

SEPTEMBER 2014

# Perspectives on the South China Sea

*Diplomatic, Legal, and Security  
Dimensions of the Dispute*



EDITORS  
**Murray Hiebert**  
**Phuong Nguyen**  
**Gregory B. Poling**

**CSIS** | CENTER FOR STRATEGIC &  
INTERNATIONAL STUDIES

*A Report of the CSIS Sumitro Chair for  
Southeast Asia Studies*



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# Preface

On July 10–11, 2014, the Center for Strategic and International Studies (CSIS) hosted its fourth annual conference on the South China Sea. The two-day conference, titled “Recent Trends in the South China Sea and U.S. Policy,” featured speeches by Representative Mike Rogers (R-MI), Deputy Assistant Secretary of State for Strategy and Multilateral Affairs Michael Fuchs, and Paul Reicher, attorney and legal adviser on the Philippines’ tribunal case against China.

But the bulk of the two days was spent on discussions by an all-star lineup of South China Sea and legal experts, including representatives from Australia, Canada, China, Indonesia, Japan, Malaysia, the Philippines, the United Kingdom, and Vietnam. This report contains papers by 15 of those experts, highlighting the diversity of views presented at the conference.

Most of the authors in this report submitted papers that track closely with the panels on which they spoke during the CSIS conference. Patrick Cronin and Alan Dupont discussed recent developments in the South China Sea. Phillip Saunders and Carlyle Thayer explored the role of national maritime forces in the disputes. Jonathan Odom, Vu Hai Dang, and Bing Bing Jia took part in a lively discussion of the legality of claims. Bonnie Glaser, Chu Shulong, Yoji Koda, and Charmaine Misalucha all offered domestic and regional perspectives on the United States’ role in the South China Sea. And James Manicom, Jerome Cohen, Alice Ba, and Euan Graham rounded out the event by exploring possibilities for cooperation and confidence building.

The papers that follow represent the views of the authors and do not reflect those of CSIS or the Sumitro Chair for Southeast Asia Studies.



# 1 | Managing the South China Sea Disputes: What Can ASEAN Do?

*Alice Ba*

## Introduction

The South China Sea disputes are long-standing. However, perhaps at no time have they posed as prominent an issue or as great a concern for China–Association of Southeast Asian Nations (ASEAN) relations as they do today. Not only that, but the disputes are also the most complicated they have ever been. Long challenged by the number of actors and different kinds of claims involved—with ASEAN itself tested by the different preferences of its members—managing these disputes are today additionally complicated by heightened domestic regime legitimacy concerns faced by key states, as well as the intersection of major power politics and the ongoing geopolitical negotiations between the United States and China.

This paper considers what recent challenges say about ASEAN as an organization—its limitations and how recent politics complicate its role. Any conclusions about ASEAN’s role in managing disputes must be made with consideration of the political, geostrategic, and institutional parameters of the organization. In the final analysis, the organization remains important as a regional mechanism and confidence-building framework in the effort to manage this particular aspect of China-ASEAN relations. However, ASEAN and ASEAN-driven frameworks can comprise only one category of a number of mechanisms.

## ASEAN and Southeast Asia

For ASEAN states, the South China Sea brings together questions of both capability and intent. Although neither Chinese capability nor Chinese intent is as strong or as certain as sometimes portrayed by pundits and commentary, recent developments have done much to intensify Southeast Asian states’ concerns about both. Provocative actions are not limited to China, but the power dynamics in China-ASEAN relations mean that Southeast Asian interests (economic and security related) may be more vulnerable in both the short term and the long term.

As regards the particular role that ASEAN itself might play, ASEAN states have the greatest stake in developing more effective mechanisms and responses to the South China

Sea conflicts. The concern for ASEAN states is not just about whether or not ASEAN can manage tensions in an effective way; the concern is also the damage this issue has done to the reputation of the organization. In particular, ASEAN, as an expression of the collective, has provided these smaller states a means by which to exercise voice and influence that they might not otherwise have had as individual states. However, ASEAN's unprecedented and very public and publicized failure to produce a joint communiqué at their regular foreign ministers' meeting in Phnom Penh in 2012 dramatically revealed the differences between ASEAN states, as much as between China and some ASEAN claimants. That failure now serves as a dramatic illustration of the difficulty faced by ASEAN as a collection of states trying to carve out a common approach.

As others have given much attention to the differences within ASEAN, there is no need to belabor them at length here. Suffice it to say that the intra-ASEAN fault lines are multiple and not always clear-cut. States differ in not just the importance attached to the disputes but also their relations with China and the kinds of regional responses prioritized. Clearly, such differences challenge any collective position. Since the 1980s, when states diverged in how best to respond to Vietnam's intervention into then Kampuchea, there has been an informal ASEAN rule that members will defer to the "frontline" state in any collective "ASEAN" response. However, in the case of the South China Sea, ASEAN's four claimant states vary significantly in how they have chosen to approach the South China Sea disputes and manage the recent intensification of tensions. The Philippines' and Vietnam's positions and concerns may grab the headlines, but Malaysia and Brunei have been notably quiet thus far. The main point here is that until ASEAN's claimant states agree about how best to approach disputes, it will be difficult to talk about a common ASEAN position.

The emphasis placed on ASEAN as a mechanism for managing South China Sea tensions is itself relatively new. This is as much attributable to intra-ASEAN differences as to the institutional and ideological parameters of the organization.

A standard characterization of ASEAN as a security organization is that it focuses more on conflict management than conflict resolution. This is especially true if one equates conflict resolution with judicial settlement or third-party binding dispute settlement. Another common assumption is that the relative lack of binding dispute settlement is indicative of inaction. However, the focus on legal settlements can also obscure the activity taking place on the maritime boundaries front. It is just that the activity mostly takes the form of diplomatic, negotiated agreements over third-party dispute settlement. For example, since ASEAN's founding (technically, since 1969), states have concluded 39 maritime boundary arrangements, 29 of which were delimitation agreements and two of which were provisional agreements that involved some joint exercise of jurisdiction and management of resources. Only one of those agreements involved third-party binding dispute settlement—namely, the dispute concerning Myanmar and Bangladesh over maritime boundaries in the Bay of Bengal. Other notable exceptions in a somewhat different category were states' decisions to submit their sovereignty disputes over Sipadan and Ligitan (Indonesia-Malaysia) and Pedra Branca (Malaysia-Singapore) to the International Court of Justice (ICJ).

In another respect, however, the focus on ASEAN as a source of conflict management may be somewhat misplaced—or, at least, it is worth noting that the kind of role that ASEAN as an institution has been trying to play in the South China Sea is relatively new. For example, historically ASEAN has placed the greatest emphasis on *preempting* conflict or *avoiding* conflict—that is, practicing self-restraint, establishing domestic developmental conditions conducive to stable status quo states—rather than *responding* to conflict. In this vein, the responsibility has lain with individual states, not ASEAN as a collective or institutional body. Thus, in the bilateral cases of boundary management above, individual claimant states took the initiative, not ASEAN. In fact, it was understood during ASEAN’s early years that bilateral disputes should remain bilateral lest they undermine what was then a fragile organization.

Thus ASEAN’s institutional role has tended to be indirect; that is, it provides an institutional setting supportive of national development, increased, continued political exchange between states, and regional integration, all of which is understood to encourage self-restraint. This is true for intra-ASEAN relations and conflicts, as well as conflicts between ASEAN states and others.

Of ASEAN documents, the Treaty of Amity and Cooperation (TAC) is most explicit in identifying an ASEAN role in managing interstate conflict. Signed in 1976, TAC was initially meant to offer a code of conduct for ASEAN states exclusively, but since 1986, other non–Southeast Asian states may also accede to the treaty. Even in the case of TAC, however, ASEAN’s role as a third party is severely constrained. For example, TAC’s key mechanism is the High Council, but, ultimately, states’ participation is voluntary. Over the years, many have cited states’ preferences for other mechanisms (the High Council has never been invoked) as a sign of ASEAN weakness. However, it should be noted that in ASEAN, states turning to bilateral negotiations or to international bodies like the ICJ is not considered a sign of institutional weakness or the absence of ASEAN influence. Again, historically, the organization has seen its role as mostly indirect—that is, creating the conditions that will encourage states to manage their conflicts peacefully, be it by ASEAN or non-ASEAN means. In this sense, it plays the role of facilitator, not active mediator.<sup>1</sup>

In this vein, the TAC (both the original and amended versions) also explicitly refers to the possibility of initiative from other states should disputing states find the High Council inappropriate. Here, some note the particularly responsive “managerial position” played by Indonesia in easing or facilitating political outcomes to key conflicts—for example, its leadership in facilitating negotiations between Phnom Penh and Hanoi during the Cambodian conflict; its offer of good offices in Cambodia’s and Thailand’s recent dispute over Preah Vihear (which resulted in a stand-alone ASEAN foreign minister’s statement on the issue, in addition to its inclusion in a statement issued by the chairman of the 19th ASEAN Summit); and, of course, most recently, its quick initiative in facilitating intra-ASEAN

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1. Ramses Amer, “The Dispute Management Approach of the Association of Southeast Asian Nations: What Relevance for the South China Sea Situation?,” in *Non-Traditional Security Issues and the South China Sea*, ed. Shicun Wu and Keyuan Zou (Surrey, UK: Ashgate, 2014), 47–72.

agreement over a set of common principles (the six basic principles on the South China Sea) following ASEAN's divisions at its 2012 ASEAN ministerial meeting.<sup>2</sup>

Over the years, though, there have been adaptations and efforts to clarify or allow for an ASEAN role in response to conflict. Typically, those adaptations have followed some critical challenge or disruption to regional relations, most notably, for example, in the case of ASEAN's response to Vietnam's intervention into Cambodia (then Kampuchea) in the late 1970s and 1980s. Similar adaptations have been made to allow for an ASEAN role in responding to domestic crises that bear on the region as a whole. As noted below, ASEAN's role in the South China Sea might be similarly characterized as a crisis-driven, institutional adaptation. This is not to say that ASEAN's institutional changes are purely crisis driven. It is only to say that events compel and give greater urgency to this particular aspect of ASEAN.

All this is to say that the focus on ASEAN, as an active mechanism of conflict management, is relatively new. And even today, ASEAN as a body does not take a position on the specific South China Sea claims. Again, to the extent that ASEAN has been involved, it has been mostly indirect—for example, through the South China Sea workshops begun in 1990. While initiated by Indonesia, the workshops have also enjoyed ASEAN's official support. Similarly, the creation of the ASEAN Regional Forum in 1993–1994 has also been linked to concerns about the South China Sea in the early 1990s; however, even there, the forum was not set up to engage the disputes directly. Its goal was to provide a regional framework conducive for different Asia-Pacific states to discuss their security concerns.

Given this history, the intensification of ASEAN's direct involvement is notable and raises the question: why now? And here it is worth elaborating some of the reasons since ASEAN's involvement has been a point of contention between China and ASEAN states.

If we look at the historical record and the points of ASEAN's entry into the disputes, a pattern emerges. First, collectively ASEAN has generally been reluctant to insert itself into the disputes. Second, when it does, ASEAN's positions have generally been quite measured, restrained, and still respectful of Chinese sensitivities (for example, ASEAN statements generally do not call out China by name). But most of all, the organization has spoken on the disputes when it is felt that not doing so would bear negatively, not just on the security of the region as a whole but also on ASEAN as an institution.

In general, ASEAN states, despite their differences, share a common interest in the peace and stability of the region and in good, productive relations with China. This last point deserves to be treated seriously and as a reminder that relations are complex and multifaceted (as much as recent tensions may dominate). This said, although most ASEAN states recognize China as having legitimate security concerns and interests in the South

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2. Ralf Emmers, "Indonesia's Role in ASEAN: A Case of Incomplete and Sectoral Leadership," *Pacific Review* 27, no. 4 (2014): 543–562; Arif Havas Oegroseno, "ASEAN as the Most Feasible Forum to Address the South China Sea Challenges," *Proceedings of the One Hundred Seventh Annual American Society of International Law* 107 (April 2013): 282–283.

China Sea, they have been unnerved by what they see to be China's lack of self-restraint and intensification of activities (of all kinds) in the South China Sea. Thus, one reason for ASEAN's higher profile in the conflicts in recent years is that the South China Sea disputes are now conceptualized as a larger challenge to regional stability, as opposed to a simple dispute between some states.

A second reason that helps explain ASEAN's higher-profile role these past few years is that more than just territorial disputes are at stake. Far more than in the 1990s, for example, ASEAN itself has much more to lose in terms of regional influence, and especially in the way of "ASEAN centrality," which has become part of ASEAN's conceptualization of "regional order,"<sup>3</sup> as well as its understanding of its institutional legitimacy.<sup>4</sup> ASEAN centrality is also important to giving Southeast Asia's smaller powers an important "voice" over regional trends. Indeed, ASEAN's fears of marginalization may be as great as its fears of domination.

Thus, states' unprecedented failure to produce a joint communiqué at the 2012 ASEAN foreign ministers' meeting was an important event because it raises questions about ASEAN coherence and centrality. Just as telling was the quick action by Indonesia, who managed to produce a statement, albeit a week (but only a week) late. In other words, events and developments contributed to an increased consensus about the danger the disputes posed not just to regional security but also to ASEAN, even if member states may disagree about other specifics of the disputes and how to approach them. Even in 2012, Cambodia's position notwithstanding, it was notable, for example, that besides the Philippines and Vietnam, Brunei and Malaysia (both claimants) and Indonesia and Singapore (nonclaimants) also submitted letters protesting Cambodia's decision to remove the South China Sea from discussion.<sup>5</sup> The problem, however, as noted below, is that events in 2014 now challenge ASEAN once again and increase interest in non-ASEAN and less diplomatic options.

## Complicating Dynamics as to ASEAN's Role

Most certainly, an important new factor in the South China Sea disputes is the role played by the United States. Here, it may be useful to highlight how the U.S. role represents an important disconnect between China and some ASEAN states, especially the most active claimants.

Among some in China, for example, there is a view that ASEAN states have deliberately brought in the United States to force concessions from China. This understanding sits at odds with the view from key states in Southeast Asia. Although some ASEAN states have been more proactive in engaging the United States, there is growing consensus that events compel them to turn to the United States for assistance. Even Malaysia, despite being the

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3. Evan Laksmana, "Regional Order by Other Means? Examining the Rise of Defense Diplomacy in Southeast Asia," *Asian Security* 8, no. 3 (2012): 251–270.

4. Alice Ba, "ASEAN Centrality Imperiled? ASEAN Institutionalism and the Challenges of Major Power Institutionalization," in *ASEAN and the Institutionalization of East Asia*, ed. Ralf Emmers (New York: Routledge, 2012), 114–129.

5. Barry Desker, "Defusing Tensions in the South China Sea," *RSIS Commentaries*, December 3, 2012.

least alarmed by events, may be undergoing some reflection, even if the changes are modest. For example, the appearance of Chinese ships in the area of James Shoal, not once but at least three times,<sup>6</sup> may be cause for reflection among some Malaysian elites who have long considered their relationship with China more special than the rest.<sup>7</sup>

While Malaysia continues to pursue one of the more layered approaches toward the disputes—one that continues to contextualize them against a considerable array of economic interests and emphasizes diplomatic processes and accommodation—its announcement of a new naval base in Sarawak (near James Shoal) and a new marine corps appears to be a response to recent Chinese actions. Similarly, Malaysia earlier this year welcomed the stepped-up U.S. naval visits to the country.

Here, it is worth underscoring just how provocative many ASEAN states viewed China's decision to place the oil drill in disputed waters with Vietnam at that particular time. Much attention has focused on *where* the rig was put. However, as regards ASEAN and its mechanisms, the critical issue here may have more to do with *when* it took place. To be more specific, the timing is no small matter because up until that point, there seemed to be some reason to believe that diplomatic processes, including the ongoing Code of Conduct (COC) negotiations and the diplomatic exchanges between China and ASEAN states, including Vietnam, were moving China-ASEAN relations to a less volatile place.

This disconnect between China and ASEAN states about how the United States has played or may play a role in the disputes is indicative of the strategic and political distrust that continues to challenge the relationship. The U.S. factor also ultimately raises different kinds of questions as to ASEAN's influence and the role it is able to play in managing the disputes. In particular, efforts to manage the South China Sea disputes are increasingly challenged by the intersection of major power geostrategic politics and tensions arising between the United States, as a longtime status quo maritime power and self-identified maintainer of the "maritime commons," and China, a historically continental power interested in expanding its maritime reach and presence.

It is quite clear, for example, that the South China Sea disputes between China and ASEAN states are now overshadowed by what Aileen Baviera calls a "U.S.-China maritime overlay."<sup>8</sup> The intersection of these two relationships—the U.S.-China relationship and the China-ASEAN relationship—is not new in that Beijing has long had concerns about ASEAN's relationship with the United States and ASEAN states' intentions toward China; however, China's worries were reignited beginning with the 2010 ASEAN Regional Forum (ARF), when then secretary of state Hillary Clinton asserted strong misgivings about

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6. Carl Thayer, "Speak Softly and Carry a Big Stick: What Is Malaysia Playing At?," *Diplomat*, February 28, 2014.

7. Cheng Chwee Kuik, "Malaysia's South China Sea Policy: A Weaker State's Optimization of Interests" (paper presented at the international conference "ASEAN's Unity and Maritime Challenges in South China Sea and Asia Pacific Region," Bangkok, June 20, 2013).

8. Aileen Baviera, "An ASEAN Perspective on the South China Sea: China ASEAN Collision or China-US Hegemonic Competition?," in *Entering Uncharted Waters: ASEAN and the South China Sea*, ed. Pavin Chachavalpongpun (Singapore: ISEAS, 2014), 88–114.

developments in the South China Sea and their implications for freedom of navigation. Ultimately, U.S. attention to East Asia, and especially its heightened interest in the South China Sea, is double-edged for the ASEAN states interested in containing tensions. On the one hand, it serves to bolster the seriousness of Southeast Asian objections to China's extensive claims and activity. On the other, it introduces the very sensitive dynamics of U.S.-China relations to China-Southeast Asia relations that can complicate the search for a *modus vivendi* on the issue. For China, its relations with the United States are far more sensitive and charged compared with its relations with Southeast Asia. Strategically, China's sense of vulnerability is also sharper in that the United States could cut off vital lifelines, as well as undermine China's growth and its regime legitimacy. Both considerations complicate a more moderate Chinese stance. Perhaps it is no surprise that some of China's more belligerent commentary on the South China Sea, including some comments from those who have historically been more moderate, took place following Clinton's remarks at the ARF meeting.<sup>9</sup>

In addition, current efforts to manage the disputes are also complicated by heightened domestic regime legitimacy concerns faced by key states, especially China, which has been undergoing one of its most significant leadership transitions of the post-Deng Xiaoping era. Indeed, recent analysis of Chinese foreign policy has tended to attribute the primary drivers behind China's actions in the South China Sea as domestic, as much as and in some cases more than strategic. Xi Jinping's leadership characteristics and efforts to consolidate his own personal power base may also factor into recent tensions. The domestic imperatives may help explain the seemingly contradictory or contrary features of China's approach to the South China Sea, the most recent being the decision to place the oil drill in contested waters near Vietnam just as China-ASEAN relations seemed to be moving beyond the crises of 2012.

The two complicating factors above offer additional reasons not to expect too much from an ASEAN solution. Ultimately, neither of the above intensifying drivers is about ASEAN-China relations or even the South China Sea, *per se*; both are beyond ASEAN's institutional or political capacity to influence in a significant way. This said, ASEAN continues to have an important role to play in keeping opportunities for cooperation open. Whereas ASEAN states' interest in engaging the United States strategically has increased as a result of China's recent activities, most states are also cognizant of the fact that although their interests may intersect and overlap with the United States, their interests are also not exactly the same. In this sense, there remain concerns about the content and tools of the United States' Asia policy, in particular the durability of U.S. attention to Southeast Asia. Thus, although it is true that ASEAN is limited in its ability to influence the deeper geostrategic and domestic drivers at play in these disputes, it remains important that ASEAN states, individually and collectively, continue to explore regional-based mechanisms and pathways toward moderating tensions and achieving mutually acceptable arrangements.

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9. Lyle Goldstein, "Chinese Naval Strategy in the South China Sea: An Abundance of Noise and Smoke, but Little Fire," *Journal of Contemporary Southeast Asia* 33, no. 3 (2011): 320-347; Thomas J. Christensen, "The Advantages of an Assertive China: Responding to Beijing's Abrasive Diplomacy," *Foreign Affairs* 90, no. 2 (March-April 2011): 54-67

# Other Opportunities for Confidence Building

ASEAN's limits in transforming the U.S.-China relationship suggest, then, a need to consider other avenues of confidence building beyond the COC. In particular, areas of nontraditional security, information sharing, and capacity building, as well as defense diplomacy, may offer less challenged and still not fully explored opportunities for cooperation.

## NONTRADITIONAL SECURITY

The line between nontraditional and traditional security can be blurred; however, because areas of nontraditional security can bear on traditional security concerns, technical cooperation in this realm may provide a different avenue for ocean governance (security and otherwise). For example, states might expand cooperation in transnational crime, environmental protection, and marine biodiversity, to pursue scientific research. The area of piracy is an area that has clear implications for traditional security. Moreover, as Baviera notes, the region's navies and enforcement agencies have already been receptive to information sharing and capacity building in the area of maritime safety. Two mechanisms already exist—namely, the Information Fusion Center in Singapore, which works with more than 60 agencies and 30 countries to provide information toward the prevention of piracy and timely responses to maritime events (e.g., hijackings, search and rescue operations), and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, which was created to promote and enhance cooperation against piracy and armed robbery in Asia.<sup>10</sup> Although cooperation on safety of navigation as regards the South China Sea has been challenged despite being identified by the implementation of Declaration on the Conduct of Parties in the South China Sea (DOC), it may still be possible to build on or expand in increments existing mechanisms as those above. The Expanded ASEAN Maritime Forum now also offers new opportunities focused specifically on functional maritime confidence building. Baviera also identifies fishing as an area with potential for greater cooperation not just because fishing activities have become triggers for conflict between states but also because fishing is a particular economic interest for local and national economies of coastal states.

Similarly, Evan Laksmana notes, “Nontraditional and transnational security issues . . . provide . . . ‘a conceptual umbrella’ under which ASEAN through the ARF [for example] could multilaterally engage key regional players within an overarching framework of confidence building.”<sup>11</sup>

## DEFENSE DIPLOMACY

Defense diplomacy is an area of growing activity and offers new and different avenues of confidence building in Southeast Asia and between Southeast Asia and China, as well as other states. Contemporary defense diplomacy generally involves militaries and defense

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10. Baviera, “An ASEAN Perspective.”

11. Laksmana, “Regional Order by Other Means?”

ministries working together or contributing to “a range of external peacetime cooperative tasks” that include senior-level meetings, military exchanges, joint training, ports of call, and bilateral military exercises. These exchanges can provide means toward conflict prevention. For example, they can signal a willingness to engage in greater cooperation, as well as a general commitment to working out problems peacefully; they can contribute to defense and military transparency; they can also build or reinforce understandings of common interest. More than 70 percent of defense diplomacy activity in Southeast Asia was generated by the ARF, followed by ASEAN at 20.5 percent.<sup>12</sup>

Currently, there is some limited defense diplomacy between China and ASEAN states.<sup>13</sup> These contacts and exchanges should continue in the interests of transparency and the building of networks. Defense diplomacy need not be exclusive to China and ASEAN states. In fact, given the strategic dynamics described above, there is an argument to also have opportunities for other states to participate with China and ASEAN states. This is obviously a sensitive area for all states, but given the strategic dynamics above and concerns about spiraling security dilemmas, states should also cultivate ways to engage and include China on the security, and not just the economic, front.

## ASEAN CHINA DIALOGUE AND SOMS

The 2004 ASEAN China Joint Working Group (ASEAN-China JWG) on the DOC falls under this framework, and given the problems associated with the DOC’s implementation and COC negotiations, it may be easy to miss the ways that the ASEAN China framework continues to provide opportunities for confidence building. This is true even under the ASEAN China JWG. For example, although the implementation of the DOC has been troubled, a range of measures potentially could fall under the ASEAN-China JWG’s mandate of identifying cooperative activities that serve mutual understanding of and greater commitment to the DOC and now COC process. As noted above, the greatest opportunity may lie in areas of nontraditional security—from transnational crime, environmental protection, and marine biodiversity, to pursue scientific research, piracy, and search and rescue operations. These are also all areas explicitly identified by the ASEAN-China JWG.<sup>14</sup> More important, the expansiveness of ASEAN-China cooperation is notable and has led to an increasingly “institutionalized process of regularized consultation leading flexibly to various formal agreements while creating political partnership,”<sup>15</sup> and it may be underappreciated in terms of its strategic significance.<sup>16</sup> At a minimum, as Cheng Chwee Kuik concludes, the limitations of the DOC and COC aside, these mechanisms remain important providers of “diplomatic space” where China and ASEAN states can consider ways to manage and avoid conflicts.<sup>17</sup>

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12. Ibid.

13. Ian Storey, “China’s Bilateral Defense Diplomacy in Southeast Asia,” *Asian Security* 8, no. 3 (2012): 287–310.

14. “2004 Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea,” Kuala Lumpur, Malaysia, December 7, 2004.

15. Laksmana, “Regional Order by Other Means?,” 260.

16. David Arase, “Non-Traditional Security in China-ASEAN Relations,” *Asian Survey* 50, no. 4 (2010): 808–833.

17. Kuik, “Malaysia’s South China Sea Policy.”

In sum, the basic point here is that there is a need to investigate less politicized venues in the interest of confidence building. This said, these activities should serve as supplements, not replacements, for the other more formal and official negotiations that have been taking place.

## Why Continue the Code of Conduct Negotiations?

The challenges associated with ongoing COC negotiations, and the questions about it actually being followed given the DOC's failure to prevent current tensions, have led some to question the merits of continuing the process. Outlined here are some reasons why states should continue negotiating, even if the actual agreement produced is likely to be limited legally and in its implementation.

The most important reasons for continued negotiations are, first, that it indicates an important commitment by states to some kind of cooperative process. It also compels states to engage the principled positions and political concerns of other states. Even if individual states may express skepticism about the process (witness the Philippines) or object to (and try to obstruct) key pieces under negotiation (witness China), it remains important that they still feel compelled to take part in the process. At the very least, their continued participation indicates a continued interest in better relations. Thus, it is notable that states refocused their attention on negotiations following the crisis in China-ASEAN relations (and within ASEAN itself) following the 2012 Phnom Penh AMM. As noted, the refocused attention on the COC negotiations was also the product of ASEAN's own renewed emphasis on some kind of an ASEAN process, as a way to address some of the damage done to ASEAN's reputation. Such a concern is obviously less pronounced for China, which could have chosen to opt out. ASEAN's and China's continued participation indicates their appreciation for the political symbolism (even if not necessarily its functional value) associated with the process. In the case of ASEAN states, the refocused attention to the COC also serves as indication of the importance they still attach to ASEAN despite their differences.

In short, the South China Sea issue has become a highly politicized one, which complicates any effort to manage (let alone resolve) what was already a highly complex dispute. The irony of such situations is that the politics intensifies the urgency of a solution, while at the same time making a solution harder to achieve. Given such politically charged situations, the likelihood of relations dramatically worsening as a result of new developments is very high, while any moves toward cooperation will be slow to take hold or to be persuasive. What this means is that efforts to manage the disputes are unlikely to progress in a linear fashion. At the same time, while protracted, the process can still offer opportunities for incremental progress. Even in less politicized disputes like that between Indonesia and Vietnam, for example, it took more than a decade to successfully negotiate their maritime border dispute.

A second value of the process is that it keeps states focused in some ways on regional order goals; that is, as troubled as the COC process has been, it still expresses a common

effort to work toward a rules-based order—as opposed to a power-based order, be it via Chinese or U.S. deterrence. That process also keeps some focus on principles of international law, as well as existing codes of conduct like ASEAN’s TAC. Even if a legal settlement of the dispute may elude states, it serves the management of disputes to have states discussing principles of law and conduct. All key states have signed and ratified both the TAC and the United Nations Convention on the Law of the Sea.<sup>18</sup> It behooves all to begin the process of making their actions and claims more consistent with both. The reasons are both normative and practical. Normatively, this is about rules of conduct and a rules-based regional order. Practically, it serves to clarify some of what is in contention.

Ultimately, the goal of continued negotiations is to achieve a *modus vivendi* between states. That *modus vivendi* may take the form of a legal binding agreement, but it also may take other forms. In fact, given the anti-legalist inclinations of not just China but also ASEAN states, we should not expect much in the way of the former. At the same time, there is still the possibility that somewhere in the process, states will be able to arrive at a common set of principles. It is worth noting, for example, that few would have thought that states would have been able to arrive at the original DOC, which, despite its limitations, did generate some stasis and provide a set of principles to reference and from which to work. Of course, the decision to make that agreement nonbinding proved to be a critical concession that made the agreement possible. On the other hand, the concession allowed states to move forward on implementation guidelines.

In short, given what has been a highly politicized climate, the objective in, and argument for, continuing the COC negotiations may be *less* than a legally binding code—although that objective should certainly remain on the table and be something to strive for. Rather, the objective is a stable, mutually acceptable *modus vivendi* about the disputes. The key argument for continuing the COC negotiations at this point in time is that they provide one of the few multilateral confidence-building instruments focused explicitly on the creation of a rules-based order as regards the South China Sea.

A third value of the process lies in the potential to generate other avenues of cooperation. As highlighted above, for example, the ASEAN-China Senior Officials’ Meeting dialogue process led to working groups on the DOC and its implementation. Another example is the ARF, which has been challenged and critiqued on a variety of fronts (e.g., the diversity of its members), yet it is from that process that the ASEAN Defense Ministers Plus arrangements, as well as other defense diplomacy opportunities, emerged. As Cheng-Chwee Kuik notes, ASEAN processes bind China (and ASEAN states) in a “continuous consultative process.” It also serves to keep diplomatic channels open.<sup>19</sup>

In the final analysis, whatever the problems, all states should remain open to the possibility of not just a meaningful COC but also other kinds of negotiated agreements. This does not mean that these processes should be the only means of confidence building or

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18. The exception is Cambodia in the case of the United Nations Convention on the Law of the Sea.

19. Kuik, “Malaysia’s South China Sea Policy.”

managing tensions and the disputes. In fact, states should be open to a variety of means by which to arrive at a working-level trust.

Ultimately, the South China Sea is just one of many dimensions of China-ASEAN relations. It may be the most dramatic and the most conventionally strategic of issues. As detailed above, the issue has heightened the concerns of ASEAN states, both claimants and nonclaimants. At the same time, other interests, especially economic, and a general belief that China's geographic proximity demands a continued search for a *modus vivendi* with China also affect how the issue plays out. These other interests and concerns contribute, for example, to the persistence of "hedging strategies" in Southeast Asia, despite the growing congruence of concerns and questions about China's actions in the South China Sea.

Similarly, the complexity of ASEAN's relations with China are also what make ASEAN—as an institution—and the ASEAN-China framework important platforms for managing relations and the disputes. This is because as comprehensive, not single-issue, frameworks, they are now constituted by multiple negotiating layers that can help guard against relationships being hijacked by any one issue. Nevertheless, ASEAN's institutional and geopolitical limitations mean that it can be only one of many approaches.

# 2 | China's View on U.S. Policy in the South China Sea

*Chu Shulong*

The South China Sea disputes have become more serious and troublesome in recent years. To the Chinese understanding, this has a lot to do with U.S. “rebalancing” in Asia in recent years, especially then secretary of state Hillary Clinton’s speech in Hanoi, Vietnam, in July 2010, which highlighted tensions in the region’s maritime domain and called for a “multilateral” approach to resolve ongoing disputes.<sup>1</sup>

## The U.S. “Rebalancing” Strategy Focuses on Security and Intends to Make and Use the Troubles in Asia

From the Chinese perspective, the United States, especially after the secretary’s speech, intends to make and utilize high tension over the territory disputes between China and those Southeast Asian countries, in order to counter, if not contain or encircle, China’s rise and tamp down its growing role and influence in the region, while maintaining U.S. predominance in the western Pacific.

Most Chinese see recent U.S. actions, especially Clinton’s troublemaking speech in Hanoi, as unnecessary and unreasonable. The Chinese believe that the situation in the South China Sea, including territorial disputes, has been basically stable and peaceful since 2002, when China and ASEAN reached the agreement on the DOC. The agreement was proposed by the Chinese side in the early 2000s, and the core of the agreement was that none of the concerning parties should take unilateral actions to change the status quo in the South China Sea. In other words, every claimant should refrain from taking unilateral actions to change the status quo; when nobody takes the first action on the disputed issues, then peace, security, and stability in the South China Sea can be maintained.

For almost 10 years after 2002, no country took military actions to alter de facto control over disputed territories, and, despite a few incidents, there was no fighting or clashes

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1. Hillary Rodham Clinton, remarks at the ASEAN-U.S. Ministerial Meeting, Hanoi, Vietnam, July 22, 2010, <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145046.htm>.

between countries in the region. In fact, there was generally peace and stability among claimants for the roughly eight years between 2002 and 2010.

Many Chinese therefore could not understand the intention of or rationale behind the U.S. government's approach toward the South China Sea after July 2010. According to U.S. officials, a number of countries demanded the United States come out to say or do something to stop aggressive Chinese actions.

These countries are the Philippines and Vietnam. China might be cutting seismic cables and harassing fishermen and fishing vessels from other countries, but these actions are nothing new. Incidents of this type take place at various times and among different parties, and they have become common practices. The South China Sea has been a disputed area among a number of countries for a long time, and, as a result, many small incidents or conflicts take place every year. The most important thing is neither serious military confrontations nor seizure of territory occurred in those 10 years. It would be unrealistic for anyone, including Americans, to expect that nothing at all should be happening in disputed areas of the South China Sea.

Therefore, the Chinese have sufficient reason to be suspicious that the U.S. position toward the relatively quiet situation in the South China Sea is not because Americans or anybody else thought the situation was serious in and by itself, but rather because the United States wanted to return to or “rebalance” Asia in response to a rising China. In order to carry out that strategy, Americans need some reasoning, and exaggerating the situation in the South China Sea is a good way for Americans to justify their return or “rebalance.”

That is quite a pity for U.S. policymakers. Ten years ago when another Democratic administration was in power, Washington's Asia strategy was defined in three pillars: economic interests, security, and democracy.<sup>2</sup> The United States was then as confident as it was active in Asia. But 10 years later, after the Iraq War and global financial crisis, Americans were no longer as confident as they watched China continue to rise. China has taken the United States' place as the largest trade partner of all economies in the region. Americans believe their role and influence have been seriously threatened and are deeply in decline because of rising Chinese power and influence in Asia, and that they must do something to stop or at least change this trend.

All of this is fine since every country wants to see its role and influence rising. Here the problem is the way rather than the will of competition. Ten years ago, Americans used three means—economy, security, and democracy—to compete with other powers and reach U.S. goals in the region. Ten years later, the administration of Barack Obama finds it now can only use security to advance U.S. interests and goal in the Asia Pacific. The United States has lost its position as the region's largest trading partner, and it cannot afford to take on new investments in the region because of internal economic difficulties. This means

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2. “Roth 7/22 Remarks to Senate Foreign Relations Committee,” *USIS Bulletin*, July 23, 1997, 19; Liu Liandi, *Major Documents on China–U.S. Relations* (Beijing: Shisi, 1998), 381.

Americans can do little to change the current trends of competition for economic influence between the United States and China in the region. And after the Iraq War, especially in light of the alleged abuse of human rights during the war and setting up of “secret jails” that seriously damaged its image as the leader of freedom and democracy in the world, the United States finds it can no longer advance its interests and goals through advocating for democracy and human rights in Asia as well as in the world, because nobody trusts and respects the United States as much as was the case before the Iraq War.

U.S. leaders as a result have found that their only strength and advantage is their military capability. The best way through which the United States can change the unfavorable geostrategic trend in Asia is in the security arena, where it is still more powerful and influential than any other regional or global powers are. But security issues also tend to be negative and troublesome, unlike many economic or democratic issues, which can be considered more positive, except for a few nondemocratic regimes. Therefore, emphasizing security issues as a strategy means emphasizing problems, troubles, and disputes. Indeed, the U.S. return to Asia and “rebalance” strategy is emphasizing problems, troubles, and disputes in the region and taking advantage of these problems, especially between China and its neighbors, to maintain U.S. influence and the alliance system and let Asians feel that they still need Americans. This approach is negative and destructive to the region. And, in fact, since the U.S. “pivot” to Asia, more troubles have been taking place in the region, and tensions among Asians have risen higher, not lower, even between U.S. allies in the region, such as Japan and the Republic of Korea.

To the Chinese, other countries in the region, especially U.S. allies such as Japan and the Philippines, have utilized the U.S. strategic “pivot” to advance their own interests and agendas in the East and South China Seas. Actions taken by Japan to nationalize the disputed Diaoyu Islands, while denying it is a disputed issue, and the Philippines’ action of sending its largest naval ship to Huangyan Island (or Scarborough Shoal) to try to take over the disputed island in May 2012 demonstrate this trend.

In addition to Huangyan Island, China and the Philippines have increasing tension resulting from their disputes over Ren’ai Reef (or Second Thomas Shoal). In 1999, the Philippines stated that it had troubles with a naval ship that ended up having to stay on the reef, an announcement with which China did not take issue because, according to the Chinese government, the Philippine government said it would repair the ship and take it away. But the Philippine government has never left, and Manila has seemingly sent materials to the ship to build facilities there permanently. Chinese ships nearby have tried to stop the shipment of building materials but not supplies for Philippine military personnel on the ship.

Against this backdrop, the Chinese government and people believe they have no alternative but standing up to the aggressive posturing by Americans and their allies in the region. This is why we have the situation we have today: more negative actions and words exchanged between China and other nations in the region, especially between China and Japan, and China and the Philippines.

# The Sino-U.S. Confrontation in the South China Sea

The most controversial areas in U.S.-China relations in the post-Cold War and the early 1990s were human rights, China's status as a most favored nation, the Taiwan crisis in 1996, and the bombing of the Chinese embassy in Belgrade in 1999. Then relations between China and the United States were heavily troubled by Taiwan's independence movement when Chen Shui-bian and the Democratic Progressive Party were in power in Taipei between 2001 and 2008.

In recent years, issues between China and the United States have switched to regional security and economic matters in East Asia and the western Pacific, and in particular the subregion of Southeast Asia. The South China Sea has become a major part of this regional competition between the United States and China.

The official position of the United States has been that it does not take position over sovereignty in the territorial disputes in the East and South China Seas. The United States only cares about the freedom of navigation of the sea lanes communication and peaceful means to resolve disputes among countries. It sounds neutral, but, in fact, the United States is not and cannot be neutral toward these disputes, because it is a treaty ally of a number of concerned parties in Asia. Every time China did something about the disputes, the United States always responded by making statements to criticize or attack China. The U.S. Senate even passed a nonbinding resolution condemning China's actions in the East and South China Seas in late July 2013, while Washington has always kept silent when the Japanese, Vietnamese, and Filipinos took actions over the disputes, including through some clearly aggressive and provocative words and deeds.

While not accepting the Chinese position on the South China Sea, and sometimes criticizing China's rhetoric and actions, the United States continues to restate its position of not taking sides over sovereignty disputes in the South China Sea and affirm its interests in upholding the freedom of navigation and resolving disputes peacefully rather than through force or coercion.

However, in recent developments in early 2014, the U.S. government started to take a position over the sovereignty issue in the South China Sea, challenging Chinese sovereignty there. Assistant Secretary of State for East Asian and Pacific Affairs Daniel Russel and other U.S. government officials stated in early 2014 that the United States did not find a basis in international law for China's claims based on the nine-dashed line.<sup>3</sup>

The Chinese Foreign Ministry spokesman has criticized the United States for "taking position on the sovereignty disputes," which stands against long-stated U.S. policy, and restated that China's sovereignty rights over the South China Sea are "historical and solid."<sup>4</sup>

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3. Geoff Dyer, "U.S. Toughens Line on China Sea Clash," *Financial Times*, February 9, 2014, [www.fortunascorner.com/2014/. . . /u-s-toughens-line-on-china-sea-clash/](http://www.fortunascorner.com/2014/. . . /u-s-toughens-line-on-china-sea-clash/).

4. Xiao Qiang and Yu Wen, "China and U.S. Diplomatic 'Oral Confrontation,'" *Global Times*, February 10, 2014, 3; Chen Weihua, "U.S. Must Cease Biased Remarks on China, Warns Top Diplomat," *China Daily*, February 22, 2014, 8.

Most Chinese support their government's position because they believe that territories in Asia, and for that matter in the world, were formed by historical developments, not by laws or treaties and agreements. In fact they were formed long before the establishment of international law, which is basically a modern phenomenon and relatively new for the past two or three hundred years, starting in Europe. And there has been a fundamental legal principle that any law cannot and should not apply to something before the law. If new laws should apply to historical developments before the laws, everything in the world should be reset, including the territorial development of the United States.

Over the years, including in the past year when China and the Philippines intensified their dispute over Huangyan Island since May 2012, the United States has tried hard not to take a position or get involved in the dispute between China and its treaty ally in Southeast Asia.

The Philippines certainly expects the United States to show its support to the Philippine side of the dispute. But in more than a year since the dispute over Huangyan Island, the U.S. government did not highlight the issue or show its support to the Philippines, and it has not said whether the alliance covers Huangyan Island. This is because the U.S. long-term position is that its security agreements or treaties will not cover territories that were not controlled by its allies when the agreement or treaty was signed.

Although the State Department spokesman and other U.S. government officials have clearly criticized the Chinese over the South China Sea disputes, illustrated by the U.S. reaction over China's establishment of the Sansha administration in 2012, Americans have tried to keep a relatively lower profile over the disputes in the sea most of the time. During frequent visits and meetings at all levels, including the summit meeting between Presidents Obama and Xi in Sunnylands, California, in early June 2013, U.S. leaders and officials talked with their Chinese counterparts about the South China Sea issue, expressing hopes that China and other concerned parties would exercise restraint while avoiding heightening tensions over the disputes. In other words, the general U.S. approach after Clinton's speech in Hanoi in July 2010 has called for lowering tensions. This is constructive for maintaining peace and stability in the region.

But the U.S. position changed dramatically in the first half of 2014. The president, secretaries of state and defense, and national security adviser, along with other high-level officials, all came out to attack China for its actions in the South China Sea, most notably calling its deployment of the oil rig "proactive" and an "invasion."<sup>5</sup> To the Chinese, Americans seem to have gone crazy in opposing China on every dispute it has with Asian countries, staying on the side against China. China does not fear this new hard-line approach. It seems that the United States and China are engaging in a confrontation over regional security issues in Asia, and China is even more resolved to defend its sovereignty and security interests—as

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5. "Remarks of President Barack Obama, Graduation Ceremony, West Point, New York, May 28, 2014," VOA, May 28, 2014, <http://www.voanews.com/content/remarks-of-president-barack-obama-graduation-ceremony-west-point-new-york-may-28-2014/1924421.html>; Li Xiaokun, Zhao Yinan, and Chen Wihua, "China Urges U.S. to Respect History," *China Daily*, February 14, 2014, [http://www.chinadaily.com.cn/china/2014-02/15/content\\_17284354.htm](http://www.chinadaily.com.cn/china/2014-02/15/content_17284354.htm).

it had done for more than six decades—even if that means going to war with the United States, such as in Korea and Vietnam in the Cold War era.

For more than 20 years, Vietnam has been exploiting oil and gas resources in the disputed areas with China in the South China Sea, yet the United States never said anything about unilateral actions taken in disputed areas by the Vietnamese. But when China launched the oil rig drilling near its controlled Zhongjian, or Triton, Island, 17 miles away and about 150 nautical miles away from Vietnam's coast, all high-level U.S. officials immediately came out to criticize China. See how biased and unfair Americans are!

National Security Adviser Susan Rice even attacked China's drilling in the South China Sea as a "provocative and aggressive action."<sup>6</sup> Rice and other U.S. officials should know that the drilling takes place 150 nautical miles from the coast of Vietnam; therefore, it is at best in the disputed area of exclusive economic zone (EEZ) between Vietnam and China, according to the United Nations Convention on the Law of Sea, rather than the territory of any country. If this is a "provocative and aggressive action," then so is the entry of U.S. war planes and ships into China's EEZ almost every day for years.

It is quite clear that with regard to territorial disputes in the East and South China Seas, the United States does not care about either the facts or historical background, or who is right and who is wrong; it only looks at these disputes as China versus other countries. It would oppose anything China says or does over those disputed issues, and it would support any other countries that confront China. This is a reflection of the "pivot" or "rebalancing" strategy aimed to counter the rise of China in Asia and protect the United States' role and influence in the region.

Such a biased confrontational approach will not help the United States reach its goal to deter or balance, if not contain, China. Since it is so clear that this approach is targeting China, China will and should choose to ignore it. Although China does not want to, it equally does not fear the confrontation that the United States has launched. China certainly had the capability to cope with U.S. confrontation decades ago in Korea and Vietnam, and it has the capacity to protect its legitimate rights in the west Pacific today.

## Conclusion

China will keep rising, even at a somewhat lower speed, compared with its annual high growth rate of 9 percent for the past 30 years. The rise of China does include its growing military strength and activities in the western Pacific, including in the South China Sea.

China seems not likely to change its long-term policy of having good relations with Southeast Asian countries, or at least with most of them. China will continue to develop its economic, diplomatic, and social-cultural relations with Southeast Asia. But Southeast Asia

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6. Susan Rice, "National Security and Foreign Policy," interview by Judy Woodruff, C-SPAN, May 14, 2014, <http://www.c-span.org/video/?319358-1/conversation-susan-rice>.

is not as strategic to China as Northeast Asia has been. The region is of most symbolic economic and diplomatic importance to China. Thus, although China will continue to strengthen its economic, social, and cultural relations and ties with the subregion, at the same time, it does not have a big strategic goal in Southeast Asia. Southeast Asia has a big influence over Chinese foreign economic and diplomatic relations, but the subregion will not determine China's security and economic future, even as the United States is deeply involved in the region. The bigger picture for China is Japan and Northeast Asia, Russia, India, Europe, and the United States; those countries determine China's great power relations and diplomacy, economic modernization, and strategic environment, now and in the future. Compared with those major powers and areas, Southeast Asia is always a relatively smaller and less powerful area to China. Therefore, China will not seek a great role in the subregion and does not see it as of great strategic importance to China, now or in the future.

China and the United States are now becoming more confrontational in the South China Sea, which seems to be a new area of Sino-U.S. tensions, now and in future years. But the growing confrontation is not likely to change the trends and direction of China-U.S. relations, because the relationship has become more solid, complicated, and comprehensive, and it is not likely to be determined by just one area of the relationship.

# 3 | International Arbitration and Adjudication as South China Sea Confidence-Building Measures

*Jerome A. Cohen*

There are, of course, all types of confidence-building measures (CBMs) available to parties that genuinely wish to peacefully resolve a dispute or limit its significance, or at least reduce tensions relating to it. For well over a decade, thoughtful commentators have suggested a broad range of CBMs that might be usefully invoked in order to improve prospects for a peaceful South China Sea dispute resolution, and some of them have been tried. Nevertheless, the situation appears to be moving from bad to worse.

In an attempt to alleviate the currently menacing South China Sea conflicts, my fellow contributors to this volume present their own valuable analyses and CBM proposals. I want to add a few of my own, although they can hardly be deemed original. For example, I would like to see all claimants, including Taiwan, cooperate in forming an expert working group to agree on a catalogue of all relevant South China Sea features and a classification of the category—*island, rock, reef, and so on*—into which each feature appropriately falls.

I would also favor, for each of the principal disputes, the formation of informal, continuous Track Two working groups of experts—not limited to those from claimant countries—who would fashion a range of suggested solutions to each of the disputes and hold a series of off-the-record meetings with officials of the claimants, either jointly or separately, to assess the feasibility of the proposals and to modify them as useful. Each working group could have a permanent neutral base and hold its series of meetings in various locations.

Yet no CBM of any type can be effective unless the major disputants are willing to cooperate and consider their broader shared interests as well as procedures and outcomes other than those they deem optimal. If there's no will, there's no way. To be specific, if China continues to insist that there is no dispute to be resolved regarding its territorial sovereignty over features that it has occupied, whether by force or other means, then it is difficult to see a role for CBMs. Similarly, if China continues to insist, regarding law of the sea issues that it acknowledges to be in dispute, that bilateral negotiation is the sole legitimate means for peaceful settlement, then the role of CBMs will be restricted and the

outcome will inevitably reflect the overwhelming military, economic, and political power that China can bring to the table.

In principle, we should not rule out the possibility that China's leadership, having amply witnessed the consequences of its recent policy and practices concerning the South China Sea, may decide to do what it has done on some other occasions when confronted by difficult diplomatic challenges—that is, demonstrate a capacity for imaginative, flexible, and indeed daring responses that have surprised and pleased the world community. Recall the 1972 Shanghai Communiqué and the terms on which China agreed to establish diplomatic relations with the United States almost seven years later. Think of the 1984 Sino-British Joint Declaration and the brilliant application of the concept of “one country, two systems” to Hong Kong. Note the extraordinary, almost humiliating, concessions China wisely accepted in order to achieve entry into the World Trade Organization. And certainly not least of these impressive precedents has been its willingness to develop a “semiofficial” formula that has enabled China and Taiwan to conclude no fewer than 21 cross-strait agreements on an equal footing, despite Beijing's oft-expressed position that China's central government would never negotiate with a mere Chinese province on equal terms!

