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# State Practices in Southeast Asia: Possible Collaboration amongst Claimants in the South China Sea Dispute

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## Abstract

This article considers the prospects for cooperation between the claimants in the South China Sea dispute. A number of reasons are provided to explain why the likelihood of resolving the dispute over territorial sovereignty is slim. Nonetheless, such disagreements need not stand in the way of managing the South China Sea dispute. In this regard, inspiration is sought in other practices in Southeast Asia where joint activities are conducted in areas where not all maritime boundaries and sovereignty disputes have been settled. These practices are (1) the management of the Straits of Malacca and Singapore, and (2) the Coral Triangle Initiative. The author suggests that China and the ASEAN member states should gain first-hand information about these practices with a view to establishing comparable joint activities in the South China Sea.

## Keywords

South China Sea – Association of Southeast Asian Nations (ASEAN) – United Nations Convention on the Law of the Sea of 1982 (LOSC)

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## Introduction

Tensions in the South China Sea are not new. Island- or reef-grabbing has been a feature in the area for quite some time. Although under international law such acts have no legal validity and do not prove title, especially when performed long after the critical date or the date when the dispute initially came into being, claimant states continue to do so for mostly domestic or other strategic purposes.

The South China Sea dispute has been marked by escalation since 2009, interspersed with periods of de-escalation on the part of the claimant states. Many have feared that the South China Sea will become the next flashpoint of global conflict, although some disagree as the facts demonstrate that the global flashpoint will remain the Middle East for at least another twenty-five years or might even return to Europe.

There is a major difference between the latest escalation of conflicts and the largest incidents that took place in the 1970s and 1980s in the South China Sea, namely strategic development in Southeast Asia and East Asia. As opposed to some 40 years ago, today Southeast Asia is full of regional infrastructures that have become important platforms for regional cooperation and cohesion.

The Association of Southeast Asian Nations (ASEAN)[1] has matured and morphed into a rules-based organization by adopting the ASEAN Charter in 2007.[2] China acceded to the Treaty of Amity and Cooperation in Southeast Asia (TAC) in 2003.[3] The relations between ASEAN and China have been largely positive and developed into a much more structured engagement from Head of State to working level. ASEAN and China have agreed on a Declaration on the Conduct of Parties in the South China Sea[4] and are currently working on a Code of Conduct. Although the progress made may not be as fast as hoped by many, engagement in the process has become an important means for countries to communicate.

However, the latest reclamations in at least six reefs in the South China Sea by China have been viewed by many analysts as a major factor that could

1 Association of Southeast Asian Nations, available at http://asean.org/.

2 Charter of the Association of Southeast Asian Nations (Singapore, 20 November 2007, in force 15 December 2008), available at http://asean.org/asean/asean-charter/.

3 Treaty of Amity and Cooperation in Southeast Asia (Bali, 24 February 1976, in force 21 June 1976) 1025 *UNTS* 317 (hereinafter "TAC").

4 Declaration on the Conduct of the Parties in the South China Sea (Phnom Penh, 4 November 2002), available at http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea.

dampen the relations between China and ASEAN claimant states and could have possible negative implications for the management of the disputes itself. Furthermore, ASEAN has also successfully launched and managed the East Asia Summit, where major global powers have discussed strategic and important issues at the same table with ASEAN in the driving seat. Indeed, there is now an ASEAN-led security dialogue in addition to a US-led security dialogue in the region.

The socio-economic conditions of Southeast and East Asian countries are tremendously different. Four countries of this region are members of the G-20 and ASEAN's combined GDP of 2.3 trillion USD is larger than that of India or Russia. If ASEAN could agree on a status similar to the European Union (EU), ASEAN would be sitting at the G-20 table as a member. A large number of economic organizations have predicted that this region will become the locomotive of global economic growth where many of its constituent countries will see their GDP triple or even quadruple by 2050. The Asian Century prediction has made many quarters both jubilant and cynical.

The threats of 40 years ago that mainly came from regional war among nations due to ideological battles have completely gone. Today, the threats come from non-human sources, pandemics, as well as the borderless war on terrorism. Organized crime syndicates can now move faster than states, especially in the absence of regional extradition arrangements. Countries in the region are working closely to fight these new forms of threats that simply did not exist four decades ago, thus making collaboration a sensible option.

