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# Maritime Disputes and Maritime Security in Asia

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## Introduction

China's economic success has turned it into a powerhouse of regional and global importance, raising its political ambition and bringing it into competition with the US and Japan. Systemic change contributes to an insecure environment bereft of a regional architecture able to build trust, to lower and to manage tensions. However, security and stability in Asia are a precondition for continued economic success in the region and beyond because of the significant level of interdependence between the EU and East Asia. Therefore, as HRVP Mogherini put it at the 2015 Shangri-La Dialogue in Singapore: "... our engagement with Asia goes well beyond trade, investment, and aid. It's political. It's strategic. And it needs to develop more also in the security field."<sup>1</sup>

Furthermore, recent actions of the various parties involved seem to confirm a preference for unilateral approach or exclusively regional (e.g. Pan-Asian) approach to security which does not facilitate the emergence of cooperative collective and inclusive solutions in the region.

The global impact is reinforced by the repercussions on the global commons – air, sea, cyberspace – and the freedoms coming along with them namely of overflight, passage and expression. This in turn reveals an underlying conflict concerning the interpretation of international law, whether conventional or customary, in particular concerning sovereignty as the bottom line. While the contradictory trajectory between economics and security has played out more or less peacefully, the question of its sustainability adds to insecurity. Through various meetings at the 2014 APEC Summit, foremost President Xi with PM Abe atmospherics have been improved, talks have restarted (trilateral forum) although the underlying geopolitical tensions remain.

## Maritime Security

In 2014 the published a comprehensive **EU Maritime Security Strategy (EUMSS)**<sup>2</sup> which covers both the internal and external aspects of the Union's maritime security. It serves as comprehensive framework, contributing to a stable and secure global maritime domain, in accordance with the European Security Strategy (ESS), while

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<sup>1</sup> [http://eeas.europa.eu/statements-eeas/2015/150531\\_02\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/150531_02_en.htm).

<sup>2</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011205%202014%20INIT>.

ensuring coherence with EU policies, in particular the Integrated Maritime Policy (IMP), and the Internal Security Strategy (ISS).

Based on the EU's founding values of human rights, freedom and democracy, the purpose of this strategy is to secure the maritime security interests of the EU and its Member States against a plethora of risks and threats in the global maritime domain. This is achieved in a cross-sectoral, comprehensive, coherent and cost-efficient way, in conformity with existing treaties, national and EU legislation and international law, in particular the United Nations Convention on the Law of the Sea (UNCLOS) and other relevant conventions and instruments.

Maritime security is understood as a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed and citizens, infrastructure, transport, the environment and marine resources are protected."

Since 2005 maritime security is a matter of regional cooperation at the EU level. Example: the implementation and control of the extended International Ship and Port Facility Security (ISPS) Code measures which include devising the content of a security plan, its review and setting up of pertinent regulations. Clear regulations facilitate stability!

The EU Commission has conducted since 2015 over 700 inspections to ensure the implementation of its maritime security provisions by EU member states: Overall good implementation with differences among national administrations.

Information sharing especially on the international level has been identified as a major challenge but also chance to improve security and to tackle maritime security threats. Although a wealth of information is available because of surveillance (reporting, intelligence, sensors, platforms and databases) there remains a large gap of 40-90% between information held and that actually shared which impairs on the quality for planning, decision making and ultimately security. Maritime problems need to be met on the international level through cooperation, thus a change of paradigm from 'need to know' to 'need and responsibility to share' would be helpful.

## Maritime Dispute

Maritime disputes in East and South China Sea have the potential to destabilise the whole region; as regional powers China and Japan are important players and shoulder therefore also special responsibilities:

China is directly involved in disputes in the East China Sea with Japan (Senkaku/Diaoyu), and In the South China Sea primarily with the Philippines and Vietnam. There are ongoing talks with ASEAN to agree a Code of Conduct based on

the relevant 2002 resolution. China, contrary to the US and like the EU, has ratified UNCLOS but made important reservations concerning the dispute settlement. The Philippines have initiated an international arbitration at the Permanent Court of Arbitration in The Hague in which China refuses to participate.

