

Grappling with the South China Sea Policy Challenge

A Report of the CSIS Sumitro Chair for Southeast Asia Studies

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Acknowledgments

On July 21, 2015, the Center for Strategic and International Studies (CSIS) Sumitro Chair for Southeast Asia Studies held its Fifth Annual South China Sea Conference. That conference informed the findings and recommendations in this report, though all opinions are those of the author and do not necessarily reflect those of the conference participants. Both the conference and this report were made possible by general CSIS funds

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The Center for Strategic and International Studies (CSIS) hosted its fifth annual South China Sea conference on July 21, 2015.¹ The event garnered more interest and a considerably larger audience—both in CSIS’s at-capacity conference room and online—than its four predecessors did. Interest in the conference reflects the wider discussion on the South China Sea among policy communities in Washington and around the Asia Pacific—discussions that have risen to the top of the strategic agenda in many capitals.

The unprecedented reclamation work China embarked on at the end of 2013 in the Spratly Islands has altered the dynamics of the South China Sea disputes and raised new worries about Beijing’s intentions. The expansion of China’s seven occupied features will allow it far more power projection capacity in disputed waters, and will undoubtedly lead to higher tensions and more frequent run-ins between its military and paramilitary forces and those of its Southeast Asian neighbors.

The reclamation also increases concerns about China possibly impinging on freedom of navigation in the future, including the right of U.S. and regional militaries to operate freely in the South China Sea. Most worrying, it means that there is no going back to the status quo ante of 2009 or 2010. The disputes cannot be frozen indefinitely: either the situation will continue to deteriorate or claimants will establish a long-term system to manage it.

It was clear from several of the conference’s expert panel discussions as well as the keynote speech by Representative Randy Forbes (R-VA) that the South China Sea disputes are now being seen as an acute threat to regional security as well as to the interests of non-claimant countries including Australia, Japan, and the United States.² This is an important shift; for most of the policy community, the South China Sea disputes had been seen until recently as a slow-moving and low-priority threat that could be safely kicked down the road.

But the palpable concern over China’s island building has added a sense of urgency to thinking about the disputes that was lacking even in the wake of China’s seizure of Scarborough Shoal from the Philippines in May 2012 or during

¹ See “Fifth Annual CSIS South China Sea Conference,” Center for Strategic and International Studies, July 21, 2015, <http://csis.org/event/fifth-annual-csis-south-china-sea-conference>.

² Ibid.

the two-month standoff between Chinese and Vietnamese forces over the deployment of the Haiyang Shiyou 981 drilling rig platform in mid-2014.³

This new level of attention to the South China Sea disputes comes as a welcome relief to those who have been concerned about the growing tensions over the last six years. But it also carries the risk of oversimplification. The claims of seven different players in the South China Sea,⁴ and the web of historical, legal, economic, and security issues underlying them, make the disputes uniquely complicated. They have no short-term solutions. Any successful policy must distinguish immediate needs—detering Chinese aggression, reassuring claimants of U.S. commitment, and preventing tensions from increasing further—from long-term interests—preserving the global maritime commons, convincing all parties to bring claims into conformity with international law, and establishing a long-term system to manage disputed waters and seabed.

Overall, CSIS's conference gave reason for optimism on this count. Several speakers on each of the day's panels highlighted the complexity of the disputes and explored long-term policy options. While it is clear that U.S. policy is still evolving, Assistant Secretary of State Daniel Russel underscored that the administration is playing the long game; it recognizes that high tensions and provocations are the new normal in the South China Sea.⁵

The United States' most vital interests—to protect freedom of navigation, preserve international law and norms, and convince China to rise cooperatively rather than at its neighbors' expense—are shared by partners throughout the region. The success or failure of Washington's South China Sea policy, or that of Canberra, Manila, Hanoi, or Tokyo for that matter, cannot be effectively judged week to week or month to month, but over the course of several years. Maintaining high-level focus over that timespan will be a key challenge for both those making and those informing policy.

U.S. Policy Options

Much of current U.S. strategy is already geared toward the immediate policy challenges in the South China Sea. The United States is engaged in substantial efforts to bolster Southeast Asian states' maritime domain awareness and patrol and deterrence capabilities, all to prevent more blatant Chinese aggression. These efforts must be enhanced, particularly through greater cooperation with the Philippines, once the Enhanced Defense Cooperation Agreement (EDCA) signed in early 2014 is enacted, and through expansion of joint activities with Vietnam. Washington must also cajole others to support its efforts. Meanwhile the U.S. government is putting considerable diplomatic effort into the long game: pushing

³ Ernest Z. Bower and Gregory B. Poling, "China-Vietnam Tensions High over Drilling Rig in Disputed Waters," CSIS *Critical Questions*, May 7, 2014, <http://csis.org/publication/critical-questions-china-vietnam-tensions-high-over-drilling-rig-disputed-waters>.

