Policy Recommendations to Boost Cooperation in the South China Sea
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Much comment on the South China Sea focuses on risk assessment and analysis; gauging the probability and drivers of potential conflict. It is rarer, however, to find detailed, specific policy recommendations intended to manage the tensions and lead towards a peaceful solution to the disputes. With the ongoing discussions over a possible Code of Conduct, there is a greater need for robust debate over the policies that could encourage cooperation and disincentivise conflict in the South China Sea.

In a recently published book, *Regional Disorder: The South China Sea Disputes*, Sarah Raine and Christian Le Miere attempt to do just this. By concentrating on more modest, and arguably more achievable, ambitions, the authors attempt to offer realisable policies that could build confidence in the short to medium term. They do so too with the hope, and indeed aim, that a more low-key, incremental approach can deliver stability in the short term which, in time, can stretch into the medium term, and that this stability is, in turn, broadly inclusive of all regional interests.

Yet even such an apparently modest ambition will require greater policy engagement on the part of all protagonists. Further, such policies do not offer a complete solution to the disputes. This longer-term goal would need to come about through a negotiated pact of some form over sovereignty. While such an outcome is currently far-fetched, there are historical examples that could help guide the process. One in particular, the 1920 Svalbard Treaty, provides a useful model of unilateral sovereignty and joint development for future negotiations, while a second, the 1959 Antarctic Treaty, offers an alternative template of non-sovereignty and lack of development.

Clarification

The goal of promoting greater cooperation in the South China Sea could be reached through four key areas of policies.

The first is clarification. All parties should be urged to clarify their claims under UNCLOS. This instils a mutual recognition and reassurance of a respect for international law that would be inherently stabilising. China's nine-dashed line is not the only clarification required, but it is the most significant given its size and the fact that it has little basis in international law. Instead of fearing that its territorial and maritime claims or negotiating strategies could be undermined by any clarification, China's leadership should recognise that its interests would instead be served. Firstly, such a move would undercut a key hostile narrative of Chinese objectives to rewrite the international order. Secondly, it would shore up confidence in Chinese intentions within Southeast Asia, including its ongoing commitment to 'peaceful development', which inevitably entails the harnessing of its ever more apparent military capabilities. Importantly, such a clarification would not necessarily involve the acceptance of third-party arbitration facilities offered under the Law of the Sea; parties would continue to be legally entitled to reject such an option. Meanwhile, China's clarification of its island claims in the East China Sea should spur

those lobbying for reciprocal consistency in the South China Sea, censuring China on its apparent preference for strategic ambiguity as a deliberate negotiating tactic.

It should be noted that the responsibilities of clarification are not China's alone. Although Vietnam has stated that it claims all of the Paracel and Spratly Islands, it has not clarified which islands actually qualify as lying within the Spratly grouping – does this, for example, include James Shoal lying just 100 km off Malaysia's coast? The provision by all disputants of a list of maritime features would go a long way towards a basis for negotiation in the future.

Such a policy both leads to greater cooperation, in that it is a significant confidence-building measure, and can involve in its very process cooperation. Claimant parties could consider, for instance, working together to agree, at least in theory, what features carry what maritime entitlements, regardless of whose claims to sovereignty are ultimately recognised. At present, there is little informed appreciation for what maritime rights are actually at stake in the South China Sea since there is no agreed narrative on what features actually qualify as islands under UNCLOS 121(1). In turn it is unclear which of those islands are capable of sustaining human habitation or an economic life of their own, thereby generating under UNCLOS 121(3) not simply a 12nm territorial sea but also a strategically more significant EEZ or continental shelf. There has, then, been a distinct paucity of mapping what different interpretations could actually signify in terms of maritime zones and entitlements. For example, it is possible that the smaller Spratly islands in particular in fact contain no features entitled to anything more than a 12 nautical mile territorial sea, especially if the definition for a capacity to sustain economic life is based on natural features rather than a state's more cynical investment in creating infrastructure on any given feature.

Realistically, this work should start in areas where disputes are at least recognised and involve working groups engaging representatives of all claimants. Agreements would need to be made on all features by all sides, regardless of present occupation. And since very few of these features are actually occupied, for once there would be at least some incentive not to take the maximalist position for fear of a claim not being recognised at some future point. A working group for the Spratlys would therefore include the six claimants, although the involvement of Taiwan here would have to be negotiated. A working group for Scarborough Reef, to take another example, would include only representatives from the Philippines, China and (again, subject to negotiation) Taiwan. A supervisory panel to which all the respective working groups reported could involve broader representation, for example from ASEAN or even the US. This way China's interest in bilateralism would be met, yet within a context of multilateral oversight. Mistrust would be managed through the objective assessment of maritime rights separated from questions of territorial ownership.