Japan is directly involved in disputes in the East China Sea with China (above), Korea (Takeshima/Dokdo) and Russia (Kurile Islands). In the South China Sea Japan is supporting ASEAN countries in their disputes with China, in particular the Philippines and Vietnam.

The US as a Pacific power is the traditional balancer and security provider in the region does not take positions like the EU on the underlying sovereignty issues, stresses the need for peaceful and negotiated solutions and watches of the common global goods.

EU has significant economic, political and strategic interests in the disputed maritime areas. Any major incident could have broad implications. Therefore the EU closely follows developments in the South and East China Sea, is concerned about the potential of escalation and engages in the efforts to find a solution.

A recent addition to the tensions are **reclaiming/construction/dredging activities**<sup>3</sup> carried out by various claimants to alter the nature of reefs, rocks, islets or maritime features in general beyond the maintenance of existing structures. At this year's Shangri-La Dialogue US Secretary of Defense<sup>4</sup> invited all countries to stop these activities but singled out China because of speed and size of its activities. US is also ready to continue exercising right of passage on the sea and air.

Persisting territorial disputes are not just a maritime boundary and sovereignty issue, but also a test of the ability of Asian countries to manage their relations in a stable and predictable way in the interests of the region and of the international community; the regional security architecture needs enforcement and regional governance be improved.

## The EU's View

### *1. HRVP Federica Mogherini at the Shangri-La Dialogue (May 31, 2015)*

"We have a direct interest in the respect for international law. We believe regionalism and multilateralism are the framework for cooperative international relations. And cooperation calls for everyone to play by the same rules. Agreed rules make states

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<sup>3</sup> CSIS Island Tracker, <http://amti.csis.org/island-tracker/>.

<sup>4</sup> [https://www.youtube.com/watch?v=oQtGHpS\\_LGI](https://www.youtube.com/watch?v=oQtGHpS_LGI).

secure, people free and companies willing to invest. When some decide to play by their own rules, cooperation gives way to confrontation—and in today's world that is bad news for everyone.

The same applies to maritime disputes, too. We need to maintain a maritime order based on international law, including the UN Convention on the Law of the Sea. We are not getting into the legitimacy of specific claims, but we are resolute as Europeans on HOW they should be resolved—that is, peacefully, without the use or threat of force.

We support the ASEAN-China negotiations for a Code of Conduct and we hope they can be concluded soon."

## *2. Freedom – Global Commons*

Mindful of the economic interdependence with Asia the EU is committed to unimpeded commerce, to the freedom of navigation, right of transit-passage and to the freedom of aviation according to international law.

## *3. Conflict Solution*

While not taking a position on the **legitimacy/legality of respective claims and underlying sovereignty issues**, the EU is concerned that that miscalculation or accidental incidents could lead to a dangerous escalation of tensions.

The EU urges all parties concerned to **clarify the basis** of their claims and to seek **peaceful and cooperative solutions** in accordance with **international law**, in particular UNCLOS. This includes the **use of legal procedures** in courts or arbitration.

In reference to the 2002 Declaration on the Code of Conduct committing partners to a **consultative and peaceful process of dispute settlement** based on equality and mutual respect, the EU calls on all the signatories of the 2002 Declaration to abide by the principles laid out in the declaration and to step up efforts towards agreeing a legally binding Code of Conduct.

In line with G7 Foreign Ministers the EU regards it as essential that all parties **refrain from the threat or use of force or any unilateral action**, which could cause further frictions; this includes **construction and reclamation activities** on various maritime features which render the determination of their legal status under UNCLOS more difficult or even impossible; they also potentially pose a maritime environment threat.