If Beijing were to demonstrate similar diplomatic wisdom and skill with respect to the South China Sea, it would quickly end the current crisis and repair its relations with Vietnam, the Philippines, and other more discreet but anxious claimant states, as well as the United States. Thus far, however, China has chosen to rely on a policy of creeping expansionism that it first experimented with decades ago but that has aroused increasing concern as it has intensified in recent years.

The new Chinese leadership, for example, shows little of the willingness to innovate and compromise that, more than a decade ago, led to mutually acceptable settlements of both Vietnam's land boundary with China and the Sino-Vietnamese disagreement over the waters of the Gulf of Tonkin. Xi Jinping is proving himself to be very different in this respect from Jiang Zemin, not to mention Deng Xiaoping. Although Xi has endorsed the rule of law in the world community and, recently in Seoul, characterized China as “a peaceful nation” and called for “justice and mutual benefits in international relations,”<sup>1</sup> he seems willing to negotiate South China Sea issues only on his own terms.

So long as this attitude persists, conventional CBMs are unlikely to make an impact. Of course, they should not be abandoned, and states that oppose China's claims should demonstrate all the ingenuity, persuasiveness, and perseverance they can muster in the hope of making such CBMs more attractive to Beijing. Yet, in the present circumstances, they would be unwise to overlook the opportunities offered by impartial international adjudication or arbitration of their disputes.

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1. “President Xi Jinping Delivers an Important Speech in ROK's Seoul National University, Stressing That China Will Always Be a Country That Maintains Peace, Promotes Cooperation and Is Modest to Learn from Others, and That China Will Create the Future of China-ROK Cooperation and Accomplish Asia's Revitalization and Prosperity Together with ROK,” Ministry of Foreign Affairs of the People's Republic of China, July 4, 2014, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1172436.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1172436.shtml).

Invoking the assistance of the ICJ and the tribunals authorized by the United Nations Convention on the Law of the Sea (UNCLOS) cannot be a cure-all for the many complex issues that plague the South China Sea, but it can dispose of some of the component issues and facilitate the disposition of others. If, for example, the ICJ were given the opportunity to consider the question of territorial sovereignty over the Paracels, it could render a “win-win” Solomonic decision that triggers a mutually acceptable compromise that politics prevents the disputants from reaching on their own.

Or if an UNCLOS arbitration tribunal should puncture China’s “nine dash line” that hangs over the South China Sea like an incubus, that would be a giant step toward resolving relevant disputes, as the current Philippines arbitration effort hopes to demonstrate. The Philippines arbitration may also clarify the application of UNCLOS provisions that are in need of further explication, such as Article 121.3’s important distinction between an “island” and a “rock.” As Peter Dutton has pointed out,<sup>2</sup> parties that seek to resolve their disputes within the context of mutual respect for the common good will find ample international law precedents for creatively building on international litigation.

Unfortunately, the Chinese government, as an integral part of what to many observers appears to be an increasingly intransigent policy, has recently begun to argue that international adjudication and arbitration are no longer to be considered “peaceful” means of resolving disputes and that only negotiation is legitimate. This, of course, is a gross distortion of both traditional international practice and the universally respected post-World War II treaty system that began with the United Nations Charter. Article 33 of the Charter explicitly authorizes not only negotiation but also “mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice” as well as resort to the United Nations itself. Nevertheless, to bolster its argument, China has begun to imply, erroneously, that the 2002 DOC concluded with ASEAN is a binding document in which the parties agreed to surrender their right to settle their disputes before an impartial institution of legal experts.

Indeed, after Japan’s prime minister Shinzo Abe and the Philippines’ president Benigno Aquino on June 27 called for reliance on the rule of law to resolve regional disputes,<sup>3</sup> China’s Ministry of Foreign Affairs, evidently concerned that Japan may also resort to litigation as a defensive weapon, accused those countries of “provoking and stirring up tensions . . . and vilifying other countries under the pretext of the rule of law.”<sup>4</sup> This was undoubtedly also meant as a warning to Vietnam, whose prime minister, during his recent visit to Manila, made even clearer than Prime Minister Abe that if attempts to negotiate with Beijing

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2. Peter Dutton, Testimony before the U.S.-China Economic and Security Review Committee Hearing on China’s Maritime Disputes in the East and South China Seas, April 4, 2013, 6–8, <http://www.uscc.gov/sites/default/files/Dutton%20Testimony,%20April%204%202013.pdf>.

3. Joel Guinto and Karl Lester M. Yap, “Japan, Philippines to Tighten Links as Maritime Disputes Fester,” *Bloomberg News*, June 27, 2014, <http://www.bloomberg.com/news/2013-07-27/japan-philippines-to-tighten-links-as-maritime-disputes-fester.html>.

4. “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on June 25, 2014,” Ministry of Foreign Affairs of the People’s Republic of China, June 25, 2014, [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1168677.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1168677.shtml).

continued to prove fruitless, Hanoi also would file some sort of suit against China,<sup>5</sup> which would be a stunning blow against Beijing's assertiveness.

Already on the defensive because of China's refusal to justify its UNCLOS arguments before the arbitration tribunal convened by the Philippines, China's Foreign Ministry spokesman said, unpersuasively, that China was not afraid to present its evidence to the tribunal but rejected the opportunity because "it is its right to do so under UNCLOS." However, UNCLOS does not grant China or any other party to UNCLOS the right to thumb its nose against an adverse decision by the arbitration tribunal, whether or not that country chooses to take part in the arbitration process.

The fact that China and all other South China Sea claimants have obligated themselves to UNCLOS and its arbitration/adjudication system is the most obvious refutation of China's effort now to discredit that system and the countries that properly invoke its aid. The tribunal may or may not decide that it lacks jurisdiction over the case in accordance with certain exceptions that China insisted on at the time it joined UNCLOS, but that is for the tribunal's impartial experts to decide, not for China, the Philippines, or any other party that might enter the case to unilaterally decide.

To be sure, without a considerable dose of sober reflection and "thought reform," it will be difficult for China to view international arbitration and adjudication as potential CBMs, as they should be viewed if the disputants keep in mind their long-term common interests. In principle, given China's millennial domestic legal tradition, third party mediation, whether by ASEAN, the United Nations, or some other impartial source, should be easier for Beijing to swallow than litigation and is more readily recognizable as a CBM.

Yet China rejects that possibility also. To the extent that it is willing to acknowledge a conflict as a "dispute," it insists on bilateral negotiation that allows it to mobilize irresistible power, and woe unto those countries that disagree. The New China News Agency (Xinhua) put it none too subtly recently when commenting on the Philippines' frustrated attempt to prosecute Chinese fishermen detained in disputed waters 60 nautical miles from undisputed Philippine territory and 650 nautical miles from undisputed Chinese territory: "Ignorance of China's resolve to defend its sovereign land will induce consequences too severe for certain countries to bear."<sup>6</sup>

Can ASEAN come up with CBMs that might be more effective? It seems politically unlikely. What about the United Nations? Vietnam, in an attempt to attract world support and demonstrate its efforts to settle the recent crisis instigated by China's placement of its huge oil rig off shore the Paracel Islands, has sent the UN secretary-general several letters containing its diplomatic protests to China, asking for them to be circulated to all UN members.

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5. Jim Gomez, "Vietnam Threatening to Take Legal Action against China amid Tense Territorial Standoff," Yahoo News, May 22, 2014, <http://news.yahoo.com/vietnam-threatens-legal-action-against-china-014358339.html>.

6. Yang Yongliang, "Manila to Bear Consequences for Deliberate Provocation," Xinhua, May 14, 2014, [http://china.org.cn/opinion/2014-05/14/content\\_32396202.htm](http://china.org.cn/opinion/2014-05/14/content_32396202.htm).

This stimulated China, in response, to offer a puzzling, but more detailed, defense of its substantive position than it had previously presented. Yet, at least at this point, neither the UN Security Council nor the General Assembly is likely to play a role since neither Vietnam nor China appears to believe it has much to gain politically from either forum. Vietnam knows that it cannot defeat China in the UN, and China is reluctant to further “internationalize” the issues, which might dilute the powerful advantages it enjoys by pursuing its current policy against the militarily and economically weaker claimants on its periphery.

Is there a role for the United States? While taking no position on the merits of the issues, the United States has increasingly supported the Philippines in its resort to arbitration and other states that are contemplating similar steps. Brad Glosserman has noted that recent Chinese behavior “has underscored the urgency of the U.S. call to shore up the institutions and mechanisms of international order, in particular respect for the rule of law and the peaceful settlement of disputes.”<sup>7</sup> But the United States is ill positioned to do more than ineffectively coach from the sidelines because of its refusal to ratify its own adherence to UNCLOS, the key international system involved.

In seeking to comprehend the philosophy underlying China’s current policy, it is worth pondering the significant reinterpretation of China’s highly touted “peaceful rise” that was published on June 16 by Zhang Jiangang, director of the Maritime Politics and Strategy Studies Center at Guangdong Ocean University. It appeared in the English version of *Global Times*, a subsidiary of the *People’s Daily*, the authentic voice of the Chinese Communist Party’s Central Committee. Although *Global Times* lacks the authoritativeness of its parent, it frequently prints views that offer insight into the thinking of at least some party leaders.

Zhang emphasized that “a peaceful rise doesn’t mean foregoing [*sic*] the use of force entirely.” China’s “macro peaceful development strategy,” he said, “won’t be affected if we selectively use force in safeguarding territorial integrity and maritime interests. For instance, we could use 10 percent force along with 90 percent negotiation to quell disputes. This doesn’t shy away from the road of a peaceful rise. When it comes to safeguarding sovereignty and territorial integrity, we shouldn’t trap ourselves by rigidly sticking to the concept of peaceful development.” When strategic opportunities arise for realizing the country’s reunification through safeguarding maritime sovereignty and recovering lost territory, he concluded, “we must seize them without hesitation. . . . taking the initiative to win the future.”<sup>8</sup>

If this is the view of Xi Jinping, we are wasting our time discussing CBMs. China should reconsider its current policy.

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7. Brad Glosserman, “Rebalancing as the Rorschach Inkblot Test,” *East Asia Forum*, July 9, 2014, <http://www.eastasiaforum.org/2014/07/09/rebalancing-as-the-rorschach-inkblot-test/>.

8. Zhang Jiangang, “China Can Use 10 Percent Force, 90 Percent Negotiation to Protect Maritime Power,” *Global Times*, June 16, 2014, 14.

# 4 | The Rise of Tailored Coercion in the South China Sea

*Patrick M. Cronin*

China is becoming increasingly assertive about its claims in the South China Sea. Recently released photographs taken in March show China's reclamation of Johnson South Reef in the disputed Spratly Islands. Johnson South Reef was also the site of a Vietnam-China naval skirmish in March 1988.<sup>1</sup> And in early May, China maneuvered a deep-sea drilling platform off the Paracel Islands, well within the EEZ of Vietnam; its vessels then rammed a Vietnamese fishing boat and a coast guard vessel.<sup>2</sup> These twin actions in the South China Sea mirror similarly brazen moves in the East China Sea and are part of a deliberate policy calculus by Beijing. Although China may not be expanding its historic claims, it is employing what I have called "tailored coercion" as a means of making those claims a reality.<sup>3</sup>

Although China is not alone in seeking to advance its territorial claims and maritime interests, China's behavior is uniquely escalatory. That is why U.S. Secretary of Defense Chuck Hagel singled out China's "destabilizing, unilateral actions" against its maritime neighbors at this year's Shangri-La Dialogue in Singapore.<sup>4</sup> The placement of the drilling platform off Vietnam, following months of concerted diplomacy to improve Beijing-Hanoi relations, is particularly perplexing to many in the region.

But China's creeping assertion of sovereignty in its near seas involves a pattern of dialing up and dialing down coercive diplomacy. As part of a renewed focus on "periphery diplomacy," China is wooing and rewarding neighbors willing to work closely with Beijing, and it is seeking to isolate and punish selected countries that want to resist China's

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1. AFP, "Philippines Release Photos Showing Chinese Reef 'Reclamation,'" *Defense News*, May 15, 2014, <http://www.defensenews.com/article/20140515/DEFREG03/305150039/Philippines-Releases-Photos-Showing-China-Reef-Reclamation->.

2. Trefor Moss, "TV Shows China Ship Ramming Another Vietnamese Vessel Near Oil Rig," *Wall Street Journal*, June 3, 2014, <http://online.wsj.com/articles/vietnam-tv-shows-chinese-vessel-ramming-another-ship-near-oil-rig-1401811550>.

3. Patrick M. Cronin, Ely Ratner, Elbridge Colby, Zachary Hosford, and Alexander Sullivan, *Tailored Coercion: Competition and Risk in Maritime Asia* (Washington, DC: Center for a New American Security, 2014).

4. Karen DeYoung, "Chuck Hagel in His Comfort Zone as U.S. Shifts Attention to the Asia-Pacific Region," *Washington Post*, May 30, 2014, [http://www.washingtonpost.com/world/chuck-hagel-in-his-comfort-zone-as-us-shifts-attention-to-asia-pacific-region/2014/05/30/c810d3a6-e816-11e3-a70e-ea1863229397\\_story.html](http://www.washingtonpost.com/world/chuck-hagel-in-his-comfort-zone-as-us-shifts-attention-to-asia-pacific-region/2014/05/30/c810d3a6-e816-11e3-a70e-ea1863229397_story.html).

unilateral demands. Although there is a rich and complex history to be considered, including a pattern of periodic assertiveness dating back to at least the 1970s, there has been an undeniable rise in China's maritime assertiveness over the past five years.

## China's Tailored Coercion

Tailored coercion as practiced by China draws on the complete range of policy instruments, encompassing maritime and air forces, coast guard and law enforcement agencies, domestic and international law, and diplomacy, as well as trade, tourism, energy, and resources. China is pursuing a "strategic opportunity" to capitalize on its newfound and growing power to expand its regional influence.<sup>5</sup> Specifically in the South China Sea, it appears to want to gain de facto and de jure control over a "nine-dash line" claim covering the vast majority of the area.

Such actions are tailored in several senses: They are tailored to be sufficiently peaceful and thus not intended to escalate into full-fledged conflict or to trigger a unified, anti-China alliance. They are tailored to appear sufficiently nonmilitary in nature and thus not intended to accentuate China's rapidly modernizing military forces. They are tailored to send varying messages to different audiences and thus to signal internally that President Xi Jinping will protect core China interests and sovereignty and signal regionally that each country looking for good trade and relations with China will have to give China greater control over security and resource issues. And they signal to the United States that its preeminence is unsustainable, and it must do more to accommodate a rising China (for instance, by coercing allies such as Japan and the Philippines to make concessions to China). China may not expect to push the United States out of Asia, but surely it hopes to expand its regional clout by reducing U.S. influence.

What China fails to see or wishes to ignore is that its increasing assertiveness is destabilizing the region and remains the most likely source of military escalation in Asia outside the Korean peninsula. By falling back on its own historical narrative, growing capability and wealth, and a growing appetite for control over its vast periphery, China is creating precisely the polarizing regional environment it blames on the United States.

Major General Zhu Chenghu recently claimed that "the Americans are making very, very important strategic mistakes right now" in their dealing with China. "If you take China as an enemy," he expanded, "China will absolutely become the enemy of the U.S."<sup>6</sup> In a subsequent interview on the margins of the Shangri-la Dialogue, General Zhu put U.S. national security policy in an even less flattering light, claiming that the United States

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5. Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2014* (Washington, DC: Department of Defense, 2014), 20, [http://www.defense.gov/pubs/2014\\_DoD\\_China\\_Report.pdf](http://www.defense.gov/pubs/2014_DoD_China_Report.pdf).

6. Trefor Moss and Julian Barnes, "U.S. Making 'Important' Mistakes, Chinese General Says," *Wall Street Journal*, May 31, 2014, <http://online.wsj.com/articles/u-s-making-important-mistakes-chinese-general-says-1401526934?tesla=y&mg=reno64-wsj&url=http://online.wsj.com/article/SB10001424052702303633604579595332479855294.htm>.

suffered from “erectile dysfunction.”<sup>7</sup> But while General Zhu seeks to defend Chinese coercion through punchy talking points, he glosses over China’s role in determining the fate of regional peace. As Joseph Nye is fond of saying, “only China can contain China” because only its disregard for its neighbors can precipitate an arms race.<sup>8</sup>

Advancing strategic cooperation while limiting competition with China is easier said than done. Chinese leaders talk about achieving a “new type of major power relations,” but they flinch from cooperation, whether on accepting regional norms on a binding code of conduct, stanching North Korea’s nuclear and missile programs, or desisting from cyber economic theft, to name just three areas of importance.

Whereas the United States wishes to build an inclusive and open rules-based system in the Asia-Pacific region, China is mostly focused on preserving internal stability and expanding its influence around its periphery. For instance, its active buildup of conventional cruise missiles are aimed at bolstering its anti-access and area-denial capability, and the People Liberation Army (PLA) navy has begun “training to prevent . . . the U.S. from interfering . . . in a Taiwan, East China Sea or South China Sea conflict.”<sup>9</sup>

The rest of this paper briefly considers China’s checkered performance as a rule maker and considers a variety of steps that the United States is and should be considering to dissuade coercion, avert escalation, build confidence, and create greater order. Such efforts require a focus both on cooperation, including CBMs, and cost-imposition moves that ensure that bad behavior exacts a price.

## Building a Rules-Based Regional Order

The United States, far from seeking to create a new Cold War in Asia or contain China, wants to see the amazing development and dynamism of Asian economies continue throughout this century. But the path of forging agreed upon rules is challenging in no small part because a reemerging China apparently does not want to buy into the post–World War II international system that it did not help create. Yet China claims that it wants to play a responsible role and wants to create rules. This begs the question as to what it means to be a rule maker.

The United States is seen by most nations as one of the world’s leading rule makers, if not the biggest rule maker in the contemporary period. President Barack Obama’s latest major foreign policy speech, delivered at the Military Academy at West Point on May 28, focused on “efforts to strengthen and enforce international order.”<sup>10</sup> Although

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7. Douglas Ernst, “Obama’s Foreign Policy Has ‘Erectile Dysfunction’ Problems: Chinese General,” *Washington Times*, June 3, 2014, <http://www.washingtontimes.com/news/2014/jun/3/obamas-foreign-policy-has-erectile-dysfunction-pro/>.

8. Joseph S. Nye Jr., “Work with China, Don’t Contain It,” *New York Times*, January 25, 2013, <http://www.nytimes.com/2013/01/26/opinion/work-with-china-dont-contain-it.html>.

9. Office of the Secretary of Defense, *Annual Report to Congress*, 37.

10. Barack Obama, “Remarks at the United States Military Academy Commencement Ceremony,” West Point, New York, May 28, 2014, <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>.

the United States is far from perfect when it comes to international law, the thrust of U.S. policy is to champion a postwar international system based on open and secure access to the global commons and the furtherance of the rule of law. The United States helped to build that order, and now it is actively seeking to preserve it and adapt it as an effective general framework for an inclusive, rules-based approach to international security.

With respect to Southeast Asia and the South China Sea, the United States seeks to uphold UNCLOS, the global regulatory framework governing the use of oceans and seas, and to support a binding code of conduct in the South China Sea.<sup>11</sup> More generally, Washington supports international law, such as the effort of the Philippines to petition the Permanent Court of Arbitration to help clarify the legal basis under UNCLOS for China's claims in the South China Sea.<sup>12</sup> The United States also opposes any effort to resolve disputes through coercion or force. These positions are quite distinct from "taking sides" over which country has sovereignty over any particular area or land feature.

Despite criticism to the contrary from some in China, there has been no change in the U.S. position regarding maritime disputes in Asia. For instance, 40 years ago, when the Chinese took advantage of the U.S.-Vietnam war to seize and consolidate control over the Paracels, the United States muted its criticism out of necessity. The United States, which was winding down its role in Vietnam, needed strategic cooperation with China vis-à-vis the Soviet Union.<sup>13</sup> But even then, the United States took no position on sovereignty of either the Paracel or Spratly island groups, opposed the use of force to resolve these issues, and supported addressing claims through arbitration.<sup>14</sup>

## China's Checkered History as a Rule Maker

From an American viewpoint, being a rule maker requires great responsibility, because the rule of law is predicated on three things: predictability or reliability, transparency, and a sense of fair play or fairness. But predictability, transparency, and fairness are not necessarily Chinese objectives.

Chinese leaders—even allowing for an inchoate decisionmaking process—generally value other goals more than the goal of enhanced international predictability. When a global disturbance or disaster happens, it tends to be the United States and not China

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11. Ibid.

12. For more on the Permanent Court of Arbitration, see "Ad Hoc Arbitration under Annex VII of the United Nations Convention on the Law of the Sea," [http://www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288).

13. Indeed, Secretary of State Henry Kissinger even joked that the United States should steer China to the Senkakus to "teach religion to the Japanese." See Kissinger's staff discussion of incident in "Secretary's Staff Meeting, January 31, 1974," in declassified Secret/NODIS State Department Memo of February 4, 1974.

14. These positions are made clear in various declassified U.S. documents. For instance, see "Paracel Islands Dispute, Spratly Claims," Confidential State Department Memo 020916, <http://aad.archives.gov/aad/createpdf?rid=8082&dt=2474&dl=1345>; "Paracel/Spratly Islands," Secret State Department Memo 025259, <http://aad.archives.gov/aad/createpdf?rid=29112&dt=2474&dl=1345>; "GVN Request That SEATO Consider Paracel Issue," Confidential State Department Memo 015405, <http://aad.archives.gov/aad/createpdf?rid=8135&dt=2474&dl=1345>.

that takes up a serious leadership challenge. The extent China is fixated on the international environment is reflected in its periphery diplomacy—the desire to stabilize, tranquilize, and monopolize the ring of 14 countries surrounding the world’s most populous country.

As Chen Xulong of the China Institute of International Studies has said: “The periphery of the United States is simple . . . a gift the God has given the U.S., and . . . the geopolitical condition for its long hegemony over the world . . . . In sharp contrast . . . a good periphery is vital for China to be a global power in a real sense. A good surrounding environment will serve as a springboard for China to go global and play its role of a responsible world power, which other countries expect.”<sup>15</sup>

Similarly, Chinese leaders often see transparency as undermining China’s authority and core interests. Let me make a somewhat extreme case to make the point. A documentary whose production was supervised by China’s National Defense University emerged briefly on the Internet last October. The 100-minute video, *Silent Contest*, argues that China’s openness to Western values and culture makes it susceptible to a subversive poison pill. As General Liu Yazhou of China’s National Defense University, said: “The American elites . . . confidently believe that the best way to disorganize China is to work closely with it, allowing it to gradually become part of the U.S.-led international and political system.”<sup>16</sup> The implication is that both transparency and Western values are dangerous. This is not to say that China’s urban elites believe this, but it certainly highlights one of the obstacles we face in trying to nudge China to abide more by international norms and rules.

Chinese leaders tend to see fairness through the prism of their own historical experience and understanding (others made rules for China). One can find a narrative for many arguments here. In his 2004 book, *Contingent States: Greater China and Transnational Relations*, William Callahan considers four Chinese narratives: (1) defense (a “Great Wall” territorial state); (2) conquest (constantly enlarging, from subduing barbarians on its borders to restoring “lost territories” and reversing the “century of humiliation”); (3) conversion (defining and spreading the characteristics of Chinese civilization, not simply soft power but the belief in the inherent superiority of Chinese civilization); and (4) identity (linking Chinese identity to its diaspora).<sup>17</sup>

Similarly, Martin Jacques, in his book *When China Rules the World*, concludes from his reading of China’s particularist history: “If the calling card of the west has often been aggression and conquest, China’s will be its overweening sense of superiority and the hierarchical mentality this has engendered.”<sup>18</sup>

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15. Chen Xulong, “Xi Jinping Opens Up a New Era of Periphery Diplomacy,” *China-U.S. Focus*, November 9, 2013, <http://www.chinausfocus.com/foreign-policy/xin-jinping-opens-a-new-era-of-chinas-periphery-diplomacy/>.

16. J. Michael Cole, “Does China Want a Cold War?,” *Diplomat*, November 5, 2013, <http://www.thediplomat.com/2013/11/does-china-want-a-cold-war/>.

17. William A. Callahan, *Contingent States: Greater China and Transnational Relations* (Minneapolis: University of Minnesota Press, 2004).

18. Martin Jacques, *When China Rules the World: The End of the Western World and the Birth of a New Global Order* (New York: Penguin, 2009), 432.

In sum, China is consumed with internal order questions and far less concerned with global order than the United States is. Some would argue that the United States' capacity for—if not interest in—supporting global order is dissipating. That should be worrisome to all, because it invites rule breaking by regional powers that may assume there will be no one around to enforce preexisting rules. Although two data points do not equal a trend, Syria's chemical weapons and Russia's annexation of Crimea would appear to be illustrative of the kind of incidents that are calling into question who makes and enforces the rules.

China has increasingly been a joiner of international bodies rather than a strong rule maker, and when it has sought to make rules it has often been in the company of like-minded emerging or regional countries. But without more predictability, transparency, and fairness with respect to international rules, China's attempts to play a larger role as a rule maker—and not simply biding time to develop as had been the long-standing dictum since Deng Xiaoping's time—will fail to attract serious support.

## China's Recent Security Record in the South and East China Seas

China appears particularly weak to compromise when it comes to security issues. After all, China is largely a rule-abiding nation, and it generally seeks to make its argument on the basis of what it perceives to be legal and historical rights; it's the potential exceptions that garner the most attention. When it comes to hard security issues, sovereignty and “core national interests” tend to trump a desire to demonstrate cooperation.

There is an ongoing dialectic between international cooperation and competition, between the rule of law and power and sovereignty, and, although these are not completely mutually exclusive, they are often in conflict with one another. Whereas China may be happy to abide by World Trade Organization rules that help it tap into global markets, it is reluctant to sign up to binding rules that might impinge on its perceived “core national interests.” By definition, core national interests are matters of sovereignty.

The nine-dash line in the South China Sea is a case in point: some Chinese scholars will privately offer reassuring interpretations of what is intended, but other scholars and even officials are much less accommodating. Officially, China refuses to clarify whether this claim is based on land features, which would almost certainly give the claim a firmer basis in international law. This harkens back to the problem of predictability: without a fixed, defensible position, China's murky claims appear blatantly counter to internationally acceptable rule making.

Chinese leaders hold fast to a sense of major power entitlement, and they prefer bilateral agreements that bind smaller neighbors. Thus, China has struck accords with Vietnam, but it has also been more aggressive in seeking to squeeze the Philippines, muscling

the Philippines out of Scarborough Reef in 2012 (and maintaining a Chinese presence ever since), and impeding the ability of the Philippines to resupply the grounded naval ship BRP *Sierra Madre* near Second Thomas Shoal.<sup>19</sup>

The reclamation of Johnson South Reef and perhaps other reefs in the Spratly Islands appears to be another assertion of power by China in general, if not also a way to register dissatisfaction with recent steps by neighbors to strengthen their security posture in particular.<sup>20</sup> For example, China may be building a runway to extend power projection, but it also may be retaliating in the wake of a successful summit meeting in which President Obama and President Benigno Aquino signed an Enhanced Defense Cooperation Agreement that provides the legal framework for permitting U.S. military access to Philippine bases over the next decade.<sup>21</sup>

Given Xi's uncertain grip on power and especially maritime and law-enforcement forces, it is not easy for outsiders to fully understand Chinese decisionmaking. Presumably Beijing has greater control over the actions of its forces given the recent consolidation of four maritime law-enforcement agencies into one China coast guard and the formation of a new national security commission.<sup>22</sup> Certainly China has exploited moves by neighbors in order to justify greater Chinese assertiveness.

China justified greater coercive action in 2012 in response to two events: when Manila deployed a naval vessel to enforce anti-poaching laws around the Scarborough Reef, and when Japan purchased the leases to three islands in the Senkaku/Diaoyu Islands. Although China was not solely at fault in either instance, its heightened response anytime a neighbor seeks to defend its interests is part of a conscious policy of tailored coercion.

Unfortunately, China has shown little willingness to sign up to binding CBMs. China resists restrictions on its ability to press its claims, expand its influence, and preserve its future options. In the East China Sea, China is unlikely to implement even a previously agreed on CBM to avert escalation with Japan unless Japan gives up its claim to uncontested sovereignty over the Senkakus. China wants geographical space, but it also wants more influence and respect.

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19. Ely Ratner, "Learning the Lessons of Scarborough Reef," *National Interest*, November 21, 2014, <http://nationalinterest.org/commentary/learning-the-lessons-scarborough-reef-9442>; Darshana M. Baruah, "Second Thomas Shoal: The New Battleground," *Diplomat*, April 30, 2014, <http://www.thediplomat.com/2014/04/second-thomas-shoal-the-new-battleground/>.

20. AP, "China Building Up More Land at Spratly Reefs, Manila Says," *Japan Times*, June 6, 2014, <http://www.japantimes.co.jp/news/2014/06/06/asia-pacific/land-reclamation-underway-china-held-spratlys/#.U5HzAF4eWDU>.

21. Emily Rauhala, "Obama in the Philippines: 'Our Goals Is Not to Contain China,'" *Time*, April 28, 2014, <http://time.com/78779/obama-philippines-china/>.

22. Andrew Erickson and Gabe Collins, "New Fleet on the Block: China's Coast Guard Comes Together," *Wall Street Journal*, March 11, 2013, <http://blogs.wsj.com/chinarealtime/2013/03/11/new-fleet-on-the-block-chinas-coast-guard-comes-together/>; Shannon Tiezzi, "China's National Security Commission Holds First Meeting," *Diplomat*, April 16, 2014, <http://www.thediplomat.com/2014/04/chinas-national-security-commission-holds-first-meeting/>.

President Obama's clear affirmation that Article 5 of the U.S.-Japan Treaty of Mutual Cooperation and Security applies to the Senkaku/Diaoyu Islands will further harden the competition over this "gray zone" issue.<sup>23</sup> Nonetheless, the president only reaffirmed the facts: Okinawa and the islands were legally reverted with an accord signed in 1971; the United States thereby handed administrative control to Japan, and the bilateral defense treaty covers the defense of Japan and *territories administered by Japan*. As with the South China Sea, tensions in the East China Sea will likely remain high, especially after President Obama has in the eyes of many Chinese failed to treat China as a coequal in the enterprise of maritime Pacific security.

China's November 2013 announcement of an Air Defense Identification Zone (ADIZ) can best be understood as an extension of its dispute with Japan. China is emphatically using more coercive means, loosely adhering to broad international principles, to change facts on the ground and in adjacent seas. But rather than rule making, China is resorting to rules as instrumental to their hard-power goals of restoring old claims and lost territories. The burgeoning "rights" advocates in China further impel Xi Jinping and other Chinese leaders to remain uncompromising on issues perceived as related to China's sovereignty.

When it comes to multilateral dialogue, China is certainly a joiner of dialogues. But it prefers multilateral dialogue to agreement, and if there must be agreement, then it should not be binding. This has been the case in China's nominal support for negotiating a COC with its Southeast Asian neighbors. A DOC was signed in 2002, and yet still there is no binding COC, and it is unlikely to be accepted by China anytime soon. Indeed, China appears to take a dim view to the prospect of unity among the 10 members of ASEAN, at least when it involves maritime tensions with China.

China also touts the fact that it recently signed a Code for Unplanned Encounters at Sea (CUES) at the recent Western Pacific Naval Symposium held in Qingdao. CUES is meant to help avoid accidents at sea. However, CUES is voluntary and applies only when naval ships and aircraft meet "casually or unexpectedly." It also does not apply to a country's territorial waters, and of course countering China's expansive claims to territorial waters is one of the most pressing problems in the South and East China Seas. "It's recommended, not legally binding," Captain Ren Xiaofen, the head of the PLA navy's maritime security and safety policy research division, made clear after the Western Pacific Naval Symposium approved the code.<sup>24</sup>

In short, China as a rising great power will not wish to lock in constraints that will slow down its power as it reemerges. China is a partial rule maker and partial rule breaker. But when it comes to hard security, it particularly finds binding multilateral rules difficult to accept. Instead, China uses rules as part of a tailored coercion of smaller neighbors and

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23. Ankit Panda, "Obama: Senkakus Covered under U.S.-Japan Security Treaty," *Diplomat*, April 24, 2014, <http://www.thediplomat.com/2014/04/obama-senkakus-covered-under-us-japan-security-treaty/>.

24. Jeremy Page, "China Won't Necessarily Observe New Conduct Code for Navies," *Wall Street Journal*, April 23, 2014, <http://online.wsj.com/news/articles/SB10001424052702304788404579519303809875852?KEYWORDS=captain+ren+CUES&mg=reno64-wsj>.

larger neighbors alike, hoping to forestall restrictive constraints on an emerging China while maximizing pressure on others. Unfortunately, this devalues CBMs as more symbolic and operationally significant. But CBMs are not the only action that can be adopted to manage tensions and competition.

## Next Steps for Building Security and a Rules-Based System

What can countries do to counter the rise of coercion in the South China Sea and beyond? Moreover, what can the United States and other regional states do further stabilize the region's security and foster an environment in which all actors are more inclined to abide by common rules and norms? Taking together the twin goals of security maintenance and order building, and focusing on countering coercion and the use of force, let me suggest several priorities that are already under way or under consideration to raise the bar on creeping assertions of sovereignty without unduly threatening regional order.

First, the United States needs to persist in fully engaging China on security issues, both on easy areas for cooperation such as disaster relief but also on the thorniest security issues such as cyber and maritime security. I have just returned from Hawaii, where the large multilateral Rim of the Pacific (RIMPAC) exercise included China, highlighted to all America's preeminent maritime power, and yet demonstrated to China and the region the genuine U.S. desire to build inclusive regional cooperation. At the same time, ongoing high-level strategic dialogue with China makes clear where we stand, whether on cyber intellectual property theft or on unilateral changes to the status quo through coercion or force.

Second, the United States will and should continue to enhance its presence in and around the South China Sea. Singapore is playing a vital role as a hub of inclusive security dialogue while facilitating U.S. naval presence—especially in the form of up to four Littoral Combat Ships. The recent enhanced defense cooperation agreement with the Philippines puts in place the legal framework for greater rotational presence in and near the South China Sea. The United States should introduce a step change in its burgeoning cooperation with Vietnam by promoting deeper strategic dialogue, but also symbolically significant steps such as moving to lift the ban on lethal arms sales.

There should be expanded defense cooperation with Malaysia and Indonesia—especially in the wake of the latter's closely contested presidential election. Presence should also come in the form of more naval, air, amphibious, and law-enforcement exercises in and through the South China Sea with Japan, India, and other countries that rely on an open maritime commons for their security and prosperity. Calculated shows of force may be appropriate depending on the actions taken by others. And the United States needs to follow through on shoring up its presence on Guam and promoting training in the Commonwealth of the Northern Mariana Islands, as well as in Australia (where air training will soon become far more significant than the modest marine presence in Darwin).

The United States needs to work closely with Canberra on its next defense white paper due out by the middle of 2015 in order to underscore the alliance's importance as a regional public good.

Third, the United States should double down on helping others in the region build their capacity for safeguarding their interests. Building partnership capacity begins with coast guard and law-enforcement elements, includes upgrading maritime domain awareness and early warning, and raising the level of naval and air force professionalism. Our land forces are also important tools for engaging partners who may undertake actions that could in turn undermine our ability to work more closely with them. And the United States should support burgeoning intra-Asian security cooperation. To cite but one concrete idea, Japan, India, or Australia could help Vietnam as it works on the monumental task of integrating six Russian Kilo-Class diesel submarines into its navy over the coming years.

Fourth and finally, the United States can do more to build regional cooperation and institutions as bulwarks against coercion. This can be done by further encouraging security cooperation among South China Sea claimant states (especially the Philippines, Vietnam, and Malaysia) that might coalesce around the importance of international arbitration or a binding COC. Washington should continue to support an ASEAN COC, as well as keeping maritime issues on the agenda of such ASEAN-centered institutions as the ASEAN Regional Forum, the ASEAN Defense Ministers Meeting-Plus process, and the East Asia Summit.

More creatively, the United States and other key regional actors, such as Japan, India, and Australia, should work with ASEAN members to create an information-sharing regime that capitalizes on the growing abundance of airborne intelligence, surveillance, and reconnaissance (ISR) information. A common operating picture of the South China Sea not only can be beneficial for humanitarian assistance and disaster relief (not to mention tragedies such as flight MH370). It very importantly can keep more eyes on coercive actions. From the ramming and sinking of a Vietnamese fishing vessel (which I viewed in Da Nang in June) to releasing pictures of reclamation projects or maritime maneuvers in disputed areas, an information-sharing regime can ensure such actions are not undertaken just because they are out of public view.

Through all of these and other steps, tailored coercion can be prevented from becoming the accepted norm in the South China Sea. Although none of these steps is likely to convince China to swiftly reverse its increasingly assertive behavior, together they can help put in place barriers to unilateral changes to the status quo through coercion or force. And despite myriad U.S. distractions, I am confident that both the Obama administration and its successor will persist in preserving an open, inclusive, rules-based system in the South China Sea and the Asia-Pacific region more generally.

# 5 | Disputes between Vietnam and China in the South China Sea: A Legal Analysis

*Vu Hai Dang*

Since May 2, 2014, relations between Vietnam and China have seriously deteriorated because of China's unilateral drilling in the northeastern area of the South China Sea, or the Gulf of Tonkin. This incident added a new issue to the list of disputes in the South China Sea between Vietnam and China. If these disputes remain unresolved, or at least unmanaged, they could be an important obstacle not only to the development of the relationship between Vietnam and China but also to peace, stability, and development in the region. This paper undertakes a legal analysis of the most challenging bilateral disputes between the two countries in the South China Sea—namely, (1) the sovereignty over the Paracels, (2) the entitlement of its features, (3) the operation of Haiyang Shiyou 981. It also seeks to provide some perspectives on how to resolve these disputes based on international law and practice.

## The Sovereignty over the Paracel Islands

The Paracels is a group of islands lying between 16°–17°N and 111°–113°E with about 30 islets, sandbanks, or reefs occupying some 5,800 square miles of the ocean surface, which are further divided into two groups—namely, Amphitrite and Crescent. Triton Island, the southwestern limit of the Paracel Islands, is about 120 nautical miles from Ly Son Island of Vietnam, whereas North Reef, its northernmost feature, is about 140 nautical miles from Hainan Island of China.<sup>1</sup>

The sovereignty over the Paracel Islands is claimed by both Vietnam and China, based on historical grounds. Vietnam claims that it was the first country that discovered, occupied, and administrated these islands in a continuous and peaceful manner. Based on evidence provided by itself, Vietnam seems to have discovered the Paracels in at least the

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1. Monique Chemillier-Gendreau, *La souveraineté sur les archipels Paracels et Spratlys* (Paris: l'Harmattan, 1996), 20; Vu Phi Hoang, *The Two Archipelagoes Hoang Sa and Truong Sa, Territories of Vietnam* [in Vietnamese] (Hanoi: People's Army, 1988), 6; Tran Nam Tien, *Paracels and Spratlys: Questions and Answers* [in Vietnamese] (Ho Chi Minh City: Youth, 2013), 28.

fifteenth century and started to exploit and administrate them as a sovereign state in the seventeenth century.<sup>2</sup>

China claims that it was the first to discover, develop, exploit, and exercise jurisdiction over the Paracels, going back as far as the Eastern Han dynasty (AD 23–220). Evidence from China shows that it has seemed to know about some islands in the South China Sea since ancient times and started to claim its sovereignty over the Paracels in 1909.<sup>3</sup>

In accordance with international law, to acquire a territory, either by occupation or by prescription,<sup>4</sup> a state must prove that it has exercised effective control over the territory for a long period of time. It means that the state has to perform sovereign acts over this territory.<sup>5</sup> Thus, based on the evidence provided by both countries so far, it could be stated that Vietnam has better grounds to affirm its sovereignty over the Paracels than China does.

China has occupied these islands since 1974, after taking them by force from South Vietnam. However, in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, no territory of a state resulting from the threat or use of force and no territorial acquisition resulting from the threat or use of force shall be recognized as legal.<sup>6</sup> Thus, the occupation of these islands by China cannot change their legal status. China also claims that there is no dispute over the sovereignty of the Paracels,<sup>7</sup> and it says it will not negotiate about it.<sup>8</sup> Vietnam, while affirming its sovereignty over these islands, seems to be willing to conduct negotiations on this issue.<sup>9</sup>

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2. Luu Van Loi, *The Sino-Vietnamese Difference on the Hoang Sa and Truong Sa Archipelagoes* (Hanoi: The Gioi, 1996), 31; Hong Thao Nguyen, “Vietnam’s Position on the Sovereignty over the Paracels and the Spratlys: Its Maritime Claims,” *Journal of East Asia International Law* 1 (2012): 165–169.

3. “Historical Evidence to Support China’s Sovereignty over Nansha Islands,” Ministry of Foreign Affairs of the People’s Republic of China, November 17, 2000; Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective* (Oxford: Chandos, 2013), 15; Jianming Shen, “China’s Sovereignty over the South China Sea Islands: A Historical Perspective,” *Chinese Journal of International Law* 1, no. 1 (2002): 95–157. It should be noted that China seems to use the same argument and evidence for both the Paracels and Spratlys.

4. Occupation is the appropriation by a state of territory that is *terra nullius*, and prescription is the acquisition of the sovereignty title over the territory that is not *terra nullius* and legitimization of the title with the passage of time and the presumed acquiescence of the former sovereign. See R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 20; Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 487–504.

5. United Nations, *Reports of International Arbitral Awards: Volume II: Island of Palmas Case (Netherlands v. USA), 4 April 1928* (New York: United Nations, 2006), 829, 840, [http://legal.un.org/riaa/cases/vol\\_II/829-871.pdf](http://legal.un.org/riaa/cases/vol_II/829-871.pdf); *The Minquiers and Ecrehos Case (England v. France) 1953 I.C.J. 47, 71*; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, 2008 I.C.J. 12, para. 274.

6. Resolution of the General Assembly, UNGA OR, 25th session, Doc. A/Res/2625 (1970).

7. “Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference,” Ministry of Foreign Affairs of the People’s Republic of China, May 12, 2014.

8. “State Councilor Yang Jiechi Holds Telephone Talks with Deputy Prime Minister and Foreign Minister Pham Binh Minh of Vietnam at Request,” Ministry of Foreign Affairs of the People’s Republic of China, May 6, 2014.

9. “Vietnam Demands China Withdraw from Territorial Waters,” Vietnam News Agency, May 6, 2014.

According to the jurisprudence of the ICJ, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other. Besides, whether there exists an international dispute is a matter for objective determination.<sup>10</sup>

Based on the above-mentioned rulings from the ICJ, it is quite clear that Vietnam and China have a dispute over the sovereignty of the Paracels. Both countries claim that they are the only owner of these islands and positively protest the other's claim on them by words and by deeds. The fact that one party denies that there exists a dispute does not make these islands nondisputed territory.

## Entitlement of the Paracel Islands

Except for some low-tide elevations and submerged banks,<sup>11</sup> most features in the Paracels have very small sizes. The largest features of the Paracels are Woody Island (about 0.8 square miles), Lincoln Island (0.6 square miles), Triton Island (0.5 square miles), and Pattle Island (about 0.1 square miles).<sup>12</sup> But China seems to hold the position that both Triton and the Paracels are entitled to have an EEZ and continental shelf, and it suggests a delimitation between the Paracels and the coast of Vietnam.<sup>13</sup>

The suggestion of a delimitation between the Paracels and Vietnam seems unreasonable and goes against international law. Maritime delimitation is defined as the process of establishing lines separating the spatial ambit of coastal states' jurisdiction over maritime space where the legal title overlaps with that of another state.<sup>14</sup> In the North Sea Continental Shelf cases, the ICJ considered the process of delimitation one of "drawing a boundary line between areas which already appertained to one or other of the states affected."<sup>15</sup> In the Aegean Sea Continental Shelf case, the ICJ considered that "to establish the boundary or boundaries between neighbouring states, that is to say, to draw the exact line or lines where the extension in space of the sovereign powers and

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10. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002 I.C.J. 303, para. 87 (preliminary objections); The Mavrommatis Palestine Concessions (Greece v. UK), P.C.I.J., series A, no. 2, 11 (August 31, 1924); Northern Cameroons (Cameroon v. UK), 1963 I.C.J. 27; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 27, para. 35 (advisory opinion); East Timor (Portugal v. Australia), 1995 I.C.J. 99, para. 22; South West Africa, 1962 I.C.J. 328 (preliminary objections); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 74 (advisory opinion).

11. Such as Bremen Bank, Dido Bank, and Jehangire Reefs. See U.S. National Geospatial-Intelligence Agency, *Sailing Directions (En Route): South China Sea and the Gulf of Thailand*, 14th ed. (Springfield, VA: National Geospatial-Intelligence Agency, 2013).

12. Ibid.; Vu Huu San, *Geography of the South China Sea with the Archipelagoes Paracels and Spratlys* [in Vietnamese] (Fremont, CA: NXB Quê Hương, 1995).

13. Letter Dated 9 June 2014 from the Chargé d'Affaires a.i. of the Permanent Mission of China to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/907 (2014), 3.

14. Yoshifumi Nakata, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford: Hart Publishing, 2006), 7.

15. North Sea Continental Shelf Case (Federal Republic of Germany v. Netherlands), 1969 I.C.J. 4, para. 20.

rights of Greece meets those of Turkey. Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same.”<sup>16</sup> It stated that in accordance with the principle “land dominates the sea,” it is solely by virtue of the coastal state’s sovereignty over the land that rights of exploration and exploitation in the continental shelf can be attached to it, *ipso jure*, under international law,<sup>17</sup> and the capacity to engender continental shelf right derives from the sovereignty over the land-mass.<sup>18</sup> So it is sovereign title over a land territory that generates the maritime entitlement.<sup>19</sup>

In this case, the title over the Paracels is *de jure* under the ownership of Vietnam and *de facto* under dispute between Vietnam and China, so one cannot call for the delimitation between two sets of territories legally belonging to the same country: Paracel Islands and the coast of Vietnam. It should also be noted that the archipelagic baseline drawn by China around the Paracels in 1996<sup>20</sup> violated the principle of respect for territorial integrity and Article 47 of UNCLOS.<sup>21</sup>

With regard to the effect of islands in maritime boundary delimitation, UNCLOS distinguishes three types of elevations: low-tide elevations, rocks, and islands. Among those, low-tide elevations do not generate maritime areas but can be used as base points if located less than 12 nautical miles from a coast, a rock can have a territorial sea, and an island can have an EEZ and continental shelf.<sup>22</sup> State practice seems to be extremely variable, from giving islands full effects, applying partial effect to islands, and enclaving or partially enclaving islands to completely ignoring them in the construction of the delimitation line.<sup>23</sup> Islands’ sizes and locations are important factors to determine the equity of a maritime delimitation involving islands—that is, the effects of islands.<sup>24</sup> For instance:

- Islands located in proximity of the mainland coast such as they could be considered representative of the mainland coastal configuration or geographically integrated to it have been awarded with full effects.<sup>25</sup>
- Islands in the median zone, detached islands, disputed islands would have no effect in delimitation.

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16. Aegean Sea Continental Shelf (Turkey v. Greece), 1978 I.C.J. 3, para. 85.

17. *Ibid.*, para. 86.

18. Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, para. 49.

19. Nuno Marques Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (Leiden: Martinus Nijhoff Publishers, 2003), 132.

20. Declaration of the Government of the People’s Republic of China on the Baselines of the Territorial Sea, May 15, 1996, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm>.

21. UNCLOS, December 10, 1982, 1833 U.N.T.S. 3, art. 47.

22. *Ibid.*, arts. 13, 121.

23. Clive Schoffield, “Islands or Rocks? Is That the Real Question? The Treatment of Islands in the Delimitation of Maritime Boundaries,” in *The Law of the Sea Convention: US Accession and Globalization*, ed. Myron H. Norquist, John Norton Moore, Alfred H. A. Soons, and Hak-So Kim (Leiden: Martinus Nijhoff Publishers, 2012), 333.

24. Hiran W. Jayewardene, *The Regime of Islands in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), 351.

25. Schoffield, “Islands or Rocks?,” 334.

- Islands that may have disproportionate effects on the median line may have a reduced effect.
- Islands on the “wrong side”<sup>26</sup> of the equidistance line would be enclaved.<sup>27</sup>

In international jurisprudence, there is a trend toward giving small islands a reduced effect in maritime boundary delimitation, particularly in cases where islands are located in considerable distance offshore and opposite to mainland coasts.<sup>28</sup>

In the region, Vietnam and China have successfully signed a maritime boundary delimitation agreement in the Gulf of Tonkin in 2000, which involves the consideration of island entitlement.<sup>29</sup> There are two islands of Vietnam that have some effects on the boundary line—namely, Bach Long Vi Island and Con Co Island. Con Co Island is a nearshore island,<sup>30</sup> and it has an area of 1 square mile and a permanent habitation of about 500 people.<sup>31</sup> According to the result of the delimitation, the island receives 50 percent effect. Bach Long Vi Island, located in the middle of the Gulf, has an area of 1.2 square miles and a permanent habitation of 1,000 people.<sup>32</sup> According to the result of the delimitation, it receives 25 percent effect.<sup>33</sup> So it could be stated that both Vietnam and China have followed international practice in defining the entitlement of islands.

