Quest Journals
Journal of Research in Humanities and Social Science
Volume 2 ~ Issue 10 (2014) pp: 42-47
ISSN(Online) : 2321-9467
www.questjournals.org

Research Paper

Progress in national, regional and international approaches to territorial disputes resolution in South East Asia.

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Received 20 October, 2014; **A**ccepted 08 November, 2014 © The author(s) 2014. Published with open access at **www.questjournals.org**

ABSTRACT:- South East Asia region and its water resources play strategic role in facilitating growing regional economy and trade and are sensitive to changes in security environment. This region encounters numerous territorial disputes that impede further economic integration and security cooperation. Specific approach to international law in Asia and differences in political culture among the regional players inhibit consensus on mutually credited approach to territorial dispute resolution. The purpose of this paper is to compare national, regional and international approaches to resolving territorial disputes in South East Asia in search for a most efficient and possibly universal mechanism. The hypothesis of this study is that peaceful territorial dispute resolution process can be boosted by multi-lateral security cooperation project that involves China and US. Lack of such initiatives for China could be a possible ground for hardlinestand on territorial disputes with its neighbors in South China Sea. The goals of the study are a) to formulate Chinese approach to resolving its territorial disputes with its neighbors; a) review legal and diplomatic traditions of addressing territorial disputes within regional frameworks, such as ASEAN; c) evaluate ICJ's past experience in South East Asia and its applicability to the current disputes.1

The growing economic activities and security needs in the South East Asia are challenged by risks associated with incidental and intentional military confrontation in the disputed waters. Existing "exclusive" security projects, hegemonic and containment strategies are unable to provide a framework, necessary for peaceful resolution of the maritime border disputes in South China Sea regarding attribution of sovereignty rights over region's economic and military resources. In order to benefit fully from the accumulated international experience on territorial dispute resolution through bilateral negotiations, regional and international bodies, there is a need for "inclusive" common security vision shared by main powers of South East Asia, such as China and the US.

KEYWORDS:- boundary dispute, Asian law, ICJ, ASEAN, China, regional integration, maritime security, South-East Asia.

I. CHINA'S APPROACHES TO TERRITORIAL DISPUTES RESOLUTION

China shares a border with more countries than any other state, including currently disputed borders with South East Asian countries in the South China Sea. China has formally resolved its border issues with 12 neighbors, which by 2005 allowed Beijing to settle 90 percent of its land borders. The marine disputes in the South China Sea are so far the opposite of the formal progress on the continent. Since China has chosen peaceful and concessionary approach to territorial disputes, in some cases the disagreement resulted into the armed conflicts with USSR, India and Vietnam, for example. There are various theories that make predictions on the posture that Beijing will choose in regards to its marine disputes in the South China Sea. Some favor the domestic politics factor, including ethno-religious effects theory, which explains how ethnic ties across boundaries can increase the danger of border wars. The ideological affect theory argues that ideological differences between the parties, such as in case of Sino-Soviet border, can sparkle military confrontation. The "two tiered game theory" combines the domestic effects and the effects of international system to explain possible scenarios of interactions between domestic politics and foreign diplomacy. The transition theories instead explain possible border wars as means of resolution of power transition crises in state's politics and since territorial disputes invoke strong nationalistic sentiments that reinforce political power. In case of China,

1 Cambodia v. Thailand in 1959 concerning the Preah Vihear Temple, Indonesia vs. Malaysia in 1998, regarding Pulau Ligitan and Pulau Sipadan, and Malaysia vs. Singapore in 2003 on Pedra Branca or Pulau Batu Puteh, Middle Rocks and South Ledgein related to Philippines coastal dispute.