⁴ Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam.

⁵ "Fifth Annual CSIS South China Sea Conference."

all claimants, not just China, to bring their claims into accordance with international law.

While existing efforts continue, more remains that U.S. policymakers can do to prevent the use of coercion to resolve disputes, pressure all parties to clarify their claims, and help develop an environment for an eventual resolution of the disputes. The following is far from an exhaustive list of possible responses by the United States, but it demonstrates how policy options should be considered with an eye to both short-term and long-term U.S. interests in the South China Sea.

§ *The White House should give renewed thought to clarifying the scope of its commitment to defend Philippine troops in areas of dispute.* The United States has for years offered an explicit guarantee of protection to Japanese forces on the Senkaku Islands, arguing that it remains neutral on the dispute but sees the features as being under effective Japanese administration. Meanwhile, senior officials including President Barack Obama have told the Philippines that the U.S. commitment to it is “ironclad” without offering specifics.⁶ Washington need not extend quite the same guarantee to Manila that it has to Tokyo. It does not need to say that it would consider Philippine-controlled Spratlys to fall within the scope of the 1951 U.S.-Philippines Mutual Defense Treaty because they are under effective Philippine jurisdiction. Indeed, a legal case can be made that they do not fall within the treaty’s scope, because the Philippines did not extend its claim to the islands until after the signing of the treaty. Instead, the United States should offer an explicit guarantee that any Philippine forces, ships, or planes that come under unprovoked aggression in disputed waters of the South China Sea would trigger a U.S. response, as specified by the treaty regarding an attack on the Philippines’ “armed forces, public vessels or aircraft in the Pacific.”⁷ Such clarity comes with its own risks, but the costs of continued ambiguity have become too high.

Washington’s current strategy trusts that both Beijing and Manila understand where the trigger for U.S. intervention lies—a point not entirely clear even to U.S. policymakers. This is a dangerous assumption, given the increasingly frequent interactions between Chinese and Philippine forces in and around the Spratlys. A clarification of U.S. commitments not only would deter China from accidentally overstepping a red line it did not know existed; it would also restrain the Philippines from adventurism that it might falsely believe the United States would support.

It would also go a long way toward countering voices in the Philippines, particularly on the political left, who argue that the U.S. commitment cannot be trusted. The differences in phrasing between the security

⁶ Mark Felsenthal and Matt Spetalnick, “Obama Says U.S. Commitment to Defend Philippines ‘Ironclad,’” Reuters, April 29, 2014, <http://www.reuters.com/article/2014/04/29/us-philippines-usa-obama-idUSBREA3S02T20140429>.

⁷ Mutual Defense Treaty Between the United States and the Republic of the Philippines, August 30, 1951, Article V, http://avalon.law.yale.edu/20th_century/phil001.asp.

guarantees in the U.S.-Japan and in the U.S.-Philippine defense treaties are negligible. This raises concerns in Manila that the United States has refused to offer it assurances not because of legal technicalities, but because when push comes to shove, Washington might not be prepared to back up Philippine forces.

Putting those arguments to bed would also help depoliticize the EDCA that was signed by the United States and the Philippines in 2014 but is mired in the Philippine Supreme Court amid both legal and political concerns. The agreement would allow U.S. equipment to be prepositioned in the Philippines and greater numbers of U.S. troops to rotate through Philippine bases. Most importantly, it would allow the United States to substantially upgrade military infrastructure in the Philippine for joint use. The agreement is critical to bolstering Philippine capacity to withstand Chinese bullying and develop what Secretary of Foreign Affairs Albert del Rosario has termed a “minimum credible defense posture.”⁸

§ *In light of China’s reclamation work, the Department of Defense should conduct a freedom of navigation operation in 2015 to assert that the new features built on low-tide elevations are legally artificial islands entitled under international law to no more than a 500-meter safety zone.* Reports leaked in May 2015 that the Pentagon was considering performing freedom of navigation (FON) operations within 12 nautical miles of certain features on which China has performed reclamation or island building in the Spratlys.⁹ U.S. officials have refused to confirm whether a decision on such operations has been reached. But Secretary of Defense Ashton Carter made clear several times during his trip to the region for the Shangri-La Dialogue in May that the Pentagon considered such operations to be well within the United States’ rights.¹⁰ Unfortunately, the rationale behind the operations has not been made clear, allowing significant misinformation to spread through the press and analytical communities.