Contrary to the view held by some that the international rules in matters relating to the oceans are made by the Western powers, the United Nations Convention on the Law of the Sea of 1982 (LOSC),[5] that has been ratified by countries in Southeast and East Asia, is a global consensus that was negotiated with high participation and contribution of developing states. It is a major legal innovation for archipelagic countries led by Indonesia and the Philippines with respect to the development of the legal principle of archipelagic waters. This means that the global agenda is no longer dictated by other global powers and the countries in the region are playing a strong role in shaping global norms.

A culture of international law has started to develop in the region as borne out by the signing of numerous maritime boundaries treaties, the settlement of disputes by the International Court of Justice (ICJ), the relocation to the region of many international organizations dealing with private international

5 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 (hereinafter "LOSC").

law, international business arbitration, and the settlement of major political disputes with external involvement, such as the Aceh Peace Process.

Clearly the strategic backdrop to the tensions between claimants in the South China Sea has evolved significantly over the past forty years when viewed from the perspective of regional security, socio-economic development, and threat assessment, as well as the norms and rules of state conduct in regional and global seas. All of these new infrastructure and socio-economic developments have become a natural barrier preventing tensions from descending into open war.

### New Major Initiatives

China recently launched a new massive connectivity program called the 21st Century Maritime Silk Road. Interestingly, China announced the idea publicly in 2013 in Indonesia, the largest archipelago in the world, and a maritime continent as normally referred to by climate experts. For such an ambitious program to succeed, China also needs the collaboration and support of countries in Southeast Asia. As one can imagine, if the political situation of Southeast Asia were similar to the Middle East, there would be no great economic achievement in East Asia. If the Straits of Malacca and Singapore were run by ISIS and pirates, there would definitely not be double-digit growth in East Asia.

Whereas on the one hand major strategic changes have taken place and contribute to restraining the tensions, the expectations were actually that such strategic changes should have played even more of a role in removing the tensions and resolving the disputes once and for all. Territorial sovereignty disputes have never been easy to settle and are always coloured by nationalism and patriotism. Even in a region that has not known war over the last 60 years and has attained such a high degree of integration that the shape, size and colour of a banana must be decided by a single rule, i.e., the EU, some of its Member States are still mired in territorial sovereignty disputes, such as in the case of Gibraltar between the United Kingdom and Spain.

### Low Probability of Resolution of the South China Sea Overlapping Claims

The governing rules on territorial sovereignty disputes form part of customary international law and many such disputes have been settled through third-party

adjudication or arbitration as demonstrated by the *Palmas/Miangas*[6] case, decided by sole arbitrator Max Huber in 1928, the *Pulau Ligitan and Pulau Sipadan*[7] case and the *Pedra Branca/Pulau Batu Puteh*[8] case, to name but a few. This form of third-party settlement requires a voluntary mechanism, which means that all parties concerned have to enter into an agreement to set the terms of reference and modalities before allowing the third party to commence the legal process of settling the territorial dispute.

With five claimant countries, i.e., Brunei, China, Malaysia, the Philippines and Vietnam, claiming over hundreds of natural features in a vast sea, the prospect of actually settling the dispute through adjudication or arbitration is very slim. However, all claimants are legally obliged to settle the dispute in a peaceful manner and without resorting to the use of force or threat of the use of force as stipulated by Article 2 of the United Nations Charter,[9] the Treaty of Amity and Cooperation of ASEAN and also the Declaration on the Conduct of Parties in the South China Sea. The United Nations General Assembly Resolution 2625 on the Declaration of Friendly Relations of 1970[10] specifically stipulated that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal".

As all of the claimant countries are not likely to bring their case to adjudication, they could resort to various different dispute settlement mechanisms as prescribed by Article 33 of the United Nations Charter, which, in addition to arbitration and judicial settlement, lists such mechanisms as negotiation, enquiry, mediation, conciliation, regional agencies or arrangements, or other peaceful means of their own choosing.

It would be rather difficult to imagine the settlement of territorial disputes through negotiation. Indonesia tried this approach once in the *Sipadan Ligitan* dispute. Both Indonesia and Malaysia were locked in endless exchanges over history and old maps. Even the idea of co-ownership was difficult to entertain. The leadership of both parties finally saw the importance of settling territorial

6 *Island of Palmas* (*Netherlands/USA*), Award (4 April 1928) 2 *RIAA* 829.