though peaceful transition of power was achieved through compromises and concessions, such as in case of Myanmar, Nepal, Mongolia, Pakistan and Afghanistan. One can say therefore that domestic stability was only one of the variables in the decision making process. The equilibrium theory explains China's choice in approaching the territorial arguments are on three factors: balance of external threats, where concessions were resources to balance the threat; balance of power, where boundary disputes are resolved I the context of hedging against rising powers; balance of interests, were states differ according to their choice of maintaining status quo(lions and lambs) or taking a revisionist approach(wolves and jackals) based on the relative costs of either choices in each case. Yet the equilibrium theories do not regard direct external threats that change the way China sees the equilibrium. Chinese understanding of direct external threats also determines if international institutions and international law tools will be effective in achieving the desired equilibrium. NieHongyi explains the logic of Chinese neighboring policies based on several variables within the Neighbor state policy effect theory with the premise that neighbor states border policies are critical factor in influencing China's choice of concessions or hardline. China chooses the concessionary stance to preclude the small neighbor states from building alliances to hedge against China and in order to keep the outside powers from interfering Chinese border affairs. It also hopes to send a positive message to the other neighbors by concessions to the country that supports the status quo in favor of creating a secure border environment. On the other hand, China does not want to take a short-termed pacifying approach towards the revisionist states with expansionary behavior, since concessions will only provide a temporary superficial peace, since most expansionist states are either dominant militarily or rapidly developing their capacities. By maintaining the hard line policy towards the expanding states and their military allies, China wishes to deter developing expansionary designs on its frontiers. This theoretical approach seems to explain the difference in the concessionary approach taken by China towards and a firm stand on the matter of Pratos islands, Paracel islands, Spratley islands and Scarborough reef in South China sea that are being claimed, for example, by quickly developing Vietnam and the US ally in the region-Philippines.

II. ASEAN AND BORDER DISPUTES IN SOUTH CHINA SEA

The growing importance of the territorial dispute agenda for the ASEAN was fully reflected in the 24th ASEAN summit of May 2014.[2]Despite the physical confrontation between China and Vietnam over theParacel Islands and between China and Philippines over Scarborough Shoal of the Huangyan Island andthe Half Moon Shoal in the Spratly Islands, Vietnamese Deputy Foreign Minister Pham QuangVinh still suggested that the ASEAN regional bloc could be instrumental in resolving territorial disputes by adopting a "collective position" on the territorial issues in general.Some consider this trend as a sign of dragging the future of the ASEAN; some see it as a step on the way to true progress. By failing to discuss territorial disputes atASEAN, and failing to negotiate these disputes through other means, the conflicting parties fail to take full advantages of their joint membership in the organization and slow the pace of development of this regional cooperation block. On the other hand, some believe that due to the Asian legal traditions of avoiding direct reference to bilateral conflicts as well as avoiding strict commitments regarding any sovereignty matters, bringing the disputes into a public discussion risks exploding the integration process from within.

Despite the frequency of the territorialdisputes in the region, the ASEAN's dispute settlement mechanism is still undeveloped. A procedurefor the peaceful settlement of disputes was not established in the foundingASEAN Declaration signed in Bangkok in 1967. However, dispute settlement is mentioned in the1971 Declaration on the Zone of Peace, Freedom and Neutrality(PP3), and in the 1976 Declaration of ASEAN Concordwhich allowed for thefollowing dispute settlement mechanisms: the1976 Treaty of Amity and Cooperation (TAC), the1996 Protocolon Dispute Settlement Mechanismandthe2004 Protocol for Enhanced Dispute Settlement Mechanism(EDSM) for disputes relating to ASEAN economic agreements, and the provisions of the2007ASEAN Charterthat serve as an overarching framework for dispute settlement in ASEAN.Yet neither the High Council of the TAC nor the EDSM have been utilized. The1992 ASEAN Declaration on the South China Seaand the2002 Declaration on the Conduct of Parties in the South China Sea declare a principle of peaceful settlement of disputes and commitment to exercise restraint. The commitment to "exercise self-restraint, not to resort to threat(s) or use of force, and to resolve disputes by peaceful means in accordance with the universally recognized principles of international law" is therefore still the only commonly accepted approach towards territorial dispute settlement. On the other hand, there is also not enough clarity on which legal path should be taken to facilitate disputes resolution according to the stated "universally recognized

[2]The current maritime disputes lie in the largest sea-South China Sea with several major island groups, such as the Spratleys, Pratas, Paracels, and Macclesfield Bank groups. Most of those more than 200 islands can't sustain human life but according to their geographic location and national waters/exclusive economic zones regulations, can provide their owners with the right for exploitation of land/water/seabed natural resources as well be used for strategic military purposes.

principles of international law." For example, should all territorial disputes be evaluated simultaneously or individually?Should the ICJ or UN tribunal[3] be involved? Should the path of bilateral negotiations pursuant to UNICLOS regulations be taken? ASEAN members have or do not have direct stakes in South China Sea territorial disputes and are more or less worried about Chinese growing military investments and therefore tend to support different scenarios.