Thus, based on relevant international law and practices (including in the South China Sea region), two conclusions could be drawn:

- The Paracels will be considered base points, but a relevant circumstance in the construction of an equidistance line for the potential delimitation between Hainan Island of China and the coast of central Vietnam (in addition to the one completed in the Gulf of Tonkin in 2000).
- Except for those low-tide elevations, which have no maritime entitlement, all island-like features of the Paracels will be enclaved and have very minimal effect (if at all) on such a delimitation.

26. That is, an island belonging to state A but located on state B’s side of the equidistance line.

27. Jayewardene, *The Regime of Islands in International Law*, 359.

28. Schoffield, “Islands or Rocks?,” 333. See, for example, *Continental Shelf*, 1985 I.C.J. 13, 72; *Continental Shelf Case (Tunisia v. Libya)*, 1982 I.C.J. 18, para. 129; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 I.C.J. 40, para. 219 (merits).

29. Agreement between the Socialist Republic of Vietnam and the People Republic of China Relating to the Delimitation of the Territorial Sea, Exclusive Economic Zone and Continental Shelf in the Tonkin Gulf, December 15, 2000, <http://biengioilanhtho.gov.vn/eng/maritimeboundary-nc-a84f2f41.aspx>.

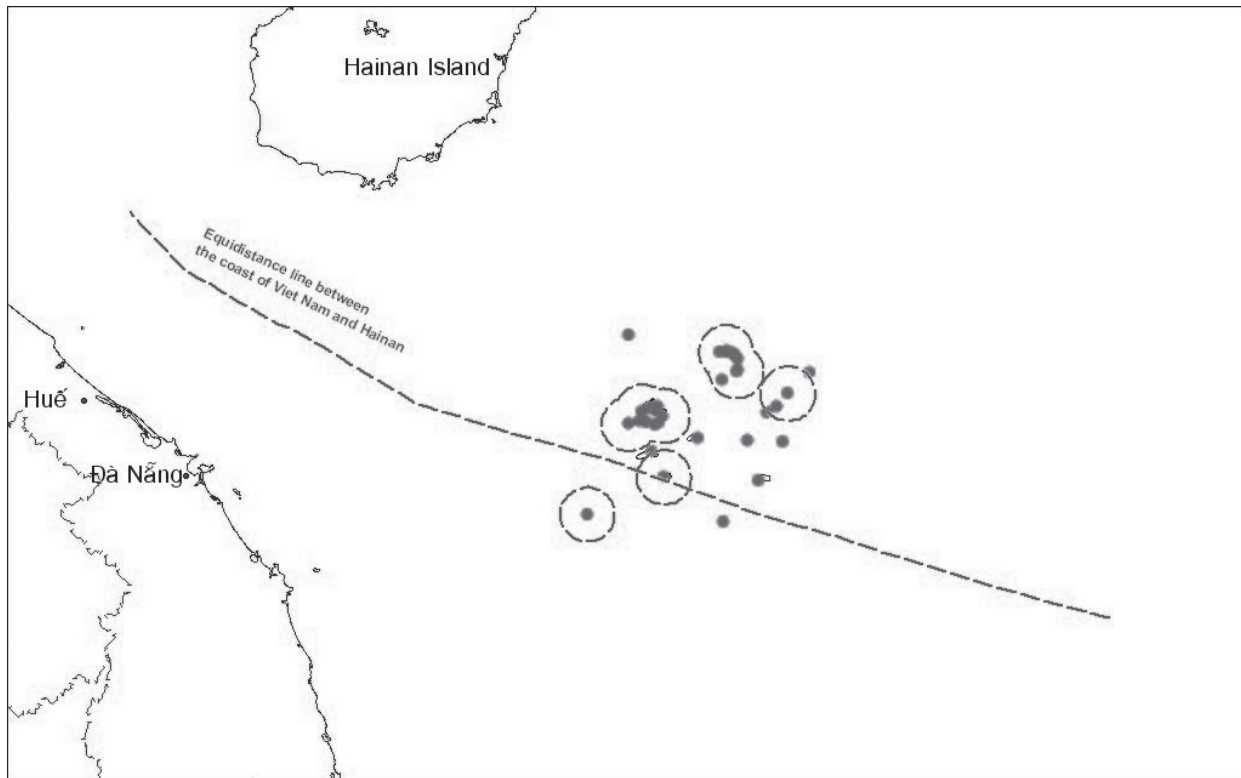
30. Con Co Island is about 15 nautical miles from Vietnam’s coast and is base point number A11 of Vietnam’s baseline declared in 1982. See Statement of 12 November 1982 by the Government of the Socialist Republic of Vietnam on the Territorial Sea Baseline of Vietnam, <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm>.

31. See “Con Co Island,” Province of Quang Tri Online Portal [in Vietnamese], October 2, 2011, <http://gioithieu.quangtri.gov.vn/index.php?language=vi&nv=news&op=Tuyen-dung/Dao-Con-Co-25>; “Youth Islands,” *Đại Đoàn Kết*, June 28, 2014.

32. Island District of Bach Long Vi’s Online Portal [in Vietnamese], May 13, 2014, <http://haiphong.gov.vn/Portal/Detail.aspx?Organization=HDBLV&MenuID=1095&ContentID=56590>.

33. Vietnam and China Delimitation, 93; Nguyen, “Vietnam’s Position on the Sovereignty.”

## Entitlement of the Paracels



Source: Hoang Tran Phuong, using MapInfo, 2014.

## The Operation of Haiyang Shiyou 981

On May 2, 2014, China brought its nearly US\$1 billion deep-sea mega oil rig Haiyang Shiyou 981 to the location of coordinates 15°29' N /111°12 E, south of the Paracels' Triton Island. The location is around 17 nautical miles from Triton, about 120 nautical miles from Vietnam's Ly Son Island, and about 180 nautical miles from Hainan Island.<sup>34</sup> China's State Oceanic Administration also issued a notice stating:

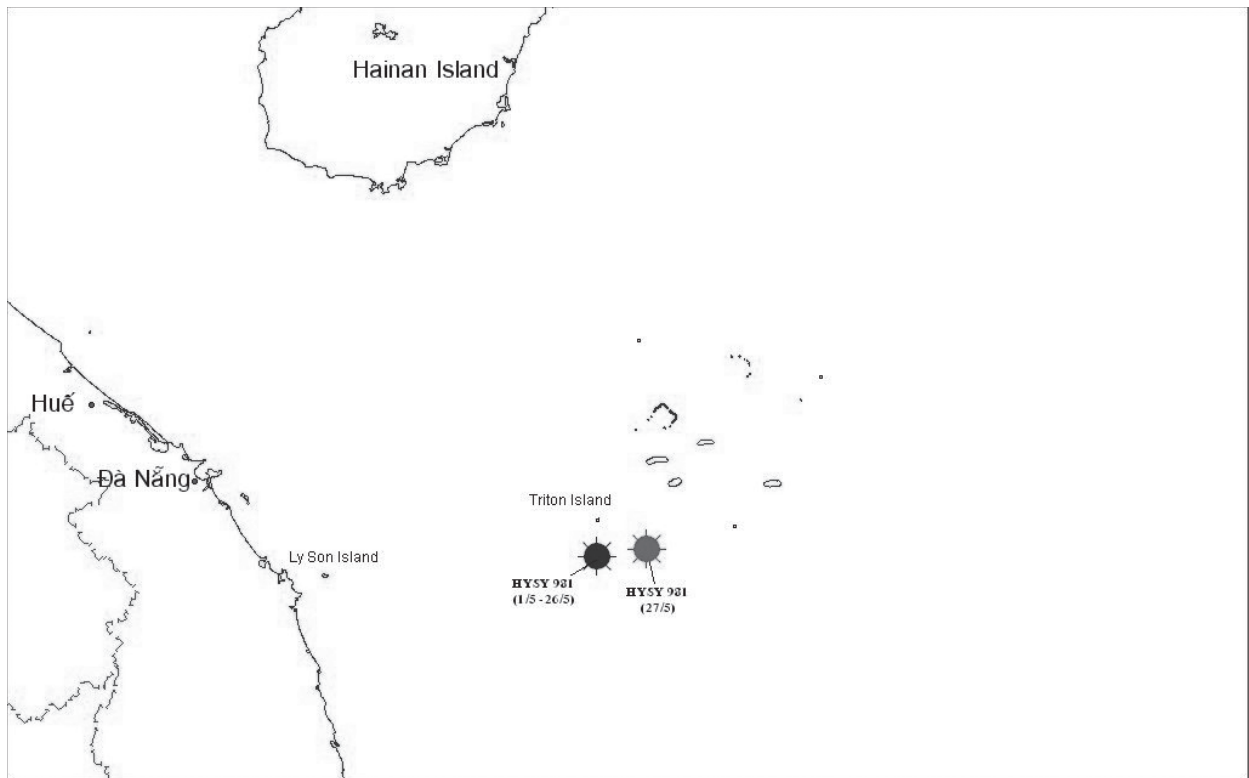
HN0034 South China Sea Drilling Work by M/V "Hai Yang Shi You 981" in area within 3 nautical miles radius of 15–29.58N 111–12.06E from May 4 to August 15 entering prohibited. Cancel HN0033 14. Hainan MSA China.<sup>35</sup>

Based on the equidistance line between the coast of Hainan Island and Vietnam and the status of the Paracel Islands, it could be stated that the location of the oil rig is inside the EEZ and continental shelf of Vietnam, and this is even after a delimitation in application of relevant international law and practices between the two countries in this area.

34. Since then, the rig has been moved a couple of times but is still around this area.

35. Maritime Safety Administration of the People's Republic of China, "Maritime Notice No.14034," June 16, 2014, [www.msa.gov.cn/Notice/9e65dcfc-e838-45f6-bde6-f858a62323db](http://www.msa.gov.cn/Notice/9e65dcfc-e838-45f6-bde6-f858a62323db).

## Locations of Haiyang Shiyou 981



Source: Hoang Tran Phuong, using MapInfo 2014.

Vietnam has dispatched about 30 vessels from its two maritime enforcement agencies—Coast Guard and Fisheries Surveillance Force—to the area against about 80 vessels from China, including coast guard, PLA navy military vessels, and also aircrafts to protect the oil rig. In addition, fishermen from Vietnam keep operating in this area while Chinese ironclad fishing boats have equally participated in the face-off with Vietnamese vessels.<sup>36</sup> At the peak, the number of vessels present in this area from two sides reached, respectively, around 60 for Vietnam and 140 for China.<sup>37</sup> What happened afterward on the ground was constant, if not daily, confrontation between Vietnamese and Chinese vessels. These confrontations consist of ships chasing, running into each other, colliding, ramming, and firing water cannons. Although both countries have provided evidence relating to these incidents, so far Vietnam seems to have a stronger case that Chinese vessels have actively

36. According to Vietnamese newspapers, Chinese fishing boats have been reinforced with a big device in the shape of a pear at their prows, which makes them much more dangerous when hitting other ships. See “China Sends ‘Fishing’ Boats with Reinforced Prows to Vietnam’s Waters,” *Tuoi Tre News*, June 7, 2014, <http://tuoitrenews.vn/society/20149/chinese-fishing-boats-with-prows-reinforced-threaten-vietnams-vessels>.

37. Letter Dated 9 June 2014, Doc. A/68/907, 2; “China’s Further Aggression Disregards Vietnam’s Good Will,” *Nhan Dan*, June 6, 2014, <http://en.nhandan.org.vn/politics/external-relations/item/2563202-china%E2%80%99s-further-aggression-disregards-vietnam%E2%80%99s-good-will.html>.

and deliberately chased after, ran into, fired water cannons at, and rammed its vessels,<sup>38</sup> going as far as sinking one of its fishing boats.<sup>39</sup> The confrontation between Vietnam and China over the operation of the Haiyang Shiyu 981 oil rig continues up until today both at sea and in the diplomatic “battlefield.”<sup>40</sup>

A look into the relevant international law, in particular UNCLOS, reveals that the above-mentioned actions of China violate a number of important rules of international law governing activities at sea—namely, the following:

- In a state’s EEZ and continental shelf, only this state has the sovereign rights for the purpose of exploring and exploiting natural resources and jurisdiction to establish and use artificial islands, installations, and structures,<sup>41</sup> and third states shall have due regard to the rights and duties of the former.<sup>42</sup>
- All states enjoy the freedom of navigation in the EEZ.<sup>43</sup>
- Artificial islands, installations, and structures outside the territorial seas can only have a safety zone that shall not exceed a distance of 500 meter radius.<sup>44</sup>

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38. Both Vietnam and China each accused the other’s vessels of deliberately running into and ramming theirs. However, the Vietnamese authorities were able to provide video clips as evidence and then had international reporters on board their ships as witnesses. Later China showed some video clips, too, but by then Vietnamese newspapers had already revealed that Chinese ships fired water cannons at and intentionally cut ahead and stopped in front of Vietnamese ships. See “Chinese Vessels Deliberately Ram Vietnam’s Ships in Vietnamese Waters: Officials,” *Tuoi Tre News*, July 5, 2014, <http://tuoitrenews.vn/politics/19513/chinese-vessels-deliberately-rammed-into-vietnamese-boats>; “2 Chinese Vessels Fire Water Cannons at Each Other: Report,” *Tuoi Tre News*, May 29, 2014, <http://tuoitrenews.vn/society/19959/2-chinese-vessels-fire-water-cannons-at-each-other-report>; “China Changes Tactics, Creating False Evidence” [in Vietnamese], VGP News, June 10, 2014, <http://baodientu.chinhphu.vn/Hoat-dong-Bo-nganh/Trung-Quoc-doi-tro-tao-hien-truong-gia/201326.vgp>; “Maritime Disputes: China Says Vietnam Impeding Free and Safe Navigation,” CCTV News, June 13, 2014. Carlyle Thayer has noted, “On 8 June an official Chinese Foreign Ministry statement accused Vietnam of ramming Chinese ships 1416 times. Given Chinese estimates that 69 Vietnamese vessels and boats were present, this means that on average each Vietnamese boat conducted 20 separate ramming each. This figure seems incredulous” (see Carlyle Alan Thayer, “China and Vietnam Square Off in War of Attrition over Disputed Waters,” *Asian Currents*, June 16, 2014, <http://asaablog.tumblr.com/post/88949660696/china-and-vietnam-square-off-in-war-of-attrition-over>).

39. “Video Shows Vietnam Fishing Vessel Sink after Collision with Chinese Boat,” Reuters, June 5, 2014, <http://www.reuters.com/article/2014/06/05/southchinasea-vietnam-idUSL3N0OM1EB20140605>.

40. China and Vietnam have traded a number of *notes verbale* at the United Nations to state their positions and protest each other. See Letter Dated 7 May 2014 from the Permanent Representative of Vietnam to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/870 (2014); Letter Dated 22 May 2014 from the Chargé d’Affaires a.i. of the Permanent Mission of China to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/887 (2014); Letter Dated 28 May 2014 from the Chargé d’Affaires a.i. of the Permanent Mission of Vietnam to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/897 (2014); Letter Dated 6 June 2014 from the Permanent Representative of Vietnam to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/906 (2014); Letter Dated 9 June 2014 from the Chargé d’Affaires a.i. of the Permanent Mission of China to the United Nations Addressed to the Secretary-General, UNGA OR, 68th session, Doc. A/68/907 (2014); See also “VN Continues Opposing China’s Illegal Rig Placement at the UN,” Vietnam Plus, July 4, 2014, <http://en.vietnamplus.vn/Home/VN-continues-opposing-Chinas-illegal-rig-placement-at-UN/20147/52339.vnplus>; “Vietnam Sends Paper Affirming Island Sovereignty to UN,” Vietnam Plus, July 4, 2014, <http://en.vietnamplus.vn/Home/Vietnam-sends-paper-affirming-island-sovereignty-to-UN/20147/52338.vnplus>.

41. UNCLOS, arts. 56, 77, 81.

42. Ibid., art. 58.

43. Ibid.

44. Ibid., art. 60; UN Convention on the Continental Shelf, April 29, 1958, 499 U.N.T.S. 311, art. 5.

- States shall take necessary measures for ships flying their flags to ensure safety of navigation with regard to, inter alia, the construction, equipment, and seaworthiness of ships and the prevention of collisions, and in taking such measures, states are required to conform to generally accepted international regulations, procedures, and practices.<sup>45</sup>
- States shall not endanger the safety of navigation or create any hazard for vessels in the exercise of their powers of enforcement against vessels.<sup>46</sup>
- Rules relating to the conduct of vessels under the International Regulations for the Prevention of Collision at Sea 1972 of the International Maritime Organization.<sup>47</sup>
- The prohibition to use force or to threaten to use force in international relations.<sup>48</sup>

## Prospective Solutions

Based on the analysis undertaken above, this section of the paper suggests some prospective solutions to the aforementioned disputes between Vietnam and China, based on relevant international law and practice and considering the reality of relations between two countries at sea:

- Both countries should not unilaterally drill in undelimited areas beyond the equidistance line between the coast of Hainan Island and Vietnam, so that they will not “jeopardize or hamper the reaching of the final agreement” as UNCLOS requires.<sup>49</sup> With regard to Haiyang Shiyou 981, as this is a movable oil rig, China could move it around this area but shall not position it, undertake drilling, and establish a “safety zone” because then the oil rig becomes an “installation” as defined by Articles 60 and 80 of UNCLOS.<sup>50</sup> Chinese ships shall stop challenging Vietnamese vessels moving in and out of this area as it is an area under freedom of navigation.<sup>51</sup>
- The area off the Gulf of Tonkin is currently under negotiations between Vietnam and China for delimitation and joint development.<sup>52</sup> As analyzed above, the features of the Paracels would have a very limited effect on any delimitation in this area. So the two countries should consider accelerating the undertaking of the delimitation in this area based on the construction of an equidistance line between the coast of Vietnam and Hainan Island. As for the Paracels, all island-like features should be

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45. UNCLOS, art. 94. This article is under the section on high seas but is also applicable to the EEZ. See UNCLOS, art. 58 (2).

46. *Ibid.*, art. 255.

47. International Maritime Organization, International Regulations for the Prevention of Collision at Sea, October 20, 1972, Part B, <http://www.imo.org/About/Conventions/ListOfConventions/Pages/COLREG.aspx>.

48. UN Charter, art. 2 (4).

49. UNCLOS, arts. 74, 83.

50. *Ibid.*, arts. 60, 80.

51. *Ibid.*, art. 58.

52. The negotiations have now reached the fifth round at the expert level. See “Vietnam, China Discuss Tonkin Gulf, Sea Issues,” Vietnam News Agency, February 20, 2014, <http://en.vietnamplus.vn/Home/Vietnam-China-discuss-Tonkin-Gulf-sea-issues/20142/46473.vnplus>.

enclaved, and the two countries could conduct joint development within those enclaves while waiting for the issue of sovereignty on these islands to be resolved.

- The dispute over the sovereignty on the Paracels remains the most challenging one between Vietnam and China. So far, the resolution of this dispute remains a deadlock as China refuses to talk about it or use third-party dispute settlement mechanisms to resolve it.<sup>53</sup> In this context, the recent issuance of *notes verbales* by China to the UN General Assembly explaining its position relating to its sovereignty over the Paracels could be seen as a good sign. It might imply a change in the way China approaches this issue; that is, at least from now on, China may be more willing to talk about it. Thus Vietnam and China should initiate talks relating to sovereignty over the Paracels. These talks could start first between scholars and academics and in an informal manner, which can then set the ground for more formal consultations between higher-level experts and hopefully lead toward bilateral negotiations to resolve the problem. The most important thing is that substantial talks on that topic between two countries could begin and be sustained periodically.
- Using international tribunals and arbitration is also an effective way to resolve maritime disputes between Vietnam and China if negotiations cannot do the job. Even though China made a declaration in 2006 excluding a number of categories of disputes from UNCLOS's third-party dispute settlement mechanisms,<sup>54</sup> a number of issues could still be resolved through it. Those are, for example, entitlement of islands, safety of navigation, and the establishment of safety zones around installations. Or China could still accept the jurisdiction of the third-party body in spite of its declaration.<sup>55</sup>

It is noteworthy that the above-mentioned measures could be implemented on a step-by-step basis or alternatively based on the developments of the situation in the region and relations between the two countries.

## Conclusion

This paper provides a legal analysis of the most challenging bilateral disputes between Vietnam and China in the South China Sea. It also tries to suggest some perspectives to resolve those disputes based on international law and practices and the reality in the region. For the author, the most urgent thing is for China to not undertake similar drilling operations and all dangerous maneuvers at sea that simultaneously prevent the performance of lawful rights of other countries at sea and endanger the freedom and safety of navigation in the region.

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53. France, the administrator of the Paracels during its colonial time in Indochina, asked China to go to international tribunals to solve the dispute over the sovereignty over the Paracels for the first time in 1932 and again in 1947. However, both suggestions were refused by China. See Chemillier-Gendreau, *La souveraineté sur les archipels Paracels et Spratlys*, 43.

54. Declaration of the People's Republic of China on August 25, 2006 with Regard to Article 298 of UNCLOS, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China) after ratification.

55. UNCLOS, art. 287.

# 6 | Maritime Disputes in the South China Sea: ASEAN's Dilemma

*Alan Dupont*

## The Strategic Significance of the South China Sea

This paper will explore recent developments in the South China Sea from the perspectives of the Philippines, Malaysia, Indonesia, and ASEAN, and in particular, how their policy positions have evolved in response to the escalating tensions over the linked territorial and resource claims in this strategically important sea.

But first, it will offer some introductory observations about the South China Sea disputes because without a historical appreciation of their origins and drivers, it is difficult to fully understand the significance of the most recent developments and their policy implications.

Nautically speaking, the South China Sea has been largely unfathomed by generations of Western strategists, schooled in the centrality of smaller, proximate seas to Eurasia's traditional geopolitical fault lines. Even as the South China Sea has become more recognized internationally, Western thinking remains revealingly Euro- and Atlantic-centric. Thus, according to Nicholas Spykman, the South China Sea is an "Asiatic Mediterranean," whereas others see it as a "Chinese Caribbean."<sup>1</sup>

These analogies are neither helpful nor insightful, masking significant differences in size, location, and strategic importance. For Asians, the South China Sea has long been a maritime highway for intra-Asian trade, commerce, and contact, as well as a bridge to Europe and the Middle East. But its strategic and trade significance now exceeds that of all other seas because of Asia's rise and the enormous and increasing volumes of trade and energy that flow through it to and from the rest of the world.

The South China Sea carries more than 40 percent of world trade and 50 percent of energy trade, with the gateway Malacca Strait having overtaken the Suez Canal, the Panama

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1. Tetsuo Kotani, "The Chinese Okhotsk: The Nuclear Dimension of South China Sea Disputes," *PacNet* 37, July 22, 2011, <http://csis.org/publication/pacnet-37-chinese-okhotsk-nuclear-dimension-south-china-sea-disputes>.

Canal, and the Straits of Hormuz as the world's most critical waterway. The amount of oil exported through the Malacca Strait is triple that through the Suez Canal and 15 times greater than the volume of oil that transits the Panama Canal.<sup>2</sup> Unfortunately, the South China Sea is also the world's most contested sea and the interested parties include not just the claimant states but all the region's major trading nations, including Australia, Indonesia, Japan, and South Korea, along with the United States.

China's growing strategic rivalry with the United States and Japan is complicating the South China Sea disputes and raising the strategic stakes for all countries. A key consideration in China's thinking is a desire to push the United States out of the western Pacific and make the South China Sea a Chinese sea in fact as well as name. A serious and extended military conflict in the South China Sea, particularly if it were to involve China, would have an extremely destabilizing impact on international trade and financial markets as well as great power relations, the consequences of which would not be confined to Southeast Asia.

These contemporary realities go a long way to explaining why a motley collection of 200 coral reefs and largely uninhabited rocks dotting the expanses of the South China Sea have assumed a strategic significance that belies their unprepossessing appearance.

Occupation and demonstrated connections with these maritime features are considered by the claimants—Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam—to be an essential part of their respective territorial claims including control of the underlying oil, gas, and marine living resources. It must be remembered, however, that under UNCLOS, although owners of habitable islands are entitled to a 200 nautical mile EEZ, the owners of rocks and reefs can only claim a 12 nautical mile territorial sea, and submerged features do not generate either an EEZ or territorial sea.

However, these important legal distinctions have done little to constrain what has become Asia's largest resource grab as states reinforce their territorial claims by building and establishing fishing shelters, concrete fortifications, military garrisons, and even airfields ground out from crushed coral and reclaimed land. Taiwan, for example, is building a US\$100-million port next to an airstrip it has constructed on Itu Aba Island, and a Chinese state-owned company has revealed plans for the construction of a man-made island in the South China Sea that the Philippines' press claims would act as "a super aircraft carrier."<sup>3</sup>

The region's fishing fleets are integral players in this contemporary resource rush, with China's being both the most numerous and aggressive. In fact the value and importance of the South China Sea's fish stocks may well exceed that of its exploitable reserves of oil and gas, making fish a strategic commodity and a driver of maritime conflict in Asia.

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2. Robert Kaplan, "Explaining the South China Sea," *Stratfor*, August 15, 2012.

3. "Beijing Strangely Silent as Rival Beefs Up Outpost," *Japan Times*, June 2, 2014, <http://www.japantimes.co.jp/news/2014/05/26/asia-pacific/politics-diplomacy-asia-pacific/beijing-strangely-silent-rival-beefs-outpost/>; Lisa Murray, "China Plans to Build Artificial Island in Disputed Waters," *Australian Financial Review*, May 28, 2014.

A final point to make is that although China's rise and increasingly muscular unilateralism has undoubtedly been the trigger for the recent escalation of tensions in the South China Sea, it should not be forgotten that rival intra-ASEAN claims have also played a role.

## The Philippines

The Philippines has been one of the two key Southeast Asian protagonists in the long-running South China Sea imbroglio, the other being Vietnam. Manila occupies eight reefs and islands in the Spratly Island group, as well as Scarborough Shoal to the northwest of Palawan Island, and it has come into conflict with China over ownership of some of these islands, although it has also been at loggerheads with Malaysia, Taiwan, and Vietnam. But maritime tensions with China have clearly risen to the top of the Philippines' security agenda, and they show no signs of cooling any time soon.

The current problems between the Philippines and China date back to China's stealthy occupation of the aptly named Mischief Reef in 1995, when Filipinos woke up one February morning to find a Chinese flag fluttering over the reef, which is well within the Philippines' EEZ but nearly 435 miles from China.

Since then relations have festered through a series of lengthy, but unfruitful diplomatic negotiations, punctuated by increasingly aggressive Chinese land grabs of other islands claimed by the Philippines, notably the Scarborough Shoal.

Scarborough Shoal was the scene of a dangerous confrontation between the Philippines and China in April 2012, when a Philippine maritime surveillance plane discovered eight Chinese fishing vessels at anchor within the shoal. An aging coast guard cutter, the BRP *Gregorio del Pilar*, was dispatched to inspect the Chinese fishing vessels, discovering a large amount of coral, giant clams, and shark among their catch, which the Philippines condemned as illegal.<sup>4</sup>

The Chinese counterclaimed that their fishing vessels were sheltering from a storm when they were harassed by the Philippine navy. As the *Gregorio del Pilar* attempted to arrest the offending fishermen, ships from China's Fisheries Law Enforcement Command (FLEC) intervened, placing themselves between the fishing vessels and the Philippine cutter, preventing any arrests.<sup>5</sup> Manila later withdrew the *Gregorio del Pilar* from the shoal, but China intensified its patrols sending a clear message that it would not retract its claim to the shoal and the adjacent fishing grounds.<sup>6</sup>

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4. Jane Perlez, "Dispute between China and Philippines over Island Becomes More Heated," *New York Times*, May 10, 2012, <http://www.nytimes.com/2012/05/11/world/asia/china-philippines-dispute-over-island-gets-more-heated.html>.

5. Tina G. Santos, "PH, Chinese Naval Vessels in Scarborough Shoal Standoff," *Philippine Daily Inquirer*, April 11, 2012, <http://globalnation.inquirer.net/32341/ph-chinese-naval-vessels-in-scarborough-shoal-standoff>.

6. Tarra Quismundo, "China's Surveillance Ships back at Scarborough Shoal," *Philippine Daily Inquirer*, July 8, 2013, <http://globalnation.inquirer.net/80007/chinas-surveillance-ships-back-at-scarborough-shoal>.

Then in March 2014, FLEC ships began to patrol around Second Thomas Reef, a partially submerged reef that is on the edge of the Philippine's continental shelf and has been garrisoned by Manila since 1999. Regular supply ships from the Philippines have since been chased away by Chinese paramilitary ships, making it abundantly clear that this reef also falls within China's ambit claim to more than 80 percent of the South China Sea.

Under increasing pressure from China, and lacking any real ability to police and protect its offshore islands, Manila has had little choice other than to fall back on traditional diplomacy. Since the Mischief Reef incident nearly 20 years ago, successive Philippine governments have engaged China in direct talks in the hope of curtailing the activities of the Chinese fishing and paramilitary fleets, while seeking a unified ASEAN position on the disputes.

The palpable failure of this strategy, allied with China's more assertive South China Sea posture has forced a change in thinking. Over the past two years, the government of Philippine president Benigno Aquino has pursued a multidimensional approach, combining elements of both soft and hard power. Its soft power tactics are aimed at embarrassing China internationally by publicizing the aggressive tactics used by China's fishing and paramilitary fleets, working with Vietnam to stiffen ASEAN's response, prosecuting infringing Chinese fishermen for breaking Philippine laws, and taking China to the Permanent Court of Arbitration. For example, on May 13, prosecutors in Puerto Princesa on Palawan Island charged nine Chinese fishermen with environmental crimes for illegally taking turtles and other protected sea animals from the waters around Half Moon Shoal.

On the hard-power front, the Aquino government has looked at ways to strengthen its weak maritime capabilities by boosting military spending and acquiring ships and aircraft from overseas, including the United States and Japan. From 2010 to 2012, some 140 defense procurement projects valued at US\$1.6 billion were being considered for funding compared with an average of US\$51 million a year for defense modernization over the previous 15 years.<sup>7</sup> The United States has supplied decommissioned coast guard cutters, and Japan will provide 10 coast guard patrol ships through a yen-denominated loan as part of a naval agreement.<sup>8</sup>

## Malaysia

Malaysia is a significant South China Sea claimant state occupying seven islands in the Spratly group along a nearly 150-mile arc stretching from Louisa Reef in the south, some 160 miles from the Sabah coast, to Investigator Shoal midway between Malaysia and the Philippines. Until recently, Malaysia adopted a relatively low profile on the South China

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7. Ava Patricia C. Avila, "Philippines' Defence Build-Up: Revival of the Self-Reliant Posture," *RSIS Commentaries* 125/2012, July 12, 2012, <http://philippinesintheworld.org/?q=node/1539>.

8. Yoichiro Sato, "Japan Aid to the Philippines a Warning to China," August 29, 2013, East Asia Forum, <http://www.easiaforum.org/2013/08/29/japan-aid-to-the-philippines-a-warning-to-china/>.

Sea, unwilling to jeopardize its traditionally warm ties with China by risking the kind of confrontation that has soured Sino-Filipino and Sino-Vietnamese relations.

It is important to note, however, that Malaysia has not always been so reluctant to forcefully defend its South China Sea claims. In 1999, despite criticism from the Philippines, Kuala Lumpur constructed a two-story concrete building on Investigator Shoal along with a helipad, radar station, and pier. In a formal protest, then Philippine foreign minister Domingo Siazon accused Malaysia of violating ASEAN agreements specifying that member states should not take unilateral action of this kind to prosecute their territorial claims. Interestingly, given Beijing's own recent muscular unilateralism, China joined the Philippines and Vietnam in protesting Malaysia's move at the time, describing the construction as an encroachment on China's territory.<sup>9</sup>

There are clear indications that Malaysia's quiescence in the face of China's South China Sea activism may be coming to an end although the government of Prime Minister Najib Razak is unlikely to emulate the more confrontational approach of Vietnam and the Philippines unless China decides to push the envelope by asserting its rights to islands and reefs claimed by Malaysia. However, Kuala Lumpur has been noticeably unnerved by China's behavior in the South China Sea and stung by Beijing's criticism of Malaysia over the tragic disappearance of Malaysia Airlines Flight 370 in the Indian Ocean in early 2014 and the subsequent loss of all on board, most of whom were Chinese nationals.

In a clear indication that Malaysia wants to strengthen its ability to defend its South China Sea claims, Kuala Lumpur announced in October 2013 the construction of a new naval base at Bintulu, in Sarawak, about 60 miles from Malaysia's James Shoal. This will involve the establishment of Malaysia's first marine battalion drawn from all three services. There have also been discussions with Washington about U.S. support for the new marine force, including training, personnel exchanges, and military acquisitions.<sup>10</sup>

Alarm bells rang in March 2014 when China conducted a military exercise near James Shoal, deploying an amphibious task force including PLA marines and hovercraft. During the exercise, the crew of the PLA ships held a ceremony swearing to defend China's sovereignty, even though Beijing has yet to specify the basis of any claim to the James Shoal, which is a fully submerged reef.<sup>11</sup>

## Indonesia

Indonesia is not a claimant state to any of the disputed maritime features in the South China Sea and has never regarded China as a neighbor in the context of maritime

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9. Rigoberto Tiglao, "Seaside Boom," *Far Eastern Economic Review*, July 8, 1999, 14.

10. Rowan Callick, "Malay Base in Disputed Area," *Australian*, October, 23, 2013, 8.

11. Gregory Poling, "The Philippines' South China Sea Memorial: Sailing into the Wind," *CSIS Commentary*, April 3, 2014, <http://csis.org/publication/philippines-south-china-sea-memorial-sailing-wind>.

delimitation.<sup>12</sup> This has allowed Jakarta to take on the self-appointed role of mediator in intra-ASEAN maritime conflicts and to adopt a low-key approach to China's disputes with fellow ASEAN members, Vietnam and the Philippines. In 2012, for example, Indonesian foreign minister Marty Natalegawa brokered a compromise agreement on the South China Sea when ASEAN, then chaired by Cambodia, failed to deliver its customary joint statement following the 2012 ASEAN Ministerial Meeting, largely because of Chinese pressure on Cambodia not to permit any reference to China's dispute with the Philippines over the Scarborough Shoal.

Indonesia's cautious approach is a reflection of President Susilo Bambang Yudhoyono's government's unwillingness to offend the region's largest and most powerful country, and a major investor and trading partner for Indonesia. In 2012 alone, China pledged US\$19 billion of investment credit and US\$9 billion in infrastructure loans to Indonesia. Like most other countries in Southeast Asia, Jakarta is anxious to reap the benefits of China's meteoric economic growth and consolidate their 2005 bilateral Strategic Partnership Agreement.<sup>13</sup>

Yet the bilateral relationship is not all light and happiness. There is a visible seam of Indonesian anxiety about the extent of China's nine-dash line claim and concerns that it may overlap the northern EEZ of Indonesia's Natuna Island group. This collection of 272 islands is located at the southern end of the South China Sea in Riau Province, nearly 1,250 miles from the Chinese mainland. Aside from its strategic location as the maritime portal to the archipelagic nation and adjacent to vital sea lanes carrying much of Indonesia's trade, the Natunas sit astride rich fishing grounds and one of the world's largest recoverable gas fields.

Jakarta's concerns about Chinese intentions have been heightened by at least three serious incursions into the Natunas' EEZ since 2009 by Chinese fishing boats protected by FLEC ships. In June 2009, the Indonesian navy detained 75 Chinese fishermen in eight boats for illegally fishing in the EEZ of the Natunas, which provoked a blunt demand from Beijing for the immediate return of the fishermen and their boats.<sup>14</sup>

A more serious incident took place the following year, when an Indonesian naval ship detained 10 Chinese fishing boats to the north of the Natunas but well within their EEZ, into which Indonesian officials maintained the fishermen had encroached in a "deliberate and coordinated manner." Within a few hours, two armed FLEC ships arrived, and there was a tense standoff before the fishing vessels were released.<sup>15</sup> A third incident occurred in March 2013, involving Indonesian and Chinese maritime law-enforcement vessels.

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12. Made Andi Arsana, "Is China a Neighbor to Indonesia?," *Jakarta Post*, August 8, 2011, <http://www.thejakartapost.com/news/2011/08/08/is-china-a-neighbor-indonesia.html>.

13. Ristian Atriandi Supriyanto, "Indonesia's South China Sea Dilemma: Between Neutrality and Self-Interest," *RSIS Commentaries* 126/2012, July 12, 2012, <http://www.rsis.edu.sg/rsis-publication/idss/1788-indonesias-south-china-sea/>.

14. Keith Loveard, "The Thinker: Caution over Natuna," *Jakarta Globe*, July 2, 2009, <http://www.thejakartaglobe.com/archive/the-thinker-caution-over-natuna/>.

15. Author's private conversation with a senior Indonesian defense official, Jakarta, September 27, 2012. The incident occurred on June 23, 2010, 65 miles to the east of Natuna Island but well within the island's EEZ.

Anxious to avoid any conflict with China, or to give substance to Chinese claims to the Natunas, the Indonesian government chose to play down these incident although officials privately voiced their misgivings about Chinese intentions and the obvious coordination between the intruding fishing vessels and Chinese maritime agencies.<sup>16</sup> Partly because of these incidents, and the unprecedented deployment of a PLA naval group through the Sunda and Lombok Straits in February 2014, Indonesia has begun to adopt a perceptibly tougher line on the South China Sea, which has moved it closer to the positions of Vietnam and the Philippines.

On March 12, Jakarta announced that China's nine-dash line map outlining its territorial claims in the South China Sea overlapped with the borders of Riau Province and, by definition, the Natuna Islands. This unprecedented public declaration suggests that Indonesia is likely to respond more robustly to any further Chinese incursions into the Natunas and significantly increases the likelihood of a serious maritime incident at sea between ASEAN's largest maritime state and China. Furthermore, the head of the Indonesian armed forces, General Moeldoko, has announced that Indonesia will increase its military presence in Riau Province, including the addition of an army battalion, fighter aircraft, and naval ships, with a larger share of Indonesia's rising defense budget allocated to maritime security.<sup>17</sup>

## ASEAN

The ongoing South China Sea disputes pose both an internal and external dilemma for ASEAN, which remains Southeast Asia's premier multilateral organization. Initially ASEAN gave priority to managing intramural tensions at sea since 4 of its 10 members (Brunei, Malaysia, the Philippines, and Vietnam) are claimant states. However, China's seizure of Mischief Reef from the Philippines in 1995 alerted ASEAN to the reality that China's growing power and maritime ambitions would pose a far greater long-term threat to ASEAN's cohesion and effectiveness in the absence of an accommodation that would satisfy all parties.

Given the internal tensions within ASEAN over the South China Sea, and the organization's lack of military clout and still nascent defense collaboration, ASEAN unsurprisingly chose the path of dialogue with China in the form of discussions on a code of conduct that it hoped would bind all claimant states, including China, to a set of principles for the peaceful resolution of maritime disputes in the South China Sea. However, this decades-long negotiation has yielded precious few results, with the notable exception of China's agreement in 2002 to sign a nonbinding statement with ASEAN—the DOC—in which all parties pledged to resolve their disputes in a peaceful manner and exercise self-restraint. But the DOC has had little practical effect, and no meaningful code of conduct is likely to be signed while China continues to reject multilateral solutions to what it sees as a set of bilateral problems.

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16. Jim Gomez, "U.S. Assures Manila of 2nd Warship amid Spratlys Row," *Jakarta Post*, November 17, 2011, <http://www.thejakartapost.com/news/2011/11/17/us-assures-manila-2nd-warship-amid-spratlys-row.html>.

17. Ann Marie Murphy, "The End of Strategic Ambiguity: Indonesia Formally Announces Its Dispute with China in the South China Sea," *PacNet* 26, April 1, 2014, <http://csis.org/files/publication/Pac1426.pdf>.

ASEAN's fraying unity on the South China Sea was revealed for all to see in July 2012, when, under pressure from China, the Cambodian chair of ASEAN blocked an attempt by the Philippines to include a reference to the South China Sea disputes in the final communiqué, preventing ASEAN from issuing an annual ministerial statement for the first time in its history. Frustrated by the failure of ASEAN to formally acknowledge and support its dispute with China, and smarting from Beijing's blockade of the Scarborough Shoal, Manila surprised its fellow members by deciding to take China to a UN arbitration court in January 2013. The court has given China until December 15, 2014, to respond to Manila's complaint that China is preventing the Philippines from exploiting waters within its EEZ.<sup>18</sup> Other claimants are likely to await the outcome of the court's finding before deciding whether they, too, might countenance legal action.

Most observers believe that the Philippines and Vietnam are still isolated within ASEAN and that other members will continue to privilege their burgeoning trade and political ties with China over the adoption of a tougher ASEAN stance on the South China Sea. Moreover, as the 2012 ASEAN ministerial meeting demonstrated, China has many levers at its disposal to persuade individual states that it would be futile and counterproductive to confront China publicly over the South China Sea.

But this view may need reassessment as sentiment within ASEAN appears to be shifting in favor of a firmer line. Whether or not this results in action depends on future Chinese behavior and Indonesia's position as the largest and most populous state in ASEAN. If China tones down its strident rhetoric and steps back from the aggressive pursuit of its territorial claims in the South China Sea, then the incentive for ASEAN to reverse its passivity will diminish.

As ASEAN's swing state, a more resolute Indonesia could tip the balance in favor of the Philippines and Vietnam, particularly if Malaysia were to follow suit. A further unknown is the likely stance of the new Indonesian president-elect, Joko Widodo. But the auguries are not good for a peaceful resolution of Southeast Asia's most serious and intractable strategic challenge, as China shows no sign of taking a backward step and the ASEAN states most affected increasingly look to counterstrategies beyond ASEAN.

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18. Aipeng Soo, "China Rejects UN Role in Dispute," *Australian Financial Review*, June 6, 2014.

# 7 | U.S. Strategy Seeks to Calm the Roiled Waters of the South China Sea

*Bonnie S. Glaser*

Speaking at the July 2010 annual meeting of ASEAN Regional Forum, Secretary of State Hillary Clinton set out the key elements of U.S. policy toward the South China Sea. These included: (1) maintenance of freedom of navigation and open access to Asia's maritime commons; (2) respect for international law in the South China Sea; (3) encouragement of a "collaborative diplomatic process" by claimants for resolving the various territorial disputes without coercion; (4) opposition to the use or threat of force by any claimant; (5) U.S. neutrality on the question of sovereignty; (6) encouragement to claimants to pursue their claims in accordance with UNCLOS, including that maritime claims derive from legitimate claims to land features; and (7) U.S. facilitation of initiatives and confidence building measures consistent with the 2002 ASEAN-China DOC and support for the establishment of a full code of conduct.<sup>1</sup> These elements of U.S. policy largely remain in place today, providing a framework for the U.S. approach to the South China Sea.<sup>2</sup>

Rising tensions in the South China Sea nevertheless continue to challenge the Obama administration's efforts to preserve peace and stability in the region and ensure that China rises peacefully by binding China into a rules-based system. Increased friction is also complicating U.S. attempts to reassure America's allies and partners in Asia concerned about the strategic implications of China's growing power in the region. In addition to frequent confrontations over fishing rights, hostilities have flared between Vietnam and China over drilling rights in disputed waters, sparked by China's positioning of a deep-sea oil rig off the Paracel Islands in early May. Another worrisome flash-point is between the Philippines and China in the area around Second Thomas Shoal, where Chinese coast guard vessels have attempted to thwart the delivery of supplies to Filipino marines deployed on a rusting warship that has been in place since it was

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1. Hillary Rodham Clinton, remarks at press availability, Hanoi, Vietnam, July 23, 2010, <http://m.state.gov/md145095.htm>.

2. For an analysis of U.S. policy, see Taylor Fravel, *Policy Report: U.S. Policy towards the Disputes in the South China Sea since 1995* (Singapore: RSIS, 2014), <http://taylorfravel.com/documents/research/fravel.2014.RSIS.us.policy.scs.pdf>.

deliberately beached on the submerged reef in 1999. Land reclamation activities by China on several land features as well as construction of military and nonmilitary facilities by several claimants are undermining U.S. efforts to prevent a change in the status quo in the South China Sea.

In response to these challenges, the United States is pursuing a multifaceted strategy that is aimed at deterring the use of coercion, reducing the risk of miscalculation and confrontation among claimants, and persuading China to adopt a less confrontational policy toward its neighbors in the South China Sea. The strategy includes the following features: (1) explicitly criticizing China for taking destabilizing actions; (2) actively mobilizing support for legal dispute mechanisms; (3) bolstering U.S. military presence and capabilities; (4) enhancing capabilities of allies and partners; (5) encouraging Southeast Asian claimants to work together; (6) backing multilateral frameworks for cooperation, risk reduction, and dispute resolution; (7) putting forward specific suggestions aimed at reducing tensions; (8) strengthening regional security and economic architecture; and (9) reinforcing ASEAN and U.S.-ASEAN Ties, and promoting ASEAN unity and centrality. This paper explains each of these evolving elements of U.S. strategy.

## Issuing Tougher Rhetoric Criticizing China

Rising U.S. concern about tensions surrounding maritime territorial disputes in Asia has prompted the Obama administration to adopt a tougher stance and finger China more explicitly than in the past. In the aftermath of China's establishment of an ADIZ in the East China Sea in November 2013, U.S. statements criticizing Chinese behavior in the South China Sea became noticeably sharper. Following the U.S. declaration that it would not recognize China's East China Sea ADIZ, Secretary of State John Kerry warned China to refrain from taking similar unilateral actions elsewhere in the region, particularly over the South China Sea.<sup>3</sup> Evan Medeiros, senior director for Asian Affairs at the National Security Council, similarly asserted that the United States would view the setting up of another ADIZ "as provocative and destabilizing development that would result in changes in our presence and military posture in the region."<sup>4</sup>

Then, in testimony to Congress in February, Assistant Secretary of State for East Asia and Pacific Affairs Daniel Russel called for China to clarify or adjust its maritime claims to bring them in accordance with customary international law. While reiterating that the United States does not side with one claimant against another, Russel declared that claims in the South China Sea that are not derived from land features are "fundamentally flawed." He also voiced firm opposition to the use of intimidation, coercion, or force to assert a territorial claim. Moreover, Russel censured specific Chinese actions in the South China

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3. John Kerry, remarks with Philippine foreign secretary Albert del Rosario, December 17, 2013, <http://www.state.gov/secretary/remarks/2013/12/218835.htm>.

4. "U.S. Could Change Military Posture If China Expands Air Defense Zone," Kyodo News International, January 31, 2104, <http://www.globalpost.com/dispatch/news/kyodo-news-international/140131/us-could-change-military-posture-if-china-expands-air->

Sea, including restrictions imposed on access to Scarborough Reef, pressure on the Philippines long-standing presence at Second Thomas Shoal, putting hydrocarbon blocks up for bid in an area close to another country's mainland, and the updating of fishing regulations covering disputed areas. Such steps, he maintained, "have raised tensions in the region and concerns about China's objectives."<sup>5</sup> Four months later, in testimony to Congress in June on U.S.-China relations, Russel again highlighted "China's increasingly coercive efforts to assert and enforce its claims in the South China and East China Seas." Noting that Beijing's neighbors are "understandably alarmed" by China's behavior, he maintained that China's actions are "raising tensions and damaging China's international standing." Choosing to "willfully disregard diplomatic and other peaceful ways of dealing with disagreements and disputes in favor of economic or physical coercion is destabilizing and dangerous," Russel said.<sup>6</sup>

## Mobilizing Support for Legal Dispute Settlement Mechanisms

U.S. support for the application of international law to resolve disputes in the South China is strong and growing. The Obama administration has strongly endorsed Manila's decision to institute arbitral proceedings under Annex VII to UNCLOS challenging China's maritime jurisdiction. After the Philippines submitted the memorial to the UN tribunal on March 30, 2014, the State Department called for all countries to "respect the right of any states party, including the Republic of the Philippines, to avail themselves of the dispute resolution mechanisms provided for under the Law of the Sea Convention." The spokesman also expressed hope that the case would serve "to provide greater legal certainty and compliance with the international law of the sea."<sup>7</sup> The following month, in a joint press conference with President Aquino, President Obama said that he had told the Philippines' leader that "the United States supports his decision to pursue international arbitration concerning territorial disputes in the South China Sea."<sup>8</sup>

Earlier this year, the United States launched a quiet campaign to encourage other governments to endorse the right of nations to use international legal dispute mechanisms to resolve territorial disputes. In addition to being consistent with U.S. policy to promote a rules-based system and compliance with international law, the effort is clearly aimed at demonstrating to Beijing that it will pay a reputational cost for refusing to participate in the case filed by the Philippines.