7 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) [2002] ICJ Rep 625.

8 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*) [2008] ICJ Rep 12.

9 Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945) 1945 *ATS* 1.

10 UNGA Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970).

disputes through the ICJ as they believed that settling this contentious issue would greatly enhance friendship and create regional peace.

Enquiry, mediation and conciliation are initial steps towards deeper negotiation with the assistance of a third party. These steps include a neutral third party and were also once employed by warring sides in Indochina to settle their differences through the mechanism of the Jakarta Informal Meeting. Indonesia has the experience and also neutrality in this mechanism to settle territorial sovereignty disputes in the South China Sea, as Indonesia does not have claims over those territories that are located over 300 nautical miles from Indonesia's outermost islands in the lower part of the South China Sea.

Article 33 of the United Nations Charter also stipulates regional arrangements as a means to settle disputes. As all claimant states are party to the TAC which also provides a mechanism for dispute settlement, the TAC may be employed by claimant states. However, regardless of the available mechanisms for settling territorial disputes, the most important factor in this matter is the *political courage* of all claimant states to pursue dispute resolution with the involvement of a third party.

The argument of non-internationalization of the dispute is rather futile at this moment, as it was China who submitted the nine-dash line to the United Nations, and other claimants have all submitted various documents on the South China Sea to the United Nations. Moreover, the Declaration on the Conduct of Parties in the South China Sea is in essence an international, not a national or bilateral, document.

The current ongoing discussion on establishing a Code of Conduct is indeed not over a legal instrument to settle the territorial sovereignty dispute but concerns a legally binding document applicable to the conduct of the claimant parties in the South China Sea and a possible framework for joint activities. Similarly, the ongoing Workshop Process on Managing Potential Conflicts in the South China Sea, initiated by Indonesia in 1990, is not aimed at settling the territorial dispute.

Furthermore, the arbitration initiated by the Philippines under the LOSC against China, which culminated in an Award on 12 July 2016,[11] was not brought to settle the sovereignty dispute for a number of reasons. First, it only involved two claimants. Second, it did not deal with the core of the disputes, namely ownership and delimitation issues, which lay outside of the jurisdiction of the

11 *South China Sea Arbitration* (*The Republic of Philippines* v. *The People's Republic of China*), Award (12 July 2016), PCA Case No. 2013–19, available at http://www.pcacases.com/web/view/7.

Arbitral Tribunal. Nevertheless, the Award addresses the interpretation of the LOSC concerning entitlement to maritime zones. So when or if, the claimants manage to solve the sovereignty issue, the Award can guide the maritime delimitation negotiations.

Thus, so far the issue of settlement of disputes is not on the table. What was agreed to was the fundamental principle in resolving the dispute, namely respect for the principle of non-use of force or the threat to use force, and what is being hammered out is a code of conduct for claimant states' behaviour in the South China Sea.

## High Probability of Managing the Dispute in the South China Sea

When meeting Suzuki Zenko, a member of the lower house of the Japanese Diet from the Japanese Liberal Democratic Party on 11 May 1979, Deng Xiaoping said that consideration may be given to joint development of the resources adjacent to the Diaoyu Islands without touching the matter of territorial sovereignty. In June 1979, China formally proposed the concept of joint development of resources adjacent to the Diaoyu Islands to Japan through diplomatic channels. This is the first time that China openly stated its position that China is ready to settle disputes with its neighbours over territorial and maritime rights using the concept of "setting aside the dispute and pursuing joint development".

All participants in the Workshop Process on Managing Potential Conflicts in the South China Sea, organized by Indonesia over the last twenty-three years, supported this mechanism which was originally suggested by China. However, this idea has faced numerous fundamental difficulties, namely (1) the area or exact location of the proposed joint development, (2) the operators of the proposed joint development, (3) burden- and profit-sharing and (4) the dispute settlement mechanism. Many more difficulties could arise but the question of the exact area would be the most challenging one.

Article 6 of the Declaration on the Conduct of Parties in the South China Sea also stipulates cooperative activities that may be taken pending a comprehensive and durable settlement. So far, however, we have not seen a single long-standing cooperative activity implemented in the South China Sea.

Meanwhile a couple of practices in Southeast Asia are a manifestation of joint activities and more importantly they are joint activities in areas where not all maritime boundaries and sovereignty disputes are settled. They are (1) the management of the Straits of Malacca and Singapore, and (2) the Coral Triangle Initiative (CTI).

