Managing Territorial Disputes (1997)*

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Abstract

This paper focuses on the management of maritime territorial and jurisdictional disputes. A big number of such disputes exist among Southeast Asian states; there are even more when we expand the area under discussion to the Western Pacific, including both SEA and the South China Sea. The disputes typically originate from questions of sovereignty, jurisdiction over maritime zones, and access rights to living and non-living resources. Some of the disputes are bilateral in nature while others involve three or more countries. The most complicated disputes thus far are those over the Spratlys in the South China Sea, which involve six claimants.

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That Southeast Asia is now a recognized center of economic growth (together with other East Asian countries) has often been attributed to the correct policies carried out by effective governments encouraging the dynamism of the private sector. It can also be attributed, in no small measure, to the success of multilateral cooperation efforts among these countries, amid a favorable international climate, which have helped preserve a peaceful and stable political-security environment for economic growth to take place.

However, territorial disputes continue to threaten the peace and prosperity that have dawned or are beginning to dawn on the countries of Southeast Asia. While such disputes have existed for a long time, they appear to have gained fresh impetus in recent years with the removal of the Cold War overlay,[1] the growing interdependence as well as economic competition among regional states, and—because many of the disputes are maritime in nature—the enforcement of the United Nations Convention on the Law of the Sea (UNCLOS).

Fortunately, Southeast Asian countries now appear more inclined to the peaceful settlement of disputes among them, and to negotiation and compromise, as indicated by the proliferation of dialogues and meetings taking place at official and non-official levels. The Western Pacific already has at least 15 delimited maritime boundaries[2] and three bilateral cooperative agreements over shared petroleum resources.[3] Another example of cooperation taking precedence over sovereignty was the establishment of the Mekong Committee. But while there appears to be agreement on the basic approach to dispute settlement, much remains to be done in actually resolving many of the conflicting claims.

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three or more countries. The most complicated disputes thus far are those over the Spratlys in the South China Sea, which involve six claimants.

International law does not offer adequate solutions to maritime boundary questions. In fact, from a purely legal perspective, that is, disregarding political and security considerations, international law sees no urgency in resolving sovereignty questions. The International Court of Justice (ICJ), for instance, says that maritime as well as land boundaries may remain undefined over long periods without this uncertainty affecting the rights of states concerned.[4] From the points of view of international politics and security, however, we have seen all too well and all too often the dangers and pitfalls of undefined limits of sovereignty. For this reason, we now find a burgeoning industry centered on developing modes of confidence-building, preventive diplomacy, and conflict management and resolution.

Maritime disputes are somewhat different in nature from land disputes, particularly since it is difficult, although no longer technologically impossible, to determine boundaries on water for purposes of enforcement of jurisdiction and exercise of sovereign rights. However, states appear to conceptualize their maritime boundaries in the same way they do land boundaries—that is, as political dividing lines, rather than maritime zones that generate different sets of rights and responsibilities.

The crux of the problem is that either on land or in water, but even more so in water, there are no such things as purely "natural" boundaries.[5] Ultimately all boundaries are political. Due to security considerations, our maritime boundaries have become political boundaries at sea, thus giving rise to a tendency for "territorialization" of even the 200-mile exclusive economic zones (EEZs).[6]

Consider the following instances:

1. Thailand has fishing disputes with Vietnam, Myanmar, and Malaysia. In December 1995, a Thai newspaper, *The Nation,* reported that the Malaysian navy shot dead two Thai fishermen, one of them a 14-

year old boy, who were ostensibly caught fishing in their overlapping EEZs. The Royal Thai Navy was subsequently reported to have said that it will not recognize Malaysia's self-declared EEZ, and to have asked the Thai Foreign Ministry to communicate the same to the Malaysian government.

2. Earlier in 1995, China's occupation of Mischief Reef (130 kilometers off the Philippine province of Palawan) under the guise of setting up shelters for its fisherfolks was roundly criticized, not only by the Philippines but [also] by ASEAN and other international organizations who are growing seriously concerned over China's long-term intentions in the South China Sea. The area has long served as fishing grounds for Filipinos, Chinese, Vietnamese, and other nationals, but this seems to be the first time that fisheries access has been used as an excuse to justify the occupation of a disputed territory.

3. In mid-1994, there was a brief confrontation between Chinese warships and a Vietnamese drilling vessel. Vietnam, China, and the Philippines have been granting oil exploration/survey grants particularly to Western oil companies. These actions were not solely in pursuit of energy programs; they were partly demonstrations of sovereignty, with the involvement of foreign companies seen as a hedge against attack by hostile rival claimants.

These examples underscore the serious conflict that may arise in the region, not just between ancient enemies China and Vietnam, but between erstwhile close neighbors China and the Philippines, as well as between longstanding ASEAN partners Malaysia and Thailand.

Ironically, the fundamental requirements of successful management of maritime territorial and jurisdictional disputes have long been present in the region. These requirements are precisely what this conference is all about: shared values and interests. And these shared values and interests have been enshrined as basic principles subscribed to, either explicitly or implicitly, by most Southeast Asian countries and other East Asians as well.

As early as Bandung, we agreed on the principles of peaceful settlement of disputes through dialogue and negotiation, and to pursue cooperation based on equality and mutual benefit in the interests of all countries concerned and of the region as a whole.

In the Treaty of Amity and Cooperation in Southeast Asia (TACSEA), we stressed the need for mutual respect of independence, sovereignty, and territorial integrity. We declared that states have the right to be free from external interference and coercion. Chapter IV of the treaty, which concerns the pacific settlement of disputes, even provides for the establishment of a High Council at ministerial level to deal with disputes which the parties concerned may voluntarily bring to it.