Collaboration

The disputes should be carefully unpacked into their constituent parts. Disputes over territorial sovereignty are by their nature zero-sum, whereas disputes over maritime zones and freedom of navigation within EEZs need not be. More collaborative approaches to these issues could and should therefore be considered. Especially if work upon island clarification, as defined under UNCLOS, established that maritime claims within this Sea were more confined than commonly

believed (even allowing for claims extending from continental shelf coastlines), there should be clear established areas for potential joint development, whether in terms of hydrocarbon exploration, or protection of fishing stocks and the maritime environment. Previous joint exploration agreements, between China, the Philippines and Vietnam in 2005 and between China and Japan in 2008, could still act as precedents and models for such agreements, despite their limited success historically and with lessons duly learnt.

In place of unilateral imposition of fishing bans aimed at preserving precious fish stocks, bilateral or even multilateral fishing bans should be discussed. This would prevent the resentment that can occur in response to China's fishing ban and create a sense of cooperation. A moratorium on deep-sea drilling in clearly disputed areas could also be considered, with the intention to restart such drilling once clarification of island claims and respective EEZs had occurred and/or joint exploitation agreements could be reached. Perhaps less ambitiously, governments could consider the establishment of fishing hotlines to facilitate a depoliticised transfer of fishermen detained for fishing in a contested area.

Naturally, it is not just in joint resource exploitation bans that cooperation can occur. Joint development also can spur greater cross-border cooperation. Recent examples of such joint exploitation agreements, including the 2008 Sino-Japanese agreement in the East China Sea (which has not progressed owing to a deterioration in bilateral relations) and the 2004-05 Joint Marine Seismic Undertaking signed between China, the Philippines and Vietnam. While the failure of these ventures underlines the difficulties in joint development/exploitation, it also highlights that such agreements are feasible, when the international environment is conducive.

A multilateral fishing ban or joint development could theoretically lead, in time, to joint or co-ordinated maritime paramilitary patrols across areas claimed by the parties involved. This would help increase coordination and maritime domain awareness, for example by requiring parties to acknowledge the position of any vessels, or pool resources. It should therefore minimise the possibility of confrontations (with the additional benefit of lowering the costs of patrols). There is even a precedent in China's pursuit of coordinated maritime patrols with three ASEAN states in the Mekong River (Laos, Thailand and Myanmar), which came about at Beijing's request following the murder of 13 Chinese citizens in October 2011.

Obviously, the South China Sea presents a more complicated set of problems, not least of which is the fact that maritime paramilitary patrols are, in reality, designed to accomplish a number of tasks, only one of which is fishery regulation. In as much as they also fulfil the role of demonstrating *de facto* sovereignty over the area, these are missions individual countries are unlikely to wish to forego in the short term. Nonetheless, there are a variety of other tasks that could be accomplished by regional states' paramilitary forces which would also encourage greater collaboration. The May 2011 Arctic Council's search-and-rescue (SAR) agreement is one example of an accord between countries with often fractious relations and existing maritime disputes, which was designed to delineate and outline cooperation in a particular maritime role. For similar reasons, SAR could be a mission that could be jointly or cooperatively accomplished in the South China Sea, allowing littoral states to harmonise their paramilitary operations and thus minimise the opportunities for potential altercations.

Finally, and already under discussion, is a form of 'incidents at sea' agreement (INCSEA). This would be informed by the experiences of the 1972 agreement between the US and the USSR, but modelled according to today's particular circumstances and regional requirements. Such an agreement would be a substantive contribution towards helping mitigate the risk of escalatory conflict and would, in and of itself, build confidence towards the more favourable outcome of managed mistrust. Currently promoted by the US and regarded with suspicion by China, Southeast Asian nations have an important role to play in pushing for the development of such a safety-valve in their own waters. An ancillary benefit of INCSEA agreements is that they formalise military-military contacts through annual workshops that discuss matters at hand, something currently pursued in Sino-US relations but without the inclusive involvement of Southeast Asian nations.

Contextualisation

The tensions which underpin disputes in the South China Sea should continue to be tackled in their own right rather than being allowed to fester within this already complex picture of regional relations. As this book has argued, rapidly expanding Chinese military capabilities are fuelling regional mistrust. Although China's right to spend its growing resources on an increased military capability is not contested, the reality is that the often deliberate opaqueness to these advancements is further fuelling the inevitable anxieties these developments are causing, both amongst the smaller and medium-sized powers of the region, as well as on the part of the established regional hegemon, the US. Regular, high-level dialogues between militaries and their governments therefore become all the more important in explaining intentions and minimising the room for misunderstanding and miscalculation.

