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MARITIME CONFIDENCE BUILDING MEASURES IN THE SOUTH CHINA SEA

By
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The Status Quo in the South China Sea

Tensions in the South China Sea have been easing since July 2016 when the Award of the South China Sea Arbitration was issued, due to the joint efforts of China and other claimant states. Positive developments include the achievement of progress in Code of Conduct (CoC) consultation between China and ASEAN countries, the conduct of a relatively successful China-U.S. Diplomatic and Security Dialogue, the reaching of a series of consensus on conflict prevention and dispute management measures, and the establishment of a bilateral intergovernmental consultation mechanism for the settlement of the South China Sea dispute between China and the Philippines.

There are also factors that could disrupt the fragile stability that has been established in the South China Sea: the strategic intention of US' Freedom of Navigation Operation Program; the scope of activities for the U.S.-Japan military alliance, Vietnam's recent moves in oil and gas exploration, which will surely have a negative impact on Sino-Vietnamese relations, the South China Sea dispute as a whole, and the CoC consultation process.

The Need for Maritime Confidence Building

The hard-earned peace and stability of the South China Sea should not be taken for granted. Regional countries should endeavor to jointly to maintain the positive trend in the South China Sea, while non-regional powers should avoid pursuing actions that could disrupt the cooperation and progress that has been achieved between the littoral countries of the South China Sea. To this end, this analysis proposes maritime confidence building measures (MCCBM) from four different perspectives, political, legal, security, and regional cooperation.

Political

China and the United States should establish an effective and integrated mechanism to manage potential crisis in the South China Sea. China and ASEAN should work together to exclude external interferences, speed up the COC consultation process, and implement the China-ASEAN “dual-track approach,” which jointly safeguards peace and stability in the South China Sea. China and disputant countries should exercise self-restraint, and avoid unilateral exploration and exploitation of natural resources in disputed areas. China and disputant countries should also seek to implement the other dimension of the “dual-track approach,” that is to properly address the South China Sea disputes through negotiations and consultations among countries directly concerned.

Legal

The United Nations Convention on the Law of the Sea (UNCLOS) is a significant aspect of MCBM. Effective maritime regimes require adherence to the legal principles of UNCLOS, as well as to other relevant international maritime treaties. However, there are still many ‘grey areas’ in the way states chose to interpret the law of the sea. This is particularly the case with provisions relating to the exclusive economic zone (EEZ) regime. The EEZ regime reflects a careful balance between the rights and obligations of coastal states and those of user states. Clarifying EEZ ambiguities and establishing a common understanding of aspects of the law of the sea where uncertainty exists would be a significant MCBM.

Many of the provisions of UNCLOS prominently feature confidence building measures. For example, the innocent passage regime in Section 3 of the convention places specific restrictions on warships exercising the right of innocent passage, including a requirement that submarines navigate territorial seas while surfaced and display their flag. UNCLOS prescribes procedures for the settlement of maritime disputes by peaceful means. By clarifying the principles for delimiting maritime boundaries between adjacent states and establishing the EEZ regime UNCLOS reduces the risk of a conflict arising from disputes over claims to offshore areas.

The South China Sea Arbitration case is so far the first attempt by a claimant state in the South China Sea to resort the dispute to a third party forum under UNCLOS. . However, despite the value ascribed to the compulsory dispute settlement under UNCLOS, this case does not make a positive contribution to resolving the real dispute between the two parties. This raises a question about the international legal culture surrounding UNCLOS. As a legal confidence building measure, all countries’ political will on choosing a suitable approach to address maritime issues in political and regional context should be respected.

Navigation

This analysis considers the development and efficacy of maritime confidence-building measures (CBMs) to ensure safe and secure navigation in the region,

and to reduce tension and prevent conflict. The 1982 United Nations Convention on the Law of the Sea (LOSC) and the 1972 International Regulations for Preventing Collisions at Sea (COLREG) are multilateral agreements that set forth legally binding obligations of all states. The 2014 Code for Unplanned Encounters at Sea (CUES) provides greater fidelity for duties of safe interaction at sea, but it is nonbinding. In 2014 and 2015, China and the United States signed a legally nonbinding Memorandum of Understanding (MOU) on the Rules of Behavior for Safety of Air and Maritime Encounters. Though many problems and unsolved issues persist, the MOU contributes much to the confidence building between the two navies.

In fact, China and the United States have intensified military-to-military exchanges over the past years, relaxing the “security dilemma” between the two, despite the tensions in the South China Sea. In the 2016 China-U.S. Strategic & Economic Dialogue Outcomes of the Strategic Track, China and the United States reaffirmed the importance of the MOUs, and committed to implement “the CBMs by incorporating exercises related to the Rules of Behavior for Safety of Air and Maritime Encounters in conjunction with agreed upon port visits and coordinate on discussions of additional annexes to the Notification of Major Military Activities MOU, including a mechanism for informing the other party of ballistic missile launches.” Joint exercises are one of the most important means of building trust between the two navies that we have seen in recent years.

China and the United States should seek to preserve good faith and a positive spirit in their military relations, despite the divergence in their legal views on maritime issues. As far as the South China Sea dispute is concerned, they should maintain interactive military relations in order to guard against misjudgment, reduce confrontation, and manage and control crises. Both countries should endeavor to avoid escalation stemming from confrontations or tensions triggered by frequent U.S. freedom of navigation operations or the Chinese construction of military facilities on reclaimed features in the Spratly Islands. China and the United States have a common interest in maintaining the peace and stability in this region, and in further enhancing maritime cooperation on non-traditional security. The benefits of such efforts should not be underestimated and call for both countries to remain calm, guard against misinterpretation, and expand channels for military exchange and communication. Both countries should also advance existing crisis-management mechanisms based on the principles of the U.S.-China Military Maritime Consultative Agreement and the two MOUs so that they can play a greater role in the future.

Regional Cooperation

The South China Sea disputes consist of a mix of territorial competition and pending maritime delimitation. A peaceful resolution to them is in the common interest of all disputant parties and other stakeholders. However, what is the most practical approach that fits well in the reality of the nature of the South China Sea dispute remains a question for debate. As analyzed from the implication of the South China Sea arbitration case, compulsory dispute

settlement mechanisms may not be the best option to address the disputes in the South China Sea. The state practice of maritime dispute management in this region suggests that there is not a unique or single answer as to which model is the best. Instead, a four tiered model of maritime dispute management is needed, namely, environmental security as a driving force of cooperation in the South China Sea, fisheries cooperation as a start of the South China Sea disputes resolution, UNCLOS as a framework for ocean governance in the South China Sea, and lastly, transformation of ways of thinking as a foundation to lead policy and research direction.

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