

Synergy or Neutrality? Time for US and Indonesia to Clarify Positions on the South China Sea

by Jared Scott Bentley

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Amidst recent debate about Indonesia's policy in the South China Sea, late last month Commander of the Indonesian Armed Forces (TNI) Gen. Moeldoko published an op-ed in the *Wall Street Journal* addressing this issue head on. Moeldoko reiterated Indonesia's current 'free and active' (*bebas aktif*) foreign policy, while clarifying that it is not a claimant in any of the disputes in the area. He also however expressed frustration with China's claims in the area, stating that Indonesia was "dismayed" that China had included waters around the Natuna islands within its nine dash line map.

Like ASEAN as a whole, the crux of Indonesia's position is that disputes between China and other claimants should be resolved peacefully and in accordance with international law. The preference within ASEAN for promoting a regional order based on rules and norms is longstanding, but the question then arises—exactly what norms are we talking about?

Given recent developments, there is a need for countries to more clearly articulate precisely what rules and norms they are referring to, to more effectively reinforce their foreign policy goals. There is a great amount of synergy between Indonesia's position and that of the US, more than is generally recognized, and diplomatic coordination between the two could hold the key to supporting a stable regional order.

While the relationship between international law and norms is often asserted as a given, this fails to take into account that norms embodied in international law are dynamic, and evolve in accordance with state practice. An important example of this is the United Nations Convention on the Law of the Sea (UNCLOS), which codified a number of norms that had been evolving throughout the 20th century, and was in fact the third convention of the same name.

The core of that agreement, the pivotal norm that all maritime claims must be generated from land-based features, is being held at risk by excessive claims to parts of the South China Sea. While China continues to promote a purposeful ambiguity regarding the scope and definition of its claims outlined under the 'nine dash line' map, actions over the last several years by its official maritime organizations have removed doubt about the extent of the claim.

These actions have included the enforcement of China's rights and interests in areas nearly 1,000 kilometers from the Chinese mainland, including in waters that comprise Indonesia's EEZ off the Natuna islands. Taken together, these

actions suggest that a decision has been reached within the Chinese government to enforce the entirety of China's claims in the South China Sea, a development likely to lead to further frustration in the region, elements of which are already evident in comments from leaders including General Moeldoko.

While there is room for debate regarding the legal basis for various claims to sovereignty over certain features in the Spratly islands, nowhere in UNCLOS can a norm be found to support China's apparent maritime claims off of Natuna island. The closest claimed features, James Shoal and Vanguard bank, are submerged, meaning that not only can there be no real dispute about sovereignty over them, but that they are incapable of generating maritime boundaries at all.

As a result, China is attempting to justify its claims to maritime areas outside the scope of the convention through what it refers to as its "historic rights," a concept that has no basis under international law. If China were to continue not only asserting but now actively enforcing its "historic rights" in the South China Sea, this would constitute an effort at normative revolution, striking at the very heart of UNCLOS.

The implications of this have long been recognized by Indonesia, which articulated a similar notion in a 2010 note to the UN secretary general, when it declared that China's nine dash line map "lacks a basis under international law and is tantamount to upset the UNCLOS." China's attempt to promote a new maritime norm based on a vague notion of "historic rights" unrelated to land based features, not only flies in the face of the last several hundred years of international legal opinion, but threatens to upend the core principles of the agreement reached at UNCLOS III several decades ago.

Any attempt to upend this crucial piece of international legislation would indirectly threaten Indonesia's national interests, as well as the ability of ASEAN to effectively promote a rules-based regional order. There could also be a direct effect on Indonesia's national security. If China were allowed to continue enforcing these "historic rights," Indonesia may by default find itself with a new maritime neighbor, one intent on limiting its access to vital resources in disputed areas.

There have been a number of incidents over the last several years whereby Chinese maritime agencies prevented their Indonesian counterparts from enforcing their jurisdiction in areas claimed by China. While these incidents could be said to stem from illegal fishing, they are about much more than fishing. At their core, they are about the future of the regional and even international order: whether it will be based on rules and norms, or some vague notion of historical entitlement enforced through military power and coercive diplomacy.

Like Indonesia, the US has been clear that while it is not itself a territorial claimant to the disputes in the South China

Sea, it does have a strong national interest in how disputes are settled, preferably in accordance with international law. When discussing the recent defense agreement with the Philippines, President Barack Obama stated the goal of the agreement was “to make sure that international rules and norms are respected.” The president mentioned specifically that this included international norms in relation to maritime disputes in the region.

After noting that the US does not itself have territorial claims in the area, Obama reiterated US policy that the disputes should be settled peacefully in accordance with international law, without the use of coercion or intimidation. To the extent it would fulfill those objectives, the foreign policy objectives of the new defense agreement are largely congruent with those of ASEAN and Indonesia.

Like Indonesia, the US has been at pains to demonstrate its neutrality in the dispute. During the same press conference in the Philippines, Obama also stated that “we don’t even take a position on the disputes between nations.” This pretense toward neutrality is misplaced in the case of both the US and Indonesia, however. The stakes are far too high in these disputes to sit idly by while Chinese actions threaten to upend pivotal international legal norms embodied in UNCLOS.

In other words, the US and Indonesia *should* take a position on the disputes, not on territorial sovereignty, but on the legal basis of the maritime claims involved. This would be a principled position in support of international law, not against China, and would be in keeping with wider US efforts to oppose excessive maritime claims anywhere they exist. Therefore, such a move would be more a clarification of existing policy than it would a policy shift, making explicit what is currently implicit in their official positions.

Both countries should more clearly articulate the potential threat to international norms posed by enforcement of ‘historic rights’ at sea, while privately articulating that there will be costs imposed in response to acts further undermining those norms. They need to clarify that while not territorial claimants themselves, they do have a strong national interest in seeing that any maritime claims are generated from land based features in accordance with UNCLOS.

This synergy in the US and Indonesian positions could allow them to make clear to China that, while not attempting to contain China’s rise, they have a strong preference that China’s rise be in accordance with key international rules and norms. This will enable not only China, but the rest of the region, to rise with China toward greater prosperity under an effective regional normative order.

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