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The South China Sea Disputes: Formula for a Paradigm Shift?

- A Response

By Raul (Pete) Pedrozo

Synopsis

China does not have valid territorial claims to the South China Sea islands. To suggest that Beijing should be permitted to claim an exclusive economic zone from these islands is counterproductive and will put China one step closer to achieving de facto control of the South China Sea. ASEAN nations can stand by and allow China to incrementally solidify its maritime claims in the South China Sea through threats and coercion or they can stand up to Chinese brinkmanship before it's too late.

Commentary

PROFESSORS Robert Beckman and Clive Schofield recently suggested a way for China to “bring its maritime claims into conformity with...international law and still protect its legitimate interests in the South China Sea”. They propose that China should depict “the outer limit of its...EEZ claims from the islands over which it claims sovereignty”. This would create an area of overlapping claims in the middle of the South China Sea where the claimant States could move towards joint development, pending a final agreement on maritime boundaries.

While I have a great deal of respect for both authors, their proposal is problematic and will not contribute to peace and stability in the region. Appeasing China in this manner is not only unproductive, but will allow Beijing to further advance its salami-slicing strategy in the South China Sea at the expense of the other claimants.

Six reasons why it won't work

There are six reasons why the proposal will not work. Firstly, it assumes China has a legitimate claim to the South China Sea islands. With the exception of Pratas Island, China does not have a valid claim to any of the South China Sea islands. The Paracels and Spratlys were both French territory until Japan invaded the islands during the Second World War. When the war ended, Japan renounced its rights to the islands and title reverted to France.

South Vietnam acquired sovereignty over the islands by right of cession after the French-Indochina War. Following unification of the country in 1975, the Socialist Republic of Vietnam inherited South Vietnam's title to the two island groups.

Secondly, the proposal rewards Beijing for its illegal occupation of the Paracel and Spratly Islands. At the end of World War II, Chinese troops were sent to Itu Aba and Woody Islands to disarm and accept the surrender of the Japanese forces. General Order Number 1 did not, however, transfer title of the Spratlys and Paracels to China. Pursuant to an exchange of notes, China agreed that French troops would relieve Chinese troops stationed in Indochina north of 16 degrees north latitude (including the Paracels and Spratlys) by March 31, 1946.

The fact that Chinese forces illegally remained on Itu Aba and Woody Islands after the Allied occupation of Indochina ended in 1946 was a clear violation of Article 2(4) of the UN Charter, and therefore, does not confer China with clear title to the two archipelagoes. China's subsequent acts of aggression in 1974 (Paracels), 1988 (Spratlys), 1995 (Mischief Reef), and 2012 (Scarborough Shoal) likewise violate the Charter's prohibition against the aggressive use of force or threat of use of force.

Thirdly, the proposal suggests China should be allowed to claim its EEZ from the 12 largest islands in the Spratlys because "they all have vegetation and in some cases roads and structures have been built on them". Therefore, the authors believe China can argue in "good faith that the [features] are 'islands' entitled...to EEZ...rights...under...UNCLOS".

The fact that an islet has vegetation, or that a claimant has built improvements on it, is not the test for determining the status of land features under UNCLOS. Only features that can "sustain human habitation or economic life of their own" are entitled to claim an EEZ.

Presupposing China's intentions

The authors appear to suggest that States should be allowed to turn what would otherwise be a "rock" or a "low-tide elevation" into an "island" in order to maximise their maritime claims. Such a suggestion is not only inconsistent with UNCLOS, but would also lead to copycat proliferation of enhancements on the vast number of features dotting the South China Sea. This can only increase tensions and further destabilise the ongoing dispute.

Fourthly, the proposal allows China to use a "full effect equidistance line" from the largest islands towards the surrounding coasts of the SCS littoral States. However, even the authors recognise that a full effect equidistance line is "inequitable and inconsistent with the reduced effect generally given to small offshore islands by international courts and tribunals". Indeed, the most urgent rationale for creation of the EEZ was not for political aggrandisement of the coastal State, but to protect subsistence fishermen.

Fifthly, the proposal presupposes China is willing to share the South China Sea resources. China's new fisheries regulations, which require foreign fishing vessels to obtain prior Chinese approval to operate in the waters within the "nine-dash line", however, belie that goal. Moreover, China's track record when it comes to joint development projects is not encouraging.

In 2008, China and Japan agreed to jointly develop gas deposits in the East China Sea. The agreement was heralded as a model for cooperation. To date, however, no joint development has occurred, and there is evidence that China is exploiting the resources on its side of the median line. When it comes to joint development, China operates on the principle of "what's mine is mine, what's yours is also mine, but I am willing to share yours".

China's creeping de facto control

Finally, the authors believe China will live up to its obligations under UNCLOS to avoid taking actions in the overlapping area that would jeopardise reaching a final delimitation agreement. China's non-compliance with its commitments under the ASEAN Declaration of Conduct (DOC) is illustrative. Despite signing up to the DOC, Beijing has engaged in a series of actions since 2002 that are clearly at odds with its commitment to exercise self-restraint in the conduct of activities that would complicate or escalate disputes in the SCS.

Recent examples of Chinese indiscretion include: *Viking II* ramming incident, Reed Bank incident, *Binh Minh 02* cable-cutting incidents, establishment of Sansha City, Scarborough Shoal incident, implementation of the Hainan maritime security regulations and new fisheries regulations, and naval patrols to James Shoal.

Designed to alter the status quo through unlawful intimidation, each of these acts brings China one step closer to achieving *de facto* control over the SCS. The mistaken belief that China is willing to coexist on an equal footing with its neighbours is wishful thinking. ASEAN can stand by and allow China to incrementally solidify its maritime claims in the SCS through coercion, or it can, together with like-minded States, stand up to Chinese brinkmanship before it is too late.

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