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5. Daniel Russel, "Maritime Disputes in East Asia" (testimony before the House Committee on Foreign Affairs Subcommittee on Asian and the Pacific, February 5, 2014), <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

6. Daniel Russel, "The Future of U.S.-China Relations" (testimony before the Senate Foreign Relations Committee, June 25, 2014), <http://www.state.gov/p/eap/rls/rm/2014/06/228415.htm>.

7. U.S. Department of State, "Philippines: South China Sea Arbitration Case Filing," press statement, March 30, 2014, <http://www.state.gov/r/pa/prs/ps/2014/03/224150.htm>.

8. Remarks by President Obama and President Benigno Aquino III of the Philippines in Joint Press Conference, April 28, 2014, <http://www.whitehouse.gov/the-press-office/2014/04/28/remarks-president-obama-and-president-benigno-aquino-iii-philippines-joi>.

So far, the policy has yielded some positive results. The joint statement signed by Obama and Malaysian prime minister Najib Razak in late April 2014 includes the sentence: “The two leaders underscored the importance of all parties concerned resolving their territorial and maritime disputes through peaceful means, including international arbitration, as warranted, and in accordance with universally recognized principles of international law, including the United Nations Convention on the Law of the Sea.”<sup>9</sup>

The joint statement issued after a meeting of the defense ministers from Australia, Japan, and the United States on the margins of the Shangri-La Dialogue called on claimants in the East and South China Seas “to pursue claims in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea” and “reaffirmed their support for the right of claimants to seek peaceful resolution of disputes, including through legal mechanisms, such as arbitration, under the convention.”<sup>10</sup>

The Group of Seven (G7) Leaders Statement released after their meeting in Brussels in early June included for the first time a section on maritime navigation and aviation. Noting that the members were “deeply concerned” by tensions in the East and South China Sea, the statement urged “all parties to clarify and pursue their territorial and maritime claims in accordance with international law.” It also expressed support for “the rights of claimants to seek peaceful resolution of disputes in accordance with international law, including through legal dispute settlement mechanisms.”<sup>11</sup>

Japan and Germany have also strongly endorsed the Philippine government’s arbitration initiative. In addition, the European Parliament adopted a resolution approving a report that expressed support for the Philippines’ choice to undertake arbitration under UNCLOS to clarify its maritime entitlements in the South China Sea.

At the ASEAN senior official meetings in Yangon, Myanmar, in mid-June, Danny Russel highlighted the opportunity presented by the International Tribunal on the Law of the Sea’s (ITLOS) invitation to China to participate in the arbitration proceedings. Noting that the tribunal declared it would be open until mid-December for China to submit clarification of the legal basis of its claim, he told his counterparts at the ASEAN Regional Forum that the arbitration “opens the door to the removal of some ambiguity regarding China’s claims that has helped fuel tension and uncertainty in the region.”<sup>12</sup>

In addition to mobilizing support for the application of legal dispute mechanisms, U.S. officials are strongly encouraging all claimants to clarify their claims in the South China

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9. Joint Statement by President Obama and Prime Minister Najib of Malaysia, April 27, 2014, <http://www.whitehouse.gov/the-press-office/2014/04/27/joint-statement-president-obama-and-prime-minister-najib-malaysia-0>.

10. Joint Statement from the Japan-U.S.-Australia Defense Ministers Meeting, May 30, 2014, <http://www.defense.gov/releases/release.aspx?releaseid=16726>.

11. G7 Leaders Statement—Foreign Policy, Brussels, Belgium, June 4, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/04/g-7-leaders-statement-foreign-policy>.

12. Daniel Russel, “Regional Telephone Conference in Rangoon, Burma,” U.S. Department of State, June 10, 2014, <http://www.state.gov/p/eap/rls/rm/2014/06/227412.htm>.

Sea in terms consistent with international law. China is not the only nation whose claim in the South China Sea is inconsistent with international law, but its nine-dash line is the most expansive and ambiguous claim. The decision to press claimants to bring their claims in line with international law, especially UNCLOS, derives from the belief that the ambiguity in the various claims creates the potential for miscalculation, confrontation, and conflict.

## Bolstering U.S. Military Presence and Capabilities in the Region

The United States is continuously strengthening its military capabilities in the Asia-Pacific region. President Obama and President Aquino announced a 10-year Enhanced Defense Cooperation Agreement (EDCA) that provides a legal framework for the increased rotational presence of American forces in the Philippines. Late last year the U.S. Navy began deploying six P-8A Poseidon aircraft to Japan, providing improved intelligence, surveillance, reconnaissance, and submarine hunting capabilities. Additional deployments to Japan include two Global Hawks at Misawa, F-22 fighter aircraft at Kadena, and MV-22 Ospreys on Okinawa. Two additional ballistic missile defense ships will soon be deployed to Japan.

Although the U.S. military has not directly intervened in any of the recent confrontations in the South China Sea, it at times deploys assets to surveil hostilities and signal U.S. interests in a peaceful outcome. For example, when China challenged the Philippines operation to resupply its marines on Second Thomas Shoal in March 2014, the United States flew a Navy P-8 Poseidon surveillance aircraft overhead and, according to one source, positioned a navy ship at a distance.<sup>13</sup> The United States also flew surveillance aircraft over the area where Chinese and Vietnamese ships faced off over the deployment of a Chinese deepwater oil rig in disputed waters between the Paracel Islands and Vietnam's coast.<sup>14</sup>

The U.S. military continues to carry out freedom of navigation operations challenging China's maritime claims. Operations are conducted regularly targeting China over what the United States believes are excessive claims about its maritime boundaries and jurisdiction over airspace above its EEZ; China's domestic law criminalizing survey activity by foreign entities in its EEZ; and its insistence that foreign warships to obtain permission before peacefully transiting its territorial seas.<sup>15</sup>

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13. Author conversation with Chinese foreign ministry official, April 30, 2014.

14. The United States flew EP-3 and RC-135 aircraft just 200 meters above the Chinese oil rig on June 30. See "US Dispatched Aircraft over Chinese Oil Rig," *Thanh Nien News*, July 3, 2014, <http://www.thanhniennews.com/politics/us-dispatched-aircraft-over-chinese-oil-rig-vietnamese-coast-guard-28037.html>; "Tường thuật từ Hoàng Sa ngày 20.6: Trung Quốc tăng thêm máy bay quân sự, tàu quét mìn," *Thanh Nien News*, June 20, 2014, <http://www.thanhnien.com.vn/pages/20140620/tuong-thuat-tu-hoang-sa-ngay-20-6-trung-quoc-tang-them-may-bay-quan-su-tau-quet-min.aspx>.

15. U.S. Department of Defense, "Freedom of Navigation Report for Fiscal Year 2013," March 6, 2014, [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY2013 percent20DOD percent20Annual percent20FON percent20Report.pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY2013%20percent20DOD%20percent20Annual%20FON%20Report.pdf).

# Enhancing Defensive Capabilities of Allies and Partners

A key element of the U.S. rebalance to Asia is increasing the capabilities of U.S. allies and partners to enhance awareness of activities taking place in the maritime domain and adequately police their territorial waters. As Defense Secretary Hagel said in his speech at the Shangri-La Dialogue, “The United States also remains committed to building the capacity of allies and partners in the region through as many as 130 exercises and engagements, and approximately 700 port visits annually. And across the Asia-Pacific region, as part of the rebalance, the United States is planning to increase Foreign Military Financing by 35 percent, and military education and training by 40 percent by 2016.”<sup>16</sup> U.S. maritime security assistance to Southeast Asia will exceed \$156 million in 2014–2015.

Provision of assistance to the Philippines, which has aging naval assets and is facing pressure and intimidation from China, is at the top of the list. Since 2011 the United States has transferred two decommissioned coast guard cutters to the Philippines and may soon be providing a third. Joint exercises are being conducted between the U.S. Navy and Philippines navy. In June 2014, the two nations held a weeklong naval drill approximately 80 miles from Scarborough Shoal, where Chinese vessels maintain continuous patrols. Although such exercises, known as Cooperation Afloat Readiness and Training (CARAT) have been held previously, this is the first time they have taken place in waters disputed between China and the Philippines. The recently signed EDCA will contribute to enhancing the Philippines maritime security by enhancing the Armed Forces of the Philippines (AFP) maritime domain awareness capacity, increasing interoperability with U.S. forces, strengthening the AFP for external defense, and increasing capacity building toward AFP modernization.<sup>17</sup>

The United States has also encouraged its allies to contribute to bolstering the capability of the Philippines to provide for its security. Japan has answered the call by agreeing to provide 10 new multi-role patrol boats for the Philippine Coast Guard, the first two or three of which will be delivered in the third quarter of 2015. The patrol boats will enhance the ability of the Philippine coast guard to defend the nation’s EEZ.

In December 2013, the United States announced a three-year \$40 million program to help the Philippines bolster its maritime domain awareness.<sup>18</sup> That same month, Washington declared that it would provide an additional \$32.5 million to help Southeast Asian nations protect their territorial waters and security freedom of navigation. The majority of the funds, \$18 million, will go to Vietnam to strengthen its maritime capacity, including

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16. Chuck Hagel, speech at Shangri-La Dialogue, May 31, 2014, <https://www.iiss.org/en/events/shangri-la-dialogue/archive/2014-c20c/plenary-1-d1ba/chuck-hagel-a9cb>.

17. Q&A on the Enhanced Defense Cooperation Agreement, April 28, 2014, <http://www.gov.ph/2014/04/28/qna-on-the-enhanced-defense-cooperation-agreement/>.

18. “U.S. Commits \$40 mil. to boost Philippines’ Maritime Security,” Kyodo, December 17, 2013, <http://www.globalpost.com/dispatch/news/kyodo-news-international/131217/us-commits-40-mil-boost-philippines-maritime-security>.

funds for five fast patrol boats for the Vietnamese coast guard. The U.S. Navy and Coast Guard have also stepped up training engagements with Vietnam since 2010. Although details have not yet been made public, a deal between Tokyo and Hanoi is in the works to provide Japanese patrol boats to Vietnam in early 2015.<sup>19</sup>

## Backing Multilateral Frameworks for Cooperation, Risk Reduction, and Dispute Resolution

A central component of U.S. policy is to promote the establishment of a reliable multilateral framework for cooperation, risk reduction, and dispute resolution. Progress was made in this regard in April 2014 at the West Pacific Naval Symposium meeting in Qingdao, China, where 20 maritime chiefs endorsed CUES. Although not legally binding, CUES is an agreement aimed at achieving a standardized protocol of safety procedures, basic communications, and basic maneuvering instructions for naval ships and aircraft during unplanned encounters at sea.

The United States is also actively engaged in ASEAN Defense Ministers Meeting Plus (ADMM-Plus) activities. Established in 2010, the ADMM-Plus is a platform for ASEAN and its eight dialogue partners to strengthen security and defense cooperation for peace, stability, and development in the region. The participants are pursuing cooperation in five areas: maritime security, counterterrorism, humanitarian assistance and disaster management, peacekeeping operations, and military medicine. An active agenda of tabletop, field training, and maritime exercises are being implemented.

The United States is also attempting to create momentum for progress on establishing a legally binding COC on South China Sea. Discussions between China and ASEAN on a COC have resumed, but are not making much headway. Indonesia circulated a draft of the COC in 2012 that includes confidence building, conflict prevention, and conflict management measures. In addition to being legally binding, the United States hopes that the COC will contain dispute settlement mechanisms. The role that the United States can play in promoting the COC is limited, however, as it is not directly involved in the negotiations.

## Encouraging Southeast Asian Claimants to Work Together

While not discouraging the claimant states in Southeast Asia from talking bilaterally with China about their territorial disputes, the United States has encouraged them to consult with each other multilaterally. After several years of seeking to convene a meeting of the

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19. "Vietnam Set to Receive Japanese Patrol Boats Next Year," Reuters, June 2, 2104, <http://cimsec.org/tag/vietnam/>.

Southeast Asian claimants, Manila successfully organized a gathering of three of the four Southeast Asian claimants to the South China Sea in February 2014—Brunei refused to participate. At the meeting, Malaysia, the Philippines, and Vietnam discussed their concerns about China's recent actions in the disputed waters and agreed to cooperate to negate China's nine-dash line. Behind this approach is a belief that if the Philippines, Vietnam, Brunei, and Malaysia could resolve their territorial disputes, they would be in a stronger position to present a united front toward China. This would put pressure on Beijing to accept whatever they agree on as the starting point for any negotiations and accept negotiations in the multilateral format that the ASEAN claimant states support. Even if an agreement can be reached among the ASEAN claimants, the fact that the discussions are taking place could instigate Beijing to negotiate more seriously on the COC.

## Putting Forward Suggestions of CBMs

The United States has long resisted proposing specific CBMs to reduce tensions in the South China Sea. Instead, it has looked to ASEAN to determine how CBMs should be applied in its bilateral discussions with China on implementation of the 2002 DOC and creation of a COC. Recently, however, the Obama administration has publicly encouraged consideration of specific CBMs. This is likely a result of U.S. frustration about the slow pace of progress of China-ASEAN discussions as well as growing concern about the potential for confrontation and conflict posed by the increased pace of destabilizing actions being taken in the South China Sea.

At the ASEAN senior officials meetings in Yangon in June, Danny Russel proposed that claimant states identify specific behavior that they consider provocative when taken against them, and establish a voluntary freeze on those sorts of actions on the condition that all the other claimants agree to do the same. Specifically, Russel suggested that the claimants pledge to not occupy land features in the South China Sea that remain unoccupied and stop large-scale reclamation projects and the construction of military facilities.<sup>20</sup>

## Strengthening Regional Security and Economic Architecture

Helping to build up the region's security and economic institutions is often referred to by U.S. officials as a pillar of the U.S. rebalance to Asia. The United States views multilateral cooperative security regimes and institutions as a valuable complement to bilateral alliances and relationships in the Asia-Pacific. Multilateral forums present opportunities to enforce shared norms and restrain any individual nation from engaging in coercion or intimidation. In addition, multilateral forums contribute to building greater cooperation in nontraditional security areas such as antipiracy, counterterrorism, and disaster management.

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20. Russel, "Regional Telephone Conference."

As national security adviser Susan Rice said in a speech at Georgetown University, such institutions “allow nations to develop ideas, share best practices, address disputes constructively, and nurture a sense of shared responsibility. Asia’s regional institutions are essential to delivering more effective solutions than any one nation can muster on its own.”<sup>21</sup> Through the building of stronger multilateral security architecture, it is hoped that cooperation can move beyond dialogue to management and possibly resolution of security problems.

The Obama administration has substantially strengthened United States participation in multilateral forums in Asia. The United States is now a full member of the East Asia Summit (EAS), and President Obama plans to attend his third EAS in November 2014, having missed the 2013 EAS because of the U.S. government shutdown. In addition, the United States remains an active member of the Asia Pacific Economic Cooperation (APEC) forum, which is the primary institution dedicated to created sustainable economic growth and prosperity in the Asia-Pacific region. The United States is also pushing to conclude the Trans-Pacific Partnership (TPP), which is an ambitious, comprehensive, and high-standard agreement that will include nearly 40 percent of global GDP.

## Reinforcing ASEAN and U.S.-ASEAN Ties, Promoting ASEAN Unity and Centrality

ASEAN is a central and strategic player in the region, not only in the rebalance to Asia but also in the building of strong regional security architecture. Based on the assessment that a robust, united ASEAN is beneficial to American interests in the Asia-Pacific region, the United States is deeply commitment to promoting ASEAN centrality and unity, and to strengthening U.S. ties with ASEAN. The Obama administration underscored the importance of ASEAN to U.S. interests when Secretary of State Kerry visited the ASEAN headquarters in Jakarta in February 2014 and met with Secretary-General Le Luong Minh and other senior ASEAN Secretariat officials.

In recent years, the United States has created institutionalized mechanisms to strengthen its relationship with ASEAN. These include an annual U.S.-ASEAN Leaders Meeting, the sixth of which will be held later this year, and a U.S.-ASEAN Defense Forum, which was inaugurated in April 2104. Numerous programs have been created as part of the U.S.-ASEAN Enhanced Partnership Plan of Action 2011–2015, including the U.S.-ASEAN Partnership for Good Governance, Equitable and Sustainable Development, and Security. The United States is also strengthening economic ties with ASEAN through the U.S.-ASEAN Expanded Economic Engagement initiative established in 2012.

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21. Susan E. Rice, “America’s Future in Asia” (remarks as prepared for delivery at Georgetown University, November 20, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/21/remarks-prepared-delivery-national-security-advisor-susan-e-rice>.

## Conclusion: Shaping China's Choices

U.S. strategy toward the South China Sea is evolving in response to rising tensions in the territorial disputes in the South China Sea and in particular to destabilizing Chinese actions. A key goal of this strategy is to persuade Beijing that its “salami-slicing” tactics and intimidation against its neighbors to change the status quo in the South China Sea in its favor are both counterproductive and self-defeating. The United States seeks to shape China's policy choices by increasing the costs to Beijing of using coercion against its neighbors and flouting international law. Possible costs for China include deteriorating relations with its neighbors; a blemished image as a nation that violates international law; closer ties, including expanded military cooperation, between the United States and China's neighbors; and increased U.S. diplomatic, military, and security involvement in the South China Sea dispute.

Changing Beijing's calculation of the costs and benefits of its strategy to advance Chinese interests in the South China Sea and the broader region will not be easy, however. Asserting Chinese claims in the South China Sea is a popular strategy domestically and is bolstering the Chinese Communist Party's legitimacy. Moreover, President Xi Jinping places great emphasis on building China's maritime power and has repeatedly said that he will not compromise or make concessions on disputes over sovereignty and territorial integrity. Finally, the Chinese are betting that U.S. willingness to intervene in South China Sea territorial disputes will be limited and that China's neighbors will eventually accommodate its interests.

# 8 | Confidence Building without Political Will in the South China Sea Disputes

*Euan Graham*

First, I will consider how recent tensions and developments in the South China Sea have broken the habits of confidence and trust building between ASEAN claimants and China, necessitating a shift of paradigm toward crisis management. Second, I will look at how some Southeast Asian claimants are actively pursuing maritime cooperation and trust building, bilaterally at the sub-ASEAN level—assessing the potential for wider “cross-bracing” in this regard. Passing consideration is given to the role of Taiwan. I will further highlight recent efforts to establish “hotline” communications links between states involved in the South China Sea, weighing their potential as a tool for building confidence and/or crisis management.

Against the current backdrop of sustained tension, any discussion about confidence and trust building in the South China Sea needs to proceed from the basic “challenge” question: what CBMs are realistic or achievable in the prevailing security environment, where trust is low or absent between China and certain Southeast Asian claimant states? Although the China–Southeast Asia dynamic is the obvious priority from a conflict prevention perspective, the shortfall of trust between China and Southeast Asian claimants in the South China Sea is driving the latter to pursue maritime cooperation with each other, as a hedge against China’s increased assertiveness. Cooperation with outside parties is also growing, but lies outside of the limited scope of this paper, which focuses on China, Taiwan and ASEAN in the South China Sea.

If trust and confidence has yielded to distrust and tension in the South China Sea, it is not for lack of effort or intellectual input on the part of Track II engagement. A great deal of attention at Track I.5 and Track II fora has been devoted to confidence and trust building in the South China Sea, dating back to the series of workshops organized and hosted by Indonesia in the mid-1990s, which recommended an array of CBMs designed to encourage trust and cooperation among territorial claimants, ring-fencing them as far as possible from sensitivities around sovereignty and military activities. Indeed, the Jakarta workshop recommendations fed into the DOC in 2002, still the most comprehensive policy attempt at

an overarching CBM for the South China Sea. A related stream of academic and Track II work has concentrated on functional cooperation in such areas as joint development of natural resources, marine scientific research, and environmental conservation.<sup>1</sup> If the trend of confidence and trust building in the South China Sea has slipped into reverse gear since the late 2000s, the root factor is rather a failure of political will.

Since around 2009, China's repeated official endorsements of the nine-dash line and growing physical assertiveness within it have merged to form the primary maritime security concern for South China Sea littoral states that perceive their sovereignty and marine resources as directly threatened by China's excessive claims, if not outright expansionism. This basic concern has caused nonclaimant states in the international community to identify their national and wider interests as being at stake in the South China Sea, in terms of safeguarding freedom of navigation and conserving regional stability. Threat perceptions toward Beijing are not shared equally among or even within individual ASEAN members, all of whom depend on China for their continued economic prosperity. Nor is China perceived as the only source of potential threat from ASEAN states, which benchmark their capabilities partly with one another in mind as well as against internal and nonstate maritime security challenges. Nonetheless, the current high level of strategic interest in the South China Sea is sustained with China as its primary reference point, and the security concerns generated by Beijing's mounting capabilities and growing assertiveness as a rising maritime power.

By the same token, the lack of political will that has undermined confidence and faith in the DOC and other specific maritime CBMs is not unique to China, but to some extent shared among all of the active claimants to the Spratly Islands: China, Taiwan, Vietnam, Malaysia, and the Philippines.<sup>2</sup> All have attempted to push the envelope of maritime jurisdiction and advance their sovereignty claims competitively, contributing to a collective process of "territorializing" the South China Sea at the expense of cooperative outcomes in the spirit of the DOC, which sought to "build trust and confidence" among the claimant parties. Brunei, which is normally bracketed among the Southeast Asian territorial claimants, has done nothing physically to enforce its sovereignty in the Spratly Islands or build up structures on the solitary feature that falls within its EEZ. It can therefore be considered a nominal claimant, but one with important equities at stake in the South China Sea. As such, Brunei is well positioned and motivated as a niche contributor to CBMs, in conjunction with the various strands of ASEAN-led engagement, and alongside the more activist ASEAN nonclaimant members, Singapore and Indonesia.

Indonesia would prefer to be cast in the role of a neutral party within ASEAN, "leading from behind" by nudging along the COC process with China. China has also appeared

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1. Scott Snyder, Brad Glosserman, and Ralph Cossa, "Confidence Building Measures in the South China Sea," *Issues and Insights* 2-01 (August 2001), <http://csis.org/files/publication/issuesinsightsv01n02.pdf>; Sam Bateman and Ralf Emmers, eds., *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (London: Routledge, 2009).

2. The Paracels, although currently front and center of the tensions between Vietnam and China, are essentially a bilateral dispute between Beijing and Hanoi.

comfortable with Indonesia playing this role. But although Jakarta does not claim territory in the Spratly Islands, its EEZ generated from the Natuna Islands is potentially bisected by China's claims in the South China Sea. If a maximalist interpretation of the dashed line is applied, this makes Indonesia party to a maritime dispute with China, something Jakarta fervently wishes to avoid. Indonesian diplomats have in the past been content to leave sleeping dragons lie by not drawing attention to this overlap, given verbal reassurances received from Beijing in the early 1990s and the fact that energy exploration offshore from Natuna has not been disrupted, kinetically or diplomatically. Indonesia is further concerned not to confer unnecessary legitimacy on China's dashed line as a basis for potential boundary delimitation. As a vocal defender of the United Nations Convention on the Law of the Sea (UNCLOS), Jakarta has consistently maintained a firm diplomatic line questioning the legality of China's dashed-line claims. Since 2010, however, Indonesia's security establishment has grown increasingly alarmed at a continuing pattern of incidents and the encroachment of Chinese fishing vessels in the vicinity of the Natunas.<sup>3</sup>

Brunei played a steadying role as ASEAN chair in 2013, on the heels of Cambodia's divisive and wayward year in the driver's seat. It has since taken the lead on an initiative that is relevant for both confidence building and potentially crisis management in the South China Sea. In its capacity as cochair of the ADMM-Plus Maritime Security Experts Working Group, Brunei is currently moving to set up a network of bilateral "hotlines," or, to use the preferred term, direct communications links (DCLs), between all 10 ASEAN defense ministers. This initiative holds out some promise in terms of cross-bracing habits of communication and consultation on maritime security and South China Sea issues across ASEAN's diverse members. Brunei's DCL concept paper was unanimously endorsed by ASEAN defense ministers at the ADMM summit in Myanmar in May 2014, with an ambitious deadline for implementation set for the ninth ADMM summit being hosted by Malaysia in 2015.<sup>4</sup> However, to date, the evidence on the utility of regional defense hotlines beyond confidence building is decidedly mixed when it comes to the acid test of managing incidents at sea and preventing crisis escalation.<sup>5</sup>

Taiwan's role in the South China Sea disputes is peripheral compared with China's, but as a mirror-image claimant of the People's Republic of China lying beyond the ambit of most existing regional maritime CBMs and regimes, including UNCLOS itself, Taiwan is both a player and a potential spoiler that should not be ignored in any consideration of trust in the South China Sea. Moreover, the role of the dashed line (now pointedly incorporating a 10th dash off Taiwan in official maps issued by Beijing in 2013) as a quasi-CBM in cross-strait relations, by dint of common claims, adds an extra dimension to the general discussion of confidence and trust building in the South China Sea, and is worthy of

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3. Leo Suryadinata, "South China Sea: Is Jakarta No Longer Neutral?," *Straits Times*, April 24, 2014, [www.straitstimes.com/news/opinion/eye-the-world/story/south-china-sea-jakarta-no-longer-neutral-20140424](http://www.straitstimes.com/news/opinion/eye-the-world/story/south-china-sea-jakarta-no-longer-neutral-20140424).

4. "ASEAN Defence Leaders Pledge Support for Hotline," *Brunei Times*, May 21, 2014, [www.bt.com.bn/frontpage/2014/05/21/asean-defence-leaders-pledge-support-hotline](http://www.bt.com.bn/frontpage/2014/05/21/asean-defence-leaders-pledge-support-hotline).

5. Euan Graham, "Maritime Hotlines in East Asia," *RSIS Policy Brief*, May 2014, [www.rsis.edu.sg/rsis-publication/idss/maritime-hotlines-in-east-asia/#.U93vSFYxFFJ](http://www.rsis.edu.sg/rsis-publication/idss/maritime-hotlines-in-east-asia/#.U93vSFYxFFJ).

separate consideration.<sup>6</sup> Taiwan occupies a solitary feature in the Spratlys, Itu Aba, which is also the largest island in the archipelago and one of a bare handful of features with a credible basis (under UNCLOS-consistent principles) for generating its own suite of maritime zones. Taiwan partially civilianized its garrison on Itu Aba a number of years ago but is currently in the process of upgrading facilities on the island. This includes large-scale enhancements to the port that would facilitate a more regular naval presence, a development Beijing would be unlikely to oppose, on grounds that it would eventually inherit this new infrastructure following reunification.<sup>7</sup> The precedent this sets for “copycat” activity by other claimants underlines Taiwan’s spoiler potential in the South China Sea since it is not a party to the DOC nor does it participate in its working group meetings.

Yet Taiwan can offer positive lessons as far as separating maritime CBMs from sovereignty is concerned. In contrast to China’s increasingly trenchant and inflexible position on maritime disputes, Taiwan continues to engage in pragmatic maritime cooperation with Southeast Asian claimants. Relations between Taiwan and the Philippines hit a trough when a Philippines coast guard vessel machine-gunned a Taiwanese fishing vessel in May 2013, killing one crew member. The incident prompted economic retaliation from Taipei and stirred nationalist feelings in Taiwan.<sup>8</sup> However, ties recovered quickly once the Philippine authorities issued an apology. As in the East China Sea, where the conclusion of a fisheries agreement with Japan in 2013 effectively took the heat out of political relations strained by Tokyo’s “nationalization” of the Senkaku islands, Taiwan’s approach toward the Philippines appears to be similarly geared toward gaining marine resource concessions, partly reflecting the influential fisheries lobby in Taiwan.<sup>9</sup> The Philippines and Taiwan have yet to conclude a fisheries agreement, but confidence in the relationship has been restored to the extent that there are indications Manila is contemplating boundary negotiations with Taipei—a highly improbable development five years ago.

One could read into this improving maritime relationship simply as an inverse correlation with the current level of distrust between the Philippines and China in the South China Sea. Nonetheless, Taiwan serves as an example—perhaps *sui generis* in light of the island’s unique status—for the effectiveness of an interests-based approach to maritime disputes that can be pragmatically insulated from sovereignty issues. Fisheries regulation by mutual agreement is to be welcomed generally as a CBM that removes a potential maritime security trigger issue among the various claimant states in the South China Sea. More

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6. Bonnie Glaser, “A Role for Taiwan in Promoting Peace in the South China Sea,” *PacNet* 30, April 16, 2014; Euan Graham, “China’s New Map: Just Another Dash?,” *RUSI Newsbrief*, September 3, 2013, [www.rusi.org/publications/newsbrief/ref:A5225D72CD72F8/](http://www.rusi.org/publications/newsbrief/ref:A5225D72CD72F8/).

7. Michael Gold and Greg Torode, “As Taiwan Beefs Up Prized South China Sea Outpost, Barely a Peep from China,” Reuters, May 25, 2014, [www.reuters.com/article/2014/05/25/taiwan-southchinasea-idUSL3N0O70AV20140525](http://www.reuters.com/article/2014/05/25/taiwan-southchinasea-idUSL3N0O70AV20140525).

8. Floyd Whaley, “Taiwan Demands Philippine Apology for Fisherman’s Killing,” *New York Times*, May 10, 2013, [www.nytimes.com/2013/05/11/world/asia/taiwan-demands-apology-from-philippines-for-fishermans-killing.html?\\_r=0](http://www.nytimes.com/2013/05/11/world/asia/taiwan-demands-apology-from-philippines-for-fishermans-killing.html?_r=0).

9. Linda Jacobson, “Implications of Taiwan-Japan Landmark Fishing Agreement,” in *Tensions in the East China Sea*, ed. Lowy East Asia Program (Sydney: Lowy Institute, December 2013), 37–49, <http://lowyinstitute.org/publications/tensions-east-china-sea>.

fundamentally, as a basic food security challenge the prevailing free-for-all approach toward overstrained fisheries is simply not sustainable.

China, unlike Taiwan, is a party to the DOC. Unfortunately, the recent tendency toward new construction across the Spratlys has exposed the shortcomings of the DOC as a non-binding framework. China may not be the only offender in this regard, but the major land reclamation and new construction under way at several features occupied by China in the Spratlys is in open defiance of Paragraph Five, which calls on signatories to refrain from such activities.<sup>10</sup> In the context of Beijing's consistent diplomatic refrain—that all parties should implement the DOC before substantive negotiations can begin on a binding code—it is difficult to have much confidence in the DOC or its potential successor as meaningful restraints going forward.

Perceptions toward China have instead sharpened within ASEAN, as it becomes increasingly apparent that the new leadership under President Xi Jinping is prepared to assert China's maritime interests in a more coordinated and committed fashion than was the case under Hu Jintao, albeit at greater political cost. Although a continuation of China's hard line toward the Philippines was to be expected as a result of the arbitral proceedings launched by Manila in early 2013, the abrupt rupture in China-Vietnam relations occasioned by the appearance of CNOOC's deepwater platform off the Paracels in May 2014 came as a major surprise to many in the region.

Arguably, one reason for China to deploy the rig within the vicinity of the Paracels was to drive a potential wedge between Vietnam and other ASEAN members, on grounds that the DOC does not specifically cover the islands—Hanoi's original efforts to draft in a reference to them in the 2002 document were rebuffed. Observers may draw parallels in this regard with Scarborough Shoal, a freestanding feature some distance from the Spratlys, where China was able to apply coercive pressure upon the Philippines in isolation.

Yet, there are important differences, too, notably the fact that China already exercises *de facto* control of the Paracels, unlike in the case of Scarborough Shoal prior to April 2012, and may therefore have greater confidence in its surrounding jurisdictional claims. Moreover, the Paracels have the obvious logistical advantage to China of being physically much closer to supporting economic and basing infrastructure on Hainan, albeit still sufficiently remote to raise questions about the commercial viability of piping back any gas found in the areas where CNOOC's rig has been drilling. Diplomatically, the two cases share the apparent aim of isolating ASEAN claimants in such a way as to minimize the possibility for concerted support from other member states. However, the rapid move by ASEAN foreign ministers to register their concerns via a communiqué issued at the May

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10. Paragraph Five of the DOC commits the signatories 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” (see “Declaration on the Conduct of Parties in the South China Sea,” November 4, 2002, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>).

2014 ASEAN summit in Myanmar at least tempered the impression that Vietnam was marginalized within the grouping as the Philippines had been at the ASEAN summit in Cambodia in 2012. Nevertheless, the communiqué stopped short of criticizing China directly, and the ASEAN position remains one of neutrality on the South China Sea maritime disputes.<sup>11</sup>

Despite the media's preoccupation with the conclusion of a COC driven by ASEAN's much-vaunted "centrality" in the process, the momentum of maritime security cooperation, confidence, and trust building among Southeast Asian states on the South China Sea has shifted to other, mainly bilateral tracks. For the frontline Southeast Asian claimants, this is in tacit recognition that neither ASEAN nor the Code is likely to deliver much beyond the current level of unity and mutual support.

Among the Southeast Asian claimants, Vietnam and the Philippines have, for obvious reasons, tended to be most active on pursuing "cross-bracing" maritime cooperation, although it was not until the appearance of China's oil rig off the Paracels that Hanoi and Manila began to cooperate more overtly by, for example, jointly condemning China's actions as a violation of international law during the visit of Prime Minister Nguyen Tan Dung to Manila in late May 2014.<sup>12</sup> Vietnam's diplomacy on the South China Sea has for some years extended beyond the confines of ASEAN to include Australia, India, Japan, the United States, and others. But in the last two years, it has also included a conscious effort to mend fences and pursue maritime cooperation with China with a focus on the Gulf of Tonkin, where agreement was reached between PetroVietnam and CNOOC in June 2013 to expand the existing zone for joint development on either side of the maritime boundary line negotiated in 2000.<sup>13</sup>

The Vietnamese and Chinese navies had conducted joint patrols in the Gulf of Tonkin, displaying a relatively high level of trust and confidence including limited cross-boundary patrolling. In addition, Vietnam and China appeared to be making solid progress on maritime crisis management, establishing hotlines at multiple layers of government, between their defense ministries and agriculture ministries (vis-à-vis fisheries incidents), and at the party level. As recently as April 2014, Vietnam was being singled out by Chinese scholars as a model for managing maritime disputes in the South China Sea.<sup>14</sup> However, when the crisis in maritime relations did occur, all efforts by Vietnamese leaders to raise a response from Chinese counterparts, using the various hotlines in place, were apparently unsuccessful.

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11. Malcolm Cook, "South China Sea: ASEAN Summit Falls Short Again," *Lowy Interpreter*, May 12, 2014, [www.lowyinterpreter.org/post/2014/05/12/South-China-Sea-ASEAN-Summit-falls-short-again.aspx?COLLCC=2063197438&](http://www.lowyinterpreter.org/post/2014/05/12/South-China-Sea-ASEAN-Summit-falls-short-again.aspx?COLLCC=2063197438&).

12. Manuel Mogato and John Ruwitch, "Vietnam, Philippines Jointly Denounce China's Maritime Moves," Reuters, May 21, 2014, [www.reuters.com/article/2014/05/21/uk-southchinasea-idUKKBN0E112A20140521](http://www.reuters.com/article/2014/05/21/uk-southchinasea-idUKKBN0E112A20140521).

13. "Vietnam, China Expand Defined Area for Joint Exploration at Sea," *Vietnam Plus*, June 20, 2013, <http://en.vietnamplus.vn/Home/Vietnam-China-expand-defined-area-for-joint-exploration-at-sea/20136/35789.vnplus>.

14. Li Jianwei, "Managing Tensions in the South China Sea: Comparing the China-Philippines and the China-Vietnam Approaches," *RSIS Working Paper* 273.

Vietnam (along with Singapore) has further taken a lead on naval confidence building among ASEAN members, inaugurating an annual meeting of ASEAN navy chiefs during its 2010 tenure as ASEAN chair, while establishing a number of bilateral communications and coordinated patrol initiatives with individual ASEAN members. Vietnam has concluded a bilateral submarine search and rescue agreement with Singapore (along with Indonesia), demonstrating a significant level of confidence and trust in a fellow ASEAN member.

The Philippines has also recently pursued bilateral maritime security cooperation and boundary agreements with its ASEAN neighbors. In May 2014, a breakthrough was achieved on a maritime boundary agreement with Indonesia, an objective that had eluded both sides over two decades of on-off negotiations.<sup>15</sup> Although the boundary agreement with Indonesia does not directly relate to the South China Sea disputes, it sets a mutually reinforcing precedent for settling boundaries based on legal principles consistent with UNCLOS.

The administration of Benigno Aquino has lately made overtures to improve relations with Malaysia. Yet a failure to make equal progress here should not be surprising given the more problematic baggage of the lingering sovereignty dispute over the eastern Malaysian state of Sabah in the bilateral relationship. It nonetheless demonstrates greater urgency and political will by the Philippine government toward cross-bracing relations with ASEAN rival or co-claimants in the South China Sea. Manila has also sought recently to upgrade security cooperation with nonclaimants such as Singapore.<sup>16</sup>

Malaysia and Brunei are moving more cautiously, while the latter is making a significant contribution at the multilateral level through its hotline/DCL initiative under the ADMM. This in part reflects the geographically shielded nature of their respective South China Sea claims. However, Malaysia has lately been on the receiving end of mixed signals from China in the South China Sea, including a PLA naval foray to James Shoal as well as other less publicized incidents.<sup>17</sup>

In sum, as a reflection of the limitations and constraints on confidence and trust building in the South China Sea, the policy onus needs to shift toward crisis management. Political trust and maritime CBMs are gaining traction on a limited cross-bracing axis among the littoral ASEAN states, centered on bilateral efforts by Vietnam and the Philippines as the frontline claimants that have experienced pressure most directly from China.

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15. Arif Havas Oegroseno, "Indonesia-Philippines Boundary Agreement: Lessons for South China Sea Claimants," *RSIS Commentary*, June 4, 2014.

16. Louis Bacani, "Philippines, Singapore Boost Defense Cooperation," *Philippine Star*, April 3, 2014, <http://www.philstar.com/headlines/2014/04/03/1308374/philippines-singapore-boost-defense-cooperation>.

17. Greg Torode, "PLA Navy Amphibious Task Force Reaches Malaysia 'To Defend South China Sea,'" *South China Morning Post*, March 27, 2013, <http://www.scmp.com/news/asia/article/1200564/pla-navy-amphibious-task-force-reaches-james-shoal-near-malaysia>.

# 9 | Four Legal Issues in Relation to the South China Sea Arbitration

*Bing Bing Jia*

The complexity of the situation in the South China Sea counsels against a comprehensive treatment of all its aspects in this paper, which is instead confined to four of the issues related to the arbitration initiated by the Philippines against China in January 2013 (South China Sea Arbitration) pursuant to Section 2, Part XV and Annex VII, of UNCLOS. The claims of the Philippines are set out in the Notification and Statement of Claim, dated January 2013 (Philippine Notification).

The first issue is that of the interconnectedness of legal issues in the South China Sea, which affects the structure of any legal case. The second issue is of the geographical scale of a possible case that involves the status of the Nansha (Spratly) Islands or Archipelago, among others. The third issue arises from the sequence of procedures under Part XV of UNCLOS. That decides the way in which the jurisdiction of a court or tribunal referred to in Article 287 of UNCLOS may be triggered. Finally, a short exposition of the effect of Article 281 (1), UNCLOS, will be provided to illustrate one special jurisdictional hurdle in the South China Sea Arbitration.

## The Interconnectedness of the Legal Issues in the South China Sea

The legal issues concerning the current situation in the South China Sea are many. They correspond to the different interests held by various stakeholders. To achieve a balance of those interests is an aim not only for the policymakers of the countries in the region but for any ongoing or future peaceful process employed for the settlement of the issues, such as negotiation or arbitration. Any success in achieving that aim requires a comprehensive perspective of the disputes.

That reminds us of the negotiating method of a package deal, to which UNCLOS owes its very existence.<sup>1</sup> This being the common trait of the contemporary law of the sea, a dispute

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1. Tommy T. B. Koh, remarks at the closing session of the Third United Nations Conference on the Law of the Sea, in *The Law of the Sea: Official Text of the U.N Convention on the Law of the Sea* (New York: United Nations, 1983), xxxiv.

is likely to require a comprehensive treatment of all its aspects in order to achieve a meaningful and viable solution. Some disputes may, however, have an even broader scope than the usual type of disputes in this field, and the South China Sea Arbitration is an example par excellence of this broader type of case. Much more may, of course, be said of this view, but for now it is taken for granted.

The South China Sea Arbitration comprises two main and mixed disputes—namely, territorial sovereignty and maritime delimitation. All the claims contained in the Philippine Notification depend on the resolution of this pair of disputes, which carry enormous importance for untangling the intricacies of the whole situation. That dependency of the Philippine claims upon these two disputes is inextricable for two reasons.

First, both China and the Philippines recognize the fundamental principle that “the land dominates the sea” in the law of the sea.<sup>2</sup> It is obvious that the term *the land* in the maxim would have to be clarified as to both its location and ownership before matters relating to the appurtenant areas of sea are considered. In *Qatar v. Bahrain*, the ICJ expressed that “it is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State.”<sup>3</sup> The ICJ made the statement in the course of determining the sovereignty over certain islands, so that relevant coastlines of the parties might be fixed.<sup>4</sup>

The ICJ has been consistent in its treatment of mixed disputes, by always taking the territorial status of the coast as the starting point in the determination of the maritime rights in contention. Its statement in the Aegean Sea Continental Shelf case makes clear that “continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.”<sup>5</sup>

Any case involving overlapping continental shelf areas will fall squarely under the ICJ’s statement. The matter of entitlement can, moreover, only follow after a determination of the relevant coast and baselines, which in turn depends on which state possesses sovereignty over the coast in question.<sup>6</sup> Otherwise, it does not make sense to talk about a hypothetical scenario concerning the extent of a geographical feature’s maritime entitlement, which is probably laid down in UNCLOS anyway, and is thus not being disputed.<sup>7</sup> Delimitation, the case added, “entails some determination of entitlement to the areas to be delimited,” but “is a secondary question to be decided after, and in the light of, the decision

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2. Republic of the Philippines, *Note Verbale* No. 000228, April 5, 2011, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf); People’s Republic of China, *Note Verbale* CML/8/2011, April 14, 2011, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).

3. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain*), 2001 I.C.J. 40, para. 185 (March 16).

4. *Ibid.*, para. 184.

5. Aegean Sea Continental Shelf (*Greece v. Turkey*), 1978 I.C.J. 3, para. 86 (December 16).

6. *Ibid.*, para. 186.

7. Northern Cameroons (*Cameroon v. UK*), 1963 I.C.J. 15, para. 98 (December 2), Judgment of December 2, 1963; ICJ Reports 1963, 15, at 98 (separate opinion of Gerald Fitzmaurice).

upon” the question of entitlement.<sup>8</sup> This reasoning is equally applicable to a court or tribunal operating under Article 288 of UNCLOS.<sup>9</sup> Without being grounded on terra firma, no dispute concerning the interpretation or application of UNCLOS in the South China Sea Arbitration could have much meaning. Here the issue of territorial sovereignty cannot be sidestepped before a court or tribunal turns to the issue of maritime entitlement of islands and the like. Besides the disputes as alleged by the Philippines in the case, contrary to what it has presented to the arbitral tribunal, has always been perceived by China and the Philippines, as well as other littoral states of the South China Sea, as comprising two types of disputes: one of territorial sovereignty, and the other of maritime delimitation.

Thus, in the Declaration on the Conduct of Parties in the South China Sea (DOC),<sup>10</sup> dated November 4, 2002, paragraph 4 says:

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.<sup>11</sup>

Additionally, a joint press statement between China and the Philippines, issued on September 3, 2004, during the state visit of China by then Philippine president Gloria Macapagal-Arroyo, says:

The two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development *pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area*. They agreed to promote the peaceful settlement of disputes in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea.<sup>12</sup>

Thus, China and the Philippines not only agree on the typology of disputes in the South China Sea but they also make no mention of the issues alleged in the Philippine Notification.

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8. Aegean Sea, 1978 I.C.J. 3, para. 83.

9. Art. 288 (1) provides: “A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”

10. Declaration of Conduct of Parties in the South China Sea, November 4, 2002, <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>. Signed by the foreign ministers of the 10 member states of ASEAN and China. An earlier example would be the 1992 ASEAN Declaration on the South China Sea, adopted by the foreign ministers of the then six ASEAN countries at the 25th ASEAN Ministerial Meeting in Manila, with the preamble “Recognizing that South China Sea issues involve sensitive questions of sovereignty and jurisdiction of the parties directly concerned.” See ASEAN Declaration on the South China Sea, July 22, 1992, <http://cil.nus.edu.sg/rp/pdf/1992%20ASEAN%20Declaration%20on%20the%20South%20China%20Sea-pdf.pdf>.

11. Italics added. The italicized part was repeated in Paragraph 5, DOC.

12. Chinese Foreign Ministry, “Joint Press Statement of the Government of the People’s Republic of China and the Government of the Republic of the Philippines” [in Chinese], September 3, 2004.

Be that as it may, a question of importance naturally arises for the arbitrators in the South China Sea Arbitration: can the jurisdiction of the tribunal cover a territorial dispute that admittedly exists in the case? If not, the case falls apart.

Here the second point becomes relevant. If the principle is that the land dominates the sea, there is a general lack of provisions under UNCLOS with regard to the acquisition of territorial sovereignty.<sup>13</sup> This view is based on the general position expressed by the negotiating states during UNCLOS III.<sup>14</sup> In addition, the preamble of UNCLOS affirms that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”

The purpose of inserting that proviso must be that, as UNCLOS cannot cover all rules and practices of international law, customary law on related subject matters will come to the aid of those states parties who find themselves in a void of law in maritime disputes.<sup>15</sup> This applies equally to any case involving historic title, over which UNCLOS is also silent.<sup>16</sup> Where a tribunal addressing a maritime dispute relies on UNCLOS for founding its jurisdiction *ratione materiae*, and finds itself unable to bypass a territorial dispute that underpins the whole case, it may have to proclaim itself to be without jurisdiction.

This remains true where the issue of territorial sovereignty is only one aspect of a dispute concerning the interpretation or application of UNCLOS, but necessary for the resolution of the latter. Given that the aspect of territorial sovereignty is always prerequisite to the settlement of a maritime delimitation dispute,<sup>17</sup> no answer to it attributable to lack of rules under UNCLOS would prevent the dispute from being decided completely under UNCLOS. This characteristic of UNCLOS does not, however, compel an inference that tribunals under Section 2, Part XV, UNCLOS, must therefore possess a kind of incidental jurisdiction over the aspect of territorial acquisition in a given dispute submitted under the section.

There is no such inevitability. Jurisdiction is granted under UNCLOS within such specified limits as contained in Articles 297 and 298, which reflect the purposes and objects of the convention. The lack of substantive rules of territorial sovereignty in UNCLOS leads to an automatic and corresponding lack of jurisdiction on the part of a court or tribunal under

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13. Myron Nordquist, Satya Nandan, and Shabtai Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff, 1989), 5:88, MN 297.1 (referring to Ambassador Galindo Pohl's statement at the second session of the conference in 1974, that there was need to exclude from obligatory jurisdiction “questions directly related to the territorial integrity of States”).

14. Bernard Oxman, “The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980),” *American Journal of International Law* 75 (1981): 211n109.

15. This point has been recognized in *Magallona et al. v. Ermita et al.*, decided by the Supreme Court of the Philippines on July 16, 2011, per Carpio J. (“UNCLOS III [shorthand for the convention as used in the decision] has nothing to do with the acquisition (or loss) of territory.”) Ten other justices concurred in the decision written by the justice.

16. (*Tunisia v. Libya*), 1982 I.C.J. 18, para. 100 (February 24).

17. *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), 2007 I.C.J. 659, para. 114 (October 8).

Article 287 over territorial disputes.<sup>18</sup> The relation of the law of the acquisition of land to that of the sea, broached early in the reference to the ICJ's view in *Qatar v. Bahrain*, smack of a duopoly. This is determined by the nature and content of UNCLOS, and the competence of Article 287 tribunals differs markedly from the statute-based competence of the ICJ in similar cases.<sup>19</sup> Although it is possible to point to a case in which the issue of territorial sovereignty over islands is “implicit in and arises directly out of” a dispute of maritime delimitation,<sup>20</sup> the latter dispute, which is unavoidable in the South China Sea arbitration, would be excluded by China's declaration filed on August 25, 2006 pursuant to Article 298 (1).<sup>21</sup>

In this light, the separation of the territorial sovereignty and maritime delimitation aspects in the South China Sea arbitration, as in the Philippine Notification,<sup>22</sup> would be both artificial and amiss for ignoring the inherent connection between sovereignty, maritime entitlement, and maritime delimitation in the whole picture. On the one hand, to acknowledge the existence of this inherent linkage between those aspects would spell the end of the legal case because of the lack of jurisdiction. On the other hand, to resolve the case without touching on those aspects may not be conducive to a meaningful and enduring settlement.

Finally, it goes without saying that, although no discussion is given here of the point of illegal use of force by the Philippines and Vietnam in the 1970s to occupy some features of the Nansha Islands that belong to China, this point will feature prominently whenever sovereignty over any part of the archipelago pops up in negotiation or adjudication. This point, just as the preceding analysis, is closely linked to the second issue for this paper.

## The Geographical Scope of the Disputes in the South China Sea

The preceding discussion has shown the importance of territorial sovereignty to the disputes in the South China Sea. But what is the extent of sovereignty?