The Straits of Malacca and Singapore are among the most, if not the most, important straits in the world today. They have a length of 500 nautical miles and over 70,000 vessels pass through annually. Almost 40% of world shipping navigates through the Straits and every day 15 million barrels of energy pass through them. Some parts of the Straits have not been delimited and the sovereignty dispute between Malaysia and Singapore in the area near Johor has not yet been settled. However, Indonesia, Malaysia and Singapore have been able to manage three major elements of the Straits, namely security, safety and environment. In 1971, the three countries agreed that management was to be achieved at three levels: Ministerial, SOM and the technical level.

In the area of security, Indonesia, Malaysia and Singapore have agreed to conduct coordinated patrol, intelligence sharing, and regular naval meetings. The three countries sometimes also invite Thailand or India to join in their activities. It is important to underline that these patrols are conducted in undelimited maritime areas.

In 1975, Indonesia, Malaysia and Singapore established a Tripartite Technical Experts Group (TTEG)[12] with the main task of ensuring safety of navigation in the Straits. The TTEG created the Traffic Separation Scheme (TSS), a marine electronic highway, and also established the Cooperative Mechanism (CM) whereby user states are invited to share the burden of maintaining safety of navigation.[13] China, Japan, Korea and the USA are among the many players who take part in the CM. These actions also constitute direct implementation of Article 43 of the LOSC.

With respect to environmental issues, the three countries, along with Japan, created a Revolving Trust Fund for clean-up operations of oil spills from vessels.

In 2007, six countries, namely Indonesia, Malaysia, Papua New Guinea, the Philippines, Timor-Leste and the Solomon Islands, agreed upon the establishment of a multilateral partnership, the CTI,[14] to address threats against the highest coral diversity in the world with 600– or 76%– of the world's known coral species. It contains the highest reef fish diversity on the planet with 2,500– or 37%– of the world's reef fish species concentrated in the area. It is also a spawning and nursery ground for six species of threatened marine

12 'Factsheet on the Tripartite Technical Experts Group (TTEG)', available at http://www.mpa.gov.sg/web/wcm/connect/www/e5a5e8d2-d828-41d4-8abe-5f84a812a3a4/annexb_270510.pdf?MOD=AJPERES.

13 Cooperative Mechanism on Safety of Navigation and Environment Protection in the Straits of Malacca and Singapore, available at http://www.cm-soms.com/.

14 Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (CTI-CFF), available at http://www.coraltriangleinitiative.org/.

turtles, as well as endangered fish and cetaceans, such as, respectively, tuna and blue whales.

This is a very large area where some parts have not yet been delimited. There is no maritime boundary between Indonesia and Malaysia or Malaysia and the Philippines, and there are no maritime boundaries between Indonesia and Timor-Leste or with the Solomon Islands. However, these six countries succeeded in agreeing upon joint cooperation to manage such a vast area of waters.

The management of the Straits of Malacca and Singapore, as well as the CTI, has many features in common:

1) some or a majority of its areas remain undelimited,
2) two of their member states happen to be claimant states in the South China Sea disputes, i.e., Malaysia and the Philippines,
3) China, a claimant, is also a member of the burden-sharing mechanism in the management of the Straits of Malacca and Singapore.

Furthermore, the issues jointly managed in those two major mechanisms are mentioned in Article 6 of the Declaration on the Conduct of Parties in the South China Sea: environmental protection, safety of navigation, and combating transnational crime.

With such striking similarities, joint activities in such matters in the South China Sea should be possible. Other factors that would make it possible are the following:

1) three claimants have the necessary experience in the management of joint activities in undelimited maritime areas,
2) all claimants are States Parties to the LOSC, which obliges countries in enclosed or semi-enclosed seas to work together,
3) they have actually implemented LOSC obligations in relation to enclosed or semi-enclosed seas, as well as straits used for international navigation.

## The Next Move

In light of the above, ASEAN and China could consider possible dialogue with the CTI and the Cooperative Mechanism of the Straits of Malacca and Singapore. In doing so, they would get first-hand information and also a feel for how in reality, not merely in theory, such joint activities are formed, their modalities, mechanisms and many other aspects, in order to establish similar joint activities in the South China Sea.