Each year the U.S. military performs FON operations and other activities to challenge excessive maritime claims around the globe. In fiscal year 2014, the U.S. Navy performed such operations to challenge the claims of 19 nations, including China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam.¹¹ In light of China’s reclamation work, the Department of Defense has every reason to add a FON operation to the 2015 calendar to assert that those new features built on low-tide elevations are legally artificial islands

⁸ Jerry Esplanada, “Japan, SoKor, Australia to Help PH Improve Defense Capability—DFA,” *Philippine Daily Inquirer*, May 20, 2012, <http://globalnation.inquirer.net/37441/japan-sokor-australia-to-help-ph-improve-defense-capability-%E2%80%93-dfa>.

⁹ Adam Entous, Gordon Lubold, and Julian E. Barnes, “U.S. Military Proposes Challenge to China Sea Claims,” *Wall Street Journal*, May 12, 2015, <http://www.wsj.com/articles/u-s-military-proposes-challenge-to-china-sea-claims-1431463920>.

¹⁰ Gregory Poling, “Carter on the South China Sea: Committed & (Mostly) Clear,” *CogitAsia*, June 4, 2015, <http://cogitasia.com/carter-on-the-south-china-sea-committed-mostly-clear/>.

¹¹ U.S. Department of Defense, “Freedom of Navigation Report for Fiscal Year 2014,” March 23, 2015, <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323%202015%20DoD%20Annual%20FON%20Report.pdf>.

entitled under international law to no more than a 500-meter, or 1,640-foot, safety zone. A U.S. Navy ship should transit within 12 nautical miles of Mischief Reef and Subi Reef (but only those two), as they were both low-tide elevations prior to China's work and they lie beyond the 12-nautical-mile territorial sea of any nearby rocks.

Legally China could challenge such passage only by claiming a low-tide elevation as a rock or island entitled to a territorial sea. That would place Beijing in an absurd legal position. It is equally likely that Beijing would recognize this absurdity and not publicly object to such a FON operation. In either case, the operation would offer clarity on what China considers these reclaimed features to be. More importantly, it would place one more pressure on China to clarify its claims and thereby shrink the size of the area in dispute to a more manageable space.

- § *Regarding FON operations and other activities to contest excessive Chinese claims, it is imperative that the United States urge claimant states and other interested parties such as Australia and Japan to take part independently and jointly.* It is also important that Washington try to convince partner nations to undertake joint activities to contest claims and bolster other claimants' capacity without the United States. A key component of China's strategy to deflect criticism over the South China Sea has been the peddling of a narrative that recent escalations are really about U.S. efforts to contain China. But the stakes in the South China Sea are high for all nations interested in the preservation of international law and the maritime commons. Allowing Beijing to sell a narrative that the disputes are a bilateral U.S.-China issue is counterproductive. That narrative would be much harder to maintain in the face of joint Australia-Philippines capacity building efforts, for example, or Japan-Vietnam joint patrols.
- § *The U.S. government should publicly release its own accounting of the status of features in the South China Sea, including the original status of those features that have been built up and which claimant physically occupies what.* (The United States does not necessarily need to declare what it considers islands or rocks, but list those that are clearly submerged features or low-tide elevations). This would help cut through the disinformation regarding who has done what, and would help undercut Beijing's narrative that all claimants are equally guilty of escalating tensions and building on features. In contrast, the U.S. government's default policy of nondisclosure regarding these questions has only helped contribute to uncertainty and disinformation, both of which play into Beijing's policy of maintaining ambiguity and deflecting criticism. The most egregious recent example was the U.S. government's decision to begin citing "48 outposts" occupied by Vietnam in the Spratlys¹² without

¹² David B. Shear, "Safeguarding American Interests in the East and South China Seas," (testimony before the U.S. Senate Committee on Foreign Relations, Washington, DC, May 13, 2015), <http://www.foreign.senate.gov/hearings/safeguarding-american-interests-in-the-east-and-south-china-seas>; Ashton Carter, "A Regional Security Architecture Where Everyone Rises," (speech

explaining that it was not counting the features occupied by Vietnam but instead each structure Vietnam has built (often two or three on a single feature).¹³