Since at least the 1930s, China has looked upon the islands in the South China Sea as groups. On September 4, 1958, China promulgated the Declaration of the Government of the People's Republic of China on the Territorial Sea (1958 Declaration on the Territorial Sea),<sup>23</sup> which has since become the foundation for China's maritime order. Article 1 not only provided for a 12-nautical-mile territorial sea for China but applied that breadth both to its mainland and coastal islands, and to the outlying islands of Taiwan and its neighboring

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18. Alan E. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction,” *International and Comparative Law Quarterly* 46 (1997): 37, 49–50.

19. *Nicaragua v. Colombia*, 2007 I.C.J. 659.

20. *Ibid.*

21. United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* 62 (2006): 14.

22. Philippine Department of Foreign Affairs, Statement and Notification of Claim, January 22, 2013, para. 7.

23. Chinese Foreign Ministry, “Position Paper,” June 8, 2014, Annex 2, [http://www.mfa.gov.cn/mfa\\_chn/zyxw\\_602251/t1163255.shtml](http://www.mfa.gov.cn/mfa_chn/zyxw_602251/t1163255.shtml); Chinese Foreign Ministry, “China's Indisputable Sovereignty over the Xisha and Nansha Islands,” *Beijing Review* 7 (February 7, 1980): 21.

islands, and island groups of Penghu, Dongha, Xisha, Zhongsha, and Nansha, and so on. This was reaffirmed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, of February 25, 1992 (1992 Law).<sup>24</sup>

China often calls these island groups “islands” and sometimes “archipelagos,”<sup>25</sup> much as the United States and Spain called the Philippine archipelago the “Philippine Islands” in Article III of the 1898 Treaty of Paris concluded between the two countries,<sup>26</sup> or as the United States and the Philippines did in the preamble of the Treaty of General Relations between the United States of America and the Republic of the Philippines, of July 4, 1946.<sup>27</sup> Geographically and legally speaking, the terms *islands* and *archipelago* are interchangeable.

Although UNCLOS is silent about the legal status of mid-ocean or outlying archipelagos, this does not mean that those archipelagos do not exist in the real world. The legal status of such islands, if ever becoming an issue between states, is probably a matter subject to customary law,<sup>28</sup> which may well be analogous to the rules of Part IV of UNCLOS.<sup>29</sup> In any case, absent customary law, countries with outlying archipelagoes would have to justify control over those on some other grounds in international law.<sup>30</sup> The doctrine of historic title could be one possible ground, just as the Philippines had advocated both before and after UNCLOS I in respect to its archipelagic waters, albeit it often met with protests.<sup>31</sup> But, as spelled out in Section A, this factor is outside the purview of UNCLOS and the jurisdiction of the arbitral tribunal.

As geography determines the physical environment in reference to which legal claims are formulated, the Chinese position in the South China Sea, as shown in the 1958 Declaration on the Territorial Sea, reflects that reality. In that declaration, the term *islands* could be understood as archipelagos. Indeed, Article 4 of the declaration applies the straight

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24. People's Republic of China, Law on the Territorial Sea and the Contiguous Zone, February 25, 1992, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf).

25. Stefan Talmon, “The South China Sea Arbitration: Is There a Case to Answer?,” in *The South China Sea Arbitration: A Chinese Perspective*, ed. Stefan Talmon and Bing Bing Jia, 40, 42–44 (Oxford: Hart, 2014).

26. John Bassett Moore, *A Digest of International Law* (Washington, DC: Government Printing Office, 1906), 1:530. “Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following lines.” The term *Philippine Archipelago* appeared later in the title both of the cession treaty between the United States and Spain of 1900 and of the demarcation treaty between the United States and the United Kingdom of 1930.

27. Treaty of General Relations between the United States of America and the Republic of the Philippines 7 UNTS, 4 (“the relinquishment of American sovereignty over the Philippine Islands”).

28. Jens Evensen, “Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos,” in *Official Records of the United Nations Conference on the Law of the Sea*, vol. 1, A/CONF.13/18, 289, 302 (November 29, 1957).

29. A recent study on this topic has reached similar conclusions. See Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (Leiden: Martinus Nijhoff, 2013), 182, 189, 260–261. She proffers evidence both relating to the considerable number of states implementing the straight-baseline system to outlying archipelagos and the general silence of other members of the international community, with the United States being pointedly seen as a persistent objector.

30. Evensen, “Certain Legal Aspects.”

31. Max Sorensen, “The Territorial Sea of Archipelagos,” in *Varia Juris Gentium. Liber Amicorum J. P. A. Francois*, ed. R.J. Alfaro, et. al, 322 (Leiden: A. W. Sijthoff, 1959).

baseline system to all the island groups in the South China Sea, among others. In addition, China's declaration made upon its ratification of UNCLOS in 1996 pointedly reaffirmed Chinese sovereignty over "all its archipelagos and islands as listed in article 2" of the 1992 Law.<sup>32</sup>

In the light of this Chinese practice over the past decades, it is clear that China's perception of the unity of those island groups, both geographically and legally, has been made known. International reaction to such manifestation of China's intention has been remarkably muted, or chiefly aimed at concerns other than the application of the straight baseline system itself.<sup>33</sup>

In short, this approach based on the geographical unity of the islands in the South China Sea suggests that the disputes in this area should be resolved wholesale and between the directly affected of the littoral states. A legal case involving only certain features in any of the groups, tailored to suit the jurisdictional requirements of UNCLOS, runs the risk of rendering ineffectual the overall settlement desired by all states concerned, and may turn real disputes into academic questions to which answers by adjudicative bodies under Article 287 of UNCLOS are not called for. There is the additional risk of incessant and frivolous lawsuits based on the legal status and maritime entitlements of some other insular features in the Nansha Archipelago, among other things, with the knowledge that the group consists of more than 200 such features.

## The Sequence of the Procedural Rules in Part XV, UNCLOS

Interpretation of the provisions of Part XV of UNCLOS has become an interesting exercise for international lawyers over the past decade or so, since the August 2000 award was delivered in the Southern Bluefin Tuna Arbitration.<sup>34</sup> The interest aroused by the intricate layout of the procedures is fully justified, in that any deviation from accepted wisdom regarding the jurisdiction of a court or tribunal referred to in Article 287 may open up possibilities that could destroy a legal case.

Without jurisdiction, the compulsory procedures under Section 2, Part XV, simply do not work. This section is concerned with the way in which those procedures under Section 2 are to be properly triggered. Although the doctrine of *la compétence de la compétence*, explicitly recognized under Article 288 (4), UNCLOS, works in favor of a tribunal or court in determining its own power *ratione materiae*, among others, under Section 2, it becomes operative only if it is unfettered by equally valid rules of Section 1, Part XV.

The South China Sea Arbitration illustrates the interplay between the provisions of Sections 1 and 2, Part XV. The submission here is that the interpretation of some provisions

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32. United Nations, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* 31 (1996): 8.

33. Kopela, *Dependent Archipelagos*, 177.

34. Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), 119 ILR 508 (August 4, 2000).

of Section 1 may well be self-judging for a state party as much as for a court or tribunal under Article 287. The reason is found primarily in the text of the provisions. Article 280 provides that “nothing in this Part impairs the right of any States Parties (sic) to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.” If the state parties in question decided “at any time” to settle disputes by their choice of means, this would surely take precedence over any existing process initiated or to be initiated under Part XV.<sup>35</sup>

There is no need for an adjudicative body under Article 287 to confirm this right before it is resorted to by state parties. Article 281 (1) reflects the precedence thus conferred upon the means chosen by the state parties, by providing that “if the State Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.”<sup>36</sup>

This interpretation is also justified on the grounds that, if a dispute regarding UNCLOS can be unilaterally brought before a court or tribunal possessing compulsory jurisdiction under the convention by any state party at any time without first complying with Article 281 on the pretext that its case is a matter of interpretation or application, it will render Articles 280 and 281, among others, totally useless. In that situation, all that is needed to trigger the compulsory mechanism of Part XV, Section 2 and bypass the requirements of Article 281 is for one state party to allege that there has been a failure to settle under Article 281. Whether that is so obviously constitutes a dispute concerning the interpretation or application of that provision or Article 286. But that course of action clearly contradicts the precedence enjoyed by the procedure of Article 281 under UNCLOS. It cannot be the purpose and object of the convention to allow this happen.

The provision of Article 281 (1) relates to a situation where a court or tribunal under Article 287, Section 2, Part XV, is prevented from exercising jurisdiction over any dispute that may otherwise fall under its jurisdiction.<sup>37</sup> The preventive effect of the provision derives from the existence of a means of peaceful settlement with regard to the dispute in question, which has been previously agreed between the states parties to the dispute (and UNCLOS). The provision assumes great importance, consequently, since its interpretation or application is not, on the strength of its wording, covered by the procedures of Section 2.

Only where the dispute fails to be settled under Article 281 (1) can Section 2 be brought into play under Article 286, with the consequence that a tribunal constituted under

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35. The parties are “complete masters” of the procedures they may use to settle disputes. See Nordquist, Nandan, and Rosenne, *United Nations Convention*, 20.

36. The provision itself does not elaborate on the meaning of the phrase *further procedure*, but it is clear that such procedures cannot but be those included in Part XV, UNCLOS, as a matter of treaty law. Further support of this interpretation can be found in *Southern Bluefin Tuna Case*, 119 ILR 508, para. 56.

37. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, 1998 I.C.J. 275, para. 56 (June 11, 1998).

Section 2 and Annex VII is left with a necessarily factual determination to satisfy itself as to its jurisdiction. If the parties to the dispute explicitly allowed the tribunal to deal with this as a matter of admissibility by, for instance, putting it before the tribunal by way of submission, it is a different matter. But there must be the possibility that one of the parties, because of its adherence to Article 281 (1) by conduct or written agreement, has never consented to the exercise of jurisdiction by the tribunal over a dispute that entails the interpretation or application of the provision of Article 281 (1).

It has been said that the state parties to UNCLOS “are permitted by Article 281 (1) to confine the applicability of compulsory procedures of Section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures.”<sup>38</sup> Where there is no agreement among those parties, there is no question of unilateral submission to Section 2 procedures.<sup>39</sup> This interpretation is borne out by the terms of Article 288 (1) that the jurisdiction of a court or tribunal referred to in Article 287 covers “any dispute concerning the interpretation or application of this Convention *which is submitted to it in accordance with this Part*” (italics added). UNCLOS does not, therefore, confer automatic and compulsory jurisdiction over *all* disputes concerning the interpretation or application of it, but only over those that are submitted to the court or tribunal in accordance with the procedural conditions of Part XV, including in particular those contained in Section 1 of that part.

Even assuming that the tribunal thus established is somehow empowered to deal with the dispute that involves the interpretation or application of Article 281 (1), the terms of the clause are difficult to satisfy. The South China Sea Arbitration shows why.<sup>40</sup>

## The Difficult Conditions of Article 281 (1)

Three cumulative requirements exist in Article 281 (1), and all must be fulfilled before any procedure prescribed in Part XV—including those provided under Section 2—becomes applicable.

First, there has been an agreement between China and the Philippines to deal with the disputes between them through bilateral consultations and negotiations. Paragraph 4, DOC, includes an *undertaking* of the parties to the DOC to settle disputes by way of consultation and negotiation. It goes without saying that a word such as *undertake* is not lightly used in diplomatic documents.<sup>41</sup> As the ICJ put it:

The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.

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38. Southern Bluefin Tuna Case, 119 ILR 508, para. 62.

39. Ibid., para. 63.

40. Bing Bing Jia, “The Issue of Admissibility in Inter-State Arbitration,” in *The South China Sea Arbitration: A Chinese Perspective*, ed. Stefan Talmon and Bing Bing Jia (Oxford: Hart, 2014), 110–125.

41. Common Art.1, the Geneva Conventions of August 12, 1949, provides that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

It is a word regularly used in treaties setting out the obligations of the Contracting Parties . . . It is not merely hortatory or purposive.<sup>42</sup>

It has been noted that an agreement in terms of Article 281 (1) does not have to be “formal,” but could exist by conduct or through the practice of the parties concerned, thus being *ad hoc*.<sup>43</sup> Moreover, the agreement can further be evidenced by such documents as the 2004 joint statement. Furthermore, on September 1, 2011, another joint statement between the presidents of China and the Philippines was issued during the state visit of China by President Benigno Aquino III, stating in particular: “The two leaders reiterated their commitment to addressing the [maritime] disputes through peaceful dialogue.”<sup>44</sup>

In light of the documented commitment of the two countries, there exists a genuine and solemn agreement between them. Evidence in further support abounds.<sup>45</sup>

Second, bilateral negotiations focusing on the issues contained in the Philippine Notification have yet to start in the spirit of the DOC and other related documents. Indeed, the Guidelines for the Implementation of the Declaration on the Conduct of Parties in the South China Sea were agreed only in July 2011 between the parties to the DOC.<sup>46</sup> It is therefore highly unlikely that any pertinent and meaningful negotiations between China and the Philippines in the spirit of the DOC could have taken place prior to 2011.

Moreover, the relevance and the impossibility for success of negotiation must be considered fully before drawing any conclusion as to the exhaustion of the venue of negotiation. It is required that “the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.”<sup>47</sup> General exchanges of views, without actually seeking a settlement, cannot count as negotiations.<sup>48</sup>

With regard to the disputes alleged in the South China Sea Arbitration, there has never been any indication—the Philippine Notification’s narrative of the factual background included—that the preceding feature had been fulfilled, before “one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiations.”<sup>49</sup> It is a fact that the bilateral

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42. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 43, para. 162 (February 26, 2007).

43. Barbados v. Trinidad and Tobago 27 UNRIAA 47, para. 200(ii) (2006).

44. Joint statement of the Republic of the Philippines and the People’s Republic of China, September 1, 2011, para. 15.

45. Jia, “The Issue of Admissibility,” 114–116.

46. For the draft text, as released to the press, see “South China Sea Guidelines Agreed,” *Jakarta Post*, July 21, 2011.

47. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), 2011 I.C.J. 70, para. 161.

48. *Ibid.*, para. 157.

49. *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), PCIJ Rep series A, no. 2, 13 (1924); *Border and Transborder Armed Actions* (Nicaragua v. Honduras), 1988 I.C.J. 69, para. 80.

negotiations that may become relevant to the present arbitration have stalled because of inaction on the part of the Philippines, despite it having been repeatedly invited by China to commence mechanisms of consultation and negotiation on the maritime issues between the two countries.<sup>50</sup>

The Philippines' response to those calls came in a *note verbale*, dated April 26, 2012, inviting China to submit the issue "to a dispute settlement mechanism,"<sup>51</sup> which hardly reflected a willingness to negotiate the substance of the disputes in question. Any previous contact between the two countries, as alleged in the Philippine Notification to have started as early as 1995,<sup>52</sup> must be assessed in this light. As the first of the agreed principles of the 1995 joint statement between the two countries was that territorial disputes should be settled by "consultations" between the two governments,<sup>53</sup> the bilateral negotiations held in 1995 actually strengthen the earlier submission that negotiations have long been selected by the two governments as the means of settlement of the disputes in question.

Third, the undertaking in paragraph 4 of the DOC was drafted in such a way as to exclude further procedures for settlement with regard to territorial and maritime disputes in the South China Sea. It is neither open-ended nor ambiguous, even though the parties to the DOC could have included any other means. The exclusion of other procedures of settlement, as contemplated by Article 281 (1), is therefore implied in the DOC. Further, the Philippines is constrained by its repeated recognition of this means of settlement in official documents issued since 1995.<sup>54</sup> The prior agreement between China and the Philippines has clearly been for consultation and negotiation, and no other agreement exists between them in favor of other procedures.

## Conclusion

This paper is a sketch of some of the legal issues related to the situation in the South China Sea. The existence of a dominant dispute of territorial sovereignty determines the form in which a legal case may be put together in the present situation, and such a dispute remains out of bounds for a court or tribunal as referred to in Article 287 of UNCLOS. The sequence of procedural rules in Sections 1 and 2, Part XV, UNCLOS, entails that where a peaceful means is predetermined between the parties to a dispute concerning the interpretation or application of UNCLOS, it takes away the dispute from the procedures of Section 2.

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50. Chinese Foreign Ministry, "Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Statement on the South China Sea," July 16, 2013 (referring to two approaches made by China to the Philippines in March 2010 and January 2012).

51. Philippine Department of Foreign Affairs, "Response of the DFA Spokesperson to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue," July 15, 2013, para. 5.

52. Philippine Department of Foreign Affairs, Statement and Notification of Claim, para. 26.

53. Joint Statement on the People's Republic of China and the Republic of the Philippines Consultations on the South China Sea and on Other Areas of Cooperation, August 10, 1995, reprinted in Xinhua, "China and the Philippines Held Consultations on the Issue of Nansha Islands, Reached General Agreement and Issued Joint Statement," *People's Daily*, August 12, 1995.

54. *Ibid.*

Here the question of Article 288 (4) does not arise. Assuming that Article 281 (1) somehow provided for a court or tribunal under Article 287 to deal with, its requirements can hardly be fulfilled by the Philippine Notification in the South China Sea Arbitration.

One point needs to be stressed: given the importance attached to the issue of territorial sovereignty by China, Vietnam, and the Philippines, it is not surprising that the three countries repeatedly avow to seek solutions by negotiation and consultation.<sup>55</sup> That commitment does have a track record over such a significant length of time as to be considered an established norm. In fact, it is the only norm that shows consistency and clarity in the situation of the South China Sea. There is, therefore, a good case of estoppel in favor of China.<sup>56</sup> But that point is reserved for another occasion.

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55. Agreement on Basic Principles to Guide the Settlement of Maritime Issues between the People's Republic of China and the Socialist Republic of Vietnam, October 11, 2011, points 1–3, [http://news.xinhuanet.com/politics/2011-10/12/c\\_122144683.htm](http://news.xinhuanet.com/politics/2011-10/12/c_122144683.htm).

56. An estoppel is a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct or representation of fact. See Jia, "The Issue of Admissibility," 132.

# 10 | Japan's Perspectives on U.S. Policy toward the South China Sea

*Yoji Koda*

The People's Republic of China's rapid and substantial naval buildup, together with its assertive and high-handed activities in Asian waters—especially those in the East and South China Seas—are generating serious security concerns within the international community. Especially, China's unique and unilateral positions on its territorial claims and EEZ rights as a coastal state, which are supported by its wider and sometimes self-centered interpretation of UNCLOS and other established international rules, really confuses and puzzles regional states and other states related to Asia, such as the United States.

Among these China-generated problems, territorial and EEZ disputes in the East and South China seas have been two of the most complicated and annoying issues since around 2008. As for the East China Sea, China's one-sided territorial claim over the Senkaku Islands from the late 1960s has gradually undermined the longtime preexisting good Japan-China relations, like a chronic disease unconsciously worsening a healthy body, first slowly in the 1980s and 1990s, then rapidly in the 2000s and after.

The fierce territorial confrontation over the islands between Japan and China, came to surface from the mid-2000s, and then reached its peak in September 2011, when the government of Japan (GOJ) purchased three privately owned islands within the Senkakus (there are five islands and three large rocks above water at high tide). A massive political reaction followed the GOJ's action, including some wild and large-scale anti-Japan protests in China. Emotional and burning nationalism, which was supported by some sense of hatred against each other, seems to have grown in the minds of average people in both nations since then. In this context, the territorial dispute over the Senkaku Islands has developed into a serious root cause of deteriorated bilateral relations between Japan and China.

But at the same time, at-sea power games around the Senkaku Islands have remained in a stabilized situation, but also at high tension, or in a stalemate, and there are a few indications for further possible escalation. Judging from reported at-sea interactions around the islands, there continue to be intense confrontations between Japan coast guard's ships and Chinese coast guard and government vessels, but there has been little military involvement. Despite recent provocative flights by Chinese fighters against Japanese self-defense forces

surveillance aircraft, both Tokyo and Beijing seem to understand the real risk of escalation that would be produced by military involvement in this island dispute.

While maintaining a strict watch posture around the islands, GOJ and JSDF have more serious concerns about Chinese military activities in the western Pacific, which could be certification exercises for its Anti-Access/Area Denial (A2/AD) strategy against Japan-U.S. combined forces operations. When Chinese military units conduct these types of exercises, they normally cross through Japan's Southwestern Islands chain, but sometimes these Chinese maneuvers are misreported by media in both countries as provocation and intimidation to nearby Senkaku activities. These reports may mislead peoples' emotions toward a worsened and more dangerous scenario and lead to a larger risk of military clash than actually exists in a real-world situation. By fully understanding this, the national leadership of Japan and China should develop and take rationalized courses of action that would not invite unnecessary military clashes in the East China Sea. So far, other than long-lasting eye-on-eye contacts between coast guard forces, which would surely have great potential to continue well into the future, each government seems to be following appropriate, coolheaded, policies.

From this point of view, problems in the South China Sea have a much larger risk of escalation into military clashes between China and regional claimants. We must recognize that situations in the South China Sea are extremely dangerous. In this paper, the Japanese perspective on the South China Sea situation will be described.

## The South China Sea

The South China Sea is a vast body of inland sea surrounded by various Asian costal states. The South China Sea stretches about 1,750 miles from Bashi/Luzon Strait to Singapore, and about 1,250 miles from Hong Kong to Brunei; 1,750 miles is about the same distance from eastern tip of Hokkaido to Japan's westernmost island of Yonaguni. The area of this sea is about 1.35 million square miles, which is about 9.5 times as large as that of Japan. There are several prominent archipelagos, such as the Paracels, the Spratlys, and the Pratas Islands in the South China Sea, and each has its own strategic significance.

With regard to islands, there are 200 islands, rocks, shoals, and reefs in the sea. Hainan, at 1,270 square miles, is the largest island, which is a little smaller than Japan's third largest island of Kyushu. The second largest is Woody Island (0.8 square miles) in the Paracel Islands, and the third is Itu Aba (0.2 square miles) in the Spratly Islands. But they are far smaller than Hainan Island, which has been a key base and staging area for China's South China Sea Policy and Strategy.

Except for Hainan Island (China), Ananbas Islands (Indonesia), and few other islands in the southern and northern ends of the South China Sea, almost all of these islands are disputed by various coastal states, including China. Some prominent characteristics of each island will hereafter be discussed.

## PARACEL ISLANDS

The location of the Paracel Islands is about 440 miles southeast of Sanya, Hainan Island, China, and 280 miles east of Da Nang, Vietnam. Among the more than 40 position-located geographical maritime terrain features, there are 14 to 16 islands, reefs, rocks, and sandbanks that have some potential for human activities.

Among them, Woody Island is the largest, and there are various facilities, including an airport with a 7,900-foot class runway, with a parallel taxiway as well as three ports. In spite of China's campaign to promote the island as a leisure resort, the island is regarded as a core key military base for the PLA's navy and air force, because of its size and well-developed infrastructure. The island has for decades been a key stepping-stone for China's maritime expansion into the South China Sea as well as development and administration of the archipelago. In this context, the island has important strategic significance not only for China but also for other regional nations.

Until 1974, regardless of conflicting territorial claims over the islands by China and Vietnam, the eastern half of the Paracel Islands, including Woody Island, was practically controlled by China. The then Republic of South Vietnam controlled the western half. As a result of a weeklong battle in January 1974, China wiped out the South Vietnamese forces, and it has been exercising practical control over the entire archipelago since then. However, the unified Vietnam has continued to claim territorial ownership of the islands, without taking military actions, for 40 years.

Beijing may have misinterpreted these relatively calm 40 years as Vietnamese complacency over territorial ownership, and in May 2014 started a trial drilling by an oil rig in the contested EEZ area. This attempt drew an unexpectedly large-scale resistance, with high intensity, by the Vietnamese. It is expected that the chaotic situation will last a long time, attracting the world's attention to China's assertive actions. In this context, China may have made a serious strategic mistake.

## SPRATLY ISLANDS

The position of the Spratly Islands is about 440 miles southeast of Cam Ranh Bay, Vietnam; 160 miles northwest of Quezon, Palawan Island, the Philippines, and 280 miles northeast of Kota Kinabalu, Malaysia, respectively. Like the Paracel Islands, there are many surfaced, semi-submerged, and shallowly submerged geographic terrain features. Among them, only 18 are permanently above water, and 13 of those have sufficient areas (i.e., larger than two football fields) for human activities.

Until the Johnson South Reef skirmish of 1988, China claimed territorial ownership but practically had no footprint on the Spratly Islands. However, with the successful ouster of Vietnamese forces from the Johnson South Reef after the military skirmish, China established its physical presence in the Spratly Islands for the first time in recent history.

Since then China has gradually seized other small rocks in the Spratlys and expanded its control. However, as of June 2014, China still failed to take over any of the above-mentioned 13 major islands and reefs, and only controls 10 small rocks and reefs. The current breakdown of various countries' practical control over the 13 islands is as follows: six by the Philippines, five by Vietnam, one by Taiwan, and one by Malaysia. There are four islands that have a short airstrip without a parallel taxiway. These are Itu Aba Island (3,800 feet), controlled by Taiwan; Thitu Island (5,900 feet), controlled by the Philippines; Spratly Island (1,700 feet), controlled by Vietnam; and Swallow Reef (4,300 feet), controlled by Malaysia. Except for Thitu Island, airstrips on the other three islands are not suitable for jet or large aircraft operations.

Having said this, however, recent public information indicates that China has started an ambitious attempt to reclaim a huge lagoon in Johnson South Reef, which China seized from Vietnam in 1988. The size of the reef is about 2.8 miles from north to south, and 1.2 miles from east to west. There is a deep channel that runs from north to south in the middle part of the lagoon, and an open mouth to the north. According to various media reports and news releases by the government of the Philippines, China seems to be reclaiming the eastern half of the lagoon and plans to build one jet-capable 8,200-foot class runway, with parallel taxiway and other facilities, including several ports and piers to accommodate deep-draft ships. The reclamation and facilities construction are reportedly to be completed within several years.

Like Woody Island, this reclaimed island has huge potential for Chinese military use. If its ambition is realized and established, China will have a strong and full-scale foothold in the Spratly Islands for the first time, which is far larger and capable than the above-mentioned other 13 islands and reefs controlled by the other four countries.

Johnson South Reef will surely be a game changer in future power competitions in the South China Sea. China will have two stepping-stones and hub bases in the South China Sea: one on the northern Woody Island and the other on the southern Johnson South Reef. One should note that the distance from Sanya, Hainan Island, to Johnson South Reef is about 750 miles, and that from Woody Island in the Paracels to Johnson South Reef is about 560 miles. Again, the distance between Sanya and Woody Island is 440 miles.

In addition to this, the location of Johnson South Reef is in the middle of the Spratly Islands, and this position makes the reef an ideal spot from which to control most of the sea lanes of communications (SLOCs) and naval/maritime activities in the South China Sea. Thus, China's strategic chain of islands in the South China Sea, which could be an enabler for Beijing's strategy and policy to control the whole South China Sea area, surrounded by its unilaterally claimed nine-dash line, will be completed. Completion of this presence-expansion attempt by China will surely have a huge impact on the strategies of Asian regional coastal states, and that of the United States as well as Japan.

We should not overlook or underestimate the real meaning of China's seemingly low-key attempt to build military facilities on small islands in the South China Sea.

## PRATAS ISLANDS

The Pratas Islands are located about 280 miles west of Kaohsiung, Taiwan, and 190 miles southeast of Hong Kong, China. The islands are composed of three large reefs and sea-mountains. The islands are Taiwanese territory. On Pratas Island, which is the main island in the archipelago with an area of 0.7 square miles, there is one 4,900-foot runway, but no parallel taxiway or other support facilities.

Together with mainland Taiwan, the islands sit in a key location to control the Bashi and Luzon Channels, which are the eastern approach to and from the South China Sea. If a geopolitical crisis were to develop in which China took over Pratas Island, the power relationships and stability of the South China Sea region would change substantially toward a direction very favorable to China. In this context, Japanese and U.S. policies and strategies with regard to this lesser-known archipelago should be thoughtfully developed as part of their plans and preparations related to Taiwan.

## OTHERS

In addition to the above-mentioned three island groups, there are four clusters of banks, shoals, and sea-mountains, most of which are submerged, in the vast central part of the South China Sea, measuring 460 miles north to south and 279 miles east to west, in between the three island groups. Eight shoals and sea-mountains are located in the north, 9 in the east, 4 in the south, and 14 in the west.

Among them, Scarborough Shoal has attracted the world's attention because of the tricky seizure over the long-controlled Philippine shoal by China in 2013. The location of the reef is about 200 miles northwest of Manila; 400 miles southeast of China-controlled Woody Island; and 560 miles southeast of Sanya, Hainan. Scarborough is one of the shoals in the eastern group, and is considered to be the only reef permanently above sea surface out of all the above-mentioned shoals and sea-mountains.

In spite of territorial claims by China, the Philippines, and Taiwan, since all the geographical maritime terrain features, except for Scarborough Shoal, are submerged by nature, there have been no land areas or rocks for each country to keep its troops for the purpose of territorial games. Thanks to this poor geographical feature, except for the Scarborough Shoal, the potential for military clashes in these islands is estimated to be low. One thing that should be noted is that all of islands in this area sit within the nine-dash line unilaterally declared by China.

The significance of a “strategic line” connecting Sanya, Hainan, Woody Island, and Johnson South Reef has been discussed. However, this imaginary north-south line alone is not enough to help China establish functioning control over the whole South China Sea. This line only enables China to exercise its control and influence toward the southern direction. Of course, since this line connects China's stronghold of Sanya with China's controlled Spratly Islands and southerly Paracel Islands, its significance is overwhelming, but China today lacks a stronghold from which to control the eastern part of the South

China Sea. From this viewpoint, the recently seized Scarborough Shoal is the only potential spot for this purpose for China. The shoal is a triangle-shaped reef with sides measuring about 14 miles, 9 miles, and 10 miles. There is enough area for land reclamation to build military facilities. In order for China to materialize this plan, it will need to reclaim the reef like it did with Johnson South Reef in the Spratly Islands.

## Three Reasons behind China's Firm Position

The South China Sea today is an area where all the coastal states, including China, claim their own different territorial integrities and EEZ rights. Thus, the South China Sea has become a difficult and complicated area in Asia's regional security. China seems to be trying to monopolize overall control of the whole area of the South China Sea, and its claim is widely referred to as the nine-dash line, of which interpretations deviate substantially from long-established international conducts and protocols such as UNCLOS.

With regard to EEZ, other littoral states have strikingly different positions, which reflect each nation's national interests but are in full compliance with UNCLOS. Because of these complicated situations, the settlement of various maritime disputes between China and neighboring states, mainly in regard to national sovereignty and territorial integrity as well as EEZ, will not be an easy task for anybody to pursue.

China has been taking a hard-line position on this issue for the last two decades and seems unwilling to make any easy concession and compromise. It is obvious that there is no short-term solution through diplomatic and/or military measures. When we try to estimate China's unilateral ambition to monopolize the whole South China Sea, there seem to be a few primary reasons behind its firm and determined positions on South China Sea issues.

### **AMBITIOUS TERRITORIAL DESIGN FOR SOUTH CHINA SEA WITHIN THE NINE-DASH LINE**

First is China's unique interpretation of international rules, which has deviated substantially from firmly established traditional interpretations of international norms and behaviors to protect a nation's territorial integrity and EEZ rights. In order for China to establish monopolistic control, or ownership, over its extreme claim over water areas in the South China Sea, China definitely needs to establish territorial ownership over all disputed maritime terrains—that is, islands, rocks, reefs, sands, banks, and shallowly submerged seabeds within the claimed area surrounded by the nine-dash line.

For China, if this ambition is realized, it will obtain its long-held dream of a more secure national sovereignty at the southern seafront and free economic activities in the South China Sea. Thus, China will be able to establish first an impregnable defense posture of its homeland by maintaining a defense-in-depth posture constructed in and around the South China Sea against external threats, which are mainly constituted by the United States and its allies, such as Japan and Australia.

Second, China will be able to establish a real EEZ that will guarantee it free and unimpeded access to all maritime natural resources in the South China Sea. Though the actual amounts of deposits and reserves of various natural resources in the South China Sea are still unknown, future monopolistic use of potentially rich natural resources in the area would provide China sufficient capacity to prepare for future reductions and drying up of land-based resources.

## **MARITIME STRATEGIC NUCLEAR POSTURE COMPARABLE TO THE UNITED STATES**

As a major world power and a permanent member of the UN Security Council, China naturally sets a national objective to build a robust strategic nuclear capability that is comparable with that of the United States. However, China's strategic nuclear posture is different from other big nuclear giants (i.e., the United States and Russia), who enjoy the luxury of fielding long-range missile and large strategic bomber forces that are a part of the triad posture. In other words, China does not have a three-pronged strategic nuclear posture that is supported by three sets of different strategic nuclear assets—that is, inter-continental ballistic missiles (ICBMs), submarine launched ballistic missiles (SLBMs), and long-range bomber fleet.

China lacks large long-range bombers and, as a result, will fully depend on ICBMs and SLBMs in the near future. Thanks to some prominent characteristics of the nuclear propulsion system, these nuclear-powered submarines (or SSNs) and SLBM-armed nuclear submarines (SSBNs) have, in general, better survivability, higher maneuverability, and longer endurance than conventionally powered diesel-electric boats. Furthermore, thanks to nuclear propulsion systems, SSNs and SLBMs could be deployed to any maritime patrol spots on this planet. From this viewpoint, China will depend more on maritime strategic nuclear capabilities than the United States and Russia do.

## **CHINA'S NUCLEAR POSTURE AND HAINAN ISLAND**

The PLA's navy seems to have three key missions for China's strategic nuclear posture: first, to maintain a robust maritime strategic nuclear capability via a SSBN force; second, to protect this force from the anti-submarine warfare (ASW) capabilities of potential adversaries—especially U.S. Navy SSNs; and, third, to track and deter the SSBN forces of the U.S. Navy. If we take into consideration the PLA navy's SSN force strength and capabilities, it is obvious that the third mission, which was a common operation of the U.S. Navy and Soviet navy in the Cold War days, will not be realized until the distant future.

In order to maintain a robust strategic nuclear capability, the PLA navy requires a large SSBN force. Although the PLA navy is in the process of constructing a new SSBN, it has for many years reportedly been developing both a second-generation SLBM (JL-2) and its platform, the Shang-class SSBN. It is public knowledge that after consecutive failures of JL-2 test launches over about the past five years, the PLA navy in 2013 finally launched a trial JL-2 SLBM successfully. Even so, in order for the PLA navy to make the JL-2 fully

operable, it is estimated that the Chinese navy will need to accumulate several more trial launches of the missile. From this point of view, the current capability of the PLA navy's SSBN fleet is still very underdeveloped and far from being able to support the PRC's nuclear strategy. Having said this, however, it is reasonable to estimate that it will be just a matter of time before the PLA navy deploys JL-2 SLBMs and Shang-class SSBNs in quantity.

The PLA navy has traditionally operated its single SSBN deep inside the Bohai Sea, between the Liaodong and Shandong Peninsulas. This deployment posture has made Bohai Sea a sanctuary for China's SSBN for years. This has made it very difficult for the U.S. Navy to pursue its ASW strategy there. However, by limiting deployment of the SSBN to this narrow stretch of water, the PLA Navy makes it very easy for the United States to maintain its ballistic missile defense (BMD) posture, since the trajectory of SLBMs launched from the SSBN in Bohai Sea would be fairly easy to predict. If SLBMs were launched from several scattered locations, such as the Indian Ocean and Pacific Ocean, it would be far more difficult for the United States to implement successful BMD.

In other words, Chinese SLBMs launched from the western Indian Ocean might strike the eastern coast of the United States from a northeastern direction, and those launched from the middle of the Pacific Ocean would reach the U.S. western coast from a northwestern direction. This is a far different threat than that faced by today's Russia-focused U.S. indication and warning posture. So, if the force strength of the PLA navy's SSBN force gets larger than today, (i.e., 8 to 12 rather than about 5 boats), the PLA navy's SSBN deployments could look very different in the future.

A recent media report reveals that the PLA navy has completed construction of a new naval base on Hainan Island in the South China Sea, with several super-bunkers to protect in-port SSBNs. There is one degaussing dock dedicated for SSBN use in the base, too. The position of the PLAN's base in Hainan Island is ideal for deploying its SSBNs to various patrol spots in the Indian Ocean and the Pacific Ocean. If the PLA navy is to launch a large number of next-generation SSBNs in combination with the Hainan base, it will surely make the U.S. BMD even more difficult. For example, the PLAN may establish two or more SSBN patrol areas in the Indian Ocean, the South China Sea, or the western Pacific, when it starts operating 8 to 12 SSBNs in the future.

However, Hainan Island poses one serious problem to the PLA navy, which is that its geographic features are different from those of the Bohai Sea. The base is openly exposed to the South China Sea, so any submarines of the PLA navy operating from this base also expose themselves to the ASW forces of the U.S. Navy, which boasts the most advanced SSN force in the world. Therefore, the SSBNs of the PLAN stationed in the island would no longer enjoy the safety of "submarine haven" inside the Bohai Sea.

Although the position and capability of the Hainan base are important factors in strategic planning, they are not as important as maintaining control of the seas and ASW operations is. In the case of the Hainan base, the locus of control would be the South China Sea, as well as potential SSBN patrol spots in surrounding waters, including the Indian Ocean

and Pacific Ocean. These are much more important factors for the U.S. Navy and other allied navies in the area. So for the PLA navy, protecting its SSBN fleet from external ASW threats will be a key task.

China's determined intent on maintaining its 40-year-long practical control over the Paracel Islands and escalated and persistent territorial claims on the Spratly Islands are clear signals that the PLA navy is beginning to carry out a plan to exert greater sea control. In this context, the aforementioned two major strongholds of Woody Island and Johnson South Reef will be key to realizing the PLA navy's robust ASW posture. The reclamation of Johnson South Reef is more important than anything else today for the PLA navy. It is only natural for the PLA navy to construct an airbase for its aviation-ASW force on Johnson South Reef, to counter SSNs of the U.S. Navy and other neighboring navies. Like Johnson South Reef, if China reclaims the easterly Scarborough Shoal and makes the shoal another ASW base, its navy's ASW capability in the sea will be substantially enhanced.

## SUBMARINE PROGRAM OF REGIONAL NAVIES

When we examine the maritime situation in the South China Sea, there is a new element on which we need to focus. That is the ambitious submarine programs of the regional navies. It is reported that the Indonesian navy has just started an aggressive submarine program to introduce two Type-209 boats from South Korea, and 24 additional submarines of an undetermined class by 2024. Some other reports indicate the number would be 12, not 24.

The Malaysian navy is operating two of the latest *Perdana-Menteri* class submarines, which are the latest *Scorpène* class of French-Spanish codevelopment. Singapore's navy has two *Archer* and four *Challenger*-class boats, which are ex-*Västergötlands* and ex-*Sjöormens* of the Swedish navy, respectively. These boats are secondhand and about 20–40 years old, but they were thoroughly refurbished and considered to be suitable assets for use by the Singaporean navy.

In addition to these navies—though details of the program are yet unknown—the Vietnamese navy has also started its submarine program of acquiring six *Kilo*-class boats. According to media reports, the first and second *Kilos* were transferred to the Vietnamese navy in 2013 and early this year. It is also reported that Thailand's navy has a strong appetite to introduce several submarines.

From a maritime security strategy point of view, the submarine forces of all these Southeast Asian regional navies, when completed, will be a robust conventional deterrent force against the PLA navy's surface force, especially that of the PLA navy's aircraft carrier battle group(s) operating in the South China Sea. This capability could form an integral part of the ASEAN states' A2/AD strategy, if there is one, to cope with a more assertive PLA navy. At the same time, however, these submarine forces could surely complicate the sea-control equations in the South China Sea.

There are two more submarine-related subjects in this region. One is water-space management, which must be conducted effectively to guarantee the safe navigation of submarines operating in relatively narrow waters in the South China Sea. Unfortunately, there are no functioning frameworks for this purpose today, and a water-space management scheme must be established before the large number of submarines of the regional navies becomes operable.

Second is the submarine rescue posture in the South China Sea. As the number of submarines operating in the South China Sea increases, there will be a larger possibility of submarine accidents. In general, it is the submarine-operating nation's responsibility to establish its own submarine rescue capability as a preparative measure for the worst; however, it would also be desirable to establish a multinational rescue posture involving all submarine-operating navies in the region.

In this context, Southeast Asia's states and navies should establish the two above-mentioned structures at the earliest date. Cooperation to create a new mechanism for the safety of submarines will surely become a new bonding agent for multinational naval cooperation.

## **CONTROL OF SLOCS IN SOUTH CHINA SEA**

The South China Sea is a huge maritime area with a large number of vital SLOCs connecting Malacca Strait/Singapore and Luzon Strait/Bashi Channel, which have traditionally been the lifelines of Japan, South Korea, Taiwan, and China, as well as other Pacific nations, including the United States. In this regard, control of the South China Sea has another significant meaning for China. For China, the geographic location of Hainan Island, Woody Island, Johnson South Reef—if fully reclaimed—and perhaps Scarborough Shoal, too, are strategically significant for this reason. Of course, Itu Aba Island (Taiwan), Thitu Island (the Philippines), Spratly Island (Vietnam), and Swallow Reef (Malaysia) are smaller than those previously mentioned but also important from this viewpoint.

Hainan Island and Woody Island, in particular, are located in an ideal position to command the coastline of northern and central Vietnam, a key state in regional security in the future, as well as the Gulf of Tonkin. They are also in a most suitable place to keep an eye on and take military measures toward the troublesome Paracel and Spratly Islands. The position of Johnson South Reef, which sits in the middle of the Paracel Islands and is connected to Woody Island and Sanya, Hainan Island, is also an ideal spot to keep a close watch on the SLOCs in the South China Sea.

Similarly, the position of Vietnam, both politically and strategically, will become more important than before. Especially, some key strategic ports and locations such as Cam Ranh Bay and Da Nang have strong potential for controlling the Gulf of Tonkin and western South China Sea. These potential strategic spots in Vietnam will surely be a vital counter-balance toward China's maritime activities, especially its sea-control attempts in the South China Sea.

## FREEDOM OF NAVIGATION

With regard to U.S. maritime policy, there is one subject that should be understood accurately within the international security community; however, there seems to have been only a slanted understanding of it. That is the concept of freedom of navigation. Traditionally and historically, successive U.S. administrations have taken clear positions on territorial disputes in the South China Sea. In other words, the United States does not support any specific country, but rather encourages those involved in sovereignty disputes to take peaceful means to solve the problem. The U.S. government seems to intend to strictly maintain this policy in the future, too.

In this context, the position of the U.S. government on territorial disputes in the South China Sea has been neutral, even toward China, which has for years created many territorial disputes over South China Sea islands and rocks with other coastal states. However, facing the quick but substantial buildup of China's naval capability in recent years, its aggressive expansion of maritime activities, and its assertive position on territorial and EEZ-related issues in the South China Sea, the United States began to re-emphasize its fundamental positions on the South China Sea problems, starting in 2010. The U.S. government did not single out China in its new policy at the time; however, it started to reaffirm freedom of navigation as one of the key national interests of the United States. After first being mentioned by then secretary of state Hillary R. Clinton at the 2010 ARF meeting in Hanoi, Vietnam, the U.S. government has repeatedly used this expression at various opportunities since then.

From maritime strategy points of view, there are two interpretations of this policy. One is simply the traditional principle of long-lasting and firmly established conduct of the freedom of navigation. In this view, the United States has been consistently reiterating this principle. The other is more important than the first one, but less understood. According to this view, since freedom of navigation is a U.S. national interest, if any conflict in the South China Sea is interpreted as causing interference or blockage, the United States, which may not even be a party to the dispute, may interpret this conflict as an infringement of its national interest. Then, the United States preserves the right to intervene in any maritime conflict in the South China Sea if the conflict is interpreted as a violation of the principle of freedom of navigation.

Without this interpretation, the United States does not have any legitimate rationale to intervene in any maritime conflict since it is not an involved party, but simply a third party. In theory and in practice, the United States may interpret any maritime conflict as a violation of the freedom of navigation leading to an infringement of its national interests. Thus, in order to protect U.S. national interests, the United States may intervene in the regional conflicts in the South China Sea.

For China, which is not specifically designated in this U.S. policy, it is a strong warning to Beijing's aggressive and tough position on South China Sea issues. This is one of the reasons why China has been strongly protesting and resisting the U.S. policy. In addition to this, despite its recent ostensible position to conclude the long-awaited COC for the South China Sea, China seemed to try to hush up the new binding declaration to conclude COC at the earliest opportunity at ASEAN's foreign ministers' meeting in Phnom Penh, Cambodia, in July 2012.

# Conclusion: U.S. Policy toward the South China Sea from Japan's Perspective

In conclusion, I would like to list several U.S. policies toward the South China Sea that I think are important.

1. Support maritime capacity building for regional states, especially the Philippines and Vietnam.

China's unilateral maritime expansion in the South China Sea is causing serious frictions with coastal states—that is, Brunei, Malaysia, the Philippines, and Vietnam. It also generates deep concerns among nonclaimant states in the region—namely, Indonesia and Singapore. Both the Philippines and Vietnam are especially facing strong pressure from China's maritime expansion toward their controlled islands in the Paracel and Spratly Islands. However, these two countries' maritime powers have been extremely weak and do not match the capability of China.

In this viewpoint, it is a real matter of urgency to improve the maritime powers and capacities of these two countries. Naval and coast guard capability building at the earliest opportunity should be given highest priority by these two governments. In addition to this, the Philippines and Vietnam have extremely limited capabilities to maintain maritime domain awareness. Without these capabilities, they cannot counter China's attempts to change the status quo by force. In order to help develop these maritime capabilities, the United States, together with Japan and Australia, should develop a robust joint action plan to support these two countries' capacity building, and execute this plan at the earliest opportunity.

2. Be true to U.S. policy, for example, freedom of navigation.

The U.S. government often expresses encouragement to Asian countries that are facing strong challenges from China's maritime expansion. However, occasionally, in recent years, the U.S. real-world policy toward China sometimes does not match the strong statements from Washington.

A typical example is China's tricky seizure of the Scarborough Shoal in 2012 and 2013, which really changed established territorial control by the Philippines government. Another example is a recent nonmilitary skirmish between Vietnamese and Chinese ships, which is caused by China's unilateral attempt to start trial drilling by its oil rig.

In these two recent cases, the U.S. government expressed strong protests and disagreements to China's conduct through public statements, but, disappointingly, no further actions were taken. For Asian nations, these non-risk-taking policies toward China shown in the two cases are deeply disappointing and discouraging.

Ironically, Asian governments see this U.S. policy as being favorable toward China. A Washington that does not have a firsthand and vivid “smell” of the strategic atmosphere in

the region may not think so; however, this disappointment is really the lens through which these countries have seen and interpreted U.S. policy.

“All talk and no action” should not be the U.S. real policy toward China. Some Asian countries may also ask, “Where have all the principles of ‘freedom of navigation’ gone?” The U.S. government should not treat its basic principles as just a pie in the sky of which China is no longer afraid. If this principle is appropriately operated and executed, the famous fundamental of “freedom of navigation” is still a huge psychological deterrence element to China’s decisionmakers, and will remain so in the future.

### 3. Maintain a more visible military presence in the South China Sea.

In order to deter and check China’s assertive and heavy-handed actions toward other countries in the South China Sea, a more visible and prominent U.S. presence will be required. U.S. efforts to maintain its military presence in the region are well understood. Having said this, however, in order to really meet China’s well-thought-out and willful maneuvers to expand its control in the sea, U.S. forces in the region should deploy their units in a more flexible manner to meet the China challenge.

Depending on a given situation, U.S. forces may employ proactive and/or reactive tactics, as well as fewer numbers of units and/or overwhelmingly larger number of units than PLA units. During the past several years, U.S. presence seems to be maintained mainly by scheduled deployments and exercises, and few actions were seen as a response to a real contingency or crisis like the Chinese seizure of Scarborough Shoal in 2012 and 2013. Of course, to realize a more visible and flexible U.S. presence in the region, it is needless to say that cooperation between the United States and Japan, as well as Australia, is a major premise. Especially Japan’s role as an allied partner that hosts the largest U.S. overseas forces and an enabler of U.S. regional strategy must be clearly understood and exercised.

### 4. Stop China’s reclamation of Johnson South Reef, and possibly Scarborough Shoal.

In order for China to really control the whole area surrounded by the nine-dash line, China should make best use of available islands for strategic purposes. As discussed in this paper, there is only one island with a jet-capable air base—that is, Woody Island in the Paracel Islands. Knowing this problem, China has started land reclamation at Johnson South Reef in the Spratly Islands from late 2012, and the reclamation and construction of various facilities are estimated to be completed within several years. Similarly, China may have ambitions to reclaim the eastern Scarborough Shoal for the same reason and purpose. If military facilities on the two islands are completed, the strategic power balance in the South China Sea will be substantially changed to an unrecoverable degree for the United States and Japan. The negative impact generated by this new challenge should be seriously recognized by both Japan and the United States.