In the 1992 ASEAN Declaration on the South China Sea, we advocated self-restraint and the non-threat or use of force in dealing with this specific dispute, then called on the parties to explore possible functional cooperation in maritime navigation and communication, protection against pollution of environment and cooperation against piracy, armed robbery, and drug trafficking in the South China Sea area. We also invited other countries to subscribe to the TACSEA, particularly non-ASEAN parties to the South China Sea disputes, underscoring our belief in common security and the inclusive, cooperative approach. We proposed that TACSEA be the basis of an international code of conduct in dealing with such disputes.

International principles also guide us on the range of options available for dispute settlement. Chapter VI, Article 33 of the United Nations charter enjoins parties to a dispute to first seek a solution "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

For a long time, ASEAN preferred to sweep its internal conflicts under the rug and concentrate on common interests, building regional resilience on the basis of domestic stability. It was a good approach, to which we owe our ability today to speak of ASEAN as having shared

identities and values. But it is also an approach which may no longer be viable under the present circumstances. I refer most specially to the increased wealth, and therefore increased confidence, assertiveness and nationalism not only within ASEAN but among ASEAN's neighbors as well. I also refer to increased interdependence, which not necessarily homogenizes but at times may lead to greater cleavages between more developed and less developed Southeast Asian nations. Wealth and interdependence—things that are good in themselves—may lead to cleavage and possibly conflict at a time when no clear-cut security regime is yet in place in the region.

One important question thus faces this Southeast Asia Forum. Assuming—and hoping—that the full membership of Vietnam and the anticipated entry of Cambodia, Laos, and Myanmar proceed without insurmountable difficulty, will ASEAN today, or in the future, be ready to further expand its common ground by addressing the outstanding issues among its member states, rather than by sweeping them under the rug? Are we now ready to make the difficult compromises of sovereignty that will enable us to pursue further together our vision of common security and prosperity—or, in other words, to suffer short-term pain for long-term gain?

Because the South China Sea (SCS) dispute is often said to be the most intractable, let us take it as a case in point. There have been many proposals for the resolution of the disputes, as well as for the prevention of conflict pending resolution of the sovereignty issues. The Indonesian-sponsored conferences on Managing Potential Conflicts (MPC) are banking on functional cooperation in areas of common benefit as the key to encouraging habits of cooperation and confidence-building among the various claimants. Under the MPC framework, SCS claimants and other littoral states are now exploring cooperation in the following areas: resource assessments (possibly including joint hydrographic surveys of dangerous areas, multilateral scientific expeditions); marine scientific research (information exchanges, sea-level and tide monitoring, biodiversity); safety of navigation, shipping and communications; marine environmental

protection; and anti-piracy. When it does take place, concrete cooperation is to be based on principles of step-bystep approach, cost-effectiveness and starting from least controversial issues.

MPC is also now looking into models of joint development. The main advantages of MPC have been its inclusiveness, the presence of non-claimants particularly those willing to serve as mediators, and its involvement of experts, thus expanding the arena of decision-making beyond officials and politicians. Its main difficulties have included the need to skirt the issues of sovereignty, failure to generate discussions on specific confidence-building measures such as demilitarization, and its inability thus far to elevate policy recommendations for adoption by governments of the respective countries. While MPC continues to be a valuable process truly deserving of regional support, it could not prevent, for example, the occupation of Mischief Reef by China, or the threat to fisherfolks posed by overly zealous armed guardians of sovereignty.

Bilateral and even trilateral solutions may provide some answers where multilateral ones are thus far unable to, or where, in the case of the ASEAN Regional Forum and the ASEAN-China Senior Officials Meeting, the terms of addressing the issue are yet to be defined. The major contribution of initiatives at the bilateral and possibly trilateral level would be in negotiating interim codes of conduct and undertaking confidence-building activities. The talks that have been held in recent years between pairs of major claimants (China-Vietnam, China-Philippines, and Philippines-Vietnam) have led to reiterations of principles earlier mentioned: self-restraint, commitment to nonthreat or use of force and to peaceful negotiations, cooperation on the basis of mutual respect, equality and mutual benefit. It remains for the parties to translate agreement on principles into concrete demonstrations of sincerity.

For Southeast Asian claimants, whose own SCS claims overlap with each other, it has been said that there is a need for us to agree on common approaches and to resolve our own disputes first. Our preparedness to do so will indicate whether we are speaking of ASEAN's shared identities, interests, and values as an objective reality, or still as an elusive ideal.

End Notes

[1] The concept of a Cold War "overlay" in regional relations was first developed by Barry Buzan.

[2] Johnston and Valencia, cited in Ong and Hamzah, "Disputed Maritime Boundaries and Claims to Offshore Territories in the Asia-Pacific Region," a paper presented at a conference on International Boundaries and Environmental Security: Frameworks for Regional Cooperation. June 14-17, Singapore.

[3] 1979/90 Malaysia-Thailand Joint Development Agreement, 1989 Australia Indonesia Timor Gap Zone of Cooperation Treaty, 1992 Malaysia-Vietnam Memorandum of Understanding, cited in Ong and Hamzah.

[4] ICJ deliberations on the North Sea, 1969.

[5] Prosper Weil, *The Law of Maritime Delimitation-Reflections*, Cambridge: Grotius Publications Ltd., 1989, pp. 30-31.

[6] Ibid, p. 93.