In the face of continuing competition for natural resources indisputed territories, and due to growing international criminal activity in the ungoverned border areas along the trading routes, the ASEAN +3 or APT have been attempting to formulate a collective regional response to non-traditional threats and marine border conflicts in South China Sea[4]. While there isa common understanding of the threats posed by possible military engagement in connection with marine border disputes in South China Sea[5], there not enough clarity on understanding the future of the regional security environment,[6] which is necessary to provide peaceful framework for economic cooperation in exploitation of regional resources. ASEAN +3[7], as the latest formulation of the direction of South East Asia regionalismhas been so far incapable of developing a political, diplomatic or legal approach that would allow the ASEAN members to rethink the current status quo in territorial order andsettle their border disputes regarding the islands and their related resources.In regards to border disputes resolution processes, there are differences between ASEAN members, who have territorial disputes with China, and those who do not. Diplomatically, with Vietnam-China, confrontations being most harsh and Philippines advocating stronger stance against Beijing, other ASEAN members, such as Indonesia, Laos, Singapore and Thailand, are reluctant to antagonize China. Singapore and Thailand avoid taking sides. Cambodia is a close ally of China and confirms its aversion to confrontation by insisting that ASEAN should not "internationalize" the South China Sea disputes.Currently, Chinauses the divisions in the bloc to reduce pressure on itself by insisting on negotiations with one country at a time.The Philippines, with the US as its ally,opposes the Chinese approach andadvocate multilateral talks or appeal to the ICJ or Tribunal of the sea according to the UNICLOS provisions. While the US are not direct claimants in disputes with China, China's foreign ministry blames the United States for generally "stoking tensions" in the disputed South China Sea by encouraging countries "to engage in dangerous behavior"[8] based on irresponsible and wrong comments from the United States regarding the status of the waters around the disputed islands.

[3]During the last AESAN Summit Mr. Aquino suggested submission of the Philippian's formal pleading to the UNtribunalhearing, seeking to invalidate Beijing's claim over the West Philippine Sea.

[5] Philippines, Vietnam, Malaysia and Brunei, Taiwan, and China have overlapping territorial claims in the South China Sea.

[6] Currently there are two patterns of defense relationships in the region, one of which is American hub-and-spoke alliance system and ASEAN's "spider web" of bilateral agreements. While the American system of alliances has traditional defense characteristics, it does not include most of the members of the region. ASEAN's framework was designed to include all South East Asia countries. However, ASEAN developed norms and informal rules for "soft" or non-legalistic regional cooperation, rather than the American version of multi-lateral security and defense cooperation of conduct.In combination with Pan-Asian frameworks, ARF, SAARC and APEC's "open regionalism" initiative, the region accounts for a mixture of non-alignment, non-interference and common security concepts. So far, none of the regional institutions meets the necessary criteria for collective security or collective defense architecture for South East Asia. Current great powers have competing visions for the region's development. They see the region astheir own sphere of influence and maintain bilateral ties with other countries in the region; they are not ready to settle for a common military instrument, and they are not ready to share their leadership and their material resources with each other. Except for US-led alliances, regional organizations have developed a tradition of notrelying on the formal commitments of reciprocity, but choose non-formal, non-binding cooperation.

[7] Currently ASEAN is composed of the Philippines, Brunei, Indonesia, Malaysia, Thailand, Cambodia, Singapore, Myanmar, Laos and Vietnam with China participating in ASEAN +3 partnership, along with Japan and South Korea and USA.

[8] China accuses Vietnam of intentionally colliding with Chinese ships. China seized the islands - known as Hoang Sa in Vietnam and Xisha in China - in 1974 and has controlled them ever since. However, Hanoi contends the islands fall under Vietnam's exclusive economic zone as defined by the 1982 UN Convention on the Law of the Sea.Vietnam's foreign ministry has expressed outrage at China's plans to commence drilling for oil in the disputed waters, calling the operation "illegal and invalid."China's Maritime Safety administration warned prior to the confrontations that all ships would be prohibited from entering the 3-mile radius surrounding the drilling area until operations end. In 2014, during the Philippines-US marine coastal

III. ICJ AND BORDER DISPUTES RESOLUTION IN SOUTH EAST ASIA

While the Chinese strategy of the attribution of South ChinaSea resources faces criticism from Philippines and Vietnam, China criticizes the United States for not signing the UNICLOS while promoting the idea of "the rule of law in Asia." Because ASEAN remains conflicted on their "collective stance" on the matter, it would seem logical to consider the ICJ as a possible tool for solving border disputes in compliance with principles promoted by the UN and shared by ASEAN members. The ICJ, as one of six principle organs of the United Nations, is a judicial organ of the UN and a world court that has necessary jurisdiction in deciding cases from conflicting states. The ICJ can alsoprovide advisory opinions based on nine categories of justifications: treaties, geography, economy, culture, effective control, history, utipossidetis, elitism, and ideology. [9]