In addition to this, both Johnson South Reef and Scarborough Shoal are disputed islands between Vietnam and China, as well as the Philippines and China, respectively. Based on established international conducts, any party concerned is not allowed to take unilateral

actions, including reclamation without mutual agreement. In this context, China's current attempt is far outside of international rules and protocols. In addition to this, the reclamation on top of coral reefs is a significant destruction of the natural environment in the area. Reclamation itself kills precious corals in the reef, and coral sucking/digging to take vast amounts of landfilling ingredients at a nearby reef is another serious environmental devastation. To say nothing of Johnson South Reef, if China makes another attempt at reclaiming Scarborough Shoal, it should be regarded as the worst challenge that destroys and removes the natural treasures of the area belonging to mankind and the international community.

For the above reasons, the United States, together with Japan and Australia, should team up with Vietnam and the Philippines and make their best efforts to stop the China's wild and willful attempts.

#### 5. Maintain a strategic deterrence posture by U.S. conventional forces.

Last but not least, the United States should provide a well-functioning deterrence by conventional force. The best way to deter China's attempts in the South China Sea is to stop China before it really takes military measures to establish its national objectives; however, all the coastal states lack the capability of conventional deterrence.

The only possible measure to make up for this handicap is U.S. forces' capability to destroy China's major infrastructures and military facilities in the region. As discussed in previous sections, China's major bases, such as Sanya, Woody Island, Johnson South Reef, and perhaps Scarborough Shoal in the future, have huge strategic significance; however, they are also subject to vulnerabilities in their base protection, especially that from incoming precision-guided missiles. Since all of these key bases expose themselves to external sea and air space, they will become easy targets of U.S. long-range Tomahawks and air-launched cruise missiles. If the United States intends to employ swarm attack tactics, it would be impossible for China to protect these bases from these serious threats. In this point of view, Washington, D.C., should send a clear signal to Beijing that the United States is determined to exercise this capability when necessary, and to deter China's adventurism in the South China Sea. This will be a real contribution provided by the United States and its forces, which coastal states have long awaited.

In this paper, I mainly developed my thoughts on the South China Sea based on my own assessment of the current situation that focused on China's activities in the sea. I hope my paper successfully provided broad, but precise, views on a troublesome situation, and hopefully can become a launching pad for readers to better understand specific South China Sea issues and the maritime security of the region.

# 11 | Empathy: The Missing Link between Confidence and Trust in East Asia

*James Manicom*

This paper will discuss a project that we're working on at the Centre for International Governance Innovation spearheaded by David Welch. David has done a lot of work on foreign policy decisionmaking, psychological explanations of decisionmaking, and on Asia-Pacific security issues, specifically Japanese security issues. His, and my, latest interest is the concept of empathy and whether it is a useful term to introduce in the Asia-Pacific security lexicon.

The project is preoccupied with the obvious trust deficit between some countries in East Asia. East Asia, as we all know, is preoccupied with its own future. Western scholars have warned that Asia's future could be Europe's past, and ASEAN has placed a deadline on itself to develop into an "ASEAN community" by next year. East Asia's future is obviously to be determined, but I would argue that the development of trust between countries would certainly increase the odds that Asia's future is a peaceful one. Although East Asia is not and does not want to be Europe, it seems from the outside that Europeans have succeeded in building trust in one another. Likewise, East Asia doesn't want to be North America, but North Americans trust each other. We often hear that mistrust is the primary barrier to solving or mitigating many of the security problems facing the region right now. Arms races, weapons proliferation, and brinksmanship at sea all stem from the fact that countries in East Asia do not trust their neighbors and take steps to protect themselves. Mistrust lies at the heart of the classical security dilemma.

Our project challenges the prevailing approach to solving regional security problems: efforts to build confidence. CBMs have been a focus point for much of the diplomatic and Track II activity in East Asia, which has generated national security outlook statements by ARF members, the regular release of defense white papers, talks toward hotlines, statements of appropriate conduct, and crisis management mechanisms, as well as no shortage of functional cooperation on the "low-hanging fruit" of maritime pollution prevention, piracy, counterterrorism, and so on. There have been some limited successes, like CUES, and some high-profile failures, like near uniform disregard by claimant states for the 2002

DOC. We argue these failures, and the limited nature of the successes, are a result of the fact that CBMs alone do little to reduce tension or prevent the outbreak of crises. The challenge is not to build confidence, but to find ways to bridge the gap between confidence and trust.

This brings us to the concept of empathy, which we view as the bridge between confidence and trust. Building more empathy could strengthen existing CBMs and facilitate the kind of positive iterative interactions that Robert Axelrod showed are the precursors towards cooperation. Somewhere along the way, as cooperation deepens, we'll get to trust. The two are mutually reinforcing. More cooperation breeds more trust, which in turn makes future cooperation easier. We view empathy as a necessary but not sufficient condition for trust. I'll say a bit more about these concepts, before identifying the "empathy gaps" in the South China Sea and before proposing ways to bridge them.

## Confidence, Empathy, Trust, and Cooperation

We hear a number of terms in the Asia-Pacific security lexicon. For instance, we often hear about the lack of confidence, which we think of as the subjective degree of certainty that one is safe from imminent conflict as a function of situational constraints, and the corresponding need for CBMs. CBMs are things that improve transparency, provide advance warning, or reduce the likelihood of a crisis. Confidence is commonly confused with trust. We think of trust as the subjective degree of certainty that one can count on nonviolent interaction and peaceful dispute resolution with another actor, owing to dispositional considerations and the nature of the relationship. If you don't trust your neighbors, lock your door to be confident you will be safe.<sup>1</sup> If you trust your neighbors, you feel comfortable leaving your door unlocked. Getting to know your neighbors, developing a "we-feeling" with them, does not happen overnight. Building trust does not require you to agree with your neighbors, but it can be greatly supported if you understand their worldview—this is empathy.<sup>2</sup> Simply put, empathy is the capacity to understand another's worldview.

Cooperation is a valuable pathway to trust because it provides opportunities to improve empathy. Iterated positive interactions with an adversary can build trust over time and can deepen cooperation. But in the absence of trust, which is built over time as adversaries do not renege on their commitments, adversaries will not likely cooperate on anything that matters to them, like core interests. After all, one can have confidence that an adversary will not renege on its commitments if these commitments serve its self-interest. Trust-based cooperation is more resilient as it necessarily includes solicitude for the other's well-being.

To return to the topic of the panel, the lack of empathy, I argue, explains the failure of the "habits of dialogue" to meaningfully build trust in the South China Sea. In the absence of empathy, people tend to overestimate another's disposition for hostility and threat.

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1. David A. Welch, "Scary Neighbours," CIGI, May 8, 2014, <http://www.cigionline.org/blogs/asia-pacific-security/scary-neighbours>.

2. David A. Welch, "Confidence, Trust and Empathy in Asia-Pacific Security," CIGI, February 5, 2014, <http://www.cigionline.org/sites/default/files/2014-02-05%20CTE%20overview.pdf>.

This leads to a preoccupation with posturing and pursuing zero-sum gains, which in turn means they don't take genuine confidence building seriously. For instance, violations of the DOC by all claimants are now routine and justified on the basis that "we didn't start this; we are simply reacting to what others have done."<sup>3</sup> This behavior has also been justified as reactions to changes in the status quo effected by others. My own work on the East China Sea suggests that perceptions of the status quo are very rarely shared, which makes it very difficult for a country to appreciate which actions will be perceived as escalatory by their adversary.<sup>4</sup> Japan, for instance, did not comprehend that Beijing would not understand its rationale for nationalizing the Senkaku/Diaoyu Islands, to prevent them from falling into the hands of a prominent Japanese nationalist. Likewise China likely perceived Asian Development Bank funding of the Pinghu gas field as tacit Japanese support for its gas exploitation activities near the median line. Tokyo did not share this understanding, and reacted strongly to Chinese drilling activities in 2005.

To return to the "habits of dialogue," however habitual they have become, Track I.5 and Track II dialogues may have run their course, at least if their purpose is to facilitate the frank exchange of constructive ideas between potential antagonists. In the case of the former, the progressively less diplomatic tone of the Shangri-La Dialogue since 2010 is a reflection of the growing animosity of the region. In the case of the latter, participants have taken to falling back on well-publicized national positions with little effort to acknowledge the views of others.

Finally, there is little evidence that Track I meetings are interested in tackling the tough issues, like territorial and maritime disputes, that plague the region. Major powers in the region all have complex bilateral relationships of which maritime tensions are only one issue, if a particularly prominent one. This tendency should come as no surprise to experienced observers of ASEAN, which has been loath to insert itself into an issue that does not directly involve the entire organization. In that context the ASEAN leaders' statement in May that called on all parties in the South China Sea to exercise restraint should actually be viewed as significant.<sup>5</sup> Track I meetings that involve extraregional countries have been more willing to address these issues directly, including the ARF and the EAS. Finally, Track I meetings that operate outside the region are now starting to weigh in on the issues, most recently the G7,<sup>6</sup> but it is questionable whether regional countries perceive these statements as legitimate. Problematically, these dialogues have done little to build confidence, much less trust. It seems, therefore, that "strategic distrust" affects the entire region.<sup>7</sup>

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3. See for example Wang Guanzhong (remarks at the 2014 Shangri-La Dialogue Fourth Plenary Session, Singapore, June 1, 2014), transcribed by Andrew S. Erickson, <http://www.andrewerickson.com/2014/06/pla-ltgen-wang-guanzhongs-remarks-scripted-unscripted-at-shangri-la-dialogue/>.

4. James Manicom, *Bridging Troubled Waters: China, Japan, and Maritime Order in the East China Sea* (Washington, DC: Georgetown University Press, 2014).

5. Tim McLaughlin and Nyan Lynn Aung, "ASEAN Unites to Condemn Rising South China Sea Tensions," *Myanmar Times*, May 19, 2014, <http://www.mmtimes.com/index.php/national-news/10406-asean-unites-to-condemn-rising-south-china-sea-tensions.html>.

6. G7 Leaders Statement–Foreign Policy, Brussels, Belgium, June 4, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/04/g-7-leaders-statement-foreign-policy>.

7. Wang Jisi and Kenneth G. Lieberthal, "Addressing U.S.-China Strategic Distrust," Brookings Institution, March 30, 2012, <http://www.brookings.edu/research/papers/2012/03/30-us-china-lieberthal>.

# Empathy Gaps

In order to build empathy—an understanding or appreciation of another actor’s worldview—the first task is to identify where the gaps in empathy are. Empathy gaps are simply a mutual misperception or misunderstanding of another’s wants, needs, fears, interests, judgments, and perceptions. We can identify several empathy gaps between South China Sea claimants and between China and the United States (the latter relationship is germane to this discussion from the standpoint of regional stability).

First, no one appreciates that, as my colleague Li Mingjiang from the S. Rajaratnam School of International Studies has stated, everyone in China, from the time they are in grade 2, learns that the entire South China Sea is Chinese. We hear the list of grievances from our Chinese colleagues all the time: other countries have been steadily infringing on China’s claimed territory. This must stop. There will be no compromise on issues of territorial integrity and national sovereignty.<sup>8</sup> As a consequence, the things China does to exploit its own areas, through the deployment of oil rigs, through fisheries bans, and by denying others these rights via the deployment of coast guard vessels, is without reproach. China’s claims are deeply rooted in its history dating back centuries. Historic waters, those within the nine-dash line, do not conform to any recognized legal method of claiming territory or of ocean space. As illustrated by Wang Guanzhong at the Shangri-la Dialogue,<sup>9</sup> China’s claims predate UNCLOS and effectively should be grandfathered into customary international law. In this view, China is justified to react assertively to the provocations of others and is now preparing to use its considerable capabilities to fully exploit its claimed jurisdiction in the South China Sea, to the detriment of other claimants. This is what we are seeing off the coast of Vietnam.<sup>10</sup> Whether these claims are historically accurate or not is for this purpose irrelevant. China certainly seems to believe its claims are grounded in history that predates the ways in which modern states do things.<sup>11</sup> No other claimant bases its claims this way and as a result none share the Chinese worldview on this issue.

A second empathy gap relates to perceptions of the historical experiences of other claimant states. We are used to hearing China’s dogmatic line that it will never compromise on issues of national sovereignty and territorial integrity and its condemnations of hegemonic or colonial powers. This is one reason, according to a Chinese colleague, that China does not like to be referred to as a “great power”; great powers are expansionist and seek hegemony, which China would never do. Yet it is curious that China cannot appreciate the frames that Vietnam uses to refer to its own national territory. In a recent interview,

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8. Teddy Ng, “No Compromise on Disputed Islands, Says Foreign Minister Wang Yi,” *South China Morning Post*, March 9, 2014, <http://www.scmp.com/news/china/article/1443949/no-compromise-disputed-islands-says-foreign-minister-wang-yi>.

9. “Chinese General Expounds Nine-Dotted Lines in Shangri-La Dialogue,” China Military Online, June 3, 2014, [http://eng.chinamil.com.cn/news-channels/china-military-news/2014-06/03/content\\_5932823.htm](http://eng.chinamil.com.cn/news-channels/china-military-news/2014-06/03/content_5932823.htm).

10. James Manicom, “The Energy Context behind China’s Drilling Rig in the South China Sea,” *China Brief* 14, no. 11, June 4, 2011, [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=42468&tx\\_ttnews%5BbackPid%5D=25&cHash=fd6080d22eab17dbac98188f894e9766#.U95\\_ebsg-k1](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=42468&tx_ttnews%5BbackPid%5D=25&cHash=fd6080d22eab17dbac98188f894e9766#.U95_ebsg-k1).

11. Zhang Zhihua, “History Backs China in Sea Disputes,” *China Daily*, June 5, 2014, [http://usa.chinadaily.com.cn/opinion/2014-06/05/content\\_17563419.htm](http://usa.chinadaily.com.cn/opinion/2014-06/05/content_17563419.htm).

Vietnam's state president Truong Tan Sang stated, "We are determined to protect every inch of our land and sea from violation. For every Vietnamese, national sovereignty is sacred and sacrosanct."<sup>12</sup> Likewise Vietnamese officials frame their resolve to stand their ground as a function of a historical experience of persecution and invasion at the hands of foreign invaders. Indeed, this perception is supported by the historical record. If China thinks it takes national sovereignty seriously, try being Vietnamese. There were no unequal treaties for Vietnam; there was outright colonization by the French and the Americans, even if the latter didn't see it that way.

The same is true in the Philippines. As is the case with Vietnam and China, the Philippines also professes that its Spratly claims, the Kalayaan Island group, are integral to the national security of the Philippines as a function of its legacy of foreign invasion. Indeed, one could argue that both the Philippines and Vietnam endured greater suffering at the hands of foreign powers than did China. To frame one's commitment to national sovereignty as China does must surely sound hollow in Hanoi and Manila, as they have had the same experience yet have not manufactured a rejection of Western legal concepts as a result.

A third set of gaps exists between the United States and China. For its part, the United States does not appreciate that, however incoherent and aggressive China's strategy in the South China Sea might appear, in China's eyes the American rebalance supports the motivation for China to assert itself. Although U.S. leaders are careful at every juncture to remind China that the rebalance is not about containment, which should be patently obvious to anyone familiar with the difficulties of a declining maritime power containing a rising continental one,<sup>13</sup> the Chinese don't buy it. Cheng Li from the Brookings Institution recently reported being struck that a number of Chinese analysts perceived that the United States was either encouraging smaller countries to provoke China or attempting to capitalize on regional tensions to justify the rebalance.<sup>14</sup> By contrast, two prominent U.S. foreign policy experts recently suggested in the prominent journal *Foreign Affairs* that the onus is on China, more than the United States, to improve relations in maritime East Asia. This betrays a lack of appreciation about stated Chinese anxieties about the role of U.S. forces in the region and their relationship with some of China's neighbors.<sup>15</sup>

For its part, China does not understand that its statement of core interests is perceived in Washington as expansionist. Although a sober analysis of the term suggests these interests are actually pretty limited in the grand scheme of things (their challenge is that they

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12. "Vietnam President Affirms Determination to Protect National Sovereignty," *Tuoi Tre News*, June 22, 2014, <http://tuoitrenews.vn/politics/20502/vietnams-leader-affirms-determination-to-protect-national-sovereignty>.

13. "Correspondence: Sea Powers, Continental Powers, and Balancing Theory," *International Security* 26, no. 2 (Fall 2011): 191, <http://fas-polisci.rutgers.edu/levy/2011%20Blagden,%20Levy,%20&%20Thompson%20-%20Correspondence.pdf>.

14. Cheng Li, "U.S.-China Ties Remain Strong amid Rising Disputes," Brookings Institutions, July 1, 2014, <http://www.brookings.edu/blogs/up-front/posts/2014/07/01-us-china-world-order-li>.

15. James B. Steinberg and Michael O'Hanlon, "Keep Hope Alive: How to Prevent U.S.-Chinese Relations from Blowing Up," *Foreign Affairs* 93, no. 4 (July–August 2014), <http://www.foreignaffairs.com/articles/141476/james-b-steinberg-and-michael-ohanlon/keep-hope-alive>.

affect a host of people that have no say in the matter, including Tibetans and China's neighbors),<sup>16</sup> U.S. policymakers seem convinced the list is growing by the day.<sup>17</sup> There is a sense in China, we are told by Wu Xinbo, that China is entitled to greater respect from the United States as befits its newfound international status.<sup>18</sup> But China does not appreciate that from the U.S. perspective the evidence suggests Beijing only responds to strength and to clear signals of deterrence (capability and commitment). This is why U.S. policy has included some form of containment, from the presidencies of Bill Clinton (the Nye report) to George W. Bush (strategic clarity) to Barack Obama (rebalance). In the U.S. view, China's capabilities and its behavior simply invite hedging, and Beijing seemingly cannot understand why.<sup>19</sup> China views the rebalance as totally disconnected from its behavior. This is the most glaring gap as for any U.S. policymaker the rebalance was entirely driven by Chinese behavior.

## The Effect of Empathy Gaps

As noted above, the primary consequence of a lack of empathy is the overestimation of threat, which can fuel the security dilemma and undermine the will to take CBMs seriously. For instance, hotlines with Beijing have been notoriously underutilized during past crises and the U.S.-China maritime mechanism has merely provided a forum for the restatement of well-worn positions on U.S. surveillance activities off the coast of China. U.S. policymakers are candid that they fear that Chinese military officials have a poor understanding of how misperception can fuel the escalation of tensions in a crisis situation.

The creation of empathy, by contrast, can highlight important limits on the behavior of an adversary, which in turn can help manage expectations or avoid policy nonstarters. For instance, Japanese scholars observed in a 2010 assessment of Chinese security policy that China views CBMs as a reward for closer political ties, not as a path to closer political ties.<sup>20</sup> This suggests that offering trade-offs to achieve progress on CBMs is a dead end as it is unlikely that China will adhere to CBMs that are not an extension of improved political ties.

Scholars have not yet considered empathy-building measures as a distinct set of processes from CBMs or trust-building measures. Those that have are generally flawed. One

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16. Michael D. Swaine, "China's Assertive Behavior—Part One: On Core Interests," *China Leadership Monitor*, November 15, 2010, <http://carnegieendowment.org/2010/11/15/china-s-assertive-behavior-part-one-on-core-interests/20tq>.

17. Caitlin Campbell, Ethan Meick, Kimberly Hsu, and Craig Murray, "China's 'Core Interests' and the East China Sea," U.S.-China Economic and Security Review Commission Staff Research Background, May 10, 2013, <http://origin.www.uscc.gov/sites/default/files/Research/China%20Core%20Interests%20and%20the%20East%20China%20Sea.pdf>.

18. Yoichi Kato, "Interview/Wang Jisi: China Deserves More Respect as a First-Class Power," *Asahi Shimbun*, October 5, 2012, <http://ajw.asahi.com/article/views/opinion/AJ201210050003>.

19. Thomas J. Christensen, "Fostering Stability or Creating a Monster? The Rise of China and U.S. Policy toward East Asia," *International Security* 31, no. 1 (Summer 2006), [https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/international\\_security/v031/31.1christensen.html](https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/international_security/v031/31.1christensen.html).

20. National Institute for Defense Studies, Japan, *NIDS China Security Report 2010* (Tokyo: National Institute for Defense Studies, 2011), [http://www.nids.go.jp/english/publication/chinareport/pdf/china\\_report\\_EN\\_4C\\_A01.pdf](http://www.nids.go.jp/english/publication/chinareport/pdf/china_report_EN_4C_A01.pdf).

oft-cited approach is to exercise restraint as a way to signal intentions.<sup>21</sup> However, in the absence of empathy, how can one arrive at a mutual understanding of restraint? For instance, some argue that China has been acting with restraint by only using coast guard vessels to police its maritime claims, rather than the PLA's navy. From the Philippine perspective, this must sound like reassuring a battered wife that she was only slapped instead of punched. Similarly, U.S. policymakers may view a reduction in intelligence-gathering operations off the coast of China as a sign of restraint, while the Chinese take issue with every occasion, which is the central barrier to reaching a workable accommodation on the issue.<sup>22</sup> Some proponents of U.S. strategic retrenchment argue that the United States should pursue a global strategic policy of offshore balancing rather than hegemony. However, even the most limited conceptions of "command of the commons" place costs on China that it may not be willing to bear,<sup>23</sup> which undermines the argument from some quarters that offshore balancing could lead to improved relations with China.<sup>24</sup> If you don't understand another country's worldview, how do you agree on what qualifies as restraint?

## Building Empathy

Building empathy is not a panacea; it will do nothing to rectify fundamental differences of objective nor will it ameliorate instances of genuine antipathy. Deeper empathy could not have avoided World War II, but it certainly could have avoided World War I. Empathy certainly ended the Cuban Missile Crisis, as John F. Kennedy and Nikita Khrushchev both realized the other also wanted a way out. Likewise, had Robert McNamara recognized that North Vietnam viewed the Vietnam War as a war for independence, rather than as an extension of the Cold War, he would have fought the war differently. Regrettably McNamara didn't learn these lessons until well after he left office, and arrived at the realization when he had the chance to engage his former adversaries through critical oral history projects.<sup>25</sup> Although it is inconceivable for leaders to engage in this exercise while in power, the lessons of McNamara that relate to empathy building are worth keeping in mind.

This raises the possibility that empathy building between South China Sea claimants may in fact do little to ameliorate tensions. Both the United States and China have been crystal clear about their objectives in maritime East Asia. China has been clear that it will not compromise and will not tolerate intrusions on its territorial integrity and national sovereignty (what are now termed *core interests*). The United States, by contrast, has said clearly that it will defend its allies and protect the safety and freedom of navigation. These

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21. Steinberg and O'Hanlon, "Keep Hope Alive."

22. James Manicom, "China and American Seapower in East Asia: Is Accommodation Possible?," *Journal of Strategic Studies* 37, no. 3 (2014), <http://www.tandfonline.com/doi/abs/10.1080/01402390.2014.900753?src=recsys&#.U96VXLsg-k1>.

23. Barry R. Posen, *Restraint: A New Foundation for U.S. Grand Strategy* (Ithaca, NY: Cornell University Press, 2014).

24. Charles Glaser, "Will China's Rise Lead to War? Why Realism Does Not Mean Pessimism," *Foreign Affairs* 90, no. 2 (March–April 2011), <http://www.foreignaffairs.com/articles/67479/charles-glaser/will-chinas-rise-lead-to-war>.

25. *The Fog of War: Eleven Lessons from the Life of Robert S. McNamara*, directed by Errol Morris, Sony Pictures Classics, 2003, <http://www.sonyclassics.com/fogofwar/>.

redlines seem to be incompatible, so building empathy may add little here. It is terrifying that neither side recognizes that these are redlines for the other.

Yet from a U.S. policy perspective, there are a number of good reasons to take the time to build empathy with an adversary. Empathy building is important to more than just trust. Empathy can strengthen deterrence, if it brings with it the recognition on both sides that neither side wants war. Moreover, even if you don't need to agree with your adversary's worldview, understanding their worldview can tell you a lot about their resolve, which in turn speaks volumes about their credibility.

A key take away from this paper, then, is that academics and practitioners should invest considerably more intellectual energy in empathy-building exercises, rather than more CBMs. Signals of tied hands or of restraint will not be correctly interpreted if the other side cannot correctly interpret the other's incentive structure for doing so. At the same time, it is worth noting that no amount of empathy can build cooperation where there is a total absence of political will to solve a problem. If China is determined to turn the South China Sea into a Chinese lake, then the entire conversation about cooperation should be jettisoned and U.S. policymakers should begin a discussion of whether the U.S. national interest requires this to be prevented and at what cost.<sup>26</sup> In the end, Chinese pundits and scholars are half right, foreigners don't understand China, but no more does China understand its neighbors or the United States. This understanding comes by building empathy.

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26. Michèle Flournoy and Ely Ratner, "China's Territorial Advances Must be Kept in Check by the United States," *Washington Post*, July 4, 2014, [http://www.washingtonpost.com/opinions/chinas-territorial-advances-must-be-kept-in-check-by-the-united-states/2014/07/04/768294dc-0230-11e4-b8ff-89afd3fad6bd\\_story.html](http://www.washingtonpost.com/opinions/chinas-territorial-advances-must-be-kept-in-check-by-the-united-states/2014/07/04/768294dc-0230-11e4-b8ff-89afd3fad6bd_story.html).

# 12 | Locating Southeast Asia in Debates on the South China Sea

Charmaine G. Misalucha

Current debates on the South China Sea highlight that although power may be shifting to China, the leadership of the United States will remain strong.<sup>1</sup> The sources of escalation and de-escalation of tensions therein have been examined before,<sup>2</sup> but the point of view of such studies has been geared toward the great powers. This is not to say that Southeast Asia is absent in analyses about the South China Sea. On the contrary, it has been noted how countries in the region have converging and diverging positions in regard to the issue,<sup>3</sup> which led to an argument on the coexistence of different forms of sovereignty in ASEAN—that is, maritime and terrestrial.<sup>4</sup>

However, the inclusion of Southeast Asia is oftentimes simply as an adjunct to great power politics. The region is at best portrayed as instrumental to the interests of the hegemon (the United States) and a rising power (China), and at worst only as the site of a likely confrontation. Southeast Asian views then become nothing but knee-jerk reactions to the policies of extraregional actors. Two things are required for Southeast Asia to play a more active role in improving regional dynamics. First, it needs to be acknowledged that current projections on the South China Sea issue, although valid, rely on assumptions that are biased toward the interactions of the United States and China. Without the active involvement of Southeast Asian states, existing policies and conflict management strategies will be less effective. Second, the engagement policies of the parties involved need to be adjusted so as to infuse agency to Southeast Asia. In particular, the motivations for engagement need to shift from protecting strict strategic interests (promoting sovereignty over islands)

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1. Michael J. Green and Nicholas Szechenyi, *Power and Order in Asia: A Survey of Regional Expectations* (Washington, DC: CSIS, July 2014), <http://csis.org/publication/power-and-order-asia>.

2. Ralf Emmers, “What Explains De-Escalation of the Spratlys Dispute,” *IDSS Commentaries*, December 5, 2006; Ralf Emmers, “The De-Escalation of the Spratly Dispute in Sino-Southeast Asian Relations,” in *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime*, ed. Sam Bateman and Ralf Emmers (London: Routledge, 2009), 128–139.

3. Christopher Chung, “Southeast Asia and the South China Sea Dispute,” in *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime*, ed. Sam Bateman and Ralf Emmers (London: Routledge, 2009), 95–109.

4. Mak Joon Nam, “Sovereignty in ASEAN and the Problem of Maritime Cooperation in the South China Sea,” in *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime*, ed. Sam Bateman and Ralf Emmers (London: Routledge, 2009), 110–127.

to protecting the global commons (ensuring the sustainability of the ecology and marine biosphere).

In line with this, the following analysis proceeds as follows. The first section presents two scenarios that result from current understandings of the South China Sea issue. The first of these depicts the possibility of an increase in tensions, given that the postures of the major players reflect the dynamics of the action-reaction spiral with the added complication of perception and misperception in a world of imperfect information. The second scenario weighs the probability of conflict, given the likelihood of a succession of hegemonies from the United States to China. Both scenarios are inevitably rooted in academic discussions regarding the security dilemma and power transition.

Against this backdrop, the second section of the analysis examines an alternative scenario that is centered on a more active Southeast Asian role. This is achieved through a modification of the engagement policies currently in place—that is, by shifting from strategic engagement to communicative or complex engagement. As a conclusion, emphasis is placed on the value of forums such as this for continuing the dialogue outside and beyond the walls of the state.

## Scenarios

Current understandings of the South China Sea issue need to be reexamined in order for Southeast Asia to play a more active role. A reexamination is crucial because our understandings and projections of the dispute are based on assumptions that are inclined toward the dynamics and interests of the United States and China instead of the smaller powers in the region. An effective solution to the crisis ultimately rests on the ability of the region to manage great power relations and be a more responsible stakeholder.

The first scenario presented here is premised on the continuation of tensions, which is likely to lead to more insecurity in the region. This scenario is extrapolated from the logic of the security dilemma. Meanwhile, the second scenario looks at the likelihood of conflict and considers the ways in which such can be avoided. The negative consequences of a power transition can be mitigated by balancing, containment, or engagement. Moving forward with these scenarios means that a more extensive and prolonged commitment from the United States is necessary in order to neutralize the tensions in the South China Sea.

### **SCENARIO 1: INCREASED TENSIONS, REDUCED SECURITY**

The security dilemma is a pervasive phenomenon in the field of international relations. In a situation of anarchy and a self-help environment, states seek security by maximizing power. The drive to security, however, generates insecurity from other states in the system because of uncertainty about others' motivations and the availability of imperfect information. The prevalence of uncertainty engenders misperceptions and mistrust, which push

states to take precautionary and defensive countermeasures to guarantee their security. This action-reaction spiral leads to an increase in tensions, a reduction in security, and the creation of self-fulfilling prophecies about the security environment.<sup>5</sup> One state's security, in short, comes at the expense of another, thereby making international life a zero-sum game.<sup>6</sup>

A similar situation appears to be taking place in the South China Sea.<sup>7</sup> In line with the logic of the security dilemma, China and countries in Southeast Asia are seeking to maximize their security, and in a situation where motivations are unclear, each side then takes measures that are misperceived as offensive and that, ironically, generate insecurity. One way of mitigating the effects of the security dilemma lies in the presence of an outside arbiter, in this case the United States and, by extension, Japan.<sup>8</sup>

The recently concluded Shangri-La Dialogue showed the stakes involved as reflected in both countries' very strong statements. Prime Minister Shinzo Abe gave the keynote address, and his rhetoric was tough on the need to uphold the rule of law at sea.<sup>9</sup> He emphasized that claims must be based on international law, that force and coercion must not be used, and that the disputes ought to be settled by peaceful means. He further expressed Japan's support of Vietnam and the Philippines, and placed emphasis on the ARF, the ASEAN Defense Ministers' Meeting, and the EAS. Japan has also extended practical support across the board to ASEAN countries to boost capacities in safeguarding the seas, including hard assets (new patrol vessels offered to Indonesia and the Philippines), experts, official development assistance, capacity-building activities in coordination with the Japanese self-defense forces, and defense equipment cooperation.

Similarly, U.S. secretary of defense Chuck Hagel's remarks reaffirmed the United States' commitment to the Asia Pacific.<sup>10</sup> He reiterated the United States' security priorities, which include encouraging the peaceful resolution of disputes by upholding the principles of the freedom of navigation and avoiding aggression, building a cooperative regional architecture based on international rules and norms, enhancing the capabilities of the United States' partners and allies in the region, and strengthening regional defense capabilities. In his condemnation of China's actions, Hagel underscored the need for a rules-based order, which presupposes a strong, cooperative regional security architecture.

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5. Thomas J. Christensen, "China, the U.S.-Japan Alliance, and the Security Dilemma in East Asia," *International Security* 23, no. 4 (1999): 49–80.

6. Robert Jervis, "Cooperation under the Security Dilemma," *World Politics* 30, no. 2 (1978): 167–214.

7. Avery Goldstein, "Great Expectations: Interpreting China's Arrival," *International Security* 22, no. 3 (Winter 1997–1998), 36–73.

8. Christensen, "China, the U.S.-Japan Alliance, and the Security Dilemma"; Joshua P. Rowan, "The U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute," *Asian Survey* 45, no. 3 (2005): 414–436.

9. Shinzo Abe (keynote address, Shangri-La Dialogue, Singapore, May 30, 2014), <http://www.iiss.org/en/events/shangri%20la%20dialogue/archive/2014-c20c/opening-remarks-and-keynote-address-b0b2>.

10. Chuck Hagel, "The United States' Contribution to Regional Security" (speech at Shangri-La Dialogue, Singapore, May 31, 2014), <https://www.iiss.org/en/events/shangri%20la%20dialogue/archive/2014-c20c/plenary-1-d1ba/chuck-hagel-a9cb>.

Southeast Asian reactions to Japanese support and U.S. policy in the South China Sea are positive. The presence of outside powers, after all, shifts the balance of power and minimizes the effects of the security dilemma. This notwithstanding, a scenario like this proves to be costly and unsustainable. The cyclical nature of action-reaction necessitates extensive and prolonged commitments on the part of outside powers to ensure regional security. This can eventually be too heavy a burden for an outside arbiter and can lead to one being overstretched.

## SCENARIO 2: MORE POWERS, MORE CONFLICT

A second scenario that is reflective of current understandings about the South China Sea dispute is the likelihood of conflict. This trajectory is based on the power transition theory where calculations are made about the existence of a hegemon and a dissatisfied rising power that challenges the status quo.<sup>11</sup> War ensues when the rising power reaches parity with the dominant state and uses force to reshape the rules of international life.<sup>12</sup> History has shown that the major wars of the past corresponded with the dynamics of the theory.<sup>13</sup> In East Asia, China's growth is seen as an indicator of how it will soon surpass the United States as the world's dominant power in the near future.<sup>14</sup>

Power transition theory presupposes hegemony. A *hegemon* is generally defined as a strong state with a sizeable territory and military and economic power. However, there are no clear specifications of these attributes, and absent that identification, it becomes challenging to pinpoint and assess when and how power transitions occurred, or even if one is taking place now.<sup>15</sup> Another characteristic of a hegemon is that it is able to structure the international system to suit its interests.<sup>16</sup> Most importantly, a hegemon is able to create patterns of order, which results from the legitimacy of its rule and recognition by other members of the international system. In this case, a hegemon enjoys more than just primacy. As the creator of patterns of order, it is able to craft acceptable rules and norms of interaction. This attribute then makes a hegemon enjoy more than just material primacy in the international system.<sup>17</sup>

Despite its significant contributions in international relations, power transition theory generated valid criticisms. For instance, scholars argue that contrary to common knowledge that rising powers are a threat to the status quo, wars are instead likely to be initiated

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11. Robert Gilpin, *War and Change in World Politics* (New York: Cambridge University Press, 1981).

12. Taylor M. Fravel, "International Relations Theory and China's Rise: Assessing China's Potential for Territorial Expansion," *International Studies Review* 12 (2010): 505–532.

13. George Modelski, *Long Cycles in World Politics* (Seattle: University of Washington Press, 1987).

14. Woosang Kim, "Power Parity, Alliance, Dissatisfaction, and Wars in East Asia," *Journal of Conflict Resolution* 46 (2002): 654–672; Douglas Lemke and Robert L. Tammen, "Power Transition Theory and the Rise of China," *International Interactions* 29 (2003): 269–271.

15. Steve Chan, *China, the U.S., and the Power-Transition Theory* (London: Routledge, 2008).

16. Richard Ned Lebow and Benjamin Valentino, "Lost in Translation: A Critical Analysis of Power Transition Theory," *International Relations* 23, no. 3 (2009): 389–410.

17. Ian Clark, "China and the United States: A Succession of Hegemonies," *International Affairs* 87, no. 1 (2011): 13–28.

by a declining power.<sup>18</sup> The argument that the rising power is expected to challenge the existing hegemon becomes untenable because given time, the latter's decline is inevitable. It is more rational for the rising power, therefore, to postpone any confrontation that may lead to conflict. This way, it is able to consolidate its power over time and avoid the costs of waging a war. In the same vein, the scope and sources of the benefits of conflict have yet to be evaluated systematically.<sup>19</sup> This line of thought led to conclusions that power transitions are rare and that they oftentimes occur peacefully.<sup>20</sup> Transposing this logic to U.S.-China relations, China's rise is not assured and is even unsustainable given its sheer scale of economic development, rapid capitalist development, and the toll on the environment.<sup>21</sup> Similarly, hegemonic succession is unlikely because the United States enjoys only primacy and therefore no transition of hegemonic rule is bound to happen anytime soon.<sup>22</sup>

These criticisms notwithstanding, the likelihood of conflict is more palpable today. The question then turns to how to manage relations in order to avoid the series of events that may lead to conflict. Three options are explored in this scenario: balancing, containment, and engagement. Balancing takes place by the formation of alliances.<sup>23</sup> Once states determine with whom to ally, they face problems related to managing the alliance. Problems of defection take the form of either abandonment or entrapment. Abandonment spells realignment, de-alignment, repealing the alliance contract, or failing to deliver on explicit commitments or to render support where it is expected. Entrapment means being forced to join an ally's war efforts for the sake of preserving the alliance. In bipolar systems, the likelihood of entrapment is higher than abandonment. In multipolar systems, meanwhile, the opposite is the case: abandonment risks are higher than entrapment.

Interestingly, however, the conduct of China's neighbors is anomalous from the traditional balance of power perspective.<sup>24</sup> For one, states are supposed to balance against the more powerful state. In today's power dynamics, logic would dictate that to be the United States. Instead states are aligning with the United States and balancing against China. Another indication that the traditional balance of power perspective does not seem to be operational in East and Southeast Asia is that the geographically proximate countries, such as Cambodia, Laos, and Myanmar, are aligning with China, and that maritime Southeast Asian countries are balancing against it. The balance of power concept postulates that the nearer a state is to a potential threat, the more that balancing is likely to occur. The opposite seems to be taking place in Asia.

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18. Chan, *China, the U.S., and the Power-Transition Theory*.

19. Fravel, "International Relations Theory."

20. Lebow and Valentino, "Lost in Translation."

21. Mark Beeson, "Hegemonic Transition in East Asia? The Dynamics of Chinese and American Power," *Review of International Studies* 35 (2009): 95–112.

22. Clark, "China and the United States."

23. Glenn H. Snyder, "The Security Dilemma in Alliance Politics," *World Politics* 36, no. 4 (1984): 461–495; Stephen M. Walt, *The Origins of Alliances* (Ithaca, NY: Cornell University Press, 1987).

24. Steve Chan, "An Odd Thing Happened on the Way to Balancing: East Asian States' Reaction to China's Rise," *International Studies Review* 12, no. 3 (2010): 387–412.

Balancing is one option to lessen the possibility of a slide to a conflict scenario. Another is containment.<sup>25</sup> Analysts subscribing to this notion posit that a rising China poses a long-term danger to Southeast Asia.<sup>26</sup> Japan's economic strength notwithstanding, China is realizing its vast economic potential. Consequently a stronger China, according to this view, is likely to undermine peace in the region because economic development will only make it more assertive and less cooperative with its neighbors. Furthermore, China has shown a pattern of opportunism from 1974 to the late 1990s that supports this view.<sup>27</sup> This also undergirds the idea of China's "creeping assertiveness" in the region.<sup>28</sup> The disadvantage of pursuing this option, however, is that it contributes to the exacerbation of the security dilemma discussed above, and hence increases the insecurity in the region.

Apart from balancing and containment, engagement is the third option in order to avoid a conflict scenario. Like containment, engagement has had a following in academic and policy circles.<sup>29</sup> The objectives of engagement are threefold: to discover the preferences of the targeted state, to shape those preferences in certain directions, and to create stable international institutions that can benefit the parties involved. Various engagement policies are in place in regard to China to encourage it to become a "moderate" participant in the international community through economic interdependence, multilateralism, and its involvement in strategic dialogues.<sup>30</sup> Unfortunately, even in this scenario, mistrust and misperception reign. The United States sees this move as appeasing and empowering a revisionist power, while China sees this as the United States' means of "soft containment" to ultimately overthrow the Chinese regime.

There are reasons why engagement policies are less than optimal. First, engagement risks being an end in itself. This is because it is difficult to communicate preferences, especially given the predilection to misrepresentation under conditions of anarchy. Also, if the goal is behavior modification, exactly how does this process take place? Using incentives and sanctions presupposes that integration to the international economy leads to

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25. Barry Buzan and Gerald Segal, "Rethinking East Asian Security," *Survival* 36, no. 2 (1994): 3–21; Richard K. Betts, "Wealth, Power and Instability: East Asia and the United States after the Cold War," *International Security* 18, no. 3 (Winter 1993–1994): 34–77; Aaron Friedberg, "Ripe for Rivalry: Prospects for Peace in a Multi-Polar Asia," *International Security* 18, no. 3 (Winter 1993–1994): 5–33; Paul Dibb, *Towards a New Balance of Power in Asia*, Adelphi Paper 295 (London: International Institute for Strategic Studies/Oxford University Press, 1995); David Shambaugh, "Containment or Engagement of China: Calculating Beijing's Responses," *International Security* 21, no. 2 (1996): 180–209.

26. Denny Roy, "Hegemon on the Horizon? China's Threat to East Asian Security," *International Security* 19, no. 1 (1994): 149–168.

27. Ang Cheng Guan, *The South China Sea Dispute Re-Visited*, IDSS Working Paper 4 (Singapore: Institute of Defense and Strategic Studies, 1999).

28. Ian J. Storey, "Creeping Assertiveness: China, the Philippines, and the South China Sea Dispute," *Contemporary Southeast Asia* 21, no. 1 (1999): 95–118.

29. Morton Abramowitz, "Pacific Century: Myth or Reality," *Contemporary Southeast Asia* 15, no. 3 (1993): 257–268; James Richardson, "East Asian Stability," *National Interest* 38 (Winter 1994–1995): 28–39; Kishore Mahbubani, "The Pacific Impulse," *Survival* 37, no. 1 (1995): 105–120; Alastair Iain Johnston and Robert S. Ross, *Engaging China: The Management of an Emerging Power* (New York: Routledge, 1999); Paul Papayouanou and Scott L. Kastner, "Sleeping with the (Potential) Enemy: Assessing the U.S. Policy of Engagement with China," *Security Studies* 9 (Winter 1999–2000): 157–187.

30. Marc Lynch, "Why Engage? China and the Logic of Communicative Engagement," *European Journal of International Relations* 8, no. 2 (2002): 187–230.

democratization. At the same time, however, engagement is silent on the legitimacy of international institutions other than their being an instrument for the exercise of power. A second shortcoming of engagement policies is that these are oftentimes one-way processes and underestimate the targeted state. This is because they assume that the targeted state remains unaware of the behavioral modification strategies aimed against it.<sup>31</sup> If engagement is a way to socialize a targeted state into international rules and norms, then it has to be a two-way process.<sup>32</sup> It is precisely these loopholes in both containment and engagement that paved the way for a modified means of interacting with China: “constraint.”<sup>33</sup> This advocates that concerted pressure is needed to moderate Chinese behavior and that, crucially, the key to constraint is the United States.

In sum, the scenarios that have been presented here are generalized versions of current understandings about China and its role in the South China Sea disputes. The assumptions embodied in these scenarios are ingrained in the various policies that are geared toward China’s rise. As a whole, however, these policies fall short as evidenced by recent tensions in the South China Sea. There are several factors that come into play as to why previous policies seem to have fallen short of the ideal outcome, not least of which is that committing indefinitely in the region’s affairs is impractical for outside powers, particularly the United States. Understandably, the small states in Southeast Asia need to figure more prominently and be active stakeholders in the maintenance of the regional security architecture. In this regard, an alternative scenario needs to be crafted that accords Southeast Asian states a more central role in addressing the South China Sea disputes.

## An Alternative Scenario

The alternative scenario presented here is a slight departure, although by no means totally radical, from preexisting calculations. It builds on what are currently in place and only shifts attention to the motives behind policies of engagement, instead of focusing only on the strategic gains of such a move. This modified variant of socialization embraces what is referred to as communicative or complex engagement, and revolves around the idea that behavior modification need not be strictly unidirectional. In the process of interaction, it is not only China’s behavior that can be altered but also Southeast Asia’s and the United States’. Recognizing this possibility allows not just a more central role for Southeast Asia but also the creation of a more effective rules-based regional architecture. Against this backdrop, the following discussion is divided into two subsections. The first looks at the region’s sentiments on the issue and on U.S. policy, and the second focuses on how communicative engagement can infuse agency to Southeast Asia.

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31. Ibid.

32. Alice Ba, “Who’s Socializing Whom? Complex Engagement in Sino-ASEAN Relations,” *Pacific Review* 19, no. 2 (2006): 157–179.

33. Gerald Segal, “East Asia and the ‘Constraint’ of China,” *International Security* 20, no. 4 (1996), 107–135.

# Southeast Asia's Sentiments

## PHILIPPINES

Considered a frontline state in the South China Sea dispute, the Philippines welcomes the United States' rebalance to Asia as this entails continued U.S. presence and commitment to the region. At the same time, however, it also hopes to make its relationship with its treaty ally less one-sided.<sup>34</sup> Since the 1980s, the Philippines has sought to include its claims in the South China Sea in the mutual defense obligations with the United States. Absent such commitment, most Filipinos see the Mutual Defense Treaty with the United States as partial. In light of recent events in the South China Sea, the Philippines submitted the issue for arbitration under UNCLOS in its desire for a rules-based arrangement to address the disputes. This is one way for the Philippines to internationalize the issue, given that co-opting ASEAN proved limited.<sup>35</sup> In 2011, the Philippines proposed the creation of a Zone of Peace, Friendship, and Cooperation, which garnered lukewarm reactions. Similarly, ASEAN issued no statement of support in the wake of the 2012 standoff in Scarborough Shoal. These therefore bolstered the Philippines' decision to refer the dispute to UNCLOS arbitration, albeit this move is more symbolic than substantive.<sup>36</sup>

Progress in the Philippine-U.S. alliance includes the EDCA, which features the development of a minimum credible defense posture and aims to boost the partners' individual and collective defense capabilities. This also complements the Mutual Defense Treaty and the Visiting Forces Agreement. The EDCA allows the U.S. military access to some facilities of the AFP for security cooperation exercises, as well as training activities for the promotion of interoperability and capacity building.<sup>37</sup>

Undergirding the EDCA is the acknowledgement that the Philippines badly needs to modernize its military in order to develop a minimum credible defense. The overarching goals of the drive to modernize the Philippine military are to equip the AFP with capabilities to protect the country's territorial integrity, to offset the evolving foreign defense challenges, and to ensure the attainment of strategic maritime interests in the South China Sea.<sup>38</sup> Furthermore, the innovations over the short- and medium-terms are the establishment of "appropriate strategic response forces" in the three branches of the AFP to undertake integrated defense missions, the enhancement of the command, control, communication, computers, intelligence, surveillance, and reconnaissance (C4ISR) system to support joint

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34. Aileen S. P. Baviera, "Implications of the U.S.-Philippines Enhanced Defense Cooperation Agreement," *Asia Pacific Bulletin* 262, May 9, 2014, <http://www.eastwestcenter.org/sites/default/files/private/apb262.pdf>.

35. Sarah Raine and Christian Le Miére, *Regional Order: The South China Sea Disputes*, Adelphi Series (London: International Institute for Strategic Studies/Oxford University Press, 2013).

36. Ibid.

37. Julio S. Amador and Karla Mae Pabeliña, "PH-U.S. Security Relations: Deepening the Alliance," *Rappler*, April 27, 2014, <http://www.rappler.com/thought-leaders/56518-ph-us-enhanced-defense-cooperation-agreement>.

38. Peter Chalk, *Rebuilding While Performing: Military Modernisation in the Philippines* (Barton: Australian Strategic Policy Institute, 2014).

strategic defense operations, and the development of a modern satellite communications network to work alongside improved C4ISR platform.<sup>39</sup>

## **VIETNAM**

Another frontline state in the South China Sea dispute, Vietnam claims the entire Spratly chain as well as the Paracel Islands. It established a military presence therein and holds extensive construction activities. Its claims date back to 1862 and 1865, when cartographic surveys of the South China Sea showed the islands as part of Vietnam.<sup>40</sup> Vietnam's claims are based on a combination of historical data and the continental shelf principle.<sup>41</sup> Crucial to Vietnam is that it has the difficult dilemma of convincing China to negotiate and persuading ASEAN to include the Paracel Islands in deliberations on sovereignty disputes.<sup>42</sup>

It is in this regard that Vietnam reached out to the United States in the hopes of transforming their relationship from a comprehensive to a strategic partnership. There are, however, limitations to this, considering that Vietnam's other strategic partners—France, Russia, and the United Kingdom—gave wan support in the wake of China's deployment of a drilling platform in disputed waters in early May 2014. In other words, how effective strategic partnerships can be in Vietnam's claims to the South China Sea is subject to other factors. Hence Vietnam may explore working together with the Philippines and the rest of ASEAN.

## **MALAYSIA AND BRUNEI**

Malaysia and Brunei are considered the quieter claimants in the South China Sea as they are more reluctant to draw attention to their disputes.<sup>43</sup> Malaysia claims 12 islands, 6 of which are occupied by Malaysian forces. It has consistently used the continental shelf principle to uphold its claims. Brunei, meanwhile, claims Louisa Reef and Rifleman Bank.

## **SINGAPORE, INDONESIA, AND THAILAND**

The small state of Singapore is dependent on the flow of shipping through the Malacca Strait and so has an interest in upholding the freedom of navigation at sea. In this sense, it is anxious about Chinese expansionism, as is Indonesia, which asserts its 200-nautical-mile EEZ in the South China Sea, and Thailand.

