectively, where the disputes were referred to the International Court of Justice.

But I am also a realist. Territorial disputes and disputes over maritime delimitation are highly emotive issues. Many countries are reluctant to refer such disputes to adjudication or arbitration because the daunting prospect of losing the disputed territory is politically untenable. As I said in my recent book Diplomacy – A Singapore Experience: "Disputes over territorial sovereignty are especially difficult to resolve. Whatever the nature of the territory... territorial disputes always evoke intense political reactions and nationalist emotions. These constraints leave governments little room to reach a negotiated settlement or compromise. They fear that their own public will accuse them of "selling out"...

"These downsides (in third-party adjudication – may explain why some of the territorial disputes in Asia, such as between China and Japan over the Diaoyu/Senkaku Islands, or between Japan and Russia over the Kuril Islands, remain intractable. Consider also the many overlapping claims in the South China Sea. I believe all the claimant states must have concluded that no legal judgment is likely to resolve the issue completely. Some claimants may even feel that they can secure their claims on the ground by de facto control through superior force."

If there is an impasse in attempts to resolve sovereignty and maritime delimitation disputes by negotiations, or if there is a reluctance to resort to third-party dispute settlement, what is the alternative if we want to avoid instability, tensions or, worse, conflict?

One option is that the countries concerned could consider the option of joint development – for instance, of hydrocarbon resources found in overlapping claim areas. Joint development agreements have emerged over the past 50 years as a viable means to allow oil exploration and exploitation in disputed areas while preserving the respective claims of the parties. It is also consistent with the Unclos concept of a "provisional arrangement of a practical nature", without prejudice to the sovereignty disputes or the final determination of the maritime boundaries.

Six Asean member states (Brunei, Cambodia, Indonesia, Malaysia, Thailand and Vietnam) and three North-east Asian countries (China, Japan and South Korea) have either officially agreed to negotiate joint development agreements, or have been party to a joint development agreement. This could be due to the Asian cultural preference for consensus-building and collective cooperation.

The idea of putting aside sovereignty claims and jointly developing hydrocarbon resources in waters surrounding the Spratly Islands has been mooted since the 1980s. The late Deng Xiaoping first promoted this principle of "setting aside dispute and pursuing joint development" in China's dispute with Japan over the Diaoyu (Senkaku) Islands. When China established diplomatic relations with South-east Asian countries in the 1970s and 1980s, Deng proposed the same approach for the Nansha (Spratly) Islands.

The fourth generation of Chinese leaders have continued talks with Asean leaders on the Spratly Islands and have reiterated their call for setting aside the dispute and pursuing joint development. Other claimants to the Spratly Islands such as Malaysia, Vietnam and Brunei have also entered or agreed to enter into similar joint development agreements.