The **EU's Maritime Security Strategy** deals in a comprehensive cross-sectoral manner with the challenges bringing together civilian and military elements; the **2014**

**Action Plan**<sup>5</sup> provides for cooperation with partners, promotes the existing legal framework, including UN Convention on the Law of the Sea (UNCLOS), contributes to maritime capacity building and promotes best practices thereby drawing on lessons learnt from ATALANTA and the Contact Group on Piracy off the Coast of Somalia.

#### *4. The Treaty of Amity and Cooperation (TAC) in South East Asia*

The **Treaty of Amity and Cooperation (TAC)** in South East Asia to which all ASEAN countries and out of region partners like China as well as the EU (2012) adhered is pertinent as all parties have taken the commitment "to promote regional peace and stability through abiding respect for justice and the rule of law and enhancing regional resilience in their relations". (Parties to a treaty are obviously entitled to watch over its implementation.)

TAC also establishes important and relevant principles, namely to settle disputes by peaceful means, through effective cooperation among parties and to renounce the threat or use of force. This includes the duty to refrain from participating "in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party". TAC also provides for a dispute settlement procedure of its own.

Consequently, all parties to tensions and disputes shall consult or negotiate in good faith, refrain from actions which would defeat the objective and purpose of the treaty under negotiation in changing de facto or through the threat or use of force the situation on the ground or the behaviour of states. (This implies a standstill or freeze of actions influencing the negotiating position.)

#### *5. Need for Confidence Building Measures – Conflict Mitigation*

Trust building measures are essential to allow successful negotiations; they include keeping communication lines open in case of accidents or crisis; no unilateral changes of the status quo; joint management of resources while working towards a cooperative solution e.g. separating the sovereignty issue from economic exploitation like in the past.

#### *6. Joint Use of Resources*

Concerning the **use of resources**, based on its own experience the EU encourages joint management of resources i.e. separating the sovereignty issue from economic exploitation and the further conclusion of Joint development agreements (JDA) as

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<sup>5</sup> [http://ec.europa.eu/maritimeaffairs/policy/maritime-security/doc/20141216-action-plan\\_en.pdf](http://ec.europa.eu/maritimeaffairs/policy/maritime-security/doc/20141216-action-plan_en.pdf).

advocated by UNCLOS which encourages "provisional agreements of a practical nature...without prejudice to the final delimitation" of maritime boundaries. This can contribute to confidence building. Furthermore, any conflict should not impede the conservation and sustainable use of natural and maritime resources including maritime biodiversity.

The EU expects its strategic partners to apply these principles and is ready to cooperate with them to find a solution acceptable to all parties involved: In November 2013 the EU organised a joint seminar with ASEAN in Jakarta on this issue, 2015 saw the follow-up meeting in Malaysia.

## Recognition of Regional Best Practices

There are positive examples of dispute settlement in the Asia-Pacific region which are recognized and should serve as best practices which include:

- The agreement reached between the Philippines and Indonesia on the boundary between their exclusive economic zones in the Mindanao and Celebes Sea as a positive example of a peaceful and cooperative solution of maritime disputes according to international law (May 26, 2014, welcomed by HRVP spokesperson statement the same day).
- The agreement reached between Singapore and Indonesia on delineating their eastern sea border limits as a further positive example of dispute settlement in accordance with international law which will strengthen a rules based regional community.
- Beyond the South China Sea the UNCLOS based Arbitration Tribunal on the India-Bangladesh Maritime Delimitation delivered its ruling on 7th July 2014, putting a the conflict between India and Bangladesh on the delimitation of Maritime Boundary in the Bay of Bengal after forty years to rest – a proof that arbitration works.

### **Toolbox for conflict mitigation**

- Joint development of resources like fish, oil, gas including mechanisms to verify thereby separating the sovereignty issue from economic exploitation.
- Joint fisheries agreements like between Japan/Taiwan, China/Vietnam to reduce the potential for tensions.
- Establish crisis communication lines (“red telephones”) to allow quick

clarification of incidents to avoid escalation because of mishaps and in case of invoking an alliance defense clause. Better communication improves understanding, transparency and avoids misperceptions – knowing differences is as important as knowing commonalities.