§ *The State Department, through its Limits in the Seas series, should provide legal analyses of the claims of Malaysia as it has already done for those of China, Indonesia, the Philippines, and Vietnam.*¹⁴ Kuala Lumpur has failed to give an accounting of its territorial baselines, and its claim is often still depicted based on a map of its continental shelf issued in 1979.¹⁵ But its 2009 submission to the Commission on the Limits of the Continental Shelf invalidated that map.¹⁶ As a matter of fairness, and as a relatively easy step, the State Department should issue a position paper on Malaysia's maritime claims and strongly urge Kuala Lumpur to clarify them in accordance with international law. The State Department should also release a paper on the claims of Brunei, which, while apparently not excessive, have not been publicly declared as required by the United Nations Convention on the Law of the Sea.

§ *The United States should offer technical, legal, and diplomatic support for an effort by Southeast Asian claimants to reach an agreement on what is and is not disputed in the South China Sea.* Given the refusal of China to clarify the scope of the nine-dash line in order to shrink the size of the disputed area in the South China Sea to something more manageable, Southeast Asian claimants should begin the process themselves to place pressure on China, seize the legal and moral high ground, and present a united front. Brunei, Malaysia, the Philippines, and Vietnam, and perhaps Indonesia, should agree to perform their own survey of disputed features; agree on which, if any, are legally islands; and then issue an agreed-upon area of overlapping maritime entitlements from those zones. U.S. diplomatic support would be valuable in helping the claimants reach a consensus on such an effort, and U.S. legal and technical capabilities, as evidenced by the work of the State Department's Limits in the Seas series, could be immensely helpful. The overarching purpose of this effort would be to recognize that the disputes over land features in the South China Sea are irreconcilable in the medium term, but that a system of resource sharing and joint activities in disputed waters could provide a long-term means of managing the maritime disputes.

delivered at the IISS Shangri-La Dialogue, Singapore, May 30, 2015), <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>.

¹³ See Gregory Poling, "Sophistry & Bad Messaging in the South China Sea," *CogitAsia*, July 2, 2015, <http://cogitasia.com/sophistry-bad-messaging-in-the-south-china-sea/>.

¹⁴ U.S. Department of State, "Limits in the Seas," accessed July 4, 2015, <http://www.state.gov/e/oes/ocns/opa/c16065.htm>.

¹⁵ *Peta menunjukkan sempadan perairan dan pelantar benua Malaysia* [Map showing the territorial waters and continental shelf of Malaysia] (Kuala Lumpur: Directorate of National Mapping Malaysia, 1979).

¹⁶ Malaysia and the Socialist Republic of Vietnam, Joint Submission to the Commission on the Limits of the Continental Shelf, 2009, http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm

§ *The U.S. government needs to build as much backing as possible among both regional and outside nations in support of any future ruling from the arbitration tribunal hearing the Philippines' case against China.* Authorities in Beijing are almost certain to ignore a ruling from the tribunal at the Permanent Court of Arbitration at The Hague, but it is possible that China could choose to clarify the nine-dash line in the future, in line with a limited ruling, in order to avoid international opprobrium and being seen as an irresponsible member of the global community. Beijing will not admit that it is clarifying its claim because it was ordered to by a court, but the effect would be the same. This will require that any ruling from the court be narrow enough to allow China to clarify the nine-dash line while still maintaining much or most of its claim to maritime space in the South China Sea. But it will also require that China's leaders feel pressure from a wide array of international players, not only in Asia and the United States but also in Europe and elsewhere.

About the Author

Gregory B. Poling is a fellow with the Sumitro Chair for Southeast Asia Studies and the Pacific Partners Initiative at CSIS. He manages research projects that focus on U.S. foreign policy in the Asia Pacific, with a special concentration on the member countries of the Association of Southeast Asian Nations. His research interests include disputes in the South China Sea, democratization in Southeast Asia, and Asian multilateralism. Mr. Poling's publications include *A New Era in U.S.-Vietnam Relations: Deepening Ties Two Decades after Normalization* (Rowman & Littlefield/CSIS, June 2014), *A U.S.-Indonesia Partnership for 2020: Recommendations for Forging a 21st Century Relationship* (CSIS, September 2013), *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute* (CSIS, July 2013), and *Sustainable Energy Futures in Southeast Asia* (CSIS, December 2012). Mr. Poling received an MA in international affairs from American University and a BA in history and philosophy from Saint Mary's College of Maryland, and studied at Fudan University in Shanghai.



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