Yet even with greater transparency, US interests in the additional reassurances provided by a continued surveillance of China's rise would realistically remain. In other words, disputes over freedom of passage for military vessels in an EEZ are a stand-alone factor fuelling tensions in the South China Sea, even if they are tied into China's military advancements. Here, the US would be well-served to argue both internationally and bilaterally. Internationally, it has to continue to seek to engage other countries which benefit either directly, or indirectly, from US security patronage in support of its argument on EEZ interpretations. It should also highlight the dangers inherent in accepting distinctions between commercial and military rights of passage. After all, in particular with the blurring of lines over paramilitaries and the engagement of militaries in humanitarian disasters and contingency planning, who is the ultimate arbiter of what vessel is or is not 'civilian' or 'for peaceful purposes'? Bilaterally, the US can discuss with China its own pragmatic interests in the protection of such capabilities against the day in which Chinese vessels might wish to conduct similar activities against other nations – and, arguably, this already occurs in disputed waters in the South China Sea and Pacific Ocean. Ultimately, knowledge and transparency are empowering – they build confidence and therefore add to stability rather than undermine it. The better the strategic picture is understood, the less likely a miscalculation, and with it a possible descent into conflict.

More broadly, US, Chinese and Southeast Asian interests would all be served by a contextualisation of South China Sea's disputes outside of the framework of a rising China and the reactions of the US as the established hegemon. Instead these disputes can be placed within a

broader context of discussions on international law, as well as the evolving regional order in Southeast Asia, thereby including other partners from beyond the immediate region – from South Asia, East Asia and Australasia, for example. The alternative, an exaggerated focus on the US-China backdrop and the story of great power dynamics, risks turning a situation which does not have to be zero-sum into one more likely to be perceived as such. Once more, Southeast Asian states have a critical role to play in this rejection of a narrower, and potentially inflammatory, focus, in favour of this broader contextualisation.

Civilianisation

Greater cooperation in the South China Sea could also be encouraged by a demilitarisation or civilianisation of the disputes. Once again this is an issue of framing as much as content. The aim should be to 'de-securitise' the disputes, protecting them as a topic of civilian control and concern, with military influences and involvement kept to a minimum. Militaries are, by their design, devised to detect threats and deal with them. They think the worst of each other, and prepare for the worst. So-called 'hardliners' are therefore understandably to be found more in military than in civilian worlds, although of course counter-veiling voices can be found in both.

In the protection of established sovereignty the military, naturally, has a key role to play. Yet in the management of disputed territory, the danger is that the military becomes part of the policymaking process, rather than a servant of it. Some dynamic to this effect can already be seen in the internal competitions for budgets between government agencies. This is particularly the case in China where the military has long been a key bastion of influence on security-related issues (for example, relations with the DPRK). And so, whilst military-military dialogues are important for maintaining lines of communication and handling incidents at sea, discussion of the management of claims in the South China Sea should be framed, where possible, by civilian actors in civilian terms. The apparent use, for example, of retired PLA officers to issue hardline articles on Chinese entitlements in the South China Sea either by way of venting nationalist sentiment or by way of a test balloon for future actions, runs directly against this, and in the process, further militarises an already strained environment. Meanwhile, an already disempowered Ministry of Foreign Affairs is left to conduct damage control. Although the impetus would have to come bilaterally, even the briefest of regular multilateral meetings between claimant MFAs could send an important symbolic indication to the region and beyond about the determination of actors to contain tensions within the civilian arena, avoiding their escalation to necessarily more hardline, military rhetoric. Regularity could be key to the success of such an initiative, as an annual meeting of MFAs dedicated to discussion of security in the South China Sea would demonstrate the central role being played by the civilian ministries, rather than the defence ministries, in management of these disputes. It would also provide a channel of communication on relevant issues. Such meetings would not necessarily be framed around conflict resolution, thus avoiding China's concerns over multilateral solutions to the disagreements, but simply information exchange, for example, on actions in counter-piracy or marine environment protection.