## **CAMBODIA, LAOS, AND MYANMAR**

This group is disinterested in a speedy resolution to the South China Sea disputes, primarily because they have no direct claims therein. More importantly, they are close Chinese allies and have no desire to provoke China.

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39. Ibid.

40. Michael G. Gallagher, "China's Illusory Threat to the South China Sea," *International Security* 19, no. 1 (1994): 169–194.

41. Rowan, "The U.S.-Japan Security Alliance."

42. Raine and Le Miére, *Regional Order*.

43. Ibid.

## ASEAN

As a regional organization, ASEAN wants the United States involved as a balancer to stanch the rapid military development of China and Japan.<sup>44</sup> In other words, U.S. presence reinforces the hedging strategy of Southeast Asia.<sup>45</sup> Since 2010, U.S. policy has been the creation of rules-based stability in the South China Sea. It remains neutral on sovereignty claims, but expressed objections in regard to assertive behavior. In this sense, ASEAN therefore has a positive view of U.S. policy in the region, particularly of the American rebalance.

Given these sentiments, it is clear that the region views U.S. presence in a positive light. It is likewise evident that an extensive, prolonged, and indefinite commitment on the part of the United States is not in the best interests of any of the parties involved. For one, it is too heavy a burden for any outside power and risks the United States' overstretching itself. Second, the involvement of nonclaimant states in the South China Sea endangers the fragile stability in the region as this can be misperceived as provocative actions. Third, it defeats the empowerment of the small states of Southeast Asia to manage regional powers and crises. Having said this, it now becomes even more imperative to infuse agency to Southeast Asia.

## Infusing Agency to Southeast Asia

A region that is proactive is needed to resolve the South China Sea dispute. This can be achieved if Southeast Asian states deepen their links with each other, increase their interoperability, and be more involved in multilateral forums.<sup>46</sup> Here, a tweaked policy of engagement is key. Communicative engagement needs to be tapped, which is the process of exchange of reasons for the resolution of problematic situations that require coordination and cooperation.<sup>47</sup> This process generates the establishment of common interpretations and mutual expectations and is in many ways an exercise in confidence building. Communicative engagement therefore paves the way for the creation of international arrangements that are amenable to the interests of both parties. Moreover, it allows for the possibility that actors' interests can and may change over the course of their interaction with each other.

Complex engagement works in the same fashion. This springs from the argument that China needs to be socialized into the international community's rules and norms. According to complex engagement, socialization is a two-way process and not just the purview of the great powers. Small powers, such as those in Southeast Asia, can also socialize more powerful states. In fact, ASEAN did so with China by drawing it in multilateral and

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44. David B. H. Denoon and Wendy Frieman, "China's Security Strategy: The View from Beijing, ASEAN, and Washington," *Asian Survey* 36, no. 4 (1996): 422–439.

45. Christopher Freise, *By Invitation, Mostly: The International Politics of the US Security Presence, China, and the South China Sea*, IDSS Working Paper 247 (Singapore: Institute of Defense and Strategic Studies, 2012).

46. Hayley Channer, "Hub and Spokes: How U.S. Allies in Asia Can Contribute to the U.S. Rebalance," *Asia Pacific Bulletin* 265, June 3, 2014, [http://www.eastwestcenter.org/sites/default/files/private/apb265\\_0.pdf](http://www.eastwestcenter.org/sites/default/files/private/apb265_0.pdf).

47. Lynch, "Why Engage?"

bilateral arrangements.<sup>48</sup> In the multilateral platform, ASEAN began by expanding the Post-Ministerial Conference (PMC) to include new dialogue partners, including China. The PMC then became the basis for the ARF. The Asia-Europe Meeting, the Asia-Pacific Economic Cooperation, and the ASEAN+3 are all frameworks that involve China. On the bilateral front, meanwhile, China's participation is also pivotal in the ASEAN-Senior Officials Consultations, the ASEAN-China Joint Cooperation Committee meetings, the ASEAN Plus China framework (alongside the ASEAN+3 process), and the ASEAN-China Summits.

In essence, the means to resolve the South China Sea dispute is already at hand. Southeast Asia is already practicing communicative and complex engagement. Discussions and dialogues about the South China Sea need to veer away from a strict emphasis on assertions of sovereignty and toward obligations to protect the global commons. Concerns about the environment, the ecology, and the marine biosphere need to be prioritized over strategic interests. An ecosystem-based management is hence crucial. Shifting the conversation this way can be a point of departure for further cooperation in the disputed waters. In short, communicative and complex engagement is not a policy that is unheard of, but rather a step that has already been taken. Its success is also not unthinkable. Southeast Asia must therefore be more mindful and keep practicing this kind of engagement.

## Conclusion

There is value in reexamining our current understandings about the South China Sea. A careful review of the foundations of states' policies reveals that the ways in which we address the crisis are biased toward the continued role and commitment of the United States in the region. This is costly and impracticable as it can lead to superpower overstretch. Hence, an alternative solution lies in a more active role played by Southeast Asia. This can be achieved by modifying preexisting policies from strategic or self-interested engagement to communicative and complex engagement. The adjusted variant values dialogue and confidence building measures more than short-term bargains. In this regard, forums that are organized by policy think tanks are critical to the creation and the fostering of relationships where the exchange of ideas outside and beyond the walls of states can flourish.

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48. Ba, "Who's Socializing Whom?"

# 13 | How a “Rules-Based Approach” Could Improve the South China Sea Situation

*Jonathan G. Odom*<sup>1</sup>

Many nations have interests in the South China Sea. Among these national interests are the freedom of navigation, a respect for international law, the security and stability of the region, and unimpeded commerce and economic development.<sup>2</sup> History has taught us that these interests cannot be taken for granted and that peace and stability are not a foregone conclusion. Without the established international legal order and the security efforts of the United States and other nations since World War II, the past 60-plus years of stability and amazing prosperity in East Asia could not have happened. Unfortunately, the unresolved disputes in the waters of East Asia among the nations bordering the South China Sea put the interests of those nations and other nations at risk. Looking ahead, the international community must be both deliberate and vigilant in preserving these interests.

Much has been said about the importance of a “rules-based approach” to resolving these international disputes and reducing the risks that arise from them.<sup>3</sup> Truth be told, there is not a single rule of international law or international norm that will solve all of

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1. The views presented are those of the author and do not necessarily represent the official policy or position of the U.S. government, the Department of Defense, or any of its components.

2. Scot Marciel, “Maritime Issues and Sovereignty Disputes in East Asia” (statement before the Subcommittee on East Asian and Pacific Affairs, Senate Foreign Relations Committee, Washington, DC, July 15, 2009), <http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm>; Hillary Clinton, comments in Hanoi, Vietnam, July 23, 2010, <http://m.state.gov/md145095.htm>; President Barack Obama, press conference with President Hu Jintao of the People’s Republic of China, January 19, 2011, <http://www.whitehouse.gov/the-press-office/2011/01/19/press-conference-president-obama-and-president-hu-peoples-republic-china>; Hillary Clinton, “Clinton Statement on South China Sea,” July 23, 2011, <http://iipdigital.usembassy.gov/st/english/texttrans/2011/07/20110723125330su0.9067433.html?distid=ucs#axzz35mQYkXpq>; Patrick Ventrell, “South China Sea,” press statement, August 3, 2012, <http://www.state.gov/r/pa/prs/ps/2012/08/196022.htm>; Daniel R. Russel, “Maritime Disputes in East Asia” (testimony before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, February 5, 2014), <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>.

3. For a use of the phrase *rules-based* approach by a senior U.S. official when discussing how to resolve the South China Sea disputes, see Russel, “Maritime Disputes.” For a use of the phrase by a senior official of another nation’s government, see Philippines Embassy to the United States, “Aquino to Push for Rules-Based Mechanism in ASEAN to Settle West Philippine Sea Issue,” press release, September 10, 2013, <http://www.philippineembassy-usa.org/news/3586/300/Aquino-to-push-for-rules-based-mechanism-in-ASEAN-to-settle-West-Philippine-Sea-issue/d,phildet/>.

these problems or mitigate all of these risks. Instead there is a patchwork of rules and norms that could help address different aspects of the matter. This paper will highlight some of the specific ways a rules-based approach could improve the South China Sea situation.

## Categorization of Claims

One way a rules-based approach could improve the South China Sea situation is by ensuring all nations understand the importance of properly categorizing the claims and the disputes arising from them.

Generally there are two types of claims in the maritime domain that can lead to international disputes. First, competing territorial and maritime claims, and, second, excessive maritime claims. A competing claim arises when two or more nations assert either sovereignty over the same land feature or sovereignty, sovereign rights, or jurisdiction over the same area of water space. An excessive maritime claim arises when a coastal nation asserts sovereignty or jurisdiction, or otherwise restricts the activities of the vessels and aircraft of other nations in waters or airspace in excess of what international law permits.<sup>4</sup>

It is important to recognize the different nature of these two types of claims in the maritime domain because there are two distinct bodies of international law that apply. More specifically, competing territorial claims are governed by the body of international law known as the law of sovereignty, which is reflected in a series of judicial and arbitral decisions.<sup>5</sup> On the other hand, competing maritime claims and excessive maritime claims are subject to the body of law known as the international law of the sea, which is reflected in UNCLOS.<sup>6</sup>

Likewise, it is important to recognize the different nature of these two types of claims because individual nations might have different national policies. For example, some have accused the United States of taking sides in the South China Sea.<sup>7</sup> These complaints, however, fail to understand that different U.S. policies are simultaneously at play within the maritime domain, depending on the category of the claims. For competing

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4. J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd ed. (Leiden: Martinus Nijhoff, 2012), 17.

5. For a discussion of the customary law of territorial sovereignty and the series of decisions by international tribunals and arbiters, see Ian Brownlie, *Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2013), 203–252.

6. UNCLOS, December 10, 1982, 1833 U.N.T.S. 397. The United States is not a party to the UNCLOS, but considers many of its provisions to reflect customary international law. See Ronald Reagan, “United States Oceans Policy” (statement, March 10, 1983), <http://www.state.gov/documents/organization/143224.pdf>; White House, “National Strategy for the Arctic Region,” May 10, 2013, [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf). For competing maritime claims of territorial sea, see UNCLOS, art. 15. For competing maritime claims of EEZs, see UNCLOS, art. 74. Maritime claims of coastal nations must conform to UNCLOS. See UNCLOS, art. 21(1).

7. “U.S. Should Honor Commitment of Taking No Sides on Asia-Pacific Maritime Disputes: Chinese Envoy,” Xinhua, April 5, 2014, [http://news.xinhuanet.com/english/china/2014-04/05/c\\_133240644.htm](http://news.xinhuanet.com/english/china/2014-04/05/c_133240644.htm).

territorial claims over islands and overlapping maritime claims, one U.S. policy applies. Specifically the United States elects to not take sides on the ultimate issue of sovereignty in competing claims to which the United States is not a party.<sup>8</sup> For excessive maritime claims, however, there is a separate and distinct U.S. policy that applies. Specifically the United States has a long-standing Freedom of Navigation Policy and Program,<sup>9</sup> through which it diplomatically and operationally challenges<sup>10</sup> excessive maritime claims asserted by coastal nations in order to preserve all of the rights, freedoms, and uses of the sea and airspace recognized in international law.<sup>11</sup> In this latter category of claims, the United States does take a side—it sides with the maritime regime based on international law.<sup>12</sup>

In summary, if the claims in the South China Sea and the disputes arising from those claims are properly categorized, this will help individual nations and the international community as a whole effectively to apply the appropriate international rules and norms.

## Clarity of Claims

A second way a rules-based approach can improve the South China Sea situation is by promoting the clarity of territorial and maritime claims.

On this issue, it is important to understand that the international legal order is generally a consent-based regime. For example, the source of international law known as conventional law acknowledges the principle of “free consent,”<sup>13</sup> and it generally renders treaties and agreements void or voidable if they were negotiated and concluded in error,<sup>14</sup> through fraud,<sup>15</sup> through corruption,<sup>16</sup> or by coercion.<sup>17</sup> Similarly for the unwritten source of international law known as customary law, the prerequisite of consent by individual nations is also present but manifests itself in a different way in

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8. Russel, “Maritime Disputes.”

9. For a description of the program, see U.S. Department of State, “Freedom of Navigation (FON) Program,” August 2, 2014, [www.state.gov/e/oes/ocns/opa/maritimesecurity/](http://www.state.gov/e/oes/ocns/opa/maritimesecurity/).

10. For an unclassified summary of diplomatic and operational challenges of excessive maritime claims, organized by coastal state, see U.S. Department of Defense, *Maritime Claims Reference Manual* (Washington, DC: Department of Defense, 2005), [http://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm). For a year-by-year summary of freedom of navigation assertions by U.S. forces, see U.S. Department of Defense, “Annual Freedom of Navigation (FON) Reports,” August 2, 2014, <http://policy.defense.gov/OSDPOffices/FON.aspx>.

11. Russel, “Maritime Disputes.”

12. *Ibid.*

13. Vienna Convention on the Law of Treaties, preamble, May 23, 1969, 1155 U.N.T.S. 331, <http://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. The United States is not a party to the Vienna Convention on the Law of Treaties, but it considers many of its provisions to reflect customary international law. See U.S. Department of State, “Vienna Convention on the Law of Treaties,” August 2, 2014, <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

14. Vienna Convention, art. 48.

15. *Ibid.*, art. 49.

16. *Ibid.*, art. 50.

17. *Ibid.*, arts. 51–52.

the required element of *opinio juris sive necessitatis*.<sup>18</sup> Additionally, the principle of consent in customary international law is reflected in the concept of the “persistent objector.”<sup>19</sup>

In the context of international law and the maritime domain, the concept of consent is manifested in an element of “acquiescence” by other nations. Consider the special circumstance of an historic bay, which is recognized in customary international law. A nation may claim an historic bay only if three criteria are satisfied.<sup>20</sup> Of note, the third prerequisite of “acquiescence” to qualify as a historic bay reinforces the principle of consent by nations. Similarly in competing territorial and maritime claims, international tribunals and arbiters have routinely considered, as a legal factor, whether one claimant has acquiesced in another claimant’s effective occupation and control for a period of time.<sup>21</sup> In short, if evidence of acquiescence by other nations does not exist, then the ability of a claimant state to prove these claims is problematic.

This brings us to another point worth recognizing about the legal concept of consent. Whether we are talking domestic jurisprudence on matters of contract law or criminal law, or we are looking at relations between nations in international law, true consent provided by a party or participant assumes that the consent was informed consent. For example, in conventional law a party consents to a matter only if the party knows the material facts and circumstances of that matter<sup>22</sup> and voluntarily agrees to enter the legal relationship with another party.<sup>23</sup>

Given this principle of consent, a problem can arise in territorial and maritime disputes between nations if a state does not clarify the nature of its claims in the maritime

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18. It is not enough to look solely at the actions of states that collectively form state practice; the system also requires consideration of the purpose or intent of those state actions. The required element of *opinio juris sive necessitatis* shows that the reason why a state takes a particular action can be extremely significant in the eyes of international law. Specifically actions that are taken by an individual state under “a sense of legal obligation” must be distinguished from some actions that are taken by a state for some other reason, such as a matter of courtesy or habit. See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969* (The Hague: International Court of Justice, 1969), 3, <http://www.icj-cij.org/docket/files/52/5561.pdf>.

19. Under this well-recognized concept, an individual state may opt out of the formation of a rule of customary law, so long as that state demonstrates its persistent objection to that practice. For a discussion of the persistent objector concept, see Brownlie, *Principles of Public International Law*, 11.

20. The three prerequisites are (1) a coastal state must demonstrate an “effective exercise of sovereignty” over the waters as internal waters; (2) the coastal state must demonstrate that this exercise of authority in the waters has been continuous “during a considerable time so as to have developed into a usage”; and (3) the coastal state must demonstrate that the claim has received the “general toleration” or “acquiescence” of other states. If any of these criteria are not satisfied, the coastal state lacks a legitimate basis under international law to assert a claim of historic waters. See “Juridical Regime of Historic Waters, Including Historic Bays, Document A/CN.4/143: Study Prepared by the Secretariat,” in *Yearbook of the International Law Commission 1962* (New York: United Nations, 1964), 2:2, [http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1962\\_v2\\_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1962_v2_e.pdf); Robin R. Churchill and Vaughan Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), 43–44; U.S. Department of the Navy et al., *The Commander’s Handbook on the Law of Naval Operations*, July 2007 ed. (Quantico, VA: Department of the Navy, 2007), 1–5, <https://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/>.

21. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States), 1984 I.C.J.

22. Vienna Convention, arts. 48–49.

23. Vienna Convention, arts. 51–52.

domain and thereby prevents other nations from providing their informed consent. In the South China Sea disputes, the United States has called upon all the claimants to clarify their claims.<sup>24</sup>

A noteworthy example of problems arising from an ambiguous claim is the nine-dash line that China draws in the South China Sea.<sup>25</sup> Is the nine-dash line a territorial claim (i.e., a line of allocation claiming sovereignty over the land features within line)? Or is the nine-dash line a maritime claim (i.e., a claim asserting sovereignty, sovereign rights, and jurisdiction for all of the waters within the line)?

The international community needs to know what China is specifically claiming with its nine-dash line, as it can then apply the appropriate body of international law to the situation. If the line merely represents a line of allocation to the land features contained therein, then the international law of sovereignty is what would apply. However, if the line represents anything other than a line of allocation (i.e., it represents a maritime claim to special status of all of the waters contained within the lines), then the international law of the sea would apply.

On the matter of competing territorial claims, the lack of clarity on the meaning of China's nine-dash line is also problematic, but in a different way. We have repeatedly heard voices in China claim that it has an "indisputable" claim in the South China Sea,<sup>26</sup> and other nations did not challenge China's drawing of the nine-dash line.<sup>27</sup> But in my personal opinion, it is highly suspect for any coastal nation to assert that its claim has not been disputed or challenged by other nations, or that its claims are "indisputable," when the coastal nation has never actually clarified the precise nature of its claim.<sup>28</sup> Thus it is no surprise that nations, including claimants and nonclaimants alike,<sup>29</sup> have called upon China to clarify the meaning and legal basis of its nine-dash line.

In summary, each South China Sea nation should be clear about what specifically it is claiming and the basis under international law for its claims.

## Conformity of Claims

A third way a rules-based approach could improve the South China Sea situation is by promoting the conformity of maritime claims with international law.

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24. Marciel, "Maritime Issues"; Clinton, "Clinton Statement on South China Sea."

25. Letter from Permanent Mission of the PRC to H.E. Mr. Ban Ki-Moon, Secretary-General, United Nations, May 7, 2009, [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf).

26. Ibid.

27. Li Jinming, "Behind the Dotted Line on the Chinese Map of the South China Sea," *China and International Relations* 1, no. 4 (November–December 2012), 22, <http://www.cicir.ac.cn/UploadFile/files/20130717113402647.pdf>.

28. Shicun, *Solving Disputes*, 77–83.

29. Permanent Mission of the Republic of Indonesia, "Letter to the United Nations to the Secretary General of the United Nations," July 8, 2010; Singapore Ministry of Foreign Affairs, "MFA Spokesman's Comments in Responses to Media Queries on the Visit of Chinese Maritime Surveillance Vessel Haixun 31 to Singapore," June 20, 2011; Raju Gopalakrishnan, "Singapore Asks China to Clarify Claims on S.China Sea," Reuters, June 20, 2011; Marciel, "Maritime Issues"; Russel, "Maritime Disputes."

Coastal nations may enact national laws and regulations governing their respective maritime zones. Those national legal authorities, however, must fit within the rights and jurisdiction afforded to coastal nations under the international law of the sea.<sup>30</sup> In fact, UNCLOS specifically uses the phrase “in conformity with this Convention” or words to that effect on at least 11 occasions as a prerequisite for laws and regulations of a coastal nation that must be followed by other nations.<sup>31</sup> If a coastal state asserts one or more claims in its maritime zones that are inconsistent with the legal regime reflected in the convention, then those excessive maritime claims could impede the rights, freedoms, and uses of the sea and airspace by other nations under the same body of international law.

Unfortunately several of the coastal nations bordering the South China Sea have enacted national laws or regulations through the years establishing maritime claims that are not in conformity with the international law of the sea. These include Vietnam,<sup>32</sup> Malaysia,<sup>33</sup> the Philippines,<sup>34</sup> and China.<sup>35</sup>

The good news is that at least two of these South China Sea nations have recently been engaged in a process of “getting their legal house in order” when it comes to national maritime claims. The Philippines has moved away from its long-claimed box of historical internal waters to instead codify its legitimate status as an archipelagic state under UNCLOS.<sup>36</sup> In 2012, Vietnam enacted a comprehensive national maritime law, which reformed some (but not all) of its excessive maritime claims that have long been inconsistent with the international law of the sea.<sup>37</sup> These noble efforts by two of the South China Sea claimants should be applauded by the international community, as the Philippines and Vietnam demonstrate a warming respect for international law and freedom of navigation.

The bad news, however, is that China has established and maintains a regime of excessive maritime claims that is the most comprehensive among the nations bordering the South China Sea. In fact, China is one of only a few nations in the entire world that has

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30. UNCLOS, arts. 2, 21 (1), and 34 (2).

31. *Ibid.*, arts. 19 (1), 21 (1), 24 (1), 41 (1), 69 (1), 70 (1), 73 (1), 240(d), 254 (3), 256, and 257.

32. U.S. Department of Defense, “Vietnam,” in *Maritime Claims Reference Manual*.

33. *Ibid.*, “Malaysia.”

34. *Ibid.*, “Philippines.”

35. *Ibid.*, “China.”

36. In April 2009, the Philippines enacted a national law that defined the baselines in conformity with its status as an archipelagic state. See Republic Act No. 9522 (An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes), in *Law of the Sea Bulletin 70* (New York: United Nations, 2009), [http://www.un.org/Depts/los/doi\\_publications/LOSBulletins/bulletinpdf/bulletin70e.pdf](http://www.un.org/Depts/los/doi_publications/LOSBulletins/bulletinpdf/bulletin70e.pdf). The Philippines has also considered legislation to establish archipelagic sea lanes within its archipelagic waters. See The Philippines Archipelagic Sea Lanes Act, Senate Bill No. 159, July 1, 2013, [http://www.senate.gov.ph/lis/bill\\_res.aspx?congress=16&q=SBN-159](http://www.senate.gov.ph/lis/bill_res.aspx?congress=16&q=SBN-159).

37. On June 21, 2012, Vietnam’s National Assembly enacted the Vietnam Maritime Law. To date, an official English translation of that law has not been published and a copy of the law has not been posted on the United Nations’ Maritime Delimitation database website. However, some provisions have been discussed by Vietnamese officials with media organizations. See “Foreign Minister Pham Binh Minh Clarifies Content of Vietnam Maritime Law,” Vietnam Government Web Portal, June 26, 2012. The United States continues to consider some of these maritime claims to be inconsistent with international law and has challenged those excessive maritime claims diplomatically and operationally. See U.S. Department of Defense, “Vietnam.”

what this author calls a “full house” of excessive maritime claims.<sup>38</sup> That is, China has established one or more excessive maritime claims in each of its maritime zones.<sup>39</sup> And assuming that China intends for its nine-dash line to reflect a maritime claim to all of the waters contained therein, it, too, would be an excessive maritime claim.<sup>40</sup> Worse yet, unlike the Philippines and Vietnam, China exhibits no intent to change any of its excessive maritime claims to conform with the legal regime reflected in UNCLOS. In fact, rather than reforming any of its excessive maritime claims, China has actually added excessive maritime claims in recent years.<sup>41</sup> Given this negative trend, there is also concern that China might enact additional excessive maritime claims in the future, such as straight baselines around the Spratly Islands.

In summary, the South China Sea nations should ensure their national maritime claims are fully in conformity with the international law of the sea.

## Critical Dates

A fourth way a rules-based approach could improve the South China Sea situation is by acknowledging that assertive actions have no legal effect of bolstering territorial claims.

In situations involving competing territorial claims, the existing international legal order does not have a strict rule or test on which claimant should prevail in a particular case. Instead international law recognizes “the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.”<sup>42</sup>

What is equally important to note, however, is how international law addresses recent actions by a claimant. Specifically, when evaluating the relative worth of competing territorial claims, the existing international legal order deliberately does not recognize recent actions taken by a claimant. By “recent,” I mean actions taken by a claimant after the “critical date.” The ICJ has described this concept of a critical date as the point in time when

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38. Only six other nations in the world have a “full house” of excessive maritime claims: Bangladesh, Burma (Myanmar), India, Iran, North Korea, and Pakistan. See U.S. Department of Defense, *Maritime Claims Reference Manual*.

39. In particular, China has the following excessive maritime claims: improperly drawn straight baselines along its entire mainland coast (including the portion bordering the South China Sea) resulting in excessive internal waters; improper baselines around two of its claimed island groups (the Paracel Islands and Senkaku Islands); unlawful restrictions on the right of innocent passage of foreign vessels; unauthorized security jurisdiction in its contiguous zone; and unlawful restrictions on non-resource activities by other nations in and over its EEZ. See U.S. Department of Defense, “China.”

40. Russel, “Maritime Disputes.”

41. Statement of the Government of the People’s Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, September 10, 2012, [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn\\_mzn89\\_2012\\_e.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf). In 2013, the United States diplomatically protested China’s straight baseline claim around the Diaoyu Islands as an excessive maritime claim under international law. See U.S. Department of Defense, “China.”

42. United Nations, *Reports of International Arbitral Awards (RIAA), Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen)*, vol. 22, 209 (October 9, 1998), [http://legal.un.org/riaa/cases/vol\\_XXII/209-332.pdf](http://legal.un.org/riaa/cases/vol_XXII/209-332.pdf).

the dispute between two or more claimants has “crystallized.”<sup>43</sup> This critical date will vary based upon the unique facts of each case. Regardless of when the actual critical date is for a dispute, the ICJ has concluded that actions taken by a claimant after the critical date when the dispute arose are deemed to be “meaningless” if those actions are taken “strictly with the aim of buttressing those claims”<sup>44</sup> or were “undertaken for the purpose of improving the legal position” of the claimant.<sup>45</sup> This conclusion of law by the ICJ makes sense because, otherwise, the obligation in the existing international legal order for claimants to resolve their territorial and maritime disputes “by peaceful means” would be undermined by the risk of assertive actions of claimants spiraling out of control and escalating into an armed conflict.<sup>46</sup>

For the territorial disputes in the South China Sea, I will not presume to possess the subject matter expertise to assess when, specifically, is the “critical date” for each of these disputes. Yet any reasonable observer would acknowledge that those “critical dates” are all clearly sometime in the past.

Therefore, in assessing the ongoing actions by claimants in the South China Sea, it is important for all nations, including the claimant states, to understand that any assertive actions by a claimant have no effect when it comes to improving its legal claims to the land features and water space. Such “unilateral acts”<sup>47</sup> risk violating a claimant’s legal obligation to resolve its international disputes by peaceful means.<sup>48</sup> Worse yet, a continuous series of such unilateral acts could tilt the international legal order away from the rules-based approach that most nations would favor toward a power-based approach that would undermine regional stability.

To reduce the risk of escalation caused by these types of assertive actions, the United States has recently encouraged the claimants to “identify the kind of behavior that they each find provocative when others do it, and offer to put a voluntary freeze on those sorts of actions on the condition that all the other claimants would agree to do so similarly.”<sup>49</sup>

In summary, the South China Sea nations should refrain from assertive unilateral actions and insist that all other claimants do the same.

## Courts

A fifth way a rules-based approach could help to improve the South China Sea situation is through the claimants collectively giving serious consideration to submitting the competing territorial claims and overlapping maritime claims to an international court for dispute resolution.

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43. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), 2002 I.C.J., para. 135.

44. Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), 2007 I.C.J. 659, para. 114 (October 8).

45. Sovereignty over Pulau Ligitan, 2002 I.C.J., para. 135.

46. UNCLOS, art. 279.

47. Russel, “Maritime Disputes.”

48. United Nations Charter, 1945, art. 2(3).

49. Daniel R. Russel, “Regional Telephone Conference, Rangoon, Myanmar, June 10, 2014,” <http://www.state.gov/p/eap/rls/rm/2014/06/227412.htm>.

Let us first acknowledge the nature of these competing claims and the resulting disputes. First, sovereignty over land territory is not a legal status that can be shared between two or more nations. Second, the disputes in the South China Sea do, in fact, exist between the claimant states, whether those nations want to admit it or not.<sup>50</sup> Third, each claimant appears equally convinced of its claims to sovereignty over the territory, often using the phrase “indisputable sovereignty.”<sup>51</sup>

For the territorial disputes in the South China Sea, there have been repeated calls for the claimants to resolve these disputes by peaceful means.<sup>52</sup> Two ways to resolve international disputes by peaceful means are by negotiations between the claimants and by third-party forums (e.g., international tribunals or arbitration). To date, the only peaceful means that all of the claimants have attempted is negotiation. Negotiations remain a legitimate means of dispute resolution and the claimants should continue to pursue that option.

At the same time, however, I personally find it difficult to imagine that any claimant will ever persuade any other at a negotiating table to accept its position when each of them believes they have “indisputable sovereignty.” Can anyone reasonably expect that one claimant will ever put forth a certain amount of information or evidence, or make some convincing argument, that will change the national position of another? Even in the remote chance that one claimant was able to persuade another to accept its position, that negotiated settlement would not be binding on other South China Sea claimants who also assert claims to the exact same territory (e.g., the Spratly Islands). For these reasons, I personally believe that submitting the competing territorial claims and overlapping maritime claims in the South China Sea to a third-party dispute resolution forum might be the only realistic way to resolve the disputes in a peaceful fashion.

The posture of the claimants on considering the use of such third-party forums is mixed. The Philippines has demonstrated its support for using such forums, as reflected in its pending arbitration case “with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea.”<sup>53</sup> Vietnam has recently made overtures that it might also consider submitting the disputes to a third-party forum for resolution.<sup>54</sup> Yet China has remained steadfast in its absolute opposition to using such third-party forums for any of its competing territorial claims.<sup>55</sup>

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50. Ibid.

51. John Pomfret, “Beijing Claims ‘Indisputable Sovereignty’ over South China Sea,” *Washington Post*, July 31, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/30/AR2010073005664.html>; Quang Minh, “Party Leader Re-affirms Indisputable Sovereignty over Archipelagos,” *TalkVietnam*, June 18, 2014, <http://www.talkvietnam.com/2014/06/party-leader-re-affirms-indisputable-sovereignty-over-archipelagos/>.

52. Clinton, “Clinton Statement on South China Sea”; Ventrell, “South China Sea”; Russel, “Maritime Disputes.”

53. Permanent Court of Arbitration, “The Republic of the Philippines v. The People’s Republic of China,” August 2, 2014, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1529](http://www.pca-cpa.org/showpage.asp?pag_id=1529).

54. “Vietnam PM Threats ‘Legal Action’ against China over Oil Rig, VOA,” May 22, 2014, <http://www.voanews.com/content/vietnam-pm-threatens-legal-actions-against-china-over-oil-rig/1919946.html>.

55. “China Not to Accept International Arbitration on Disputes: Senior Diplomat,” *CRIEnglish*, June 22, 2014, <http://english.cri.cn/12394/2014/06/22/3441s832789.htm>.

Although China might have the legal right in territorial disputes to not submit them to a third-party forum, such as an international tribunal, the question is: should China, as a matter of national policy, reconsider its absolute position of never doing so? Deciding to seek the use of an international arbitration to resolve a dispute is not “against morality and the basic rules of international relations,”<sup>56</sup> as some voices in China have argued. To the contrary, the use of international tribunals and arbitration is a legitimate, peaceful means to resolve such disputes.<sup>57</sup> In fact, China apparently believes that such international tribunals are legitimate forums; otherwise, China would not support those tribunals by manning them with Chinese jurists, such as Judge Xue Hanqin on the International Court of Justice<sup>58</sup> and Judge Zhiguo Gao on the International Tribunal for the Law of the Sea.<sup>59</sup>

These disputes of competing territorial and maritime claims are not unprecedented in the community of nations, as there is substantial international jurisprudence on similar matters. These international tribunals and arbiters have extensive experience in helping to resolve these types of international disputes, including disputes involving multiple claimants.<sup>60</sup>

In summary, given the multi-claimant nature of the South China Sea disputes and the “indisputable” posture of the claimants, they should give serious consideration to submitting these disputes to a third-party forum for resolution.<sup>61</sup>

## Collision Prevention

A sixth way a rules-based approach could improve the South China Sea situation is by reducing the risk of collisions between vessels operating in those waters.

This point is not focused on the actual disputes over competing territorial and maritime claims, but rather on some of the incidental behavior at sea arising while those disputes remain unresolved.

It is important to recognize the full breadth of the body of international law governing activities in the maritime domain. Given that the nexus of the two concepts of international law and the maritime domain is found in UNCLOS, some observers will focus only on the balance of interests between coastal nations and user nations reflected in the

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56. “Commentary Gives China’s Reasons for Refusing Arbitration on South China Sea,” Xinhua, April 1, 2014, [http://news.xinhuanet.com/english/china/2014-04/01/c\\_133228152.htm](http://news.xinhuanet.com/english/china/2014-04/01/c_133228152.htm).

57. Barack Obama, joint press conference with President Benigno Aquino III of the Philippines, April 28, 2014, <http://www.whitehouse.gov/the-press-office/2014/04/28/remarks-president-obama-and-president-benigno-aquino-iii-philippines-joi>; U.S. Department of State, “Philippines: South China Sea Arbitration,” press statement, March 30, 2014, <http://www.state.gov/r/pa/prs/ps/2014/03/224150.htm>.

58. “Judge Xue Hanqin,” International Court of Justice, August 2, 2014, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=170>.

59. “Judge Zhiguo Gao,” International Tribunal for the Law of the Sea, August 2, 2014, <http://www.itlos.org/index.php?id=92>.

60. North Sea Continental Shelf Case (Federal Republic of Germany v Netherlands), 1969 I.C.J. 4.

61. Maritime Boundary in the Gulf of Maine, 1984 I.C.J.

convention. I think it is important, however, to also recognize that the law of the sea is not the only source of international law that applies to maritime activities throughout the world.

In addition, this body of law includes the international rules and norms that affect safety of navigation. Many of these specific obligations arise from the International Regulations for Preventing Collisions at Sea (COLREGs).<sup>62</sup> (The COLREGs are one of the most widely joined international conventions. In fact, every claimant state in the South China Sea, and every major user nation, including Australia, Canada, France, Indonesia, Russia, the United Kingdom, and the United States, are all parties to the COLREGs convention and its accompanying rules.<sup>63</sup>)

What is important to note about the COLREGs is that they obligate state parties to ensure their governments and flagged vessels alike operate safely at sea through adherence to a detailed regime of specific safety rules.<sup>64</sup> Furthermore, there are also no exemptions or exceptions identified in the COLREGs for vessels to operate differently (i.e., unsafely) in disputed areas.

What is also important to note about the COLREGs, when read together with Article 94 of UNCLOS, is that much of the responsibility for regulating the behavior of vessels, including nongovernment vessels, is assigned to the government of the flag state. More specifically, the flag state of a vessel has an express duty to take all necessary measures to ensure that vessel maintains safety at sea with regard to the prevention of collisions.<sup>65</sup> This duty as a flag state includes the responsibility to take any steps that may be necessary to secure the observance of international regulations, such as the COLREGs.<sup>66</sup> Additionally, a flag state has an obligation to investigate alleged violations of the COLREGs by any of its flagged vessels, and if appropriate, to take any action necessary to remedy violations by those flagged vessels.<sup>67</sup> Of note, these obligations are not suspended merely because the flagged vessel is operating in the waters where its flag state asserts a competing claim.

Thus, given the high percentage of Asia-Pacific nations that are state parties to the COLREGs and the claimant-neutral manner in which those safety rules are worded, I often wonder why regional documents such as the 2002 DOC signed by China and the 10 members of ASEAN, as well as drafts of a potential South China Sea COC do not expressly reference the COLREGs when they indicate a common commitment to promoting safety of navigation.

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62. International Maritime Organization, Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16, amended by Amendments to the International Regulations for Preventing Collisions at Sea, Nov. 19, 1981, 35 U.S.T. 575, 1323 U.N.T.S. 353.

63. For a list of state parties to the COLREGs and other maritime-related treaties and conventions, see International Maritime Organization, "Status of Conventions," August 2, 2014, <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls>.

64. It is worth noting that unlike some international treaties and conventions, such as UNCLOS (arts. 32, 42 [5], 95, 96, 110 [1] 236), there is no exception or exemption in the COLREGs for sovereign-immune vessels.

65. UNCLOS, art. 94 (3).

66. UNCLOS, art. 94 (3)(c).

67. UNCLOS, art. 94 (6).

In summary, the South China Sea nations have not only a political commitment to ensure their vessels operate safely—they have a legal obligation to do so.

## Conclusion

There is no silver bullet answer for how to resolve the overall situation in the South China Sea. If there was one, it would have been resolved years ago. Yet the international legal order is composed of rules and norms that, if followed by the nations involved, can help to resolve the situation or, at a minimum, reduce or mitigate some of the risks arising from the situation.

Just as there is no silver bullet answer to the overall situation in the South China Sea, there is no single rule of international law or international norm that addresses all the disputes involving the land and waters within the South China Sea. Rather, a rules-based approach requires the international community to rely on a mosaic of rules and norms, several of which this paper has discussed: all the claimant states should clarify the nature of their claims; all the claimants should conform their national maritime claims to the international law of the sea; all the claimants should refrain from assertive actions in advancing their competing territorial claims and overlapping maritime claims; all the claimants should resolve their disputes by peaceful means, especially giving serious consideration to submitting them to a third-party forum for resolution; all the claimants should ensure their government and flagged vessels and crews are complying with their obligations to operate safely at sea and hold those crews to account for any failure to do so.

Merely because there is no single solution that will resolve the entire South China Sea situation does not mean that the claimants should take no steps to positively address as many aspects of the problem as possible. A rules-based approach provides some of those steps that each of these claimants can and should take to improve the situation. It will take the political will and deliberate decisions by the government leaders of these individual states to follow such a “rules-based approach.”

# 14 | The Role of the Chinese Military in the South China Sea

*Phillip C. Saunders*<sup>1</sup>

China's regional strategy has a schizophrenic quality. On the one hand, Chinese leaders have resumed their diplomatic charm offensive, with President Xi Jinping and Premier Li Keqiang visiting five Southeast Asian countries in October 2013 and attending a high-level work conference on “periphery diplomacy” that highlighted Beijing’s intention to use “good-neighborliness and friendship” to create a peaceful and stable regional environment. During their travels, Xi called for a “maritime silk road” to connect China with Southeast Asia, and Li put forward a seven point proposal to deepen cooperation with ASEAN.

On the other hand, Beijing’s aggressive steps to pursue its maritime territorial claims have generated fear and alarm throughout Asia. Since declaring an ADIZ in the East China Sea in November 2013, Beijing has deepened its confrontation with Japan over the disputed Diaoyu/Senkaku Islands, sent a three ship navy patrol to the James Shoal (50 miles off the Malaysian coast), tried to prevent the Philippines from resupplying the crew of a derelict warship grounded on the Second Thomas Shoal, and conducted oil exploration activities in waters claimed by Vietnam. These actions show China’s determination to expand its effective control over disputed maritime territories in the East and South China Seas and highlight President Xi’s vow never to compromise on basic interests.

How can China hope to maintain regional stability when it is aggressively strengthening its claims to territory claimed by its neighbors? From a Chinese perspective, a contradiction (*maodun*) is a tension to be managed, not an imperative to choose between conflicting goals. China uses a variety of tactics to manage the tension between its dual goals of maintaining stability (*weiwen*) and protecting maritime rights and interests (*weiquan*).

These include relying primarily on paramilitary rather than military forces and using “salami-slicing tactics” to expand China’s effective control of disputed territories while staying below the threshold of military confrontation. However, China has become

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1. The views expressed are solely those of the author and do not necessarily reflect those of the National Defense University, the Department of Defense, or the U.S. government. Center for the Study of Chinese Military Affairs research intern Harry Krejsa provided research support for this paper.

increasingly willing to use its growing military power advantage to intimidate rival claimants and its economic leverage to punish countries that challenge Chinese sovereignty claims.<sup>2</sup>

The PLA's navy and various Chinese maritime paramilitary forces (now mostly aggregated into the new China coast guard) are key elements in Beijing's efforts to defend its maritime territorial claims in the South China Sea. This paper discusses China's efforts to reorganize and expand the capabilities of its paramilitary forces, reviews some aspects of PLA navy modernization with most relevance to the South China Sea, and considers how Beijing is using its military and paramilitary capabilities to expand its effective control over disputed territories.

China's 2013 defense white paper highlights the growing importance of the maritime domain, stating,

China is a major maritime as well as land country. The seas and oceans provide immense space and abundant resources for China's sustainable development, and thus are of vital importance to the people's wellbeing and China's future. It is an essential national development strategy to exploit, utilize and protect the seas and oceans, and build China into a maritime power. It is an important duty for the PLA to resolutely safeguard China's maritime rights and interests.<sup>3</sup>

## Coast Guard Reorganization and Modernization

Paramilitary forces typically play the lead role in Chinese efforts to exercise control over disputed waters and maritime territories. This is partly because they are better suited for activities such as enforcing fishing regulations and partly because Beijing regards lightly armed paramilitary forces as less provocative, reducing the likelihood of confrontations escalating into violence and military conflict.

Prior to March 2013, five different Chinese agencies had some responsibility for maritime security issues.<sup>4</sup> These included:

- The China Maritime Police (CMP) [公安边防海警部门], which belonged to the Border Control Department of the People's Armed Police. The CMP was also referred to as China's coast guard (中国海警). It operated small high-speed vessels armed with

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2. For a fuller analysis of China's regional strategy, see Phillip C. Saunders, "China's Role in Asia: Attractive or Assertive?," in *International Relations of Asia*, 2nd ed., ed. David Shambaugh and Michael Yahuda (Washington, DC: Rowman & Littlefield, 2014), 147–172.

3. Information Office of the State Council, People's Republic of China, *The Diversified Employment of China's Armed Forces* (Beijing, Information Office of the State Council, April 2013), <http://eng.mod.gov.cn/Database/WhitePapers/>.

4. This description draws on Lyle J. Goldstein, *Five Dragons Stirring Up the Sea: Challenge and Opportunity in China's Improving Maritime Enforcement Capabilities* (Newport, RI: U.S. Naval War College, 2010); and Linda Jakobson, "The PLA and Maritime Security Actors," in *PLA Influence on Chinese National Security Policy-Making*, ed. Phillip C. Saunders and Andrew Scobell (forthcoming from Stanford University Press).

machine guns or small cannons. CMP responsibilities included protection of China's security and the law and order of China's maritime territory.

- The China Maritime Surveillance (CMS) [中国海监], a department of the State Oceanic Administration [海洋局] administered by the Ministry of Land and Resources. CMS was founded in 1998 with the mission of protecting China's EEZ from various forms of encroachment.
- *The Fisheries Law Enforcement Command* (FLEC) [中国渔政], part of the Fisheries Bureau administered under the Ministry of Agriculture.
- The Maritime Anti-Smuggling Bureau [海上缉私警察部门] under the General Administration of Customs, which operated its own fleet of fast patrol boats.
- The Maritime Safety Administration [中国海事局] under the Ministry of Transportation, with responsibilities including supervising maritime traffic control. This was the largest of the "five dragons" and the one element that has continued as an independent entity after the others were consolidated into the Chinese coast guard in March 2013.

Chinese analysts were critical of the effectiveness of these agencies. One line of criticism focused on the inadequate capabilities of China's paramilitary forces, arguing that their ships were too few in number and not large enough to carry out their duties effectively. Chinese analysts compared China's coast guard agencies with their Japanese, South Korean, and U.S. counterparts, noting that the Japanese coast guard and U.S. Coast Guard operated more large (3,500-plus tons) and medium-size (1,500-plus tons) cutters. Chinese analysts also noted that the Chinese agencies lagged far behind in aviation capabilities compared with their counterparts.<sup>5</sup>

Another line of argument highlighted the problems caused by having five different maritime agencies with overlapping missions and bureaucratic rivalries. This arrangement produced duplication of effort, diffused limited resources, and made coordination much more difficult.<sup>6</sup> Chinese analysts argued for a consolidation into a unified and more effective force, which then produced bureaucratic arguments over which agency should be in charge of the consolidated force. The PLA navy also put in an unsuccessful bid to have the consolidated coast guard report directly to the navy.<sup>7</sup>

The reorganization that took effect in March 2013 consolidated four of the agencies (CMP, CMS, FLEC, and the Maritime Anti-Smuggling Bureau) into a unified China coast guard under the auspices of the State Oceanic Administration. As Figures 14.1 and 14.2 show, the new agency will carry out its maritime law-enforcement duties under the new CMP [中国海警局]. The Ministry of Land and Resources will administer the State

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5. Goldstein, *Five Dragons Stirring Up the Sea*, 3–5.

6. Ibid., 25–26; and Jakobson, "The PLA and Maritime Security Actors."

7. Christopher D. Yung, "The PLA Navy Lobby and Its Influence over China's Maritime Sovereignty Policies," in *PLA Influence on Chinese National Security Policy-Making*, ed. Phillip C. Saunders and Andrew Scobell (forthcoming from Stanford University Press).

Figure 14.1

## Marine Law Enforcement Agencies (Pre-2013 Reorganization)

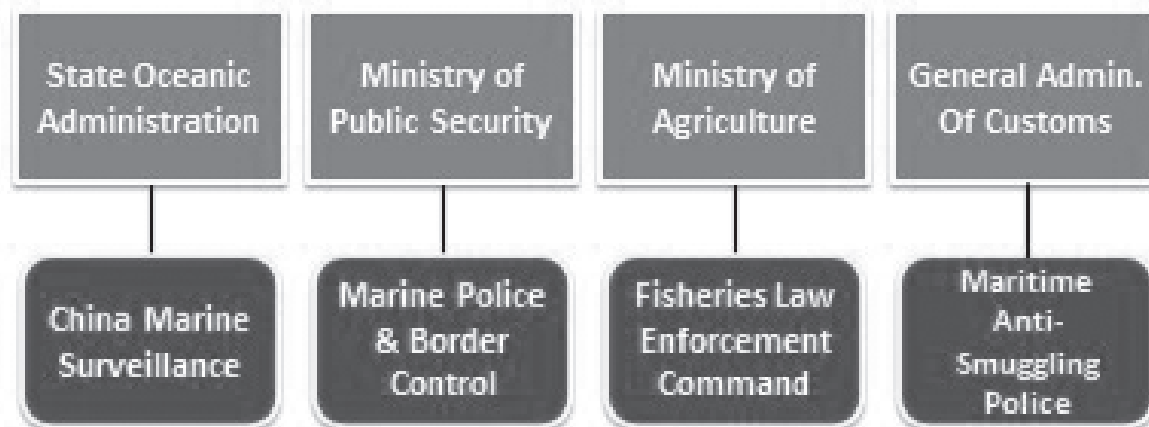
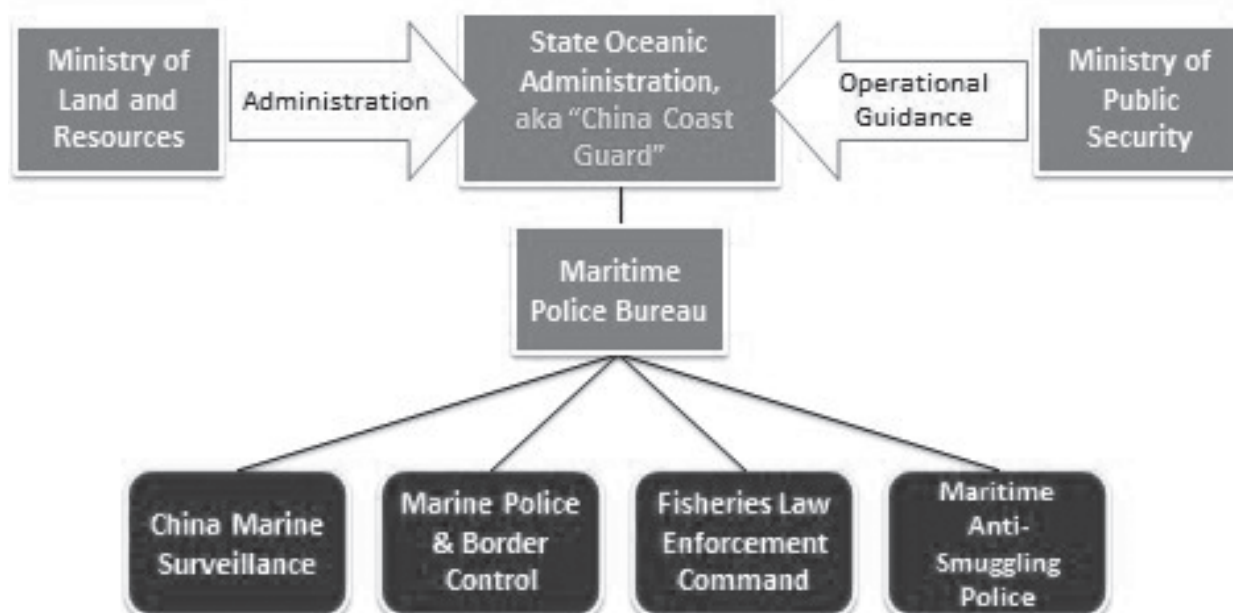


Figure 14.2

## China Coast Guard (Post-2013 Reorganization)



Oceanic Administration, but the Ministry of Public Security will provide “operational direction.” One analyst argues that this arrangement, coupled with the appointment of a Ministry of Public Security vice minister as head of the Maritime Policy Bureau, is likely to give the Ministry of Public Security significant influence over China coast guard operations.<sup>8</sup>

The 2013 reorganization came in the midst of concerted efforts to increase the size and enhance the capabilities of Chinese maritime forces. The 2014 report *Military and Security Developments Involving the People’s Republic of China* by the Office of the Secretary of Defense (OSD) describes two phases of capability expansion. The initial phase (2004–2008) saw almost 20 new oceangoing patrol ships. The second phase (2009–2015) is expected to add another 30 large and medium-size ships, decommission some older, less capable ships, and add 100 new smaller patrol craft to expand the fleet and replace decommissioned ships. The total force is expected to grow by 25 percent through new construction and the addition of larger ships passed down from the PLA navy.<sup>9</sup>

In qualitative terms, Chinese paramilitary forces are receiving newer and larger ships capable of extended patrols farther from China’s coast. Many of these larger ships are armed and can support helicopter operations, further improving capabilities. These force improvements, which are the product of a decade of investment, give the China coast guard the ability to sustain a more robust presence in the South China Sea. As the OSD report notes, “the enlargement and modernization of China’s MLE [maritime law-enforcement] forces will improve China’s ability to enforce its maritime sovereignty.”<sup>10</sup>

## PLA Naval Capabilities Relevant to the South China Sea

Taiwan remains the priority mission for the PLA Navy, but the task of defending China’s maritime territorial claims is becoming increasingly important. This section briefly reviews modernization of PLA Navy ships most relevant to the South China Sea. Table 14.1 shows the current and projected expansion of selected PLA Navy ships from 2005 to 2015.