- Trust/confidence building measure like dialogues, seminars, mutual visits including military-to-military contacts leading to port calls and common exercising; P2P contacts to reduce nationalism and prepare the ground for cooperation.
- Strengthening the regional architecture to provide for permanent forums for discussions of threat perceptions, negotiations incl. back-channel diplomacy, conflict mitigation, to find solutions including through mediation by third parties or decisions by international arbitration or courts; to avoid a spillover of politics into economics like in the case of rare earth, boycott of third country products, cancellation of participation in international/regional meetings of international institutions through pre-established procedures of conflict management.
- Strengthen awareness for and understanding of the benefits of a rule-based system creating stability and predictability which were preconditions for China's re-emergence.

## The Annex – Materials

### 1. Asia

#### *a) Treaty of Amity and Cooperation (TAC)<sup>6</sup>*

#### Chapter IV: Pacific Settlement of Disputes

##### Article 13

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

##### Article 14

To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

##### Article 15

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

##### Article 16

The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all

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<sup>6</sup> <http://www.asean.org/news/item/treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3>.

possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.

#### Article 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

#### *b) Declaration on the Conduct of Parties in the South China Sea (2002)*<sup>7</sup>

1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;
2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;
3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;
5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

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<sup>7</sup> <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

- a. holding dialogues and exchange of views as appropriate between their defense and military officials;
- b. ensuring just and humane treatment of all persons who are either in danger or in distress;
- c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and
- d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

- a. marine environmental protection;
- b. marine scientific research;
- c. safety of navigation and communication at sea;
- d. search and rescue operation; and
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

*c) ASEAN Summit (Kuala Lumpur, April 27, 2015)<sup>8</sup>*

### South China Sea

59. We share the serious concerns expressed by some Leaders on the land reclamation being undertaken in the South China Sea, which has eroded trust and confidence and may undermine peace, security and stability in the South China Sea.

60. In this regard, we instructed our Foreign Ministers to urgently address this matter constructively including under the various ASEAN frameworks such as ASEAN-China relations, as well as the principle of peaceful co-existence.

61. We reaffirmed the importance of maintaining peace, stability, security and freedom of navigation in and over-flight over the South China Sea. We emphasised the need for all parties to ensure the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea in its entirety: to build, maintain and enhance mutual trust and confidence; exercising self-restraint in the conduct of activities; to not to resort to threat or use of force; and for the parties concerned to resolve their differences and disputes through peaceful means, in accordance with international law including the 1982 United Nations Convention on the Law of the Sea.

62. While noting the progress made in the consultations on the Code of Conduct in the South China Sea (COC), we urged that consultations be intensified, to ensure the expeditious establishment of an effective COC.

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<sup>8</sup> <http://www.asean.org/news/asean-statement-communications/item/chairman-s-statement-of-the-26th-asean-summit>.

## 2. EU

### *a) 2012 East Asia Policy Guidelines<sup>9</sup>*

32. The EU and its Member States, while not in any sense taking position on these various claims, should nevertheless:

- recall the great importance of the South China Sea for the EU (inter alia in the perspective of promoting the rules-based international system, the principle of freedom of navigation, the risk of tensions impacting on the consistent increase in trade and investment, with negative consequences for all, energy security);
- continue to encourage the parties concerned to resolve disputes through peaceful and cooperative solutions and in accordance with international law (in particular UNCLOS), while encouraging all parties to clarify the basis for their claims;
- recall previous work to build a collaborative diplomatic process on these issues at the regional level, and encourage ASEAN and China to build on this foundation and agree on a Code of Conduct;
- and, if welcomed by the relevant parties, offer to share the experience of the EU and its Member States in relation to the consensual, international-law-based settlement of maritime border issues, and to the sustainable management of resources and maritime security cooperation in sea areas with shared sovereignty or disputed claims.