The ICJ's positive experience in territorial dispute resolution in South East Asia includes three cases: Cambodia vs. Thailand in 1959 regarding the PreahVihear temple; Indonesia vs. Malaysia in 1998 regarding the Pulau litigant and PulauSipidan islands in the Celeb sea; and Malaysia vs. Singapore in 2003 regarding the PedraBlanca or PulauBatuPuteh, Middle Rocks and South Ledge islands. The decision to resort to the ICJ in these cases was largely driven by the desires of the conflicting parties to advance their regional integration, promote their economic development and security ties, and protect their trading routes. The same rationale theoretically could be applied to China and its territorial disputes in the South China Sea.

Yet According to Article 298 of UNCLOS, China made a statutory declaration on Aug 25, 2006 to the UN secretary-general that it does not accept any international court or arbitration in disputes oversea delimitation, territorial disputes and military activities. This means that China does not intend to accept intervention of the ICJ or the Tribunal for the Law of the Sea into territorial matters in South China Sea, despite Beijing's general support of the authority of the UN and its Charter principles and organizations. While there are technical difficulties with utilizing ICJ as a UN organ or the UN's Security Council in regards to Chinadue to China power of veto, there are also strategic observations that do not allow China to see the ICJ as a solution to the problem of marine disputes. China's application to the ICJ on one hand will produce an unpredictable result in terms of sovereignty rights attribution over waters and seabed resources, but for sure will not bring the benefits of multi-lateral military and security ties to back further economiccooperation as in the case of Philippines, Malaysia and Indonesia. After successfully resolving their border arguments via ICJ, Philippines, Malaysia and Indonesia are members of the same Coastal watch system, supported by the US with shared intelligence information, experience, technologies and joint command. Together they protect the straits, seas and coastal lines from various threats, that undermine social and economic stability of the individual countries, as well as safety of international trade in this vitalmaritime domain. After resolving its border disputes with Philippines or Vietnam, China is not going to benefit from the Coastal Watch system or similar initiative. NeitherPhilippines nor Vietnam is likely to participate in similar initiative, offered by China. In other words, if China, like the Philippines and Vietnam, submits its cases to the ICJ, redistribution of property right over the islands, waters and their resources will not occur within a friendly security alliance.

After resolving the territorial disputes with the help of the ICJ,China's and Philippine's cooperation on certain political, economic and socialsecurity matters will be enhanced, but the benefits of it won't be comparable to the level of commitment that Philippines, Indonesia and Malaysia received through the joint security initiative along their coastal lines and beyond. Unless China and the US are members of the same regional security organization, sovereign rights over territories claimed by Philippines and attributed by the ICJ will strengthen the existing US system of naval alliances at the cost of any potential Chinese-lead multi-lateral security initiative in the region. In other words, traditional security rationale puts China in the same position it put Russia some time ago in regards to its territorial dispute with Japan. Russia and Japan are currently developing together strategic oil and gas resources in Sakhalinpeninsular without a formal border. While providing the citizens of the border areas with relaxed migration regime and increase in economic cooperation

watch exercise, the Filipine's maritime police arrested 11 Chinese fishermen who allegedly illegally collected more than 300 endangered marine turtles in a disputed shoal close to the western province of Palawan. Manila refuses to release the fishermen and their boat despite the arguments that China presents to justify the fisherman's actions.

[9] Although territorial disputants perennially make arguments based on all these justifications, only three of these justifications have operated consistently as the ICJ's decision rule: treaty law, uti possidetis, and effective control. Only when a decision on any of these three grounds is impossible will the court resort to equity in deciding a case. The hierarchy among treaties, uti possidetis, and effective control has the effect of giving a broad scope to treaty law and possibly imputing more meaning to the principle of uti possidetis than it merits at this stage in the evolution of public international law. The ICJ's hierarchy of justifications for territorial claims rationale is still an open question which might benefit from current trend of synchronizing the legal and political agendas within the international relations theory and international law studies