The data show a relatively modest expansion in terms of numbers of major surface combatants, coupled with a significant upgrade in the percentage of modern destroyers and frigates in the PLA navy inventory. China’s modern ships have enhanced capabilities, such as more effective radar and communications systems, better air defenses, the ability

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8. Lyle J. Morris, “Taming the Five Dragons? China Consolidates its Maritime Law Enforcement Agencies,” *China Brief* 13, no. 7 (2013): [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=40661&cHash=c3c1a5a4ce04d29db680c8a092843afd#.VAYpbvldWSo](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=40661&cHash=c3c1a5a4ce04d29db680c8a092843afd#.VAYpbvldWSo).

9. Office of the Secretary of Defense (OSD), *Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2014* (Washington, DC: Department of Defense, 2014), 38, [http://www.defense.gov/pubs/2014\\_DoD\\_China\\_Report.pdf](http://www.defense.gov/pubs/2014_DoD_China_Report.pdf).

10. Ibid.

**Table 14.1. PLA Navy Ships (selected classes)**

	2005	2010	2015
Destroyers	21	25	28–32
% of modern design	40%	50%	70%
Frigates	43	49	52–56
% of modern design	35%	45%	70%
Corvettes	0	0	20–25
Amphibious ships	43	55	53–55
Missile-armed coastal patrol craft	51	85	85

Sources: Ronald O'Rourke, *China Naval Modernization: Implications for U.S. Navy Capabilities—Background and Issues for Congress*, Congressional Research Service, June 5, 2014; Craig Murray, Andrew Berglund, and Kimberly Hsu, *China's Naval Modernization and Implications for the United States*, U.S.-China Economic and Security Review Commission, August 26, 2013.

to carry more modern anti-ship cruise missiles, and a greater operational range.<sup>11</sup> These capabilities are particularly important for operations in the southern part of the South China Sea, which lies beyond the range of Chinese land-based combat aircraft.

The PLA has also deployed its first aircraft carrier, the *Liaoning*, which was commissioned in September 2012. The *Liaoning*, originally built by Ukraine but never finished, is a “ski-jump” style carrier, which will limit the payload of the J-15 fighters operating from its deck. Although the *Liaoning*'s fighter wing is not yet combat capable, it has conducted training takeoffs and landings from the flight deck.

China has historically been reluctant to reveal its military capabilities, with Chinese officers arguing that transparency benefits the strong (who reveal their capabilities) at the expense of the weak (who reveal their vulnerabilities). National Defense University scholar Yu Lin notes that for “the weak, transparency means revealing weaknesses and becoming more vulnerable.”<sup>12</sup> The Chinese Academy of Military Science's Major General Luo Yuan makes the same point: “To rich countries military transparency is an effective way to brandish military power and deter others; whereas to poor nations, low military transparency is a way to protect themselves, by being ambiguous rather than specific.”<sup>13</sup>

However, increasing PLA strength means that China now has the ability to demonstrate its military capabilities in order to intimidate less powerful countries.<sup>14</sup> There are a num-

11. For a fuller discussion, see Phillip C. Saunders, Christopher Yung, Michael Swaine, and Andrew Nien-Dzu Yang eds., *The Chinese Navy: Expanding Capabilities, Evolving Roles* (Washington, DC: National Defense University Press, 2011).

12. Yu Lin, “Relativity of Military Transparency,” *China Daily*, October 29, 2009, [http://www.chinadaily.com.cn/opinion/2009-10/29/content\\_8865633.htm](http://www.chinadaily.com.cn/opinion/2009-10/29/content_8865633.htm).

13. Luo Yuan, “China to Increase Military Transparency,” *China Daily*, October 25, 2007, [http://www.chinadaily.com.cn/opinion/2007-10/25/content\\_6205574.htm](http://www.chinadaily.com.cn/opinion/2007-10/25/content_6205574.htm).

14. Isaac Kardon, “China's Emerging Debate on Military Transparency,” *China Brief* 10, no. 18, (September 2010): 8–11; Andrew Erickson and Phillip Saunders, “Selective Transparency: How the PLA Uses Development, Testing, Deployment, and Exercises as Shaping and Signaling Tools” (paper presented at CAPS-RAND-NDU conference on the PLA, Taipei, Taiwan, November 2013).

ber of recent instances where the PLA navy has used exercises and extended deployments to demonstrate its improved capability to defend Chinese maritime claims in the South China Sea. These include the following:

- The March 2013 deployment of a four-ship PLA navy flotilla (including the landing platform dock *Jinggangshan*, destroyer *Lanzhou*, and frigates *Yulin* and *Hengshui*) into the South China Sea.<sup>15</sup> One of the highlights of the 16-day deployment was a televised “oath-taking” ceremony by Chinese marines and sailors pledging “to defend the South China Sea, maintain national sovereignty, and strive toward the dream of a strong China.” The ceremony took place near James Shoal, at the outer limits of China’s South China Sea claim (only 50 miles from Malaysian coast).<sup>16</sup> The significance of this signal was reinforced when President Xi subsequently visited the naval base at Sanya on Hainan Island on April 12, 2013 to inspect some of the ships involved in the deployment.<sup>17</sup>
- The *Liaoning*’s initial training deployment in November 2013, when it embarked on a 37-day cruise from its home port in Qingdao into the South China Sea. The carrier group included at least two missile destroyers (the *Shenyang* and *Shijiazhuang*) and two missile frigates (the *Yantai* and the *Weifang*).<sup>18</sup> Although not yet combat capable, the *Liaoning*’s deployment into the South China Sea sent a symbolic message of expanded PLA navy capabilities and commitment to defend China’s maritime claims.
- A January 2014 PLA navy deployment of two Chinese destroyers and one amphibious landing craft in the South China Sea, including through the Paracel Islands and past James Shoal. The flotilla passed through the Sunda, Lombok, and Makassar Straits and conducted anti-piracy and search-and-rescue exercises. The ships also conducted live-fire drills in the western Pacific.<sup>19</sup>

## Coordination between the PLA Navy and the China Coast Guard

There appears to be a significant degree of coordination between the China coast guard and the PLA navy in operations in the South China Sea. The 2014 OSD report notes,

During the 2012 Scarborough Reef and 2013 Senkaku Islands tensions, the China Maritime Surveillance (CMS) and Fisheries Law Enforcement Command (FLEC) ships

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15. 白瑞雪、高毅、甘俊 Bai Ruixue, Gao Yi, and Gan Jun, (军事)从南海到西太平洋:海军编队战备巡逻远海训练全记录 “From South China Sea to West Pacific: Complete Record of Navy Task Force’s Distant Sea Training of Combat-Readiness Patrol,” 新华社 [Xinhua], April 3, 2013.

16. Minnie Chan, “PLA Takes Higher Profile in Disputed Waters,” *South China Morning Post*, March 31, 2013, <http://www.scmp.com/news/asia/article/1200564/pla-navy-amphibious-task-force-reaches-james-shoal-near-malaysia>.

17. Teddy Ng, “Xi Jinping Calls on Navy to Be Prepared for Struggle,” *South China Morning Post*, April 12, 2013.

18. Zhao Lei, “First Photos of *Liaoning* Battle Group Made Public,” *China Daily*, January 2, 2014, [http://www.chinadaily.com.cn/china/2014-01/02/content\\_17209280.htm](http://www.chinadaily.com.cn/china/2014-01/02/content_17209280.htm).

19. Trefor Moss and Rob Taylor, “Chinese Naval Patrol Prompts Conflicting Regional Response,” *Wall Street Journal*, February 20, 2104.

were responsible for directly asserting Chinese sovereignty on a daily basis, while the PLA navy maintained a more distant presence from the immediate vicinity of the contested waters. China prefers to use its civilian maritime agencies around these islands, and uses the PLA navy in a back-up role or as an escalatory measure.<sup>20</sup>

The PLA navy and elements of the China coast guard have conducted joint exercises to improve their interoperability. The first major exercise was held in July 2009, and involved the PLA navy's South China Sea fleet and 13 civilian agencies conducting search-and-rescue operations in the Pearl River Delta.<sup>21</sup> Another exercise, called East Sea Collaboration, was held in October 2012 with a territorial enforcement scenario involving 11 vessels and 8 aircraft. CMS and FLEC ships operated with support from the PLA navy.<sup>22</sup> Linda Jakobson has also documented an increasing educational and training relationship between the China coast guard and the PLA Navy.<sup>23</sup>

Perhaps the most impressive example of PLA navy and China coast guard coordination occurred in the May 2014 deployment of the China National Offshore Oil Company (CNOOC) oil rig to conduct oil exploration operations in waters claimed by both Vietnam and China. On May 2, 2014, the CNOOC offshore oil rig HD-981 was moved into Block 143 of Vietnam's EEZ to conduct exploration operations. The rig was accompanied by 80 ships, including seven PLA navy warships. The size of the fleet suggests that China anticipated potential resistance from Vietnam and had plans to defend the rig against any attacks, including military attacks. The operation was clearly planned carefully, indicating China's ability to conduct coordinated operations involving PLA navy, China coast guard, and state-owned enterprise assets.<sup>24</sup> China specialist Taylor Fravel argued that because the drilling was unlikely to be commercially viable, "China is most likely using the rig to assert and exercise its jurisdiction over the waters it claims in the South China Sea."<sup>25</sup> China's actions produced responses from the Vietnamese coast guard and a series of incidents involving use of water cannons and ramming of vessels. In late June, China moved a second rig into the South China Sea (this time with advance warning by the Maritime Safety Administration asking vessels to give the rig a wide berth).<sup>26</sup>

## Conclusion

China's investment in improved coast guard and PLA navy capabilities has improved Beijing's ability to enforce its maritime territorial claims in the South China Sea against

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20. OSD, *Annual Report to Congress*, 38.

21. Goldstein, *Five Dragons Stirring Up the Sea*, 23.

22. Jakobson, "The PLA and Maritime Security Actors."

23. Ibid.

24. Carl Thayer, "China's Oil Rig Gambit: South China Sea Game-Changer?," *Diplomat*, May 12, 2014, <http://thediplomat.com/2014/05/chinas-oil-rig-gambit-south-china-sea-game-changer/>.

25. Edward Wong, "Q&A: M. Taylor Fravel on China's Dispute with Vietnam," *New York Times*, May 8, 2014, <http://sinosphere.blogs.nytimes.com/2014/05/08/q-and-a-m-taylor-fravel-on-chinas-dispute-with-vietnam/>.

26. Jane Perlez, "In Push to Assert Rights, China Plans to Send 2nd Oil Rig to Waters Near Vietnam," *New York Times*, June 19, 2014, <http://www.nytimes.com/2014/06/20/world/asia/china-plans-to-send-second-oil-rig-to-waters-near-vietnam.html>.

other claimants. As the 2012 Scarborough Shoal and 2013 Senkaku Islands cases illustrate, Chinese leaders have become more willing to use these enhanced capabilities in response to perceived challenges by other claimants. This more assertive approach to territorial disputes is in tension with efforts to persuade China's neighbors of Beijing's commitment to "peaceful development." A hard line on territorial disputes raises tensions with other claimants and with major regional powers such as Japan and India. Chinese leaders are trying to strike a balance between maintaining a peaceful and stable security environment and gradual efforts to strengthen control over disputed territories. In a July 2013 Politburo study session on maritime issues, President Xi reiterated China's uncompromising position on sovereignty, but also highlighted the importance of simultaneously "maintaining stability" and "safeguarding [maritime] rights."<sup>27</sup> A senior PLA officer privately described one of China's major challenges as "the balance between pursuing national interests and maintaining world peace."<sup>28</sup>

China's policy includes a number of elements designed to make this tension more manageable. One is to rely primarily on paramilitary forces and coercive tactics while minimizing employment of military assets and the use of force. This reduces the political cost of aggressive tactics and limits the risk of escalation into a broader military conflict. A second is to try to deter challenges by ensuring that countries that challenge China's claims wind up in a worse position. Beijing hopes that improved relations with Washington may limit U.S. support for other claimants or even restrain them from challenging China's claims. Beijing's insistence on bilateral resolution of territorial disputes allows it to differentiate and adjust its policies toward individual claimants, preventing rivals from uniting to resist Chinese tactics. China's proclaimed willingness to pursue joint development in disputed areas is also intended to soften Beijing's hard-line approach to territorial disputes and offer "win-win" solutions. Chinese leaders hope that these measures, coupled with liberal use of reassurance measures, will allow China to gradually expand its effective control of disputed territories without the need to use force.

Beijing's approach is based on the belief that the regional balance of power is moving in China's favor and that other countries will eventually compromise in order to maintain good relations with a dominant China. This belief allows Chinese leaders to avoid the difficult compromises that would be necessary to settle maritime territorial disputes through negotiations. However, other claimants also face nationalist publics and are unlikely to simply abandon their claims. If they adopt equally uncompromising policies, Beijing's efforts to gradually extend its control of disputed territories are likely to have an increasingly corrosive impact on China's relations with its neighbors and on the regional security environment. Managing the tensions between competing Chinese goals will require agile diplomacy and effective control of both military and paramilitary forces. However, China's nationalistic policy environment and mixed crisis management record does not inspire confidence in Beijing's ability to strike the right balance.

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27. M. Taylor Fravel, "Xi Jinping's Overlooked Revelation on China's Maritime Disputes," *Diplomat*, August 15, 2013.

28. Author's interview, Beijing, September 2013.

# 15 | Vietnam's Maritime Forces

*Carlyle A. Thayer*

This paper presents a brief overview of three of Vietnam's maritime forces, the Vietnam People's Army (VPA) navy, the Vietnam coast guard (also known as Vietnam Maritime Police), and the Vietnam Fisheries Surveillance Force (VNFSF). The focus is on current modernization efforts. By way of conclusion, the paper offers some observations about the crisis that resulted when China placed a mega oil-drilling platform within Vietnam's EEZ and continental shelf in early May 2014.

## Vietnam People's Army Navy

The VPA navy was officially founded on May 7, 1955. The navy was mainly a riverine and coastal defense force that operated Soviet-donated fast-attack craft. It was only after the signing of the Treaty of Friendship and Cooperation between the Soviet Union and Vietnam in November 1978 that the VPA navy began to develop into a balanced comparatively modern force. The VPA navy took on the additional mission of surveillance of Vietnam's EEZ in the Gulf of Tonkin, South China Sea, and Gulf of Thailand, and protection of Vietnamese-occupied features in the Spratly archipelago. The VPA navy has limited capability to project significant power in the South China Sea.

**Table 15.1. Vietnamese Naval Strength, 1990 and 2013**

<i>VPA Navy Order of Battle 1990</i>	<i>VPA Navy Order of Battle 2013</i>
—	2 <i>Varshavyanka</i> -class submarines
	2 <i>Yugo</i> -class SSI
8 Frigates	2 Frigates (FFGM)
	6 Corvettes (FSG)
	8 <i>Tarantul</i> -class PCFGM
52 PBCs, PBs, and PCMs	54 Patrol and coastal combatants
7 Amphibious ships	8 (5 LSMs and 3 LSTs)
6 Landing craft	30 Landing craft
11 Minesweepers	13 Mine warfare and countermeasures
—	29 Logistics and support

Between late 1978 and early 1985 the Soviet Union provided 2 *Petya*-II (Export Class) FFLs (light frigates); 7 *Zhuk*-class coastal patrol craft; 8 *OSA* II-class PTGs (missile attack boats) armed with SS-N-2b STYK and SA-N-5 GRAIL surface-to-surface missiles (SSM); 14 *Shershen*-class PT/PCFs also armed with SA-N-5 GRAIL SSMs, 4 S.O. 1-class PCS sub-chasers; 5 K 8-class MSB and 2 *Yurka*-class MSF (minesweepers); 3 *Polnocny* B-class LSMs; 3 PO 2-class patrol boats; 2 *Poluchat* I-class PBs; 4 *Turya*-class PTH/PBH hydrofoils; 1 *Shelon*-class YPT torpedo retriever; 1 *Kamenka*-class AGS (survey ship); and 2 *Shmel*-class PM (river monitors).

Between 1985 and 1990, Vietnam procured from the Soviet Union three additional *Petya* II-class frigates, three *Turya*-class hydrofoils, two *Shershen* PCFs, two S.O. 1s, one *Sonya* MCSC, and two *Yevgenya*-class MH (mine hunters). Table 15.1 sets out the cumulative total of all types of naval ships and vessels acquired by Vietnam and in service in 1990.

In the mid-1990s, Vietnam initiated a modest effort to modernize its naval and air forces in response to sovereignty disputes with China in the South China Sea. For example, in 1994, Vietnam and the Russian Federation concluded an arms sale contract, and in October 1998 signed a major Defense Cooperation Agreement (DCA). On May 13, 1995, in an important speech Do Muoi, the secretary-general of the Vietnam Communist Party, called for the modernization of the VPA navy so it could protect the country's territorial waters. According to Do Muoi, "we must reinforce our defense capacity to defend our sovereignty, national interests and natural marine resources, while at the same time building a maritime economy."<sup>1</sup>

Between 1994 and 1999, Vietnam purchased four modified *Tarantul* 2-type corvettes from Russia. The ships were armed with twin launchers for the SS-N-2D STYX anti-ship missile, Igla surface-to-air missiles (SAMs), and additional guns. Russia and Vietnam also reached agreement to coproduce BPS 500-type missile boats.<sup>2</sup> Russia continues to remain the main source for Vietnam's arms acquisitions.

Vietnam's modernization program is clearly aimed at improving its capacity to monitor its territorial waters, continental shelf, and EEZ; project naval power into the South China Sea; and develop ASW capabilities. Vietnam also seeks to protect its key offshore oil and gas rigs, counter the power projection capabilities of regional states, and meet the potential threat posed by the growing number of conventional submarines operated by China and other regional states. Vietnam's limited naval procurements appear aimed at developing modest anti-shipping ASW and mine countermeasure capabilities.

Almost all major defense procurement programs either under way or planned reflect the above priorities. Vietnam's navy currently has plans to construct up to 20 "blue water"

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1. Quoted in Carlyle A. Thayer, "Force Modernization: The Case of the Vietnam People's Army," *Contemporary Southeast Asia* 19, no. 1 (June 1997): 17–18.

2. Only one BPS-500 (HQ 381) was produced because more modern missile boat designs became available. Vietnam opted for the *Molniya*-class. In 2013, the HQ 381 underwent repairs, overhaul, and upgrade. This was Vietnam's first domestically produced missile corvette and it was armed with the Kh-35 Uran-E anti-ship missile. The HQ-381 displaced 520 tons.

naval vessels and modernize its Hong Ha and Ba Son shipyards. Vietnam's naval modernization program aims to replace older boats and ships through purchase or domestic production under a plan approved by the Government and Ministry of National Defense.<sup>3</sup>

In addition, Vietnam has sought to develop its national defense industry capacity, with an initial priority on maritime capabilities, in partnership with Russia and India, and to promote international defense diplomacy. In June 2014, it was reported that Russia and Vietnam were negotiating setting up a maintenance and repair joint venture facility in Cam Ranh Bay to service ships from all countries.

In 1997, Vietnam acquired two *Yugo*-class midget submarines from North Korea, which it subsequently refitted. The acquisition of *Yugo*-class subs represented the first phase in implementing Vietnam's long-standing interest in developing an undersea-warfare capability.<sup>4</sup> In 2008, for example, Vietnam was reportedly in the market for secondhand submarines from Serbia.<sup>5</sup> Vietnam explored the possibility of acquiring three full-size submarines and three midgets, all nonoperational.<sup>6</sup>

In March 2000, India and Vietnam signed a DCA under which the Indian navy agreed to provide training to Vietnamese naval personnel including submariners, and to repair, upgrade, and build fast patrol craft for the Vietnamese navy. In October 2002, Vietnam officially asked India to provide submarine training.

In June 2005, the Indian navy transported 150 tons of spare parts to Vietnam for its *Petya* frigates and *Osa-II* fast-attack missile craft. In December 2007, during the visit to Hanoi by India's defense minister, A. K. Anthony, India agreed to donate to Vietnam 5,000 essential spare parts for its *Petya*-class anti-submarine ships in order to make them operational.

In May 2002, Vietnam and the Ukraine reached agreement on military-technical cooperation up to 2005. Under the terms of this agreement the Ukraine provided assistance to Vietnam to upgrade and modernize its naval force under plans drawn up by Ukrainian defense specialists. These plans called for substantial Ukrainian involvement across a number of areas, including the renovation of the Ba Son dockyard in Ho Chi Minh City; developing naval test facilities; arms coproduction; and repairing, upgrading, and supply of all types of unspecified equipment and weapons. Vietnam later canceled its deal with the Ukraine because of differences over performance.<sup>7</sup> The Ukraine contract provided for 20 400-ton patrol vessels, but only 6 were built and delivered.

In March 2004, Vietnam signed an agreement for two *Tarantul V* (Project 1241.8) corvettes armed with SS-N-25 (Kh 35 Uran missiles).<sup>8</sup> They were delivered in late 2007. Viet-

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3. "New Boats Equipped for Transport Units," *Quan Doi Nhan Dan*, February 18, 2009.

4. Vietnam had previously expressed an interest in obtaining two or three *Kilo*-class conventional submarines from the Soviet Union before its collapse.

5. Robert Karniol, "Slow Advance for Viet Army Revamp," *Straits Times*, February 9, 2009.

6. Serbia offloaded its fleet to Egypt.

7. Karniol, "Slow Advance for Viet Army Revamp."

8. The modified *Tarantul V* is sometimes referred to as *Molnya*; in Vietnam it is called *Ho-A* class.

nam reached another agreement in December 2006 with Rosoboronexport (Russian Defense Exports) for the purchase of two *Gepard 3.9*-class (Project 11661) guided missile frigates. This deal was estimated at \$300 million. Since 2008, the Vietnamese navy has taken delivery of two *Gepard*-class guided missile stealth frigates,<sup>9</sup> four *Molniya* missile corvettes,<sup>10</sup> and four *Svetlyak*-class fast patrol boats armed with anti-ship missiles.

Between January 2012 and May 2014, the Hong Ha Shipbuilding Company handed over three TT 400 TP gunships to the Vietnamese navy.<sup>11</sup> These vessels displace approximately 480 tons. They are armed with 14.5 millimeter anti-aircraft guns, one AK-176 76 millimeter automatic cannon, and a six-barreled 30 millimeter AK-630 radar-controlled gun. The gunboats are also armed with the MANPAD SA-N-14 GROUSE anti-missile system.

In April 2014, the VPA navy took delivery of its third Canadian DHC-6 Twin Otter Sea-plane. The first DHC-6 was designed to carry passengers; the second was also equipped with nose radar. The third was configured to carry freight. Three more DHC-6s are on order.

Two *Gepard 3.9*-class frigates are currently under construction and will be configured for ASW. They will be equipped with the Palma CIWS. They displace 2,200 tons each. They are expected to enter into service in February and May 2017, respectively.<sup>12</sup> These missile corvettes will be equipped with an AK-176M 76 millimeter cannon, Palma CIWS, anti-submarine torpedoes, and Kh-35 Uran-E anti-ship missiles. Vietnam also has on order two to four Dutch *Sigma*-class corvettes to be equipped with Exocet missiles.

Since 2010, Vietnam has also strengthened its air and coastal defenses with the acquisition of, respectively, two batteries of the highly capable S-300 PMU-1 air defense system and two batteries of the K-300P *Bastion* coastal defense missile system.

## Project 636 Varshavyanka-Class Submarines

In 2008, Vietnam's defense minister and state president made separate visits to Moscow to conclude negotiations for the purchase of conventional submarines. On April 24, 2009, Vladimir Aleksandrov, the general director of Admiralteiskie Verfi (Admiralty Shipyard) in Saint Petersburg, announced that his company would build six improved *Kilo*-class Project 636M submarines for Vietnam. The submarines were priced at US\$300–\$350 million per unit or US\$1.8-2.1 billion in total.

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9. The frigates HQ 11 *Dinh Tien Hoang* and HQ 12 *Ly Thai To* were commissioned in March and August 2011, respectively. They were armed with the Palma Close in Weapons System (CIWS). This system comprises Sosna-R hypersonic SAMs, two six-barrel AO-18KD 33 millimeter automatic cannons and the 3V-89 electro-optical multichannel electronic countermeasures fire control system. The CIWS can engage six targets up to 8 kilometers away.

10. These ships were constructed at the Ba Son shipyard. On April 28, 2014 two *Molniya*-class corvettes, HQ 377 and HQ 378, test fired missiles near Cam Ranh Bay.

11. TT, *tuan tra*, stands for patrol, whereas TP, *tau phao*, stands for gunship. These are numbered HQ 272, HQ 273, and HQ 274.

12. Designated HQ 956 and HQ 957.

The formal contract to purchase the six Kilos was signed in Moscow by Rosoboronexport and the Vietnamese Ministry of National Defense in December 2009. The signing was witnessed by President Vladimir Putin and Prime Minister Nguyen Tan Dung. Admiralty Shipyards began construction of the first of six submarines with a keel-laying ceremony on August 24, 2010.

The Russia-Vietnam submarine contract also included provisions for crew training and the construction of an onshore maintenance facility in addition to the delivery of the six submarines. In March 2010, Vietnam formally requested Russian assistance in constructing a submarine base at Cam Ranh Bay.

The Project 636M submarine is officially designated the *Varshavyanka*-class by Russia; it is more widely known by its NATO designation, the *Kilo*-class. The *Kilo* is a nonnuclear fast-attack submarine (SSK). Vietnam has ordered the latest variant of the improved 636MV. It has better range, speed, reliability, sea endurance, acoustic characterizes, and firepower than its earlier variant. It can perform the following missions: anti-submarine and anti-shipping warfare, coastal defense, mine laying, general reconnaissance, and patrol.

The Project 636 *Kilo*-class submarine has been dubbed the “black hole” by the U.S. Navy for its level of quietness. The Project 636MV-class submarine has improved stealth features through the removal of flooding ports and treating the hull with multilayer anechoic rubber tiles. The tiles are fitted on casings and fins to absorb active sonar waves that reduce and distort the return signal. The anechoic tiles also shield sounds from within the submarine thus reducing the range of detection by passive sonar.

The improved *Kilo* is 242 feet in length, 32.4 feet in width with a draft of 20.3 feet. It has a surface displacement of 2,350 tons and can dive up to quarter of a mile. The improved *Kilo* is also powered by diesel-electric engines. It has a range of nearly 6,000 miles and can travel 434 miles underwater at 2.7 knots at quiet speed. The improved *Kilo* can reach a top speed of 20 knots and has a crew of 57.<sup>13</sup>

The Project 636MV submarine has six 533 millimeter forward torpedo tubes. It can carry 18 torpedoes (6 loaded in the tubes and 12 in racks) or 24 mines (2 in each tube and 12 in racks). Two of the torpedo tubes are designed to fire remote-controlled torpedoes with very high accuracy. The improved *Kilo* can also fire anti-ship cruise missiles from its torpedo tubes and carries MANPADS STRELA-3 anti-aircraft missiles.

In June 2010, it was reported that the total cost of Vietnam’s submarine package had risen from the original estimates of US\$1.8–\$2.1 billion to US\$3.2 billion. The additional costs included armaments and infrastructure construction. Industry sources report that Vietnam’s *Kilo*-submarines will be equipped with the anti-ship 53–65 and TEST 71

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13. Vietnam apparently has not opted for the Air Independent Propulsion system that would permit extended time on patrol.

anti-submarine torpedoes.<sup>14</sup> Industry sources also speculate that Vietnam's *Kilos* will be kitted out with *Klub* anti-ship missiles, such as the 3M-54E or 3M-54E1. In July 2011, Oleg Azizov, a representative of Rosoboronexport, confirmed that Vietnam will take delivery of the deadly *Novator Club-S* (SS-N-27) anti-ship cruise missile with a range of 300 kilometers.

Vietnam is acquiring *Kilo*-class submarines for operations in the relatively shallow waters of the South China Sea. When they commence operations, they will enhance Vietnam's maritime domain awareness about the operations of foreign paramilitary and naval vessels in waters off Vietnam's coastline and in waters surrounding the Paracel and Spratly Islands. In addition, the *Kilo* submarines will provide a deterrent against the contingency that China might attempt to quickly seize an island or feature occupied by Vietnam in the South China Sea. More generally, the *Kilos* will provide a modest but potent A2/AD capability against intimidation by Chinese PLA navy warships.

In August 2011, Vietnam's defense minister said that he expects to deploy a modern submarine fleet by 2016–2017. Vietnam, however, faces major challenges in integrating six conventional submarines into its existing force structure. Regional naval analysts argue that the VPA navy, as it is currently structured and organized, is incapable of effectively operating a fleet of six *Kilo*-class submarines in the future. Further, Vietnam has yet to master the revolution in military affairs and create truly joint naval-air operational groups. Addressing these challenges is a major strategic priority for Vietnam. It may have to consider reducing the size of its standing army in order to finance and develop its naval and air forces.

In late November 2013, during the visit of Vietnam's party secretary-general Nguyen Phu Trong to India, it was announced that India would provide training for up to 500 submarines as part of its defense cooperation program with Vietnam. Training will be conducted at the Indian navy's modern submarine training center *INS Satavahana* in Visakhapatnam. The Indian navy has operated Russian *Kilo*-class submarines since the mid-1980s.

On December 31, 2013, Vietnam took delivery of its first Russian Project 636 *Varshavyanka*-class submarine at Cam Ranh Bay. The sub was transported from the port of Saint Petersburg on the heavy lift vessel *Rolldock Sea*. The submarine was accompanied by experts from Admiralty Shipyards in Saint Petersburg who undertook final work before the formal handover ceremonies. The submarine was named HQ 182 *Hanoi*. The second *Varshavyanka*-class submarine, HQ 183 *TP Ho Chi Minh*, was delivered in early 2014. These submarines will form Submarine Brigade 189 in the Vietnamese navy.

The third *Varshavyanka*-class submarine is currently completing sea trials and is expected to be delivered to Vietnam in the second half of 2014 and the fourth

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14. Industry sources reported in March 2014 that Vietnam purchased 50 3M-54 *Klub* anti-ship missiles, 80 53–65 anti-ship torpedoes, and 80 anti-ship/anti-submarine TEST-71 torpedoes in 2013.

*Varshavyanka*-class sub was launched in late March 2014. The fifth *Varshavyanka*-class sub is under construction, and the sixth was laid down in March 2014 and is expected to be delivered by 2016.<sup>15</sup>

The six *Varshavyanka*-class submarines will be armed with *Club-S* anti-ship missiles. Before Vietnam acquires these capabilities it will have to transition from a two-dimensional (surface and air) to a three-dimensional force. Vietnam will also need to find the funding for maintenance and repair to keep the *Kilos* operational and develop a capable submarine rescue capability. Industry analysts predict that Vietnam will fall somewhere between Singapore and Indonesia in its ability to absorb the *Kilos* and produce effective capability. These analysts say much depends on sustained Russian and Indian support over the coming years for Vietnam to develop a truly modern submarine fleet.

## National Defense Industry

Vietnam entered into coproduction arrangements with Russia to assemble KBO 2000 corvettes and BPS-500 missile patrol boats. In early 2008, Vietnam and Russia signed a contract for the delivery of several shipbuilding kits and related weapons systems for domestic assembly in Vietnam's Hong Ha shipyard. Reportedly the kits contain a mix of vessels for the navy and coast guard. The contract was valued at \$670 million.

Vietnam's national defense industry is capable of shipyard repairs and assembling navy patrol boats from kits. For example, Vietnam assembled two BPS 500 (Project 12418) missile corvettes from a kit provided by a Russian supplier. However, more ambitious plans to build a Russian-designed Project 2100 corvette were abandoned because the task was beyond local technical capabilities. In November 2006, Vietnam announced the launch of the largest made-in-Vietnam rescue boat at the Da Nang military port. The boat was built by Plant Z124, Song Thu Company, Defense Industry General Department, in 18 months utilizing technology transferred by the Damen Corporation in the Netherlands.<sup>16</sup>

In November 2006, it was reported that Russia and Vietnam were drawing up an agreement on technical assistance in the production of *Yakhont* ship-to-ship missiles.

## Defense Diplomacy

Vietnam has also utilized defense diplomacy in an effort to enlist support from major maritime powers to enhance its own military capabilities and to counter Chinese assertiveness. In 2010, for example, Vietnam as the ASEAN chair lobbied the United States and other

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15. These submarines will be named *HQ 184 Hai Phong*, *HQ 185 Da Nang*, *HQ 186 Khanh Hoa*, and *HQ 187 Ba Ria-Vung Tau*.

16. Robert Karniol, "Vietnam's Defense Industry Stutters Along," *Straits Times*, July 14, 2008, reports that Vietnam plans to build two 2,500-ton search-and-rescue ships.

powers to intervene in the South China Sea dispute at the midyear meeting of the ARF and the inaugural meeting of the ADMM-Plus held in Hanoi in October.

Vietnam has played a delicate diplomatic hand with China and the United States. In November 2008, at Vietnam's invitation, the PLA navy resumed port visits to Vietnam after a hiatus of 17 years. PLAN ships now visit annually. In January 2013, two PLA navy frigates and a replenishment ship paid a goodwill visit to Ho Chi Minh City after deployment in the Gulf of Aden. The VPA navy made its first port call to China in June 2009 and revisited in June 2011.

In 2009, Vietnamese officials began a series of regular fly-outs to U.S. aircraft carriers transiting the South China Sea. In 2010, the annual U.S. naval port visit to Vietnam was widened to include joint naval activities. Vietnam also agreed to carry out minor passage repairs on U.S. Military Sealift Command vessels. The most recent repairs were carried out at the commercial port facilities in Cam Ranh Bay. These three developments were largely symbolic but also served Vietnam's purpose of signaling to China that the United States is a legitimate actor in regional maritime security and its presence is welcome.

Since 2008, Vietnam and the United States have conducted an annual Political, Security and Defense Dialogue under the auspices of the U.S. State Department and Vietnam's Ministry of Foreign Affairs. In August 2010, Vietnam and the United States held their first Defense Policy Dialogue between their respective militaries. In September 2011, at the second U.S.-Vietnam Defense Policy Dialogue, the two sides signed a Memorandum of Understanding (MOU) identifying five priority areas: regular high-level defense dialogues; maritime security; search and rescue; UN peacekeeping; and humanitarian assistance and disaster relief.

In 2003, Vietnam and the United States agreed to exchange alternate visits by their defense ministers every three years.<sup>17</sup> In 2009, Vietnam's minister for National Defense, General Phung Quang Thanh, visited Washington. In reciprocation, Secretary of Defense Leon Panetta visited Hanoi in June 2012. He made an unexpected detour to Cam Ranh Bay to meet with the crew of a U.S. Military Sealift Command vessel undergoing repairs. Panetta's visit sparked media speculation that the U.S. Navy might return to its former base. Vietnamese officials were quick to point out that the navies of any country could avail themselves of the commercial repair facilities at Cam Ranh but no country would be allowed to establish a military base in Vietnam.

The meeting between Secretary Panetta and General Thanh mainly focused on reviewing progress under their 2010 MOU. General Thanh flagged future cooperation in addressing nontraditional security issues such as humanitarian assistance, disaster relief, and search and rescue. He requested additional U.S. support in addressing legacies from the Vietnam War, such as Agent Orange and unexploded ordnance disposal. He also requested the lifting of U.S. restrictions on military sales to Vietnam. Secretary Panetta suggested

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17. In 2013, Vietnam invited Secretary of Defense Chuck Hagel to visit Vietnam in 2014. This may presage more frequent ministerial exchanges.

that Vietnam grant approval for the setting up of an Office of Defense Cooperation in Hanoi to expedite future defense cooperation.

Also in 2010, Vietnam and China raised their strategic dialogue to deputy ministerial level. In August 2011, China and Vietnam held their second Strategic Defense and Security Dialogue. At this meeting it was agreed that military exchanges would be increased and a hot line established between the two defense ministries. China and Vietnam also expanded the scope of their joint patrols in the Gulf of Tonkin initiated in April 2006. The 13th joint patrol, which was conducted in June 2012, included day and night signaling exercises and an anti-piracy drill. By the first half of 2014, a total of 16 joint patrols had been conducted.

In September 2012, China and Vietnam held their sixth defense and security consultations. The two sides agreed “to continue high-level visits, strengthen dialogue and consultation, promote cooperation in the fields of personnel training, border exchanges, navy and multilateral security issues.”<sup>18</sup>

## VPA Navy Conclusion

Vietnam’s most recent defense white paper, issued in December 2009, emphasized gradual modernization of the regular armed forces. Current defense priorities were outlined in January 2011 at the 11th National Congress of the Vietnam Communist Party. The Political Report, delivered by the party secretary general, identified modernization of the armed forces and defense industry as one of the five key national objectives for the next five years (then 2011–2015). According to this report, the major challenges affecting “national defence responsibilities in the new environment” included “war using hi-tech weaponry, disputes over maritime sovereignty, terrorism, and hi-tech and transnational crimes.” In order to meet these challenges the political report gave priority to ensuring “that the armed forces incrementally have access to modern equipment with priority being given to the navy, air force, security, intelligence, and mobile police forces.”<sup>19</sup> Speaking on the sideline of the party congress, General Thanh, minister of national defense, included electronic and technical reconnaissance among the priorities for defense intelligence.

Vietnam’s recent arms acquisitions reflect a number of factors, such as the need to modernize and upgrade existing stocks of weapon systems and platforms, the growing importance of Vietnam’s maritime economy, the modernization of other regional armed forces, and the introduction of new military technologies into the region. But no issue is more pressing for Vietnam than its territorial disputes with China in the South China Sea that reemerged in 2007. In 2012, Vietnam commenced reconnaissance patrols by Su-27/Su-30 aircraft over the South China Sea.

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18. Xinhua, “Sixth China-Vietnam defense, security consultation held in Hanoi,” *People’s Daily Online*, September 4, 2012, <http://english.peopledaily.com.cn/90883/7935590.html>.

19. Political Report quoted in Carlyle A. Thayer, “Strategic Posture Review: Vietnam,” *World Politics Review*, January 15, 2013, 8, <http://www.worldpoliticsreview.com/articles/12623/strategic-posture-review-vietnam>.

**Table 15.2. Vietnam Coast Guard Assets, 2012**

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1 Offshore Patrol Vessel (PSO)
1 Patrol Craft Offshore (PCO)
4 TT-400 TP Patrol Craft Coastal (PCC)
2 <i>Shershen</i> Patrol Boats Fast (PBF)
12 TT-200 Patrol Boats (PB)
13 TT-120 Patrol Boats (PB)
1 misc. Patrol Boat
4 Logistics and Support ocean tugs (ATF)

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Vietnam's defense budget is closely tied to the growth of Vietnam's gross domestic product (GDP). In 2012, the official defense budget was estimated at \$3.3 billion or 2.5 percent of GDP. Vietnam must find not only the funds to finance its ambitious weapons procurement program but additional funding to maintain and service these systems as well. A major case in point is whole-of-life funding for the six *Kilo*-class submarines that Vietnam will acquire over the next five years.

Vietnam has a long extended coastline, EEZ, and continental shelf. The Vietnam Marine Police (Cảnh sát biển Việt Nam) was created in April 1998 to exercise sovereign jurisdiction over this maritime, including surveillance, law enforcement, and search and rescue.<sup>20</sup> The coast guard comes under the responsibility of the Ministry of National Defense and operates separately from the VPA navy.

The Vietnam coast guard is equipped with approximately 38 vessels ranging from 120 tons to 2,500 tons. Other vessels are built domestically or at Vietnamese shipyards while the larger ships are constructed in cooperation with the Damen Group from the Netherlands. For example, the largest ship in the coast guard is a Damen 9014-class OPV. Three more OPVs of this type are scheduled to be built by Vietnam's Z189 Ship Project Company.

In addition, the Vietnam coast guard operates three C-212-400 maritime patrol aircraft. In August 2013, the Vietnam coast guard took delivery of three former South Korean Maritime Police patrol vessels, including a 1,219-ton *Mazinger*-class OPV and two 250-ton *Sea Wolf/Shark* (Haeuri Mod B)-class patrol vessels.

In June 2014, Vietnam's National Assembly allocated funds totaling US\$756.8 million to increase the capabilities of the coast guard and VNFSF. Part of the money will be spent on building 3,000 steel-clad fishing boats that are larger than the present wooden hulled fishing craft.

On July 3, Prime Minister Dung announced that US\$540 million would be allocated to the construction of 32 patrol vessels for the Vietnam coast guard and VNFSF.

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20. The Vietnam Maritime Police was officially approved by the National Assembly on March 28, 2008, and formally established on April 7 that same year through Presidential Order No. 3-L/CTN.

The coast guard will equip its DN 2000 (*Damen* 9014-class) OPV with new naval helicopters to boost maritime surveillance capabilities.<sup>21</sup> Vietnam will also purchase an unspecified number of CASA C-212 Aviocar aircraft for maritime surveillance missions. Vietnam is expected to take delivery of decommissioned Japan coast guard vessels early next year.

The Vietnam coast guard's missions include:

- Drug smuggling
- Human trafficking
- Counterterrorism
- Industrial radioactive and toxic waste dumping
- Marine environmental protection
- Surveillance of illegal operations by foreign fishing vessels
- Vietnam maritime law enforcement
- Marine assistance
- Search and rescue
- National defense—alongside the VPA navy

## Vietnam Fisheries Surveillance Force

VNFSF was officially stood up on April 15, 2014, at ceremonies in Da Nang attended by Prime Minister Dung.<sup>22</sup> VNFSF comes under the responsibility of the General Department of Fisheries within the Ministry of Agriculture and Rural Development. The main headquarters of VNFSF is in Hanoi, which oversees four operational zones. VNFSF is currently drawing up a Master Plan to 2020.

VNFSF is tasked with carrying out the following missions in Vietnam maritime zone: patrol, monitoring and inspecting fisheries-related activities, detecting and responding to violators and protecting Vietnam's aquatic resources, assisting fishermen, and contributing to security order and national sovereignty in Vietnam's maritime area.

Vietnam's fishing fleet is currently estimated at 120,000 fishing vessels of all sizes employing around 1 million fishermen.

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21. Industry sources report that the frontrunners are the K-27 and AS-565 Panther helicopters, but other options are still under consideration (as of March 2014).

22. Prime Minister's Decree No 102/2012/ND-CP, November 29, 2012, and Decision No. 3285/QĐ-TCCB, November 28, 2012.

The VNFSF boats operate daily alongside the Vietnam coast guard vessels in confronting China's armada around the mega drilling rig. The VNFSF boats operate between 6 and 8 nautical miles from the oil-drilling rig. They report that when they reach a distance of 7.5 nautical miles from the rig, they are confronted by Chinese ships. On June 2, it was reported that the Chinese maritime force totaled 125: 40 coast guard ships, 14 transport ships, 20 tugboats, 47 fishing boats, and 4 PLA navy warships. In addition, Vietnam reported that five military jets were flying over the area.

On June 4, Prime Minister Dung announced that the government would allocate US\$200 million to build four large fisheries surveillance vessels. Dung made this commitment at ceremonies marking the launch of the VNFSF's newest and largest ship, KN-781. The KN-781 was built by the Ha Long shipyard to design specification provided by Damen Shipyards Group of the Netherlands. The KN-781 is the most advanced of its class, with a helicopter deck and a displacement of 2,500 tons. A similar vessel will be completed in July by the same shipyard.

## Haiyang Shiyou 981 Drilling Platform

On May 2, 2014, China parked the mega oil-drilling platform Haiyang Shiyou 981 at a location west of Triton islet and approximately 50 miles within Vietnam's EEZ. The drilling platform was initially accompanied by an armada of ships including China coast guard, fishery enforcement, transport and supply ships, fishing boats (some armed) and PLA navy warships (Jianghu II-class frigate, fast-attack Missile Craft 753). By May 7, the number of Chinese ships and vessels had increased to 73, including 7 PLA navy warships. On July 5, 2014, Vietnamese authorities reported that up to 115 Chinese ships, including 5 PLA navy warships, were deployed at the site where the rig was located.

During the period from May 2 to its departure on July 15, Vietnam's coast guard and VNFSF vessels attempted to confront the Chinese and force them to leave Vietnam's EEZ. China responded by declaring an expanding exclusion zone around the drilling platform and enforcing it by directing high-powered water cannons at the bridges of Vietnamese coast guard and VNFSF vessels. Chinese ships, on average two to four times heavier than their counterparts, have also engaged in ramming Vietnamese vessels.<sup>23</sup> By June 5, Vietnamese officials reported that 24 Vietnam coast guard and VNFSF vessels had been damaged.

China also employed other methods of intimidation such as unsheathing deck cannons and other weapons and aiming them at Vietnamese vessels, flying military and civilian aircraft overhead, and directing the high-powered water cannons at the communication masts and antennae of Vietnamese vessels. On May 26, a Chinese enforcement ship No. 11209

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23. On May 7, for example, Vietnamese officials charged a China coast guard ship (Haikan No. 44044) with ramming a Vietnam coast guard ship (CSB 4033) on May 3, China's Haikan No 2012 with ramming Vietnam coast guard ship no. 2012 on May 4, and China's Haikan No. 3411 with ramming Vietnam coast guard ship no. 8003 on May 7.

rammed and capsized a Vietnamese fishing boat DNA 90152, endangering its crew. Chinese law-enforcement officials also boarded Vietnamese fishing craft outside of China's exclusion zone and seized their catch, navigational equipment, and other items of value. Vietnamese fishermen report being intimidated, and in some cases beaten, by metal-bar-wielding Chinese officials. Most recently, Chinese officials have seized a Vietnamese boat and its crew operating in waters far removed from the present site of confrontation.

China has also gone into overdrive in a calculated campaign of information warfare, charging that 69 Vietnamese boats rammed Chinese ships 1,500 or more times. If true this would mean each Vietnamese boat was responsible for 21.7 ramming incidents each.

## Conclusion

Since the eruption of the oil-drilling crisis, the VPA navy has been kept in port or well away from the area of confrontation. Vietnamese government officials have adopted a passive policy of confronting the Chinese. Vietnamese coast guard vessels repeatedly call on the Chinese to leave Vietnam's EEZ over loudspeakers broadcast in Chinese, Vietnamese, and English.

The Vietnamese government has been extremely conciliatory in its response. Vietnam initially and subsequently called for the activation of hotlines so the crisis could be discussed by senior leaders. Vietnam twice has offered to send a special envoy to China. Both sides agree that approximately 30 diplomatic contacts have been made, but both blame each other for lack of progress.

The current confrontation has evolved into a kind of slow war of attrition whereby China uses its greater numbers and heavier ships to batter and ram Vietnamese vessels to inflict sufficient damage to cause them to retire. If China suspends operations of the HD 981 and withdraws the oil rig from within Vietnam's EEZ on or before August 15, as foreshadowed in the original announcement when the drilling platform was deployed, both sides are likely to withdraw their naval forces before the onset of the typhoon season in September–October. This could provide an opportunity for both sides to engage in direct talks.

What remains unclear is whether China's use of the drilling rig marks a "new normal" in Chinese assertiveness in advancing its South China Sea claims. Will the HD 981 or other Chinese oil-drilling rigs make an annual appearance in disputed waters accompanied by a flotilla of armed escorts?

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