Within this context of 'civilianisation', other more dramatic measures could be considered. Realistically, under the incremental approach being proposed, these more ambitious measures would only be appropriate in time, but could, for example, extend to a freeze on the upgrading of

any military infrastructure on islands already occupied. The 2002 Declaration on Conduct in the South China Sea asks signatories to engage in 'self-restraint' with regard to developments, but the only example of this cited is the requirement to refrain from the militarisation of further features. Indeed, its relative success in limiting *new* occupations since 2002 might suggest that a similar agreement could prove feasible in restricting the further expansion of current occupations. Such a freeze could be achievable in that it would effectively cement Chinese (and Vietnamese) military superiority on key structures, but in return for the guarantee that further divergences in finance and capabilities between claimants would not be deployed to fuel the existing disparities in military presence. The longer-term goal of such an agreement would be the civilianisation of these occupations: transferring responsibility for the management of the features from the military to paramilitary agencies. Indeed, Taiwan has already attempted to pursue this demilitarisation tactic, replacing its Marines for Coast Guard Administration officials in 2000 on Itu Aba. Given the rising importance of maritime constabulary agencies in the region generally, this would seem a logical step that could have the benefit of further distancing the military from the equation, minimising the likelihood of any repeat of the bloody military clashes of 1974 and 1988.

Long-term solution

All of the above four policy areas – clarification, collaboration, contextualisation and civilianisation – encourage and/or involve greater cooperation among the various claimant states in the South China Sea. They are therefore confidence-building measures that limit the probability of conflict in the short to medium term. They do not, however, provide a long-term solution to the disputes themselves.

This is something that can only be achieved through treaty. Such an agreement currently seems far-fetched, but the above-stated policy areas can also act as principles to any negotiations over an agreement to the disputed areas of the South China Sea.

In fact, there already exists an international treaty that embodies some of these principles and offers an interesting model for any possible future negotiations over the South China Sea.

That agreement is the 1920 Spitsbergen Treaty, signed by nine powers at its outset but later joined by 33 countries. The treaty was designed to manage growing discontent over the Spitsbergen archipelago (later renamed Svalbard), where competing commercial interests were creating competition and disagreements over sovereignty and economic rights.

The proposed solution was a broad and comprehensive compromise. Essentially signatories agreed that the islands were under Norwegian sovereignty, but that all parties had the rights to economic exploitation of the islands and the territorial waters. Norway also agreed not to construct any military fortifications or naval bases in Svalbard, essentially amounting to a demilitarisation agreement of the islands as they "may never be used for warlike purposes". Freedom of navigation to all waters was considered absolute.

There are problems with the Svalbard Treaty, most notably that it does not outline rights to the 200 nautical mile exclusive economic zone that Norway now believes it can claim around the

islands. Nonetheless, the treaty itself closely follows the above four policy areas, by clarifying claims of sovereignty and requiring clarification of the islands themselves; suggesting collaborative measures such as an international meteorological station; contextualising the disputes over the islands into the realm of joint exploitation and development; and civilianising the islands by entirely demilitarising them.

The Svalbard Treaty thus suggests a model of single-state sovereignty over the disputed territories, but undermines any disagreements by offering full and joint economic development of the territories themselves. Such a treaty in the South China Sea would be unlikely to lead to one state gaining sovereignty over all the islands, and would require a compromise on which islands belonged to whom, but it could offer a model for negotiation in suggesting that any future agreements on sovereignty need not affect development of the resources or lead to any militarisation of the disputes.

Another historical treaty offers a distinctly different solution to the problem of overlapping claims to sovereignty. The 1959 Antarctic Treaty has now been signed by 50 different countries. In essence, the treaty stipulates that there will be no permanent military bases on the continent, and that it all international scientific activities will be permitted (military forces can be used to assist scientific activities, but the Antarctic is reserved entirely for peaceful purposes). Commercial exploitation was omitted from the original treaty, but the subsequent 1991 Madrid Protocol (Protocol on Environmental Protection to the Antarctic Treaty) very bluntly states in Article 7 that "any activity relating to mineral resources, other than scientific research, shall be prohibited" for 50 years. The original Antarctic Treaty also did not recognise any existing claims to sovereignty but did prohibit member states to press any new claims.

The Antarctic Treaty System is therefore a different method in encouraging dispute management. It encourages collaboration, contextualisation and civilianisation, by rejecting notions of sovereignty, preventing commercial development and mandating only scientific endeavour. Such a concept of non-sovereignty rather than unilateral sovereignty is appealing in a region with such complex and overlapping claims to sovereignty as the South China Sea. However, the prevention of the sea from any commercial development would be unfeasible given the importance of fishing to littoral states. Nonetheless, this would accord with the idea of temporary and multilateral fishing bans, and the concept of moratoria on hydrocarbon exploitation in certain areas of the sea.

These two very different models of dispute resolution – unilateral sovereignty but full joint development or non-sovereignty and no commercial exploitation – both rest upon the similar principles outlined above.

As such, while clarification, collaboration, contextualisation and civilianisation are in their policy prescriptions only designed to build confidence and manage the dispute, as principles they can form the bedrock of any long-lasting negotiated solution to the South China Sea.