in general, Tokyo and Moscow cannot decide on the fate of the strategic straits and waters surrounding the islands. Similar to the Russia-Japan formula of separating economics from politics, in regards to its territorial disputes in the South China Sea, instead of applying to the ICJ or resorting to a multi-lateral framework for negotiations, China is suggestingnot legal but economic and administrative set of bilateral solutions, namely "joint development" of the islands, many of which are being exploited already to some extend by different countries.While allowing for economic exploitation, such approach will require "shelving the dispute" politically until all the parties have more advantage to come back to the question of exclusive sovereignty rights over strategic waters.So far, in terms of economic and administrative solutions advocated by China, there has been some successes:on June 30, 2004, an agreement between China and Vietnam on the Demarcation of the Beibu Gulf and the Beibu Gulf Fishery Cooperation Agreement came into force; on March 14, 2005, China, Vietnam and the Philippines signed the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea. Some similar agreements between China and Vietnam are on the way.

IV. FINDINGS

- In terms of progress in border delimitation matters with the help of ASEAN, ASEAN +3 or broader regional organizations, the split among Asian members in understanding the principles of state sovereignty and sovereignty of the geographic borders in the globalization discourse prevents the creation of a common vision of future security environment and the alteration of the existing, weak non-binding decision making tradition in these organizations. While the chances of extrapolating progress ofASEAN's "borderless" free trade architecture into "borderless" security environment in South East Asia may be low, there is not enough evidence to conclude that no progress was made on the matter of marine territorial dispute resolution in this region. In fact, considering the strategic importance of the islands, the fact that two cases were settled in the international court, and that the territorial dispute agenda does not leave the ADEA forum floor, is indeed a positive sign. It is a sign that the nation states are ready to take a more active approach to providing their maritime security by clarifying their borderlines, their rights and responsibilities over the vast areas of national and international waters.Peaceful territorial disputes resolution process in South Asia, like elsewhere, depends on defining common security environment and establishing clear rules of conduct. Between the Hague conference in 1899 and the end of the Cold War, the maritime treaties were designed primarily to maintain the peace through preventing the expansion of war at sea and reducing provocative and risky behavior.But in the past decades, the international maritime law has evolved from a set of rules designed to avoid naval warfare toward a new global framework designed to facilitate maritime security cooperation, broaden partnerships for enhancing port security, coastal and inshore safety, and promote the maritime domain. The 1982 Law of the Sea Convention (UNCLOS), entered into force in 1994, provides the umbrella framework for international law in the maritime domain.Post-9/11 updates were made to the 1948 Convention on the International Maritime Organization (IMO) and the 1974 Safety of Life at Sea (SOLAS) Convention.The 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation was amended to include the 2005 Protocol. Currently,Chapter VII of the United Nations Charter is being discussed in terms of its broader applicability to enforce action in the maritime domain by the Security Council. The normative framework of maritime security changed from hegemonic to collaboration and now favors involvement of an international judicial body, the ICJ, in marine border dispute resolution. As a result, five ASEAN members, Cambodia, Thailand, Indonesia, Malaysia, and Singapore have already decided to rely on the ICJ's non-partisan status and adhered to its decisions.

- Currently, China's bilateral negotiations are successfulfor avoiding military escalation of the conflicts and allowprogress in joint economic use of resources. Yet bilateral negotiations will always be hostage to domestic politics. Regional organizations like ASEAN offer more room for diplomatic maneuver but also bear risks of involving third parties with their own vested interests into the decision making process. Resolving the international territorial disputes through ICJ is a rather new, yet promising, legal means of settling territorial disputes in terms of impartiality of the opinions provided by the court.The ICJ has just began building its credibility in the South East Asia region, but has already contributed to a new legal tradition in Asiaand proved to be able to adapt quickly. Nonetheless, the ICJ is unlikely to become the main tool for border dispute in the South East Asia in the nearest future. Despite the fact that the ICJ provides an opportunity for China to support the UN's Charter principles, build a solid platform for showing good will, and promote good neighborhood policies, China's position on resolving territorial disputes with Southeast Asian countries seems to depend more on current US military strategy as part of American vision of free navigation in the South China Sea.Unlike Europe, Asia has little experience in utilizing international judicial bodies for the purpose of dispute resolution. Yet, once China and the US come to an understanding on the future security architecture in Asia, the ICJ (or something similar to the ECJ regional international judicial institution) can become the main means of maritime territorial disputes resolution in South East Asia. Much like how the universal principles declared by the United

Nations were preceded by non-universal principles of League of Nations, the ICJ's limited geographic scope of positive impactonthe developing system of dispute resolution in this region cannot be ignored.

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