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The South China Sea: “Disputed waters” everywhere?

By Huy Duong

Synopsis

Since 2011, the disputes over maritime space in the South China Sea have involved not only which country has sovereign and jurisdictional rights over an area, but also whether an area constitutes disputed waters. This is an important question that must be answered with certain principles.

Commentary

China's National Offshore Oil Corporation has, on 23 June 2012, invited bids for nine blocks for oil & gas exploration in the South China Sea. The blocks lie inside Vietnam's declared Exclusive Economic Zone, bounded to the West by China's "U-shaped line", and extending to 57 nautical miles off the Vietnamese mainland.

Vietnam's Ministry of Foreign Affairs stated on 26 June 2012 that this area "lies entirely within Viet Nam's 200-nautical mile exclusive economic zone and continental shelf ... It is absolutely not a disputed area". China's MOFA responded that its jurisdiction applies to this area and referred to the "proper settlement of maritime disputes", thereby asserting that the area is disputed.

This controversy on whether an area constitutes disputed waters echoes the incident in May 2011 in which China's Maritime Surveillance ships cut the seismic cable being towed by a Vietnamese geological survey vessel. At that time, Vietnam asserted that the incident took place in undisputed waters, while China disagreed.

A similar controversy exists between China and the Philippines regarding the EEZ in the Reed Bank area, which the Philippines regards as not being part of the Spratlys and therefore undisputedly its own, while China maintains otherwise.

The need to define the disputed areas

These controversies raise the question "Where are the disputed areas in the South China Sea?" Surprisingly, no claimant to the disputed islands and rocks in the South China Sea has declared the limits of its claims to maritime space as derived from these features, so the boundaries of the disputed areas are unknown. Since the disputes have proved intractable, the need to manage them and reduce the risks of conflict breaking out is paramount. Unfortunately, the absence of declared, let alone agreed, boundaries for the disputed areas, makes managing the disputes extremely difficult. It also increases the risk of mismatched expectations and conflicts.

An example is the Declaration of Conduct of Parties in the South China Sea 2002 between ASEAN and China. The fact that this does not delineate and differentiate disputed areas and undisputed ones is a limitation similar to that of having a single speed limit for motorways and urban streets. Similarly, if the new Code of Conduct does not delineate and differentiate disputed and undisputed areas, it will suffer from the same limitation.

Another example is China's proposal to set aside the disputes and pursue joint development. While joint development is in principle a valid approach for managing the disputes, it cannot work in practice without the claimants agreeing on the boundaries of the disputed areas, i.e., on the actual areas to be subjected to joint development.

Principles for determining disputed areas

There is a view that if there exist conflicting claims in one area then that area is disputed. However, setting the common denominator this low would allow any country to make any area a disputed one by making a conflicting claim there. For example, China could start declaring specifically that the U-shaped line represents a boundary for maritime space to make the whole area inside it disputed. Similarly the Philippines and Vietnam could do the equivalent with a C-shaped line and a D-shaped one respectively. This would make it impossible to contain or manage the disputes.

Instead, the common denominator for the notion of "disputed area" has to be based on UNCLOS, which stipulates specific maritime zones and embodies the principle that claims to these zones must be derived from land and insular territories. This common denominator can be further clarified by international law of maritime delimitation.

It is clear that the 12-nautical-mile territorial sea around the islands and rocks of the Paracels, Spratlys and Scarborough Shoal are disputed. Beyond this, the picture becomes more complicated. Nevertheless, it is possible to specify the range of the spectrum of opinions.

At the first end of the spectrum is the view that none of the disputed features deserves EEZ or continental shelf. This would mean that the disputed areas are confined exclusively to the 12-nautical-mile territorial sea generated from valid baselines and base points around these features.

At the other end of the spectrum is the counterfactual hypothesis that the outermost features of the Paracels, Spratlys and Scarborough Shoal are all islands which are entitled to EEZ and which deserve 100% EEZ delimitation in areas where this entitlement overlaps with that of uncontested territories. Under this hypothesis the boundaries of the disputed areas would be the equidistance lines between uncontested territories and the outermost features of these three clusters. In reality, not every one of these outermost features is entitled to EEZ.

Additionally, according to international law of maritime delimitation, every feature of the three clusters should have only limited or no effect in EEZ delimitation in areas where its potential EEZ entitlement overlaps with that of larger landmasses. This means that in reality the extent of the EEZ belonging to the disputed features will fall short of the equidistance lines. Therefore, in areas of overlapping EEZ entitlements, boundaries for the disputed areas that are consistent with international law would be near the first end of the spectrum, and cannot extend to near or past the equidistance lines.

Basis for dispute management

Instead of adopting a common denominator that is too low to assert that an arbitrary area of the South China Sea constitutes disputed waters, the claimants should use one that is based on UNCLOS and international law of maritime delimitation. Furthermore, they should jointly determine where on this spectrum the boundaries of the disputed areas are. This can be done either through negotiation or by submitting the question to an international court.

The existence of agreed boundaries for the disputed areas will be the necessary basis for dispute management measures. Boundaries that are near the first end of the spectrum, in addition to being consistent with international law, will also keep the disputed areas small, thus improving the likelihood of the claimants agreeing on these measures.

Dr Huy Duong is a UK-based IT consultant and commentator on maritime affairs. He contributed this article specially to RSIS Commentaries.