### *b) Maritime Security Strategy<sup>10</sup>*

III.c. Respect for rules and principles: respect for international law, human rights and democracy and full compliance with UNCLOS, the applicable bilateral treaties and the values enshrined therein are the cornerstones of this Strategy and key principles for rules-based good governance at sea. The EU and its Member States support the settlement of maritime disputes arising from the interpretation and application of UNCLOS through competent international courts and tribunals provided therein, which play an important role in implementing the rule of law at sea;

IV. b) The preservation of peace in line with the Charter of the United Nations, the peaceful settlement of maritime disputes in accordance with international law, the prevention of conflicts and the strengthening of international security, including through EU engagement with international partners, without prejudice to national

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<sup>9</sup> [http://eeas.europa.eu/asia/docs/guidelines\\_eu\\_foreign\\_sec\\_pol\\_east\\_asia\\_en.pdf](http://eeas.europa.eu/asia/docs/guidelines_eu_foreign_sec_pol_east_asia_en.pdf).

<sup>10</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011205%202014%20INIT>.

competences. This promotes international maritime cooperation and the rule of law and facilitates maritime trade and sustainable growth and development;

VI.1. f) Promoting the dispute settlement mechanisms according to the UNCLOS, including the International Tribunal for the Law of the Sea, in the political dialogues of the EU with third countries and regional organisations.

*c) Maritime Security Strategy (2014) – Action Plan<sup>11</sup>*

1.5.3. Mainstream maritime security into the Common Foreign and Security Policy agenda, in close cooperation with all relevant EU actors, in line with the EU's comprehensive approach, enhancing measures for conflict prevention and crisis management.

3. G7

*a) G7 – Summit (June 7, 2015)<sup>12</sup>*

Maintaining a Rules-Based Maritime Order and Achieving Maritime Security

We are committed to maintaining a rules-based order in the maritime domain based on the principles of international law, in particular as reflected in the UN Convention on the Law of the Sea. We are concerned by tensions in the East and South China Seas. We underline the importance of peaceful dispute settlement as well as free and unimpeded lawful use of the world's oceans. We strongly oppose the use of intimidation, coercion or force, as well as any unilateral actions that seek to change the status quo, such as large scale land reclamation. We endorse the Declaration on Maritime Security issued by G7 Foreign Ministers in Lübeck.

*b) G7 Foreign Ministers (Lübeck. - April 15, 2015)<sup>13</sup>*

We are committed to maintaining a maritime order based upon the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). We continue to observe the situation in the East and South China Seas and are concerned by any unilateral actions, such as large scale land

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<sup>11</sup> [http://ec.europa.eu/maritimeaffairs/policy/maritime-security/doc/20141216-action-plan\\_en.pdf](http://ec.europa.eu/maritimeaffairs/policy/maritime-security/doc/20141216-action-plan_en.pdf).

<sup>12</sup> [https://www.g7germany.de/Content/DE/\\_Anlagen/G8\\_G20/2015-06-08-g7-abschluss-eng.pdf?\\_\\_blob=publicationFile&v=5](https://www.g7germany.de/Content/DE/_Anlagen/G8_G20/2015-06-08-g7-abschluss-eng.pdf?__blob=publicationFile&v=5).

<sup>13</sup> <http://www.g8.utoronto.ca/foreign/formin150415-maritime.html>.

reclamation, which change the status quo and increase tensions. We strongly oppose any attempt to assert territorial or maritime claims through the use of intimidation, coercion or force. We call on all states to pursue the peaceful management or settlement of maritime disputes in accordance with international law,

including through internationally recognised legal dispute settlement mechanisms, and to fully implement any decisions rendered by the relevant courts and tribunals which are binding on them. We underline the importance of coastal states refraining

from unilateral actions that cause permanent physical change to the marine environment in areas pending final delimitation.