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ASEAN & the South China Sea Disputes

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PART I.

PAST ROLE IN THE SOUTH CHINA SEA DISPUTES
HISTORY OF ASEAN

• Established in 1967: Indonesia, Malaysia, Philippines, Thailand & Singapore

• Brunei (1984)
  Vietnam (1995)
  Laos (1997)
  Myanmar (1997)
  Cambodia (1999),

• ASEAN Charter, 2007
Success of ASEAN

- Has maintained peace among member States despite major historical differences
- Absorbed former Indo-China States & Myanmar
- Has maintained a balance of power in Southeast Asia
Actions on South China Sea

- 1992 ASEAN Declaration on the South China Sea
- 2002 Declaration on the Conduct of Parties in the South China Sea (ASEAN Member States & China)
- 2016 Joint Statement on the Application of the *Code for Unplanned Encounters at Sea* (CUES) in the South China Sea
- 2017 August: Foreign Ministers of ASEAN & China endorsed framework for the Code of Conduct for the South China Sea
2002 Declaration

• resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

• reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
2002 Declaration

- **exercise self-restraint** in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, **refraining from action of inhabiting on the presently uninhabited islands**, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

- Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts **to seek ways**, in the spirit of cooperation and understanding, **to build trust and confidence** between and among them, including:

- Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities
Prospects for COC

• May reach an agreement but not likely to address:
  – underlying sovereignty disputes
  – disputes on maritime claims
  – militarization of the occupied features

• Issues making agreement difficult:
  – Geographic scope?
  – Legally binding?
  – Dispute settlement clause?
  – Status Quo on occupied features?
Prospects for COC

• Likely to place emphasis on:
  1. No threat or use of force
  2. Status quo on occupied features
  3. Framework to minimize risk of incidents at sea
  4. Framework to encourage cooperation in areas of common interest
  5. Cooperative measures will be “without prejudice” to underlying disputes on sovereignty and maritime claims
PART II

PROMOTION OF COOPERATION UNDER COC
Joint Development of Resources

• Old mantra was “set aside the sovereignty disputes and jointly develop the resources”

• Legal basis for “provisional arrangements” in articles 74 of UNCLOS if areas of overlapping EEZ claims

• Difficult because under the Award in the South China Sea case, there are no areas of overlapping EEZ claims

• Philippines & China currently in negotiations on this issue with respect to Reed Bank
Legal Basis for Cooperation on Other Issues

• UNCLOS Article 123 on Semi-Enclosed Seas

• State bordering a semi-enclosed sea should cooperate with each other with respect to:
  
  1. management, conservation, exploration and exploitation of living resources
  2. their rights and obligations to protect and preserve the marine environment
  3. Marine Scientific Research
Any Cooperation must be on a “Without Prejudice” Basis

• Any cooperation on these three issues must be “without prejudice” to the existing sovereignty disputes as well as the disputes on maritime claims and jurisdiction

• Basis for Cooperation by each State:
  – Does not imply that we recognize the legitimacy of the position of any other State bordering the SCS on the sovereignty disputes and disputes on maritime claims
  – Does not imply that we give up or change our position on the sovereignty and maritime disputes
Low-Hanging Fruit # 1 – Land-based Marine Pollution

• As much as 80% of the pollution of the marine environment is from land-based activities, including agricultural activities, manufacturing activities, etc.

• States bordering the SCS can cooperate to reduce marine pollution in the SCS from pesticides and fertilizers, toxic chemicals and PLASTIC.

• Since each State will focus on activities within its own territorial sovereignty, such cooperation will not raise any of the sensitive disputes on sovereignty and maritime claims.
Low-Hanging Fruit # 2 – Pollution from Ships

• Pollution of the marine environment from ships is governed by UNCLOS and the conventions and regulations of the International Maritime Organization (IMO)

• All of the States bordering the SCS are parties to the relevant IMO conventions, but some States have difficulty fulfilling their responsibilities as flag States and port States

• A regional cooperative mechanism could be established for the South China Sea with technical assistance from the IMO

• Such cooperation would not trigger any sensitive sovereignty or maritime disputes
Low-Hanging Fruit # 3 – Cooperation on Fisheries

• Unless the States bordering the SCS cooperate to sustainably manage fisheries, the SCS will soon be overfished

• The States bordering the SCS should work toward the creation of a Regional Fisheries Management Organization (RFMO) under 1995 Fish Stocks Agreement

• At present, only Indonesia, Philippines and Thailand are parties to the 1995 Fish Stocks Agreement
Low-Hanging Fruit #3 – Cooperation on Fisheries

- The States bordering the SCS could take steps now to cooperate on fisheries and establish trust and confidence essential for further cooperation:

1. Agree to coordinate “No Fishing Seasons”
2. Agree to ban certain types of illegal fishing and to prosecute vessels flying their flag that engage in illegal practices
3. Agree to establish a Marine Protected Area where fishing is prohibited, and monitor their vessels to ensure that they do not fish in the zone
Enforcement of Fisheries Cooperation

• The above modes of cooperation on fisheries will work if each State in good faith monitors and enforces the rules against fishing vessels flying its flag.

• The cooperative measures should state that coast guard vessels of one State are not authorized to arrest the fishing vessel flying the flag of another State that is a party to the cooperative agreement.

• If each State monitors vessels flying its flag and punishes ships that do not comply, trust and confidence could be established.
Higher-Hanging Fruit: Status Quo on Occupied Features

- Current negotiations to prevent incidents at sea between coast guard vessels
- CUES covers only naval vessels
- Serious issue because of close proximity of occupied features - often on the same reef
- Can the States agree to retain status quo on occupied features – allow supply ships
Bold Proposal – ”Cooperation Zone” in Area of Occupied Features

• Establish a Cooperation Zone in area of disputed islands occupied by China, Vietnam, Philippines and Taiwan

• Zone is “without prejudice” to sovereignty and maritime disputes

• Many of occupied features in the Zone are within 12 nm of each other

• Zone should be in an area where greatest risk of incidents at sea near occupied features

• Claimants agree to cooperate to protect the marine environment in the Zone
Ship traffic density in Southeast Asia

Legend
Ship traffic density
- 1 - 10
- 11 - 50
- 51 - 100
- 101 - 500
- 501 - 1000

Note: This map shows the density of ship traffic in Southeast Asia. The density is indicated by the color of the lines, with darker colors representing higher traffic density. The map was produced by [Authors, 2017].

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Restriction on activities in the Zone

1. Claimants prohibit their fishing vessels and commercial vessels from entering the Zone
2. Military vessels and supply ships of claimants have access to and from features occupied by them
3. Vessels of non-claimants requested not to enter the Zone
4. All claimants agree not to enter waters within 12 nm of a feature occupied by another claimant, unless overlapping area prevents 12 nm territorial sea
5. Claimants cooperate by conducting joint scientific research in the Zone
6. Claimants agree to work toward demilitarization of Zone
THANK YOU