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South China Sea: How China Could Clarify its Claims

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Synopsis

China's recent submission to the United Nations on its claim in the South China Sea has caused some confusion. This can be resolved by Beijing clarifying its claim by bringing it into conformity with the 1982 UN Convention on the Law of the Sea.

Commentary

CONFUSION IN the international community over the nature of China's claim in the South China Sea has created apprehension and misunderstanding. One of the main causes of this confusion was the Note Verbale sent by China to the United Nations Secretary-General on 7 May 2009, objecting to the Joint Submission of Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf (CLCS).

In its Note Verbale, China made the following statement about its claims in the South China Sea: "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map)."

Controversial U-Shaped Line on China's Map

China's critics have focused on the attached map, rather than on the words of the Note. This map, originally published by the Republic of China Government in 1947, has nine dashes drawn in a u-shape around the South China Sea. The u-shaped line encompasses most of the South China Sea, and comes very close to the mainland territories of the Philippines, East Malaysia and Vietnam.

What some observers regard as particularly significant is that this is apparently the first time China attached the map to an official communication to the UN. This has led some to conclude that China is officially claiming all the waters within the u-shaped line as its territorial or historic waters, a position which is contrary to the 1982 Law of the Sea Convention (UNCLOS).

Observers in the United States have interpreted Chinese actions as a threat to the high seas freedoms of overflight and navigation in the South China Sea. This has prompted statements by Secretary of State Hillary Clinton at the ASEAN Regional Forum meeting in Hanoi in July 2010 which brought the US into what has always been regarded as a regional dispute. The result has been that China's claim in the South China Sea is

now perceived by most of the international community as contrary to UNCLOS and therefore illegitimate.

Ten Points to reconcile China's Claim with UNCLOS

China could make its claim in the South China Sea consistent with UNCLOS and at the same time protect its national interests by making the following points:

First, China claims sovereignty over all the islands within the u-shaped line, including those islands which are currently occupied by other states or by Taiwan, as well as sovereignty in a 12 nautical mile territorial sea adjacent to the islands;

Second, China claims an exclusive economic zone (EEZ) beyond 12 nm from those islands which are capable of sustaining human habitation or economic life of their own as set out in Article 121 of UNCLOS, and China has the sovereign right to explore and exploit the living resources in the water and the living and non-living resources of the sea-bed and subsoil in the EEZ;

Third, China recognises that all states enjoy high seas freedoms in the EEZ claimed from those islands, including the freedoms of overflight, navigation and the right to lay submarine cables and pipelines;

Fourth, sovereignty over the islands in the South China Sea is not governed by UNCLOS, and disputes concerning sovereignty over the islands in the South China Sea cannot be referred to any international court or tribunal without China's express consent;

Fifth, given the highly sensitive nature of the sovereignty claims, it is unlikely that China and the other claimant states will be able to agree to settle the issue of sovereignty over the islands in the foreseeable future;

Sixth, although Malaysia and Vietnam have made submissions to the CLCS in which they claim an extended continental shelf beyond the limits of their 200 nm EEZ claims, the CLCS cannot consider those submissions under its rules of procedure because of the existence of a maritime dispute in the area;

Seventh, China's claim to an EEZ from the islands in the South China Sea will overlap substantially with the EEZ claims and the extended continental shelf claims of Malaysia, Vietnam and the Philippines. Such overlapping maritime boundary claims cannot be referred to any international court or tribunal without the consent of all the parties, including China. This is because China has exercised its right under Article 298(1) to opt out of the compulsory binding dispute settlement procedures in UNCLOS for disputes relating to the delimitation of maritime boundaries. Furthermore, the overlapping maritime boundary claims cannot be agreed upon until the sovereignty claims over the islands in the South China Sea have first been resolved;

Eighth, pending final settlement of the sovereignty and maritime boundary claims, the states concerned have little choice but to enter into "provisional arrangements of a practical nature" as called for in the UNCLOS provisions on boundary delimitation, provided that such provisional arrangements are without prejudice to the final determination of the sovereignty claims and to the final agreements on maritime boundaries;

Ninth, China is willing to work with the ASEAN member states on the development of confidence-building measures and cooperative measures as called for in the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea; and

Finally, China reaffirms its position that the claimant states should agree to set aside the sovereignty and maritime boundary disputes, and negotiate a mechanism which allows for joint development of the natural resources.

Towards a Long-term Solution

If China were to clarify its claim in the South China Sea in the above manner, it would enhance the legitimacy of its claim and provide a setting for discussions with its neighbours on the only viable long-term solution in the South China Sea, namely, the establishment of provisional arrangements of a practical nature in the South China Sea, including joint development of